St. John's Law Review

Volume 46, May 1972, Number 4 Article 31

CPLR 7511(b)(1)(iii): Letter Agreement on Submissions Held Not To Limit the Scope of a General Arbitration Clause, Thereby Permitting an Award for Consequential Damages

St. John's Law Review

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Recommended Citation

St. John's Law Review (1972) "CPLR 7511(b)(1)(iii): Letter Agreement on Submissions Held Not To Limit the Scope of a General Arbitration Clause, Thereby Permitting an Award for Consequential Damages," *St. John's Law Review*: Vol. 46 : No. 4 , Article 31.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol46/iss4/31

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In *Lease Plan Fleet Corp. v. Johnson Transportation, Inc.*,[213] the parties entered into a leasing agreement which provided for arbitration of all controversies pertaining to the agreement. Thereafter, defendant served a notice of intention to arbitrate which merely referred to "a controversy arising out of an equipment lease contract" and specified the date of the contract.[214] Plaintiff contended that this notice was defective in that it failed to state the specific nature of the dispute.[215] The Supreme Court, Monroe County, agreed with the plaintiff and enjoined the defendant from proceeding with arbitration, with leave to serve a new notice properly describing the controversy to be arbitrated.[216]

Whether a dispute is covered by an arbitration agreement is an issue determinable by a court.[217] "[A] court must always inquire, when a party wants to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute."[218] Clearly, specification of the dispute is essential to determination of whether it is arbitrable. No person should be compelled to arbitrate a particular issue unless he has contractually agreed that it was to be arbitrable.

CPLR 7511(b)(1)(iii): Letter agreement on submissions held not to limit the scope of a general arbitration clause, thereby permitting an award for consequential damages.

CPLR 7511 enumerates the various grounds upon which an arbitration award may be vacated. The broadest ground is a claim under CPLR 7511(b)(1)(iii) that the arbitrator has exceeded his power.[219] Decisional law has interpreted this basis for vacatur to mean that an arbitrator exceeds his power "only if [he gives] a completely irrational construction of the provisions in dispute and in effect [makes] a new contract for the parties."[220] The scope of the arbitrator's power has

213 67 Misc. 2d 822, 324 N.Y.S.2d 928 (Sup. Ct. Monroe County 1971) (mem.).

214 *Id.*, 324 N.Y.S.2d at 929.

215 *Id.*

216 *Id.* at 823, 324 N.Y.S.2d at 930, *citing* Nager Elec. Co. v. Weisman Constr. Corp., 29 App. Div. 2d 939, 289 N.Y.S.2d 473 (1st Dep't 1968) (mem.).

217 Mohawk Maintenance Co. v. Drake, 53 Misc. 2d 272, 278 N.Y.S.2d 297 (Sup. Ct. Queens County 1967), *discussed in The Quarterly Survey*, 42 St. John's L. Rev. 283, 310 (1967).

218 United Steel Workers v. American Mfg. Co., 363 U.S. 564, 570-71 (1960), *quoted in In re* Carey, 11 N.Y.2d 452, 456, 184 N.E.2d 298, 300, 230 N.Y.2d 703, 705 (1962) (per curiam).

219 It is well settled that arbitrators must act within any limits imposed by the arbitration agreement which is the foundation of their authority and jurisdiction. 8 WK&M ¶ 7511.18.

220 National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 383, 171 N.E.2d 302, 305, 208 N.Y.S.2d 951, 955 (1960) (emphasizing the immense power of interpretation given to the aribtrator).

been further augmented by the frequent use of very broad arbitration clauses. Thus, a broad clause impliedly grants the power to award compensatory damages,[221] and indeed, it has been decided that a very broad clause would justify the award of consequential damages.[222] Therefore, in some situations, the determination of what exactly constitutes the arbitration agreement between the parties may be the critical issue. It is now clear that a general arbitration clause complete in itself may be limited by express exclusions in the contract-in-chief.[223] The contract and the arbitration clause must be read together to determine the precise agreement between the parties.

Such a situation arose in *United Buying Service International Corp. v. United Buying Service of Northeastern New York, Inc.*,[224] which held that a letter agreement on submissions did not supersede the general arbitration clause of the American Arbitration Association contained in the franchise contract. Therefore, the arbitrator did not exceed his powers by awarding consequential damages for loss of salary to one of the franchisees. The court stated that the arbitration agreement between the parties would be determined by reading the franchise agreement, the arbitration clause and the supplementary letter agreement.[225] The dissent claimed that the letter agreement limited the scope of the general clause, thereby precluding any award for consequential damages.[226] It must be noted that if the letter agreement was construed to limit the general arbitration clause, it must do so *impliedly*, in contrast with the express limitation in *Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd.*[227] The majority was obviously

> Thus, if there is any possible way of construing the agreement to encompass the dispute and the arbitrator so construes it in assuming jurisdiction, the courts would seem to lack authority to review the determination.

8 WK&M ¶ 7511.18. *See also* 11 BUFFALO L. REV. 82 (1961).

221 Publishers' Ass'n v. New York Stereotypers' Union No. One, 8 N.Y.2d 414, 171 N.E.2d 323, 208 N.Y.S.2d 981 (1960). For a discussion of this case, see 11 BUFFALO L. REV. 85 (1961).

222 DeLaurentiis v. Cinematografica, 9 N.Y.2d 503, 174 N.E.2d 736, 215 N.Y.S.2d 60 (1961); A.D. Julliard & Co. v. Baitch & Castaldi, Inc., 2 Misc. 2d 753, 152 N.Y.S.2d 394 (Sup. Ct. N.Y. County 1956); *see* 11 BUFFALO L. REV. 78 (1961). *But see* De Lillo Constr. Co. v. Lizza & Sons, Inc., 7 N.Y.2d 102, 164 N.E.2d 95, 195 N.Y.S.2d 825 (1959).

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> [W]here it is clear from the face of the award itself or from an examination of the computations made by the arbitrator that the arbitrator has included an element of damages specifically excluded by the contract pursuant to which he obtained his very authority to act, he exceeds his powers under the contract and the award thus made must be vacated upon proper applications.

Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 456, 255 N.E.2d 168, 170, 306 N.Y.S.2d 934, 938 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 175 (1970).

224 38 App. Div. 2d 75, 327 N.Y.S.2d 7 (1st Dep't 1971).

225 *Id.* at 78, 327 N.Y.S.2d at 12.

226 *Id.* at 81, 327 N.Y.S.2d at 15.

227 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969). *See* note 223 *supra*.

influenced by the fact that the item constituting the consequential damages was fully litigated without objection.[228] Not only does the decision reaffirm the view that the precise arbitration agreement between the two parties is determined by a reading of the contract-in-chief plus the arbitration clause and any supplements to it, but further indicates that any limitation on a general clause such as the one involved in the instant case must be an express one and that any implied limitation will have little effect in restricting the arbitrator's broad remedy power.

ARTICLE 78 — PROCEEDING AGAINST BODY OR OFFICER

CPLR 7801: State comptroller may not be compelled to challenge the legality of the state budget.

When an officer fails to perform a statutory duty which is purely ministerial, an article 78 proceeding in the nature of mandamus can be commenced to compel such performance. This remedy is not available, however, where the matter in issue is within the discretion of the officer.[229]

In *Posner v. Levitt*,[230] the Appellate Division, Third Department, affirming the Supreme Court, Albany County, held that the state comptroller could not be compelled to institute a declaratory judgment action to test the constitutionality of the state budget.[231]

The fact that the comptroller has the prerequisite standing to maintain such an action does not require him to prosecute it if he deems it unwise.[232] Pointedly, the state constitution does not necessitate such a course of action.

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228 Where parties to the arbitration litigate a particular issue not within the expressed description of the matters set forth in the submission, the parties waive the right to object that such issue is not arbitrable. Ingardia Constr. Co. v. Dyker Bldg. Co., 14 App. Div. 2d 23, 216 N.Y.S.2d 978 (1st Dep't 1961).

229 Gimprick v. Board of Educ., 306 N.Y. 401, 118 N.E.2d 578 (1954) (the grant of credit for prior teaching experience by board of examiners is discretionary); Frey v. McCoy, 35 App. Div. 2d 1029, 316 N.Y.S.2d 166 (3d Dep't 1970) (mem.) (State Director of Probation is not mandated under the correction law to conform with formulated staffing and caseload standards; where workloads assigned do not conform to standards, the denial of state funds is within the discretion of the proper official).

230 37 App. Div. 2d 331, 325 N.Y.S.2d 519 (3d Dep't 1971).

231 *Id.* at 333, 325 N.Y.S.2d at 521, *citing* Cortellini v. City of Niagara Falls, 257 App. Div. 615, 14 N.Y.S.2d 924 (4th Dep't), *reargument denied*, 258 App. Div. 852, 16 N.Y.S.2d 694 (1939) (mem.); Goldberg v. Wagner, 9 Misc. 2d 663, 168 N.Y.S.2d 16 (Sup. Ct. N.Y. County 1957), *aff'd*, 5 App. Div. 2d 857, 172 N.Y.S.2d 526 (1st Dep't) (mem.), *cert. denied*, 357 U.S. 943 (1958).

232 37 App. Div. 2d at 333, 325 N.Y.S.2d at 521.