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CPLR 7503(c): Ten-Day Period Within Which To Apply for a Stay of Arbitration Construed as a Statute of Limitations

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The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

PREFATORY NOTE

CPLR 7503(c): Ten-day period within which to apply for a stay of arbitration construed as a statute of limitations.

The advantages of "arbitral preclusion" as a protection against the unwarranted interruption of arbitration are obvious; certain "threshold questions"[1] properly should be decided before proceedings before the arbitrator have been commenced. However, where a ten-day preclusionary provision is construed as a statute of limitations,[2] thereby foreclosing judicial review of such questions under *all* circumstances, the "justifications" proffered in its defense should be carefully examined.

Under CPA 1459, arbitration was denominated a special proceeding to be initiated by service of a notice of intention to arbitrate.[3] The party so served was precluded from asserting that a valid agreement to arbitrate had not been made or complied with, unless notice of an application to stay arbitration was served within ten days.[4] As an incident to a special proceeding, such applications were justifiably

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1 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 the statute of limitations.
See 7B MCKINNEY'S CPLR 7503, commentary 488 (1963).

2 Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 24 N.Y.2d 208, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969), *aff'g* 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968).

3 Katz v. Burkin, 1 Misc. 2d 67, 146 N.Y.S.2d 332 (App. T. 2d Dep't 1955); 7B MCKINNEY'S CPLR 7503, supp. commentary 110 (1967); S. TRIPP, A. GUIDE TO MOTION PRACTICE § 199 (rev. ed. 1949); 8 W. K. & M. ¶ 7502.04.

Although there appears to be a dispute as to when this special proceeding was commenced under the CPA, courts frequently held that it was neither by a motion to compel arbitration nor a motion to stay arbitration, but instead, by service of a notice of intention to arbitrate. Falls, *Arbitration Under the Civil Practice Law and Rules in New York*, 9 N.Y.L.F. 335 (1963).

4 CPA 1458(2).

considered motions,[5] thus falling beyond the statutory proscription that "[n]o court shall extend the time limited by law for the commencement of an action."[6] Accordingly, the ten-day rule was judiciously relaxed by the courts[7] where no prejudice would result.[8] Indeed, such applications were frequently made and often granted.[9] On the other hand, where an application related to the commencement of an action or special proceeding, the applicable statute of limitations was determinative and the courts were powerless to grant any time extensions.[10]

Adopting the substance of CPA 1458, CPLR 7503(c) provides that a notice of intention to arbitrate which conforms to all the procedural requisites,[11] including proper service, will prohibit the recipient from raising the threshold questions unless he "applies to stay the arbitration within ten days." Significantly, however, it was the intention of the draftsmen that arbitration would itself no longer be considered a special proceeding.[12] Consequently, unless made during the pendency of an action, applications are no longer considered motions,[13] but rather are deemed independent applications for relief, subject to the provisions governing the commencement of a special proceeding.[14]

5 CPA 1459. The distinction between special proceedings and motions was recognized in Lima v. Honeoye Falls Ry., 68 Hun 252, 253, 22 N.Y.S. 967, 968 (Gen. T. 5th Dep't 1893):

> a motion is an application in a proceeding . . . upon which it depends for jurisdiction; whereas a special proceeding is an independent prosecution of a remedy, in which jurisdiction is obtained by original process.

6 CPA 99, now CPLR 201.

7 *See* CPA 98.

8 *See, e.g.*, Grand Central Theatre, Inc. v. Moving Pictures Mach. Operators Union, 69 N.Y.S.2d 115 (Sup. Ct. N.Y. County 1941), *aff'd*, 263 App. Div. 989, 34 N.Y.S.2d 400 (1st Dep't 1942).

9 7B McKINNEY'S CPLR 7503, supp. commentary 123 (1967).

10 For example, in Brown v. City of New York, 198 Misc. 147, 97 N.Y.S.2d 560 (Sup. Ct. N.Y. County 1950), it was held that the applicable four month statute of limitations could not be tolled by providing in a timely order for service after the expiration of the time limited by statute. *See also* Kram v. Cohen, 50 N.Y.S.2d 322 (Sup. Ct. Queens County 1944).

11 Under CPLR 7503(c) 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 for a stay of arbitration is made within ten days after such service, he will be precluded from raising the threshold questions. Service of the notice of intention to arbitrate may be in the same manner as a summons or by registered or certified mail, return receipt requested.

12 *See* SECOND REP. 134-35.

13 CPLR 7502(a) states: "A special proceeding shall be used to bring before the court the first application arising out of an arbitrable controversy which is not made by motion in a pending motion."

14 CPLR 304 provides that "a special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause." For a discussion of

This procedural innovation has been attended by a general confusion among the courts and practitioners alike. Refusing to accede to the legislative intendment, both often mistakenly cling to earlier practice. For example, in *Beverly Cocktail Lounge, Inc. v. Emerald Vending Machine, Inc.*,[15] the petitioner, relying upon CPLR 2103(b),[16] which pertains to the service of motions and other papers, sought an additional three days within which to serve a notice of petition to stay arbitration. In denying this application, the court soundly reasoned that since there was no action pending, the moving papers should have been received by the respondent within ten days after the notice of intention to arbitrate was mailed. Thus, *Beverly* was an early indication of the initiatory-interlocutory papers distinction engendered by CPLR 7503(c).

While in accord with the *Beverly* rationale that CPLR 2103(b) was inapposite, the court in *Finest Restaurant Corp. v. L&A Music Co.*[17] opined that the ten-day period did not commence until the postal authorities first delivered or attempted to deliver the notice of intention to arbitrate. Accordingly, the petitioner in *Manitt Construction Corp. v. J.S. Plumbing & Heating Corp.*,[18] contended that service upon him of the notice of intention to arbitrate was effected on the date of receipt; thus, his notice of petition to stay arbitration was timely inasmuch as it had been mailed nine days later. However, the court held that service by the respondent was completed on the date of mailing, in view of the statutory proviso that "service by mail shall be completed upon deposit of the paper. . . in a post office . . . ."[19] Nevertheless, service of the notice of petition for a stay of arbitration was deemed proper in light of the three-day extension provided by CPLR 2103(b).

The availability of a three-day extension has not been the only source of confusion generated by CPLR 2103(b). The *Beverly* rationale was implicitly reaffirmed in *State-Wide Insurance Co. v. Lopez*,[20] where

the other pertinent sections of the CPLR (especially article four) see 8 W. K. & M. ¶ 7502.02.

15 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965). *See also The Biannual Survey*, 40 ST. JOHN'S L. REV. 173 (1965).

16 CPLR 2103(b)(2) provides that papers to be served upon a party in a pending action be served upon his attorney. It further states that: "Where a period of time prescribed by law is measured from the service of a paper and service is by mail, three days shall be added to the prescribed period."

17 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup. Ct. N.Y. County 1966). *See also The Quarterly Survey*, 42 ST. JOHN'S L. REV. 160 (1967).

18 50 Misc. 2d 502, 270 N.Y.S.2d 716 (Sup. Ct. N.Y. County 1966).

19 CPLR 2103(b)(2).

20 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968). *See also The Quarterly Survey*, 43 ST. JOHN'S L. REV. 532 (1969).

a notice of petition to stay arbitration served upon an attorney was invalidated. Cognizant of the legislative innovation, the court found service defective insofar as process had not been served upon a party to the "action." Concluding that it was without personal jurisdiction, the court noted:

> While CPLR 7503 subd. (c) provides for an alternate method of service, it does not change the general rule that initial process must be served upon the party over whom jurisdiction is sought to be acquired and not upon his attorney.[21]

The efficacy of service upon an attorney was again questioned in *Bauer v. MVAIC*.[22] Noting that the parties had incorporated the rules of the American Arbitration Association providing for service of papers upon a party or his attorney,[23] the court reasoned that such, in effect, constituted a designation of the attorney as an agent to receive initiatory process, and was, therefore, a valid predicate for the assertion of personal jurisdiction over the principal.[24] By predicating its decision upon principles of agency, the court seemingly recognized the distinction drawn in *Lopez* between service of initiatory and interlocutory papers. Significantly, however, the court in *Bauer*, by way of dictum, expressly rejected *Lopez*, and, in the process, cast serious doubt upon its own initial reasoning. Indeed, the court concluded that the same result was warranted by CPLR 7506, which permits service of papers upon a party's attorney.[25] However, inasmuch as this section governs procedure once the parties are before the arbitrator, it should not affect the "initiatory-interlocutory" distinction in effect when the parties first seek judicial recognition of their grievance.[26]

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21 30 App. Div. 2d at 694, 291 N.Y.S.2d at 930.

22 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 158 (1969). *Cf.* Worth v. Government Employees Ins. Co., 158 N.Y.L.J. 98, Nov. 21, 1967, at 17, col. 7 (Sup. Ct. N.Y. County 1967).

It should be noted that if an attorney is served, and an answer to the petition is served without an objection to the defective service, the objection is waived. Appis v. Employers Liab. Assurance Corp., 56 Misc. 2d 969, 290 N.Y.S.2d 617 (Sup. Ct. Westchester County 1968).

23 Rule 30 of the American Arbitration Association.

24 31 App. Div. 2d at 243, 296 N.Y.S.2d at 679. *Cf.* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1963).

25 The soundness of this "dictum" is also questioned in 7B MCKINNEY'S CPLR 7503, supp. commentary 122 (1969).

26 Nor have the difficulties arising from the procedural changes made by article 75 been confined to applications for a stay of arbitration. Acceding to the legislative innovations, the court in 2166 Bronx Park East, Inc. v. Local 32E Bldg. Serv. Employees, 45 Misc. 2d 492, 257 N.Y.S.2d 192 (Sup. Ct. Bronx County 1965), dismissed petitioner's application for failure to personally serve the respondent with its notice to compel arbitration. Similarly, in Graffagnino v. MVAIC, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1963), an application to confirm an arbitrator's award was denied

The confusion occasioned by the procedural changes of article 75 and the dichotomy between motions and special proceedings recently led to extensive litigation concerning the propriety of a time extension pursuant to CPLR 2004. In *Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc.*,[27] the petitioner received a notice of intention to arbitrate on April 2, 1968. The notice conformed to the procedural mandates of CPLR 7503(c), stating that petitioner would be precluded from asserting that a valid arbitration agreement had not been made or complied with, or from asserting the bar of a time limitation in court, unless application was made for a stay of arbitration within ten days. On April 11, 1968, a supreme court justice signed an order requiring the respondent to show cause why the arbitration should not be stayed and directing that service be effected on or before April 18. Accordingly, respondent was served on April 18, sixteen days after petitioner received the original notice. Having complied with the court order, petitioner contended that service was timely and proper. The respondent, however, argued that the application was time-barred, and the Supreme Court, New York County, granted its cross-motion to compel arbitration.[28]

On appeal, the petitioner asserted that there had not been an agreement to arbitrate. Moreover, it was contended that the statute did not require service within ten days, and, if it did, an extension of time under CPLR 2004 should be allowed since no prejudice had been shown. Petitioner further reasoned that it had acted in good faith, attempted to comply with the statute, and had followed the supreme court directive.[29] In support of its position that service need not be made within ten days, the petitioner maintained:

> There is a notable exception to the rule that actions and proceedings are commenced when applicable papers are served, the notable exception being the commencement of an action or proceeding upon the issuance of a provisional remedy.[30]

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without prejudice because service was not effectuated in the manner provided in petitioner's order to show cause. The fact that the application was the first one arising out of an arbitrable controversy was controlling.

27 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 208, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

28 158 N.Y.L.J. 124, June 26, 1968, at 2, col. 3 (Sup. Ct. N.Y. County).

29 Brief for Appellant at 4, Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 31 App. Div. 2d 208, 259 N.Y.S.2d 853 (1st Dep't 1968).

30 *Id.* at 8, *citing* Schram v. Keane, 279 N.Y. 227, 18 N.E.2d 136 (1938). The appellant in *Logan* attempted to compare the order to show cause staying any further arbitration with a provisional remedy. *Schram* (which dealt with the tolling of a statute of limitations) and similar decisions are largely responsible for the enactment of CPLR 203(b)(3) which, like *Schram*, states that the procurement of a provisional remedy will give the court conditional jurisdiction until service is made in compliance with a court order. Thus, if a stay of arbitration could be likened to a provisional remedy, the service of the order to show cause within the time set would have tolled the statute of limitations.

In other words, petitioner argued that the order to show cause, "was more than a mere substitute for the ordinary notice of petition."[31]

In affirming the order of special term, the appellate division refused to consider the merits of the petitioner's claim. Instead, the court concerned itself with whether there had been compliance with CPLR 7503(c). Reading CPLR 7502 and CPLR 304 in conjunction, the court concluded that the requisite special proceeding must be commenced by service within ten days. Construing the ten-day period as a statute of limitations, the court was compelled to view the petitioner's failure to effect service within the prescribed time as fatal to his claim since CPLR 201 prohibits an extension of the time provided by law for the commencement of an action.[32] In support of this interpretation, the court noted that statutes should be construed and applied so as to effect the purpose for which they were enacted.[33] And, as article 75 was enacted to expedite the settlement of disputes,[34] an extension of time for an application to stay arbitration would presumably frustrate the intent behind that article.[35] The Court of Appeals adopted this reasoning in a memorandum affirmance, Chief Judge Fuld and Judge Burke dissenting.[36]

While well within the literal construction of CPLR 7503(c), *Logan* is predicated upon an unarticulated yet clearly present judicial belief that ten days provides sufficient time within which to commence a special proceeding for at least two reasons: the moving papers may be served quickly by registered or certified mail, and CPLR 7503(c) affords sufficient procedural safeguards to the party served. Indeed, if a notice of intention to arbitrate does not comply with the CPLR, the recipient will not be precluded from raising the "threshold questions" by an application for a stay of arbitration after the ten-day period has elapsed,[37] or by an application to vacate an arbitrator's award.[38] In short, "the validity of the ten-day limitation depends upon the sufficiency of the notice."[39] And, applications have been entertained after

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31 *Id.*

32 The word "action" includes a special proceeding. CPLR 105(b).

33 *See* N.Y. STATUTE §§ 92, 96 (MCKINNEY 1942).

34 Mole v. Queen Ins. Co., 14 App. Div. 2d 1, 217 N.Y.S.2d 330 (4th Dep't 1961).

35 *See The Biannual Survey*, 39 ST. JOHN'S L. REV. 239 (1964).

36 24 N.Y.2d 898, 249 N.E.2d 477, 30 N.Y.S.2d 636 (1969). Accordingly, it must be assumed that both the appellate division and the Court of Appeals considered the procurement of an order to show cause as an alternative to a notice of petition—not as a provisional remedy.

37 *See* Napolitano v. MVAIC, 26 App. Div. 2d 757, 272 N.Y.S.2d 220 (3d Dep't 1966).

38 CPLR 7511(b)(2).

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

the ten-day period had expired where the notice was served by ordinary mail,[40] or where the petitioner had failed to include his address,[41] or where the demand did not specify the subject matter in dispute.[42]

Notwithstanding these procedural safeguards, the situation may well develop wherein the practitioner is unable to make an application for a stay of arbitration within ten days. The question thus arises as to whether all applications made after the ten-day period has elapsed must be dismissed as time-barred. It appears that such a construction would not only contravene the spirit of the CPLR,[43] but is also untenable in view of the functional purposes of preclusion. A comparison of the policies sought to be effectuated by preclusion as opposed to those underlying a statute of limitations may be helpful. The latter is generally justified on the grounds that it is designed "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[44] On the other hand, the ten-day caveat is intended to preclude consideration of the threshold questions subsequent to the commencement of the arbitral process.[45] Concededly, the latter objective is valid since these issues should be decided beforehand. But, during the interim between service of a notice of intention to arbitrate and the institution of proceedings before an arbitrator should not applications be entertained despite the expiration of the ten-day period when special circumstances are evident? Could it be seriously argued that "the obscuring effects of time" have made these claims "stale"? Moreover, in view of the unique purposes attached to both a statute of limitations and the ten-day preclusion caveat, it would appear that in the context of CPLR 201 the word "action" is not intended to encompass those "special proceedings" involving an application for a stay of arbitration.[46] To hold otherwise would be to presuppose that the preclusion caveat *is* a statute of limitations. Considering the purposes usually attached to each, the fact that

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40 Napolitano v. MVAIC, 26 App. Div. 2d 757, 272 N.Y.S.2d 220 (3d Dep't 1966).

41 Allstate Ins. Co. v. Neithardt, 24 App. Div. 2d 941, 265 N.Y.S.2d 128 (1st Dep't 1965).

42 Unipak Aviation Corp. v. Mantell, 20 Misc. 2d 1078, 196 N.Y.S.2d 126 (Sup. Ct. N.Y. County 1959).

43 Construction — CPLR 104 provides that: "The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."

44 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1944). *See also* Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 81 N.E.2d 45, 86 N.Y.S.2d — (1948).

45 FOURTH REP. A-244.

46 CPLR 105(a) states that "[u]nless the context requires otherwise, the definitions in this section apply to the civil practice law and rules." CPLR 105(b) provides that the word "action" includes a special proceeding.

the legislature has not affirmatively defined it as such,[47] and that ten days would be the shortest limitation period provided in the CPLR,[48] there appears little reason for denying extensions in the sound discretion of the court.

This flexible approach is supported by an analysis of the decision in *Logan*. Obviously, when a party is compelled to submit a dispute to arbitration, he is confronted by a system of procedural and substantive law which differs with that enforced in the courts.[49] Furthermore, although the situation in *Logan* is comparable to one arising from an irregularity in the application, the result is not a dismissal without prejudice, permitting a renewed application.[50] On the contrary, such a decision is in effect a final determination foreclosing judicial scrutiny

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47 *See* 2 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE § 13:3 (1965).

48 There are other "short" periods of time within which a party must complete an act. However, there is inherent justification for these short periods. For example, under the election law, proceedings to attack a nominating petition or to object to a primary election must be commenced within twenty days of the alleged infraction. N.Y. ELEC. LAW § 330 (McKinney 1964). However, such provisions are not unreasonable because they are inextricably connected with the public interest.

Also, the General Municipal Law, mandates that a notice of claim be filed within 90 days of an alleged injury. N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965). Filing the notice is a condition precedent to the right to maintain an action against various public corporations. However, this requirement is justified on the ground that when a state waives its sovereign immunity it may attach whatever condition it desires before a party will have the right to bring an action.

As witnessed in *Logan*, the ten-day preclusion caveat contained in CPLR 7503(c) is usually justified on the ground that it expedites arbitration. Accordingly, it is maintained that to permit an application for a stay of arbitration after the ten days have elapsed would result in a great deal of uncertainty as to the validity of the arbitration proceedings. This viewpoint presupposes that preclusion always achieves the desired goals and overlooks the fact that a decision denying a stay of arbitration is appealable, and, therefore, the process of arbitration can be held in abeyance for months. Secondly, an unwilling party to an arbitration proceeding can otherwise prolong arbitration appreciatively. *See* Costikyan, *Some Observations on Arbitration*, 151 N.Y.L.J. 40, Feb. 27, 1964, at 1, col. 3.

49 The argument that the parties have waived certain rights by their agreement to arbitrate is circular in these premises because it is just such a question (*viz.*, whether a valid agreement to arbitrate exists) that the courts are being called upon to decide.

When a party does agree to arbitrate, he subjects himself to procedures peculiar to the arbitral process. Among other things, the arbitrators are not bound by rules of substantive law. 2 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE § 141:2 (1965). In addition, the availability of pretrial examinations is the exception rather than the rule and the hearings are not conducted under the usual evidentiary rules. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 363 (2d ed. 1966).

50 *See, e.g.*, Graffagnino v. MVAIC, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1965), wherein petitioner's application to confirm an arbitrator's award was dismissed without prejudice due to improper service.

It should be noted that CPLR 7510 has been held to be a one year statute of limitations. Belli v. Matthew Bender & Co., 24 App. Div. 2d 72, 263 N.Y.S.2d 846 (1st Dep't 1965). However, the decision was grounded in CPLR 215(5) rather than § 7510 itself because the latter section was not in specific terms a statute of limitations. However, even if improperly made, an application to confirm an arbitrator's award made within one year would toll the statute of limitations. CPLR 205(a).

of the "threshold questions."[51] Does this situation conform to the liberal construction mandated by the CPLR? Justice Steuer's dissenting opinion in *Logan* would clearly warrant a negative inference.[52]

The difficulties inherent in *Logan* are demonstrated by *General Accident Fire & Life Assurance Corp. v. Cerretto*,[53] where the parties by stipulation had agreed upon an extension of the ten-day period. Although the agreement was executed after service of petitioner's notice of intention to arbitrate, it was nevertheless set aside as ineffective on the ground that "if the court is prevented from extending the time, certainly an attorney for either party should not be permitted to waive his client's rights by agreeing to enlarge the period prescribed by law."[54] This holding directly contravenes section 17-103(1) of the General Obligations Law[55] which provides that parties may agree not to plead the statute of limitations if the promise is made after the cause of action accrues. Moreover, even if it were maintained that the written stipulation was procedurally ineffective, the court could have reached a similar result via section 17-103(4)(b),[56] New York's codifica-

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51 CPLR 7511, which concerns vacating or modifying an award, does not make provision for an application (by one who has been served with a notice of intention to arbitrate) to raise the threshold issues. CPLR 7502(b) allows the arbitrators at their sole discretion to entertain the issue of a limitation of time. In short, neither section provides for the raising of the question as to whether a valid agreement has been made or complied with after a party has failed to apply within ten days.

Not only is a consideration of the threshold questions prohibited, but the court is also limited in the extent to which it can review the arbitrator's award. CPLR 7511(b)(1); *see* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 363 (2d ed. 1966). For an illustration of the independence of the arbitrator, see Torano v. MVAIC, 15 N.Y.2d 882, 206 N.E.2d 353, 258 N.Y.S.2d 418 (1965). In that case claimant's husband, sole support of herself and two children, was killed in a hit and run accident. The arbitrator arrived at a $500 award. Nevertheless, the Court of Appeals held that the inadequacy of the award, since it is not a ground specified in the statute, was not reviewable.

52 Justice Steuer phrased his dissent thusly:

> Of all the statutes enacted and in force it is impossible to designate one which is more peculiarly the province of the lawyer than the CPLR. Written by lawyers, its directions are for all practical purposes directed to them, and to them alone. It is submitted that no lawyer regards the institution of an action or a special proceeding as an "application." One "applies" to the court but not to the opposing party.

30 App. Div. 2d at 212, 295 N.Y.S.2d at 858. *Cf.* Justice Valente's dissenting opinion in Chariot Textiles Corp. v. Wallalancit Textiles Co., 21 App. Div. 2d 762, 763, 250 N.Y.S.2d 493, 495 (1st Dep't 1964):

> Since the desirability and usefulness of consolidation are no longer open to question, power to effect such ends should not be lightly disclaimed. Particularly is that true where an act such as the CPLR — intended to remove many of the technicalities of practice and pleading and is to be liberally construed — is the asserted basis for ouster of jurisdiction.

In the latter case, the Court of Appeals reversed on the basis of Judge Valente's dissenting opinion. 18 N.Y.2d 795, 221 N.E.2d 914, 275 N.Y.S.2d 383 (1966).

53 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (mem.).

54 *Id.* at 218, 303 N.Y.S.2d at 225.

55 N.Y. GEN. OBLIGATIONS LAW § 17-103 (McKinney 1964).

56 N.Y. GEN. OBLIGATIONS LAW § 17-103(4)(b) (McKinney 1964). This subsection

tion of the principle of substantive law by which a party may be estopped from pleading the statute of limitations.

CONCLUSION

An overview of *Logan* indicates that so literal a construction of CPLR 7503(c) may often be unduly oppressive. Although ten days is usually enough time within which to make an application for a stay of arbitration, should a situation arise where an application cannot be made because of special circumstances and no prejudice would result from a time extension, courts are presently powerless to grant relief. The subsection would seem to mandate a more flexible interpretation: one that would grant judicial relief based upon the relative exigencies present in a given case.[57] Even if it were hypothesized that the facts presented in *Logan* did not warrant such liberality, the Court should have disclosed this factor. Moreover, in view of the confusion generated by lower courts in their interpretation of article 75, *Logan* could have been given prospective application[58] only, thereby achieving two objectives: the Court could have obtained a decision which it obviously felt constrained to reach, and the legal profession would have been "on notice" that a time extension thereafter would be unavailable.

While speculation as to the ultimate judicial reaction to *Logan* is at best conjectural, most recent progeny intimate blind adherence.[59] Unfortunately, while the case removed many of the pitfalls to which an unwary practitioner could conceivably be exposed,[60] it also injected the possibility of its own self-perpetuation in the lower courts. That is, with *Logan* in its arsenal, courts can summarily dispose of applications to stay arbitration without ever reaching the threshold

provides that the enactment of § 17-103 into law "does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitation." *See also* Robinson v. City of New York, 24 App. Div. 2d 260, 265 N.Y.S.2d 566 (1st Dep't 1965).

[57] Such an approach could recognize special circumstances as they occur and, yet, maintain the general purpose of preclusion, *viz.*, to insure that the arbitral process is not unduly hindered. Thus, preclusion would remain as a useful device, especially in cases where laches is evident. *See, e.g.*, Langemyr v. Campbell, 23 App. Div. 2d 371, 261 N.Y.S.2d 500 (2d Dep't 1965) (declaratory judgment action commenced six months after receipt of notice of intention to arbitrate was not available in lieu of an application for a stay of arbitration; petitioner had earlier abandoned his application for a stay of arbitration).

[58] *Cf.* Hersh v. Homes Ins. Co., 284 App. Div. 428, 131 N.Y.S.2d 488 (1st Dep't 1954).

[59] *See, e.g.*, Sisters of Charity of St. Vincent DePaul v. Boegel, 32 App. Div. 2d 818, 302 N.Y.S.2d 462 (2d Dep't 1969) (mem.) (extension of time under CPLR 2004 denied primarily on authority of Logan).

[60] *See, e.g.*, Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969). Relying on *Logan* the court experienced none of the difficulties evident in the earlier cases in holding the time extension under CPLR 2103(b) inapplicable. *See* notes 15-19 and accompanying text *supra*.

questions or the underlying equities. Inasmuch as the present approach appears unsatisfactory, two alternatives are submitted: (1) the legislature "affirm" *Logan* and, realizing its implications, extend the time period within which to commence the special proceeding; or, (2) the Court seize upon the earliest opportunity to distinguish *Logan* on its facts.

NEW YORK STATE CONSTITUTION

Art. 6, § 19(f): Status of litigation in supreme court affected by proceedings in New York City Civil Court even though civil court transferred the action because it lacked jurisdiction.

The mandatory transfer provision contained in article 6, section 19(f) of the state constitution[61] is self-executing;[62] hence, the burden of effectuating the intent behind that section falls upon the judiciary. And, although the language of the section is explicit, delicate questions of interpretation surround its implementation.[63] For example, in *Kemper v. Transamerica Insurance Co.*,[64] the New York City Civil Court was confronted with the problem of determining the effect, if any, of previous proceedings in the civil court upon the status of the litigation in the supreme court.

In *Kemper,* the defendant, already in default, moved in the New York City Civil Court to dismiss the complaint on the ground that plaintiff's claim exceeded the court's monetary jurisdiction. Recognizing the validity of the defendant's assertion,[65] the court, nevertheless, denied the motion; instead, it directed, sua sponte, that the action be transferred to the supreme court.

Concerning the stage at which the action should reach the supreme court, the civil court held that despite the absence of legislative guidance the status of the case should be no different than if it had

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61 N.Y. CONST. art. 6, § 19(f) (1962) provides that the court "*shall* transfer to the supreme court . . . any action . . . over which the said courts for the city of New York have no jurisdiction." (Emphasis added.)

62 *Cf.* Frankel Assoc., Inc. v. Dun & Bradstreet, Inc., 45 Misc. 2d 607, 257 N.Y.S.2d 555 (Sup. Ct. N.Y. County 1965).

63 Many of the problems of construction arise because the CPLR was drafted prior to the judiciary article of the state constitution, and, in several aspects, they are inconsistent. 7B MCKINNEY'S CPLR 325, commentary 622-23 (1963). Nevertheless, the constitutional provisions take precedence over the CPLR. Garland v. Raunheim, 29 App. Div. 2d 383, 288 N.Y.S.2d 417 (1st Dep't 1968).

64 61 Misc. 2d 7, 304 N.Y.S.2d 515 (N.Y.C. Civ. Ct. N.Y. County 1969).

65 Although the complaint in *Kemper* stated several causes of action, the court held that it alleged one primary right of the plaintiff and one wrong by the defendant. Therefore, the court viewed the complaint as stating one cause of action which exceeded its jurisdiction.