

## CPLR 7511(a): Date of Actual Delivery of Arbitration Award Must Be Stated in Pleading Ninety-Day Statute of Limitations

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courts of any discretion to extend it.<sup>196</sup> It has also been held that the parties themselves cannot extend the period by agreement.<sup>197</sup>

Almost invariably, inattention to the form required by CPLR 7503(c), with respect to both the notice of intention to arbitrate and the application for a stay, is fatal.<sup>198</sup> However, the Second Department, in *Liberty Mutual Insurance Co. v. Granelli*,<sup>199</sup> recently ignored alleged technical defects in the demand which were "at most nonprejudicial irregularities which should be disregarded."<sup>200</sup>

This shift in attitude is a welcome one among harried practitioners who have experienced the often burdensome results of rigid application of the section. The First Department is also so inclined, as evidenced by *Empire Mutual Insurance Co. v. Levy*.<sup>201</sup> Therein, the respondent utilized the notice of intention to arbitrate so as to prevent compliance with the ten-day provision by the petitioner. The court refused to allow such manipulation and granted the stay. Although the holding was limited to the facts, one may infer that courts will be increasingly sensitive to the equities in particular situations.

*CPLR 7511(a): Date of actual delivery of arbitration award must be stated in pleading ninety-day statute of limitations.*

CPLR 7511(a) provides that a party moving to vacate or modify an arbitration award must do so within ninety days after its delivery to him. In *Ganser v. New York Telephone Co.*,<sup>202</sup> the Appellate Division, First Department, considered a petition to set aside an arbitration award rendered on April 30, 1971. The date of delivery of the award was not alleged or otherwise indicated. The original petition, filed on July 27, 1971, was followed by a motion noticed on August 24, 1971. The Supreme Court, New York County, dismissed the petition on the ground that more than ninety days had elapsed from the date of the award before the motion to vacate was made. The Appellate Division, First Department, reversed, strictly construing CPLR 7511(a) to require that

<sup>196</sup> See CPLR 201.

<sup>197</sup> See *General Acc. Fire & Life Assur. Corp. v. Cerretto*, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (mem.), discussed in *The Quarterly Survey*, 44 Sr. JOHN'S L. REV. 758, 768 (1970).

<sup>198</sup> See, e.g., *Chasin v. Chasin*, 37 App. Div. 2d 839, 326 N.Y.S.2d 151 (2d Dep't 1971) (mem.); *State Farm Mut. Auto. Ins. Co. v. Szwec*, 36 App. Div. 2d 863, 321 N.Y.S.2d 800 (2d Dep't 1971) (mem.); *Liberty Mut. Ins. Co. v. Keane*, 28 App. Div. 2d 703, 280 N.Y.S.2d 972 (2d Dep't 1967) (mem.); *Napolitano v. MVAIC*, 26 App. Div. 2d 757, 272 N.Y.S.2d 220 (3d Dep't 1966) (mem.); *Allstate Ins. Co. v. Neithardt*, 24 App. Div. 2d 941, 265 N.Y.S.2d 128 (1st Dep't 1965) (mem.).

<sup>199</sup> 37 App. Div. 2d 113, 322 N.Y.S.2d 390 (2d Dep't 1971).

<sup>200</sup> *Id.* at 115, 322 N.Y.S.2d at 392 (dictum).

<sup>201</sup> 35 App. Div. 2d 916, 316 N.Y.S.2d 24 (1st Dep't 1970) (mem.), discussed in *The Quarterly Survey*, 45 Sr. JOHN'S L. REV. 536, 549 (1971).

<sup>202</sup> 39 App. Div. 2d 653, 331 N.Y.S.2d 914 (1st Dep't 1972) (mem.).

where the ninety-day statute of limitations<sup>203</sup> is pleaded as an affirmative defense, the date of delivery of the award must be stated.

*CPLR 7511(b)(1)(ii): Arbitration award affirmed, where challenged arbitrator had prior attorney-client relationship with one party, when opposing party knowingly waived its objection.*

CPLR 7511(b)(1)(ii) empowers a court to vacate an arbitration award when a "neutral" arbitrator is actually "partial."<sup>204</sup> In *Baar & Beards, Inc. v. Oleg Cassini, Inc.*,<sup>205</sup> the parties made an exclusive licensing agreement which provided for the arbitration of disputes according to current rules of the American Arbitration Association (AAA). A dispute arose, and Baar & Beards, Inc., the appellant, sought arbitration. One of the arbitrators appointed by the AAA had represented the appellant's president six years earlier, a fact of which Oleg Cassini, Inc., the respondent, was immediately notified by the appellant. The respondent objected, but the AAA refused to remove the contested arbitrator. The respondent subsequently signed a statement accepting the arbitration panel.

Following the award, the appellant sought confirmation in the Supreme Court, New York County, and the respondent opposed on the grounds of bias and misconduct. The court vacated the award as unfair. The Appellate Division, First Department,<sup>206</sup> affirmed, holding that the appearance of bias was present.

The Court of Appeals reversed and ordered the matter remitted to special term for proceedings in accordance with its decision. In reviewing the order vacating the award, the Court held that the respondent had knowingly waived its objection.<sup>207</sup>

#### COURT OF CLAIMS ACT

##### *Ct. Cl. Act § 10: Statutes of limitations or conditions precedent?*

In *Lewis v. State*,<sup>208</sup> the Court of Claims recently held that the time provisions set forth in section 10(2) of the Court of Claims Act for wrongful death actions against the state are conditions precedent

<sup>203</sup> The ninety-day period is a limitations provision which establishes a maximum time for proceeding, but sets no minimum time period, and does not impinge on a party's right to move under other CPLR sections. *Foreign Operations, Ltd. v. Miller*, 52 Misc. 2d 828, 276 N.Y.S.2d 942 (Sup. Ct. N.Y. County 1967).

<sup>204</sup> See H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 368-71 (3d ed. 1970). See generally *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 345 (1968).

<sup>205</sup> 30 N.Y.2d 649, 282 N.E.2d 624, 331 N.Y.S.2d 670 (mem.), motion for reargument denied, 30 N.Y.2d 790, 285 N.E.2d 322, 334 N.Y.S.2d 1027 (1972).

<sup>206</sup> 37 App. Div. 2d 106, 322 N.Y.S.2d 462 (1st Dep't 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 335, 385 (1971).

<sup>207</sup> 30 N.Y.2d at 649, 282 N.E.2d at 685, 331 N.Y.S.2d at 670.

<sup>208</sup> 69 Misc. 2d 1031, 332 N.Y.S.2d 292 (Ct. Cl. 1972) (mem.).