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CPLR 7502(b): Referral of "Threshold" Question to Arbitrator Ruled Improper

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ment, maintaining that on the day in question he had a case load of 40 cases in 13 different parts. In denying the motion, the court ruled that "'where no attempt was made to hire outside counsel, and there was indication that [the] case was prepared for trial"[59] the policy of deciding cases on the merits must yield to two superseding considerations: the inconvenience and loss caused the plaintiff and the responsibility of the bar to assist in ameliorating the court's calendar dilemma.[60]

ARTICLE 55 — APPEALS GENERALLY

CPLR 5528(a)(5): Bar advised to reproduce testimony in logical sequence when utilizing the appendix method.

CPLR 5528(a)(5) permits an appeal to be prosecuted by the appendix method whereby the appellant submits only so much of the record as is material to the questions presented on appeal. This proviso is directed at reducing the appellant's costs and easing the court's burden.[61] Moreover, a thoroughly prepared appendix by the appellant can obviate the appellee's need to print any part of the record in his own brief.[62] Because of the benefits that could conceivably be derived by all concerned if the appendix is satisfactory, the courts have indicated that abuses will not be tolerated and have expressed their displeasure by withholding or imposing costs on the lax party.[63]

In *Kimberly-Clark Corp. v. Power Authority*[64] the appellant submitted an appendix in which he presented the testimony of the witnesses in alphabetical order rather than in the order of their appearance at the trial. As a result of this illogical sequence, the appellate division was presented with a distorted record. Refusing to be subjected to the chore of untangling facts from the incoherent appendix, the court rejected it as inadequate and unacceptable.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Referral of "threshold" question to arbitrator ruled improper.

In *Blends, Inc. v. Schottland Mills, Inc.*[65] a spinner of yarn, Textiles, sold goods to a weaver, Schottland Mills, Inc. (Schottland), which

59 64 Misc. 2d at 500, 314 N.Y.S.2d at 760.

60 *Cf.* Herbert Land Co. v. Lorenzen, 113 App. Div. 802, 99 N.Y.S. 937 (2d Dep't 1906).

61 *See* 7 WK&M ¶ 5528.01.

62 *Cf.* SECOND REP. 354.

63 *See, e.g.*, Richard C. Mugler Co. v. A. C. Management Corp., 29 App. Div. 2d 548, 286 N.Y.S.2d 81 (2d Dep't 1967) *aff'd mem.* 24 N.Y.2d 814, 248 N.E.2d 446, 300 N.Y.S.2d 591 (1969); *see also* Lo Gerfo v. Lo Gerfo, 30 App. Div. 2d 156, 290 N.Y.S.2d 1005 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 527 (1969).

64 35 App. Div. 2d 330, 316 N.Y.S.2d 68 (4th Dep't 1970).

65 35 App. Div. 2d 377, 316 N.Y.S.2d 912 (1st Dep't 1970).

in turn sold to a textile converter, Blends, Inc. (Blends). In February of 1969, Blends complained of defects in the yarn and returned it to Textiles which issued a credit to Schottland. Textiles refused, however, to assume responsibility for yarn which had already been processed. On May 5, 1970, Blends served a demand for arbitration on Schottland and the latter served a similar demand on Textiles, contending that if it were liable to Blends then Textiles would be liable over to it.

The contracts between Textiles and Schottland contained a provision whereby any action of any kind must be commenced within one year from the date the claim accrued. Consequently, Textiles moved to stay arbitration on the ground that the claim was time-barred under CPLR 7502(b). Inasmuch as the resolution of this objection might involve an intimate knowledge of the textiles industry, the lower court referred it to the arbitrator.[66] The First Department reversed, ruling that the parties were free to adopt a reasonable period of limitations[67] and that Textiles had a right to have such a provision enforced.[68]

It should be noted that the lower court did not purport to nullify the contractual limitation; it merely concluded that as between itself and the arbitrator the latter was in a better position to decide the question of timeliness. On its face, such a position is not objectionable since expertise is a primary motivation for agreeing to arbitrate. Moreover, though an arbitrator is usually free to disregard the time-limitations objection,[69] it could be argued that his refusal to hear an issue which the court has specifically referred to him would automatically render the award vulnerable on the ground that the arbitrator had exceeded his powers.[70] Nevertheless, the difference in the scope of review is a crucial consideration. If the court denied Textile's objection on the ground that the arbitration was not time-barred, its order would be appealable;[71] if the arbitrator considered the objection and ruled adversely to Textile's position, the award would not be reviewable.[72] Accordingly, although the lower court's approach was certainly practical, the First Department has wisely insured that the petitioner who

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[66] *In re* Textiles, Inc., 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).

[67] *See* N.Y.U.C.C. § 2-725(1) (McKinney 1964).

[68] *See* River Brand Rice Mill, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545, 113 N.Y.S.2d 132 (1953); *see also* 8 WK&M ¶ 7502.15.

[69] CPLR 7502(b).

[70] *See* CPLR 7511 (b)(1)(iii).

[71] *See* 8 WK&M ¶ 7502.08.

[72] *See* CPLR 7511(b)(1).

asserts a timely objection to arbitration will not be denied judicial consideration.

CPLR 7503(c): Court of Appeals sanctions service-not receipt-as sufficient to satisfy statute of limitations; First Department decries "trick" service of notice of intention to arbitrate.

Despite the legislative mandate that "[t]he civil practice law and rules shall be liberally construed . . . ,"[73] CPLR 7503(c) has been accorded an extremely stringent interpretation. Postulating that the ten-day period within which to apply for a stay of arbitration is a statute of limitations,[74] courts have simply pointed to their inability to grant a time extension, even when the parties have so agreed,[75] as ground for refusing to review "untimely" applications.[76] Furthermore, by positing that practical considerations are irrelevant when jurisdictional issues are involved,[77] courts have demonstrated little reluctance in vitiating service of an application for a stay of arbitration where the moving papers were not received within ten days[78] or were not served directly upon the party demanding arbitration[79] or were served pursuant to the three-day extension provided by CPLR 2103(b) for service of interlocutory papers.[80] Interesting indeed, will be the lower court's reaction to two recent appellate pronouncements.

In *Empire Mutual Insurance Co. v. Levy*[81] the Appellate Division, First Department, announced that the judiciary has not been rendered completely impotent by CPLR 7503(c): the expiration of the ten-day period does not preclude a subsequent application for a stay of arbitration when the notice of intention to arbitrate is deliberately served

73 CPLR 104.

74 *See* Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968), *aff'd*, 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, 760-70 (1970).

75 *See* General Acc. Fire & Life Assur. Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (mem.). *But see* N.Y. GEN. OBLIGATIONS LAW § 17-103 (McKinney 1964).

76 *Compare* CPLR 201 *with* CPLR 2004.

77 Knickerbocker Ins. Co. v. Gilbert, 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970), *rev'd*, 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971).

78 *Compare* Knickerbocker Ins. Co. v. Gilbert, 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970) *with* Glens Falls Ins. Co. v. Anness, 62 Misc. 2d 592, 308 N.Y.S.2d 893 (Sup. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 173 (1970).

79 *Compare* State Wide Ins. Co. v. Lopez, 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968) *with* Bauer v. MVAIC, 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969).

80 *See, e.g.*, Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969).

81 35 App. Div. 916, 316 N.Y.S.2d 24 (1st Dep't 1970).