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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

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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).

in a manner to hinder or prevent timely objection. Petitioner's New York City office had been negotiating an accident claim with respondent; yet, the notice of intention to arbitrate was mailed to petitioner's office in Rockville Centre. In reversing an order denying a stay of arbitration the appellate division reasoned that if such tactics were permitted a nationwide insurance company could be served anywhere and, consequently, the ten-day period would be virtually nonexistent.

Inasmuch as "the validity of the ten-day limitation depends upon the sufficiency of the notice,"[82] the First Department's decision in *Levy* might not represent a significant departure from earlier cases which permitted late applications where the notice requirements of the CPLR[83] had not been met.[84] Nonetheless, such an expansive interpretation of precedent does evidence a judicial sensitivity to the burdens imposed upon the recipient of a notice of intention to arbitrate who must act within ten short days. A more profound appreciation of these exigencies was manifested in *Knickerbocker Insurance Co. v. Gilbert.*[85]

In *Knickerbocker* a notice of intention to arbitrate was received on December 1, 1969. On December 11, petitioner posted by certified mail a notice of petition for a stay of arbitration, which was received by respondent's attorney on the following day. The Appellate Division, First Department, ruled that the application was untimely inasmuch as the moving papers had not been received within ten days. The Court of Appeals reversed.

Essentially, the Court reasoned that there is no justifiable ground for precluding an application which is mailed on the tenth day after receipt of a notice of intention to arbitrate. For, the draftsmen of the CPLR intended that the application to stay arbitration remain assimilated to service of a motion which does not require actual receipt

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82 Hesslein & Co. v. Greenfield, 281 N.Y. 26, 31, 22 N.E.2d 149, 151 (1939).

83 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).

84 *See* Napolitano v. MVAIC, 26 App. Div. 2d 757, 272 N.Y.S.2d 220 (3d Dep't 1966) (notice served by ordinary mail) *rev'd*, 21 N.Y.2d 271, 234 N.E.2d 433, 287 N.Y.S.2d 393 (1967); Allstate Ins. Co. v. Neithardt, 24 App. Div. 2d 941, 265 N.Y.S.2d 128 (1st Dep't 1965) (party demanding arbitration failed to include his address); Unipak Aviation Corp. v. Mantell, 20 Misc. 2d 1078, 196 N.Y.S.2d 126 (Sup. Ct. N.Y. County 1959) (demand did not specify subject matter in dispute).

85 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971), *rev'g*, 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970). *See also The Quarterly Survey*, 45 ST. JOHN'S L. REV. 530 (1971).

to be effected.[86] Moreover, in the Court's opinion its construction would allow a full ten days and no more — in which to act, thereby preserving the underlying purpose of the preclusionary caveat: to prevent a party from participating in the arbitration with the option of asserting threshold objections should the arbitration be proceeding unfavorably.[87] Finally, the Court recognized that a contrary decision might discourage a party from utilizing the mailing proviso of CPLR 7503(c). Such an effect would be unfortunate particularly in view of the shortness of time in which the petitioner has to act.

Additionally, the Court sanctioned service of the moving papers upon an attorney rather than upon the party himself. It had been held that this mode of service was jurisdictionally defective.[88] The Court ruled, however, that since many arbitration agreements incorporate the rules of the American Arbitration Association,[89] which permit service of all papers upon an attorney, there is in effect a designation of the attorney as an agent for service of process.[90]

Certain aspects of *Knickerbocker* appear abstruse, especially the pre-occupation with what the advisory committee intended rather than a concern for the statute as finally enacted.[91] In addition, it is difficult to comprehend why the Court made only a fleeting reference to *Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc.*,[92] a case which is largely responsible for much of the inequities that have arisen in the lower courts. Nonetheless, in view of the framework within which the Court was compelled to operate, *Knickerbocker* is a well-reasoned decision. Although there was no intimation that the ten-day period should no longer be deemed a statute of limitations, the Court has at least afforded the practitioner a full ten days in which to act and in

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86 *See* 1960 N.Y. LEG. DOC. NO. 20 . . . FOURTH REPORT OF THE COMM. ON PRACT. & PROC. 80-81.

87 *See id.* at A-244; 8 WK&M ¶ 7503.25.

88 State-Wide Ins. Co. v. Lopez, 30 App. Div. 2d 694, 291 N.Y.S.2d 928, 930 (1968):

> While (CPLR 7503) subdivision (c) provides for an alternate method of service, it does not change the general rule that initiatory process must be served *upon the party* over whom jurisdiction is sought to be acquired and not upon his attorney. (Emphasis in original).

But see Bauer v. MVAIC, 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 158 (1969).

89 AMERICAN ARBITRATION ASSOCIATION, RULES OF COMMERCIAL ARBITRATION No. 30.

90 *Cf.* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1963).

91 Although the Advisory Committee intended that the procedure upon an application to stay arbitration remain assimilated to a motion, 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."

92 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).

the process has restored some semblance of practicality to an area of law which has engendered some very harsh results.

CPLR 7511(b)(1): Court establishes criteria for review of award rendered at compulsory arbitration.

Much that has been theorized concerning article 75 is premised on the notion that parties are free to select a private forum in which to settle their disputes thereby waiving a portion of the substantive and procedural law of the state.[93] Implicit in many of the decisions regarding arbitration is the attitude that since the parties have voluntarily agreed to arbitrate they have no cause to complain if the proceedings are not entirely satisfactory.[94] Indeed, CPLR 7511(b)(1) reflects the judicially created maxim that an arbitrator's award cannot be vacated for errors of law or fact.[95] Under this section, the grounds for overturning an award focus primarily on the integrity of the participants and the arbitrator rather than on the wisdom of the award.[96]

In addition to their refusal to scrutinize an arbitrator's award, courts have also manifested a reluctance to examine the submission agreement in the first instance.[97] For example, in *National Equipment Rental Ltd. v. American Pecco Corp.*,[98] the respondent sought an order modifying the petitioner's reservation of "the right to request other and different relief" in addition to a demand for a specified sum. Noting the arbitrator's power to grant any remedy or relief deemed just and equitable,[99] the Appellate Division, First Department, declined to circumscribe the demand. For, the court was of the opinion that where the dispute to be submitted to arbitration is adequately set forth, the

93 *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); Spectrum Fabrics Corp. v. Main St. Fashions, 285 App. Div. 710, 139 N.Y.S.2d 612 (1st Dep't) *aff'd* 309 N.Y.2d 709, 128 N.E.2d 416, 103 N.Y.S.2d 128 (1955).

94 *E.g.*, Amtorg Trad. Corp. v. Camden Fibre Mills, Inc., 304 N.Y. 519, 109 N.E.2d 606 (1952).

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

96 *But see* Granite Worsted Mills v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 175-76 (1970).

97 One situation, however, wherein the courts are compelled to supervise the arbitral process, concerns a conflict between an arbitration agreement and an appraisal agreement under CPLR 7601. It has recently been ruled that when such a conflict arises it is for the court to decide which mode of private-dispute settlement takes precedence. *See* American Silk Mills Corp. v. Meinhard-Commercial Corp., 35 App. Div. 2d 197, 315 N.Y.S.2d 144 (1st Dep't 1970). *See also* Dimson v. Elghanayan, 19 N.Y.2d 316, 227 N.E.2d, 10, 280 N.Y.S.2d 97 (1967).

98 35 App. Div. 2d 132, 314 N.Y.S.2d 838 (1st Dep't 1970).

99 AMERICAN ARBITRATION ASSOCIATION, RULES OF COMMERCIAL ARBITRATION § 42; *see also* Matter of De Laurentiis (Cinematografica), 9 N.Y.2d 503, 174 N.E.2d 736, 215 N.Y.S.2d 60 (1961); Matter of Staklinski (Pyramid Elec. Co.), 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).