St. John's Law Review

Volume 44, October 1969, Number 2 Article 34

CPLR 7501: Consolidations of Arbitrations Permissable Unless Prejudice Would Thereby Result

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in such decisions,[166] and the effect upon the infant who must wait through both an arbitration and a court proceeding, when the arbitration may be of questionable value.

In short, *Agur* signifies the judiciary's reluctance to compel arbitration in child custody disputes where it finds arbitration to be a less than adequate solution. The value and desirability of arbitration are for the court to determine in each situation, especially when it is concerned with the more weighty problems of custody. If the arbitration agreement of the parties is not an adequate remedy, the court will not enforce it. However, the well-drafted document, which provides for a qualified, mutually acceptable panel of arbitrators, should continue to be honored and enforced by the courts.

CPLR 7501: Consolidations of arbitrations permissible unless prejudice would thereby result.

In *Met Food Corp. v. M. Eisenberg & Brothers, Inc.*[167] a general contractor, The Heyward-Robinson Company, Inc. [hereinafter Heyward], and an electrical contractor M. Eisenberg & Brothers, Inc. [hereinafter Eisenberg], had each provided for arbitration clauses in their separate construction contracts with Met Food Corporation [hereinafter Met]. Under the terms of the arbitration clauses, each party was to appoint one arbitrator, with a third to be chosen by the two already appointed. The agreements also contained a provision with respect to Met's right to indemnification for any claims asserted against it by one contractor for damages caused by any other contractor employed by Met.

Eisenberg subsequently served a notice to arbitrate on Met. Pursuant to their agreements, each party appointed an arbitrator, and a third member of the panel was duly chosen. However, Met then sought to enjoin the arbitration pending the joinder of Heyward as a party, asserting that it had subsequently learned that many of Eisenberg's claims were "predicated upon 'omissions and misdeeds' of Heyward."[168]

The court reasoned that even under the CPA, pursuant to which joinders and consolidations were unquestionably proper in light of the fact that arbitration was then itself a special proceeding, consolidation could not be ordered in a situation such as the present one. Unless either Eisenberg or Heyward waived its right to participate in the

166 *See* CPLR 7511(b).
167 59 Misc. 2d 498, 299 N.Y.S.2d 696 (Sup. Ct. Suffolk County 1969).
168 *Id.* at 500, 299 N.Y.S.2d at 698.

selection of arbitrators, opined the court, the consolidation would be prejudicial since the non-participating party would be precluded from exercising its full rights under the arbitration agreement.

It is difficult to take issue with the reasoning of the court, which, standing alone, is supported by sufficient precedent to warrant denial of Met's petition.[169] However, the court added:

> [S]ince the enactment of the CPLR, arbitrations are no longer considered special proceedings (CPLR 7502) thus depriving the courts of the statutory power, formerly authorized under the Civil Practices [sic] Act, to consolidate arbitrations of controversies. . . . Just as arbitrations are no longer subject to consolidation, because they are neither actions nor special proceedings, they surely are also exempt from such procedural regulation by the courts . . . , as third party practice (CPLR 1007) or joinder of parties (CPLR 1001).[170]

It would seem that the court erred in reaching this conclusion. As support for its lack of power to consolidate arbitrations under the CPLR, the court relied upon the appellate division opinion in *In re Chariot Textiles Corp.*[171] However, prior to the instant decision, the Court of Appeals had reversed the *Chariot* case,[172] adopting the appellate division dissent[173] which held that the courts may still order consolidations under CPLR 7502. The practitioner should therefore avoid placing reliance upon the *Met Food* dictum.[174]

CPLR 7502: Federal Arbitration Act is controlling in petition for a stay of arbitration in maritime action.

In *Ludwig Mowinckels Rederi v. Dow Chemical Co.*,[175] the Appellate Division, First Department, was petitioned to stay an arbitration demanded in connection with a contract for furnishing tankers for the carriage of chemicals. The contract contained an arbitration agreement and a provision incorporating certain sections of the Carriage of Goods by Sea Act,[176] thereby providing for the discharge of

169 *See, e.g., In re* Symphony Fabrics Corp., 16 App. Div. 2d 473, 229 N.Y.S.2d 200 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963).

170 59 Misc. 2d at 501, 299 N.Y.S.2d at 699.

171 21 App. Div. 2d 762, 250 N.Y.S.2d 493 (1st Dep't 1964).

172 18 N.Y.2d 793, 221 N.E.2d 913, 275 N.Y.S.2d 382 (1966). *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 686, 704-05 (1969).

173 21 App. Div. 2d at 763, 250 N.Y.S.2d at 494 (dissenting opinion).

174 *See In re* Vigo Steamship Corp., 32 App. Div. 2d 10, 299 N.Y.S.2d 200 (1st Dep't 1969), where the court reached a result similar to that in *Met Food* by denying consolidation because substantial prejudice might occur. However, the *Vigo* court recognized that such consolidations might otherwise be proper.

175 31 App. Div. 2d 372, 297 N.Y.S.2d 1011 (1st Dep't 1969).

176 46 U.S.C. §§ 1303(6), 1304 & 1311 (1964).