

CPLR 7503(c): Ten-Day Statute of Limitations Is Satisfied by Posting Papers by Certified Mail on Tenth Day after Receipt of a Notice of Intention To Arbitrate

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1970) "CPLR 7503(c): Ten-Day Statute of Limitations Is Satisfied by Posting Papers by Certified Mail on Tenth Day after Receipt of a Notice of Intention To Arbitrate," *St. John's Law Review*: Vol. 45 : No. 1 , Article 35.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol45/iss1/35>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

CPLR 7503(a): Service of an application to compel arbitration upon an attorney by mail is proper if an action is already pending.

In *Olsen & Chapman Construction Co. v. Village of Cazenovia*,²⁰⁰ a contractor sought a declaratory judgment as to whether certain items constituted additional work under the terms of his contract. The defendant thereupon moved to compel arbitration by mailing an order to show cause to the plaintiff's attorney. Since the application to compel arbitration was made within a pending action, the court ruled that this mode of service²⁰¹ was proper.

Inasmuch as arbitration is no longer deemed a special proceeding,²⁰² a great deal of confusion surrounds the service of the first application arising out of the arbitrable controversy.²⁰³ Indeed, this initiatory-interlocutory papers distinction has received continuous attention in the *Survey*.²⁰⁴ If an action is not pending when the first application is made, jurisdiction over the defendant must be acquired. Hence, exacting compliance with the service requirements of the CPLR²⁰⁵ is mandated.²⁰⁶ However, when an action has already been commenced, the first application is classified a motion.²⁰⁷ Therefore, as illustrated by *Olsen*, resort to the rules governing the service of motion papers is undoubtedly proper.²⁰⁸

CPLR 7503(c): Ten-day statute of limitations is satisfied by posting papers by certified mail on tenth day after receipt of a notice of intention to arbitrate.

Under CPLR 7503(c), the recipient of a properly drafted notice of intention to arbitrate²⁰⁹ must apply to stay arbitration within ten

²⁰⁰ 33 App. Div. 2d 929, 306 N.Y.S.2d 560 (3d Dep't 1970).

²⁰¹ Service of an order to show cause in lieu of a notice of motion is authorized by CPLR 2214. Service by mail upon an attorney is authorized by CPLR 2103.

²⁰² Compare CPA 1458 with CPLR 7502(a).

²⁰³ CPLR 7502(a) provides: "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action."

²⁰⁴ See, e.g., *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 760, 158, 157 (1969); *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 532, 344, 70 (1968).

²⁰⁵ CPLR 304

²⁰⁶ See, e.g., *Graffagnino v. MVAIC*, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1963).

²⁰⁷ CPLR 7502(a).

²⁰⁸ In addition to service by mail upon an attorney, the three-day extension authorized by CPLR 2103(b) would be available.

²⁰⁹ The notice of intention to arbitrate must contain the name and address of the claimant and must specify the agreement pursuant to which arbitration is sought. Also, notice must be given the recipient that unless an application is made within ten days after such service, he will be precluded from raising the "threshold" questions. CPLR 7503(c).

days. Otherwise, he is thereafter precluded from asserting that a valid agreement had not been made or complied with.²¹⁰ This ten-day caveat is not mere precatory language.²¹¹ In effect, it constitutes a very short statute of limitations²¹² in that instance wherein it is necessary to commence a special proceeding, *i.e.*, if an action is not already pending.²¹³

To date, a frequent question surrounding the interpretation of CPLR 7503(c) has been when the ten-day period begins to run.²¹⁴ Recently, however, in *Glens Falls Insurance Co. v. Anness*,²¹⁵ the Supreme Court, New York County, was confronted with the problem of determining the final date on which a "timely" application for a stay of arbitration could be received.

In *Glens Falls*, the moving papers for a stay of arbitration were posted by certified mail, return receipt requested, on the tenth day following the receipt of a notice of intention to arbitrate, but were not delivered until several days later. In response to the contention that service was untimely, the court held that service was effected on the date of posting — not the date of actual receipt.

The decision in *Glens Falls* was motivated by a number of practical considerations as well as the logical discernment of legislative intent. As recognized by the court, the party demanding arbitration may have several months to prepare and serve his papers. In addition, an objection to his opponent's subsequent application for a stay of arbitration is styled a motion; hence, the period of time in which to respond can be enlarged.²¹⁶ On the other hand, the recipient of a notice of intention to arbitrate is denied the time extensions afforded by CPLR 2004²¹⁷ and 2103(b).²¹⁸ Thus, in accord with previous decisions,²¹⁹

²¹⁰ The third "threshold question," whether the arbitration is barred by a limitation of time may be presented to the arbitrator, but he may refuse to consider it. CPLR 7502(b).

²¹¹ 7B MCKINNEY'S CPLR 7503(c), *supp.* commentary at 123 (1967).

²¹² See *Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc.*, 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

²¹³ CPLR 7502(a): "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action."

²¹⁴ See, *e.g.*, *Finest Restaurant Corp. v. L&A Music Co.*, 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup. Ct. N.Y. County 1966); *Beverly Cocktail Lounge, Inc. v. Emerald Vending Mach., Inc.*, 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

²¹⁵ 62 Misc. 2d 592, 308 N.Y.S.2d 893 (Sup. Ct. N.Y. County 1970).

²¹⁶ CPLR 2004.

²¹⁷ *Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc.*, 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

²¹⁸ *Beverly Cocktail Lounge, Inc. v. Emerald Vending Mach., Inc.*, 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

²¹⁹ See *Finest Restaurant Corp. v. L&A Music Co.*, 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup. Ct. N.Y. County 1966).

the court concluded that if the ten-day period is indeed a statute of limitations, a party must be given a *full* ten days in which to apply for a stay of arbitration.

A contrary decision would presumably frustrate the purpose of permitting service by certified mail. For, to insure timely receipt, a party would often be compelled to post his moving papers at least three days before the ten-day period expired. Or, service by mail would be abandoned in favor of personal delivery.

CPLR 7511(b)(1)(iii): Court of Appeals establishes criteria for determining whether arbitrator has exceeded his powers.

In marked contrast to earlier hostility,²²⁰ courts have demonstrated an extreme reluctance to interfere with the arbitral process,²²¹ except to scrutinize the arbitration agreement itself.²²² Recognizing the contractual right of parties to choose arbitration as the proper forum in which to settle their disputes,²²³ thereby waiving the substantive and procedural law of the state,²²⁴ courts have been similarly hesitant in vacating an arbitrator's award.²²⁵ Indeed, it is generally accepted that an award cannot be vacated for errors of law or fact.²²⁶ The CPLR reflects this approach inasmuch as the grounds for vacating an award focus primarily on the integrity of the participants²²⁷ and the arbitrator,²²⁸ rather than on the wisdom of the award. Even CPLR 7511 (b)(1)(iii), which provides for vacation if the arbitrator has exceeded his power, has been emasculated by an earlier decision that to fall within the ambit of this subsection, a contract must be given an irrational construction by the arbitrator: one that, in effect, makes a new contract for the parties.²²⁹ Quite surprising, therefore, is the Court of Appeals' decision vacating an arbitrator's award in *Granite Worsted Mills v. Aaronson Cowen, Ltd.*²³⁰

²²⁰ See 8 WK&M ¶ 7501.01.

²²¹ See, e.g., *Astoria Medical Group v. Health Ins. Plan*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

²²² For a discussion of the "threshold questions," i.e., those to be decided by the court, see 7B MCKINNEY'S CPLR 7503, commentary at 488-89 (1963).

²²³ *Astoria Medical Group v. Health Ins. Plan*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

²²⁴ *Spectrum Fabrics Corp. v. Main St. Fashions*, 285 App. Div. 710, 139 N.Y.S.2d 612 (1st Dep't 1955).

²²⁵ See, e.g., *Torano v. MVAIC*, 15 N.Y.2d 882, 206 N.E.2d 353, 258 N.Y.S.2d 418 (1965).

²²⁶ *Wilkins v. Allen*, 169 N.Y. 494, 62 N.E. 575 (1902).

²²⁷ CPLR 7511(b)(1)(i): "corruption, fraud or misconduct in procuring the award."

²²⁸ CPLR 7511(b)(1)(ii): "partiality of an arbitrator appointed as a neutral."

²²⁹ *National Cash Register Co. v. Wilson*, 8 N.Y.2d 377, 171 N.E.2d 302, 208 N.Y.S.2d 951 (1960).

²³⁰ 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969), *rev'g* 29 App. Div. 2d 303, 237 N.Y.S.2d 765 (1st Dep't 1968).