St. John's Law Review

Volume 46
Number 2 *Volume 46, December 1971, Number 2*

Article 25

CPLR 7501: Article 75 Held Applicable to Advisory Arbitration

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would probably cause great personal hardship, and commercial or industrial property. The court stressed that the presence of a waiver of constitutional protections in a typical consumer contract of adhesion[193] is "without such effect."[194]

Because of the type of property and possible hardship involved and indications that the defendant might not be able to comprehend his rights, the court directed the company, contractual stipulations notwithstanding, to notify the defendant of a scheduled hearing date. The defendants were temporarily enjoined from disposing of the property and were required to account for their default.

The approach taken in these two cases is preferable to limiting *Sniadach* to wages and upholding the contractual waiver of a debtor's fourteenth amendment rights. As noted previously,[195] the view that *Sniadach* is applicable only to wages has already been undermined. Failure to acknowledge the injustice of treating all consumers as copowers with their creditors can only perpetuate the very inequities which *Sniadach* was designed to dissolve. The flexibility and fairness embodied in the *Finkenberg* and *Wellbilt* decisions deserve favorable Supreme Court consideration when that tribunal ultimately resolves these issues.

ARTICLE 75—ARBITRATION

CPLR 7501: Article 75 held applicable to advisory arbitration.

CPLR 7501 provides for the enforcement of written agreements to arbitrate future or existing controversies without regard to the justiciable nature of the controversy. In determining whether a right to arbitrate exists, the court is not authorized to consider the merits of the dispute.[196] "The only pertinent questions are (1) whether there is a dispute; (2) whether there is a contract to arbitrate; and (3) whether there is a refusal to arbitrate."[197]

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193 *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943):

> The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary [sic] to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

Quoted in 166 N.Y.L.J. 28, at 10, col. 4.

194 166 N.Y.L.J. 28, at 10, col. 4. *See* note 184 *supra* and accompanying text.

195 *See* note 181 *supra* and accompanying text.

196 *See, e.g.*, Empire State Master Hairdressers' Ass'n, Inc. v. Journeymen Barbers Local 17-A, 18 App. Div. 2d 808, 809, 236 N.Y.S.2d 371, 372 (2d Dep't 1963).

197 Greene Steel & Wire Co. v. F.W. Hartmann & Co., 235 N.Y.S.2d 238, 240 (Sup. Ct. Kings County 1962), *aff'd*, 20 App. Div. 2d 683, 247 N.Y.S.2d 1008 (2d Dep't 1964), *appeal*

In *Board of Education of Central School District No. 1, Town of Clarkstown v. Cracovia,*[198] the Appellate Division, Second Department, was called upon to decide whether article 75 of the CPLR empowers a court to direct parties to arbitrate a dispute when the agreement between them provides for binding arbitration of certain disputes and advisory arbitration[199] of others. The board sought to stay arbitration of a contractual dispute which had been demanded by the Clarkstown Teachers' Association pursuant to their collective bargaining agreement. In a memorandum opinion, the court held that the board could properly be directed to proceed to arbitration since they saw no reason why article 75 should not apply to advisory arbitration if that was what the parties intended. Arbitration is a matter of contract, and the details can vary with the contract. The court did not decide whether the dispute was subject to binding arbitration.

The Second Department unhesitantly gave full effect to the parties' unequivocal agreement to arbitrate their future disputes, without being deflected by the additional consideration of the advisory nature of the arbitration decision. There may be, however, an important problem to which the court did not expressly address itself: Is the court's directive to the parties to proceed to advisory arbitration indirectly an advisory opinion beyond its power?[200]

CPLR 7511(b)(1)(ii): Arbitration award vacated where challenged arbitrator appointed by American Arbitration Association previously had attorney-client relationship with one of the parties.

CPLR 7511(b)(1)(ii) empowers the court to vacate an arbitration award where the arbitrator appointed as a "neutral" was "partial."[201]

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dismissed, 14 N.Y.2d 688, 198 N.E.2d 914, 249 N.Y.S.2d 886 (1964). It has been suggested that the first inquiry is more properly whether one party claims that there is a dispute. Since the answer is yes if the parties are in court, only the last two questions would remain. 8 WK&M ¶ 7501.20. However, the courts have chosen to decide whether the controversy is covered by the arbitration agreement. *See, e.g.,* Mohawk Maintenance Co. v. Drake, 53 Misc. 2d 272, 275, 278 N.Y.S.2d 297, 301 (Sup. Ct. Queens County 1967), *discussed in The Quarterly Survey,* 42 St. JOHN'S L. REV. 283, 310 (1967).

198 36 App. Div. 2d 851, 321 N.Y.S.2d 496 (2d Dep't 1971).

199 Binding arbitration forecloses future litigation of a dispute. This contingency is not precluded by advisory arbitration. Advisory arbitration facilitates a settlement, however, and the arbitration decision can be an aid to the court in any subsequent litigation.

200 *See* Schollmeyer v. Sutter, 3 App. Div. 2d 665, 158 N.Y.S.2d 354, 356 (2d Dep't 1957) ("The Supreme Court, Appellate Division, will not render advisory opinions. . . ."); 667 E. 187th St. Corp. v. Lindsay, 54 Misc. 2d 632, 283 N.Y.S.2d 199 (Sup. Ct. N.Y. County 1967); Kuhn v. Curran, 184 Misc. 788, 56 N.Y.S.2d 737 (Sup Ct. Albany County 1944).

201 CPLR 7511(b)(1)(ii) provides:

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either