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Article 45

CPLR 7511(b)(1): Court Establishes Criteria for Review of Award Rendered at Compulsory Arbitration

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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).

court should not anticipate that the arbitrator will improperly fulfill his duties.[100]

The above considerations are grounded in a voluntary agreement to arbitrate. What, however, can be observed about the arbitral process when the agreement to arbitrate did not emanate from an arm's-length transaction? Can it seriously be argued that a party to a form contract, *e.g.*, an automobile insurance policy, has freely selected arbitration as a forum in which to settle his disputes? Accordingly, the question arises as to how readily the usual statements pertaining to voluntary arbitration can be adapted to quasi-voluntary arbitration as in the case of an insurance policy or to compulsory arbitration as in the case of private or non-profitmaking hospitals. The latter issue was presented to the Court of Appeals in *Mount St. Mary's Hospital v. Catherwood.*[101]

Section 716 of the Labor Law[102] provides for the compulsory arbitration of grievances under a collective bargaining agreement and for the compulsory arbitration of differences that may arise in drafting a collective bargaining agreement. An application to confirm, modify, or vacate the award is governed by article 75 of the CPLR.[103] In *Mount St. Mary's Hospital* the plaintiff had failed to reach an accord with an employee's representative concerning the terms of a collective bargaining agreement. Consequently, the State Industrial Commissioner directed that the dispute be submitted to arbitration. The hospital balked at this order and commenced instead the instant declaratory judgment action contending *inter alia* that the scope of review prescribed by article 75 was unconstitutionally deficient if applied to compulsory arbitration.

The Court immediately acknowledged that concepts applicable to voluntary arbitration could not simply be superimposed upon those related to compulsory arbitration, "if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions . . . if compelled by government, must accord with procedural and substantive due process."[104] Having recognized this distinction the Court was faced with the crucial question: To what degree should a court be permitted to reexamine the arbitrator's decision?

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100 *In re* Auto Mechanics Lodge #1053 (Houdaille Constr. Materials, Inc.), 23 App. Div. 2d 953, 259 N.Y.S.2d 510 (4th Dep't 1965).

101 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970).

102 N.Y. LABOR LAW § 716 (McKinney Supp. 1969).

103 *Id.* § 716(6)(b).

104 26 N.Y.2d at 500, 260 N.E.2d at 511, 311 N.Y.S.2d at 867.

Basically, the Court divided its opinion into two distinct phases. Regarding arbitration under an existing agreement, the scope of review provided by CPLR 7511(b)(1)(iii) was deemed adequate. In the context of compulsory arbitration, however, the phrase contained in this subsection, *i.e.*, whether the arbitrator had exceeded his powers, was equated with the following criterion: whether "the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record."[105] In the Court's estimation, this test, which is similar to that employed in an article 78 proceeding,[106] would insure that due process of law has been accorded to the participants, while obviating the need for a time-consuming trial de novo.[107]

Regarding the instance wherein the arbitrator is called upon to draft a collective bargaining agreement, the Court ruled that the scope of review under CPLR 7511(b) must be similar to that employed when examining a legislative enactment: "The award may not be arbitrary or capricious, and the indirect exercise of the police power by the arbitrators must be justified by the public interest and reasonable conditions to effect that interest."[108] The Court established this criterion because in this instance there is no arbitration agreement from which to discern whether the arbitrator has exceeded his powers.

Chief Judge Fuld and Judge Burke separately concurred in the outcome but strongly protested the majority's assignment of three significantly different meanings to the phrase "exceeded his power" under CPLR 7511(b)(1)(iii). Judge Fuld reasoned that the scope of review provided by this subsection is not as restrictive as the majority had described and that decisions of federal[109] and state courts[110] dealing with compulsory arbitration awards have sanctioned a type of review which is narrower than that mandated by the majority. In addition, Judge Burke noted that section 716 of the Labor Law is presumptively constitutional[111] and that the courts should not substitute their

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105 *Id.* at 508, 260 N.E.2d at 516-17, 311 N.Y.S.2d at 875.

106 *See* 8 WK&M ¶ 7803.09.

107 The hospital sought a trial de novo, *citing* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947). However, the Court of Appeals rejected this approach on the ground that the requirement of de novo review has ebbed in the federal courts. 26 N.Y.2d at 503-04, 260 N.E.2d at 513, 311 N.Y.S.2d at 870, *citing* 4 DAVIS, ADMINISTRATIVE LAW § 29.09 (1958).

108 26 N.Y.2d at 510, 260 N.E.2d at 517, 311 N.Y.S.2d at 876.

109 *See* Gunther v. San Diego & A.E. Ry. Co., 382 U.S. 257 (1965); Brotherhood of Trainmen v. Chicago R & I.R.R. Co., 353 U.S. 30 (1957).

110 *See* Washington Arbitration Case, 436 Pa. 168, 259 A.2d 437 (1969); Fairview Hosp. Ass'n. v. Public Bldg. Serv., 241 Minn. 523, 64 N.W.2d 16 (1954).

111 *See* Lincoln Bldg. Associates v. Barr, 1 N.Y.2d 413, 135 N.E.2d 801, 153 N.Y.S.2d 633 (1956).

opinion vis-à-vis reviewability in place of the legislature's interpretation.

ARTICLE 80 — FEES

CPLR 8012(b)(2): Sheriff must commence plenary action against attorney in order to fix liability for poundage fees.

CPLR 8012(b)(2) prescribes that "where an execution is vacated or set aside[112] the sheriff may move for an order fixing his poundage fee and[113] to pay the same to the sheriff." Unlike poundage fees based on attachment,[114] poundage fees based on a levy of execution are collectible against an attorney as well as the party whom he represents.[115] Nevertheless, it was held in *Jewelry Realty Corp. v. Newport, Associates, Inc.*[116] that although the attorney may be included under this subsection a plenary action must be commenced in order to fix his liability.[117]

The plaintiff's attorney issued to the sheriff an execution which was subsequently vacated upon application by the defendant. The sheriff thereupon moved for an order fixing his poundage fees. Said relief was granted against the plaintiff. But, noting that the remedy described in CPLR 8012(b) is to be strictly limited[118] and fearing that the procedure employed in the instant case might cause constitutional problems regarding due process, the court refused to grant similar relief against the attorney unless an independent action was commenced.

NEW YORK CITY CIVIL COURT ACT

CCA 202: Civil court reduces verdict in excess of jurisdictional limitation upon plaintiff's consent.

The jurisdiction of the New York City Civil Court is restricted to

112 Under CPLR 8012(b)(1), the sheriff must actually collect the money before he is entitled to poundage fees. Two exceptions to this rule are contained in subparagraphs two and three: where the parties settle the claim after the execution is issued or where the execution is vacated or set aside. An additional exception is where the sheriff is prevented from collecting the money due to active interference by the party who issued the execution. 8 WK&M ¶ 8012.04.

113 The courts are in disagreement regarding whether an attorney is included in the phrase "party liable therefor" under this subsection. *Compare* Myers v. Grove, 242 App. Div. 637, 272 N.Y.S. 162 (2d Dep't 1934) *with* Gadski Tauscher v. Graff, 44 Misc. 418, 89 N.Y.S. 1019 (Sup. Ct. N.Y. County 1904) *and* Manni v. Shirtcraft Co., 6 Misc. 2d 925, 161 N.Y.S.2d 791 (Sup. Ct. Kings County 1957).

114 *See* CPLR 6212(b).

115 Adams v. Hopkins, 5 Johns. 252 (N.Y. 1810). *See also* Osterhout v. Day, 9 Johns. 114 (N.Y. 1812).

116 64 Misc. 2d 409, 314 N.Y.S.2d 787 (N.Y.C. Civ. Ct. N.Y. County 1970).

117 Personeni v. Aguino, 6 N.Y.2d 35, 38, 159 N.E.2d 559, 187 N.Y.S.2d 764, 767 (1959). (dissenting opinion).

118 Judson v. Gray, 11 N.Y. 408 (1854).