St. John's Law Review

Volume 45, March 1971, Number 3 Article 26

CPLR 7502(b): Court Refers Time-Limitations Objection to Arbitration

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first was no defense inasmuch as the income executions specified two different employers.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Court refers time-limitations objection to arbitrator.

In *City of Auburn v. Nash*[141] the Appellate Division, Fourth Department, was called upon to determine whether it is the arbitrator or the court who should decide an objection addressed to the timeliness of a demand for arbitration. The case arose under a collective bargaining agreement involving city employees. Special term found that although the employee had fully complied with the prescribed grievance procedures, a substantial issue was presented regarding the timeliness of the employee's demand for arbitration. Accordingly, an order was entered which permanently stayed the arbitration.

The appellate division reversed on the ground that questions of "procedural arbitrability" are properly decided by the arbitrator. The court compared the contract before it with one wherein compliance with time limitations is made a condition precedent to arbitration and concluded that, in the latter instance, the issue of timeliness is for the courts;[142] whereas in the former circumstance the issue is for the arbitrators.[143] As support for this proposition the court pointed to the presumption of arbitrability in labor arbitration cases,[144] particularly when no language evidencing a contrary intent is discernible.

In reaching this conclusion no mention was made of CPLR 7502 (b).[145] This section concerns statutes of limitations and reasonable time limitations which are created by contracting parties.[146] In either instance, the issue of compliance with a time limitation is deemed a "threshold" question[147] to be decided by the court. As such, the petitioner who makes a timely application for a stay of arbitration is entitled to judicial review. Moreover, a preliminary determination regarding the proper forum in which to decide the issue is of critical importance inasmuch as a court's determination that the arbitration is

141 34 App. Div. 2d 345, 312 N.Y.S.2d 700 (4th Dep't 1970).

142 *Id.* at 347, 312 N.Y.S.2d at 702, *citing* Matter of Bd. of Educ. (Heckler Elec. Co.), 7 N.Y.2d 476, 166 N.E.2d 666, 199 N.Y.S.2d 649 (1960).

143 34 App. Div. 2d at 347, 312 N.Y.S.2d at 702, *citing* Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 207 N.E.2d 190, 259 N.Y.S.2d 142 (1965).

144 *See* 7B McKINNEY's CPLR 7503, supp. commentary at 136 (1966).

145 CPLR 7502(b) provides: "If . . . the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation . . . to the court . . . ."

146 CPLR 201; *see* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953).

147 7B McKINNEY's CPLR 7503, commentary at 488 (1963).

not time-barred is appealable,[148] whereas a similar conclusion by the arbitrator is not reviewable.[149]

The outcome in *City of Auburn* cannot be explained solely on the ground that there is a presumption of arbitrability in labor arbitration cases. A result similar to *City of Auburn* issued in *In re Textiles, Inc.*,[150] a commercial arbitration case. The only distinction between the cases is that the *Textiles* court relied on the freedom of contracting parties to choose a forum in which to settle their disputes.[151] Furthermore, although it is often stated that there is a vast difference between commercial arbitration and labor arbitration,[152] the differences do not appear so pronounced under the CPLR.[153] In fact, as between *Textiles* and *City of Auburn* it is the former which presents better arguments for permitting the arbitrator to decide the time objection since in *Textiles* difficult questions requiring a precise knowledge of the textile industry were presented. Thus, an experienced arbitrator was in a better position to determine whether certain defects in the materials had been discovered and objected to within a reasonable time.

The conclusion, therefore, is that in both commercial and labor arbitration cases the issue of timeliness of a demand for arbitration has been referred to the arbitrator. Such a result is supportable for at least four reasons. First, although the time-limitation objection is deemed a "threshold" one, it may also be raised before the arbitrator should the parties so choose.[154] Thus, there is no legislative mandate that the objection must always be decided by a court. This observation is fortified by the second ground in favor of *City of Auburn*: the issue raised does not involve public policy and there is no practical reason why the arbi-

148 *See* 8 WK&M ¶ 7502.08.

149 *See* CPLR 7511; *see also* 8 WK&M ¶ 7502.12.

150 164 N.Y.L.J. 18, July 27, 1970, at 2, col. 2 (Sup. Ct. N.Y. County), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 367-69 (1970).

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

152 *See, e.g.*, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960): "In the commercial case, arbitration is the substitute for litigation, [in labor cases] arbitration is the substitute for industrial strife. . . . Arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement."

153 *See* 7B MCKINNEY'S CPLR 7503, supp. commentary at 136 (1966). For example, it was the law that a party could defeat arbitration by demonstrating that there was no "bona fide" dispute. International Ass'n of Machinists v. Cutler-Hammer, Inc., 297 N.Y. 519, 74 N.E.2d 464 (1947). Such reasoning was dispelled in labor arbitration cases inasmuch as "[t]he agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567 (1960). Nonetheless, when the CPLR was enacted, it abrogated the Cutler-Hammer doctrine in all types of arbitration cases. 8 WK&M ¶ 7501.

154 It should be noted, however, that CPLR 7502(b) permits the arbitrator to refuse to decide the limitations issue.

trator should not be allowed to decide it.[155] Third, the arbitrator's experience in a particular field makes him better able to rule on technical issues than the court. Finally, *City of Auburn* relieves the court of its duty to determine threshold questions and, as a calendar-clearing device, is much more palatable than an oppressive ten-day statute of limitations.[156] Nonetheless, the legislature has identified the time-limitations objection as a threshold one to be decided by the courts upon a timely application for a stay of arbitration. Particularly in view of the variance in scope of review between the court's decision and the abritrator's determination, CPLR 7502(b) should not be abrogated by judicial fiat.

CPLR 7503(c): Nonsignatory of arbitration agreement is not precluded by the failure to apply for a stay of arbitration within ten days.

The recipient of a properly drafted[157] notice of intention to arbitrate will be foreclosed from raising certain threshold questions[158] in court[159] unless he applies for a stay of arbitration within ten days.[160] This ten-day period has been construed as a statute of limitations.[161] Such an interpretation is onerous when applied to a signatory of an arbitration agreement; if applied to a nonsignatory it would be even more oppressive. This was the conclusion reached by the Appellate Division, Second Department, in *Glasser v. Price*.[162]

The petitioners entered into a leasing agreement with the individual respondents, Price, Kligher and Tobin. The contract contained a clause whereby the parties agreed to arbitrate any and all disputes arising thereunder. Respondent, Premier Estate Planners, Inc. (Premier), which was not a party to the leasing agreement, notified peti-

155 *Cf.* Aimcee Wholesale Corp. 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).

156 CPLR 7503(c), *as construed in* 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).

157 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).

158 Under CPLR 7503(c) the threshold questions are: (1) whether a valid agreement to arbitrate was made; (2) whether it was complied with; (3) whether the claim sought to be arbitrated is barred by a limitation of time.

159 The recipient may nonetheless present before the arbitrator the objection that the arbitration is barred by a limitation of time. However, the latter may refuse to consider it. CPLR 7502(b).

160 CPLR 7503(c).

161 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), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 760 (1970).

162 35 App. Div. 2d 98, 313 N.Y.S.2d 1 (2d Dep't 1970).