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CPLR 7502(b): Court Refers "Threshold Question" to Arbitration

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The recipient of a properly drafted notice of intention to arbitrate[148] must apply for a stay of arbitration within ten days.[149] Otherwise, he is thereafter precluded from asserting in court that a valid agreement had not been made or complied with.[150] A third "threshold" question, whether the arbitral proceedings are barred by a limitation of time,[151] is not, however, waived by the failure to press a timely objection; it may also be raised before the arbitrator.[152] Seizing upon this latter consideration, the court, in *In re Textiles, Inc.*,[153] recently held that notwithstanding a timely application for a stay of arbitration, the determination of whether the pending arbitration is barred by a limitation of time may, in proper circumstances, be referred to the arbitrator.

The parties in *Textiles* had inserted a provision in their contract to the effect that any action of any kind must be commenced within one year from the date on which the claim accrued.[154] Recognizing that the resolution of respondent's contention that the claim was time-barred might involve an intimate knowledge of trade customs, the court chose to defer to the arbitrator's experience and judgment. Moreover, the court was also influenced by the fact that the parties had utilized a broad arbitration clause inasmuch as it has been posited that when such a provision is adopted, all questions except those relating to public policy should be left for the arbitrator to decide.[155]

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148 Under CPLR 7503(c) 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 for a stay of arbitration is made within ten days after such service, he will be precluded from raising the threshold questions. Service of the notice of intention to arbitrate may be in the same manner as a summons or by registered or certified mail, return receipt requested.

149 Jonathan Logan, Inc. v. Stillwater Worsted Mills, 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 208, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969); *see also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 760 (1970).

150 CPLR 7503(c).

151 CPLR 7502(b).

152 *Id. See* Davis, Brody & Wisniewski v. Temple Emanu-El, 49 Misc. 2d 251, 267 N.Y.S.2d 19 (Sup. Ct. Suffolk County 1966).

It would not, however, be a good practice to ignore a notice of intention to arbitrate with the intent to raise the limitations issue before the arbitrator since CPLR 7502(b) gives him the discretion to refuse to hear the objection.

153 164 N.Y.L.J. 18, July 27, 1970, at 2, col. 2 (Sup. Ct. N.Y. County).

154 Such provisions are usually strictly enforced. 8 WK&M ¶ 7502.15. *See also* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953).

155 *See* 8 WK&M ¶ 7501.23. For a discussion of the emerging "separability" doctrine, see Aksen, *Prima Paint v. Flood & Conklin — What Does It Mean?*, 43 ST. JOHN'S L. REV. 1, 7-8 (1968).

Thus, the *Textiles* decision not only recognized the ability of the arbitrator to deal with technical issues, but also presumably served to effectuate the intent of the contracting parties.[156]

Whether it was the arbitrator or the court who decided the limitations question would probably be academic were it not for the fact that *Textiles* raises serious problems concerning the scope of review. An order of the court denying an application for a stay of arbitration on the ground that the arbitration is not time-barred is appealable;[157] a similar conclusion by the arbitrator is not reviewable.[158] Perhaps this consideration manifests a need for legislative action. If article 75 is indeed intended to expedite the settlement of disputes,[159] then no appeal should be allowed from an interlocutory court order denying a stay of arbitration.[160] In any event, under present law a party should not be denied the avenue of appeal which is secured by a timely application to the court.

What is more importantly involved, however, is the broader question as to whether a time limitation issue should be deemed a "threshold" one. Certainly, a distinction can be drawn between allegations that a valid agreement to arbitrate had not been made or complied with and the contention that the arbitration is time-barred. Significantly, the Federal Arbitration Act,[161] which was patterned after the New York statute,[162] excludes limitations questions from preliminary judical consideration.[163] Moreover, the objection seems closely akin to those relating to lack of mutuality[164] or fraud in the inducement;[165] there is no public policy which dictates that such issues be decided by the court.[166] Finally, if the limitations defense is properly deemed

156 *Cf.* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961).

157 *See generally* 8 WK&M ¶ 7502.08.

158 *See* CPLR 7511.

159 *See* Jonathan Logan, Inc. v. Stillwater Worsted Mills, 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968).

160 *See* 8 WK&M ¶ 7502.08.

161 9 U.S.C. §§ 1-14 (1964).

162 *See* Note, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 854 (1960).

163 *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 338 U.S. 395, 404 (1967).

164 *See, e.g.*, Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961).

165 *See, e.g.*, Matter of Amphenol Corp., 49 Misc. 2d 46, 266 N.Y.S.2d 768 (Sup. Ct. N.Y. County 1965), *aff'd*, 267 N.Y.S.2d 477 (1st Dep't 1966) (mem.).

166 *Cf.* Aimcee Wholesale Corps. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968); Agur v. Agur, 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (2d Dep't 1969).

"threshold," then logical consistency mandates that it too be waived by the failure to make a timely objection.

DOMESTIC RELATIONS LAW

DRL 245: Contempt unavailable until foreign judgment has been entered in New York.

Since 1965, the family court has had the power to enforce an order or decree granting alimony or support entered by a court of competent jurisdiction outside the state of New York,[167] irrespective of the grounds upon which it was rendered.[168] By implication, the supreme court possesses concurrent jurisdiction over applications to enforce such decrees and orders.[169] Nevertheless, a recent case, *Cooperman v. Cooperman*,[170] indicates that other aspects of the pre-1965 enforcement procedure have remained intact.

In *Cooperman*, the plaintiff brought an action in the supreme court to have the defendant punished for contempt because of his failure to make alimony payments under a Mexican divorce decree. The court reasoned that, although the 1965 amendment to the Family Court Act broadened the jurisdiction of the supreme court to include decrees rendered on non-New York grounds, it in no way altered or abrogated the enforcement procedure contained in DRL 245.[171] Thus, in accordance with a number of preamendment decisions,[172] the *Cooperman* court concluded that the remedy of contempt was available only after the foreign decree had been reduced to a judgment of the courts of this state.

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167 N.Y. FAMILY CT. ACT § 466(c) (McKinney supp. 1965).

168 Matter of Seitz v. Drogheo, 21 N.Y.2d 181, 234 N.E.2d 209, 287 N.Y.S.2d 29 (1967). Prior to the 1965 amendment, the out-of-state decree could be enforced or modified only if it was entered on grounds recognized in New York. *See* Griffin v. Griffin, 275 App. Div. 541, 90 N.Y.S.2d 596 (3d Dep't 1949); Kelley v. Kelley, 275 App. Div. 887, 90 N.Y.S.2d 178 (4th Dep't 1949) (mem.); *see also* Boissevain v. Boissevain, 252 N.Y. 178, 169 N.E. 130 (1929) (enforcement provisions of CPA § 1172 not applicable to matrimonial decrees of foreign countries).

169 Matter of Seitz v. Drogheo, 21 N.Y.2d 181, 234 N.E.2d 209, 287 N.Y.S.2d 29 (1967). In *Seitz* it was held that the broadening of the family court's power to encompass decrees entered on non-New York grounds was a "new class of actions and proceedings" within the meaning of the state constitution. N.Y. CONST. art. VI, § 7(c) (1962). Hence, the jurisdiction to entertain enforcement proceedings automatically vested in the supreme court. *Cf.* Thrasher v. United State Liab. Ins. Co., 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967).

170 62 Misc. 2d 745, 309 N.Y.S.2d 683 (Sup. Ct. N.Y. County 1970).

171 DRL 245 is identical to CPA 1172. FOURTH REP. 392. Hence, the latter provision should facilitate construction of the former.

172 *See, e.g.*, Griffin v. Griffin, 275 App. Div. 541, 90 N.Y.S.2d 596 (3d Dep't 1949); Chamberlain v. Chamberlain, 32 Misc. 2d 308, 222 N.Y.S.2d 662 (Sup. Ct. Kings County 1961).