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Article 39

CPLR 7501: Commercial Arbitration Held To Be Improper Medium for Determining Violations of State Antitrust Laws

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In *Bulman v. Bulman*,[144] an action for replevin of certain stock certificates and dividend checks, the defendant interposed a separate defense based on ownership in the "Estate of Virginia Bulman" and a counterclaim asking that the estate be adjudged the owner of the certificates and checks. The plaintiff moved, *inter alia*, to strike the defense and dismiss the counterclaim. Special term, Rensselaer County, granted this portion of plaintiff's motion, holding that the nature of the action was such that the plaintiff should succeed if his possessory right was superior to that of the defendant. The court pointed out that if a defendant is truly interested in the rights of the true owner he may use interpleader or give notice to the true owner so that he can intervene under CPLR 7103.

If a defendant would be liable to a third party if he is ordered to give possession of a chattel to plaintiff, should he be able to plead the title of the third party and his permissive connection therewith? If the defendant's claim rests on some basis other than his own title then a statement of that basis should be made.[145] In such a situation defendant would only be showing a stronger possessory right than the plaintiff.

ARTICLE 75 — ARBITRATION

CPLR 7501: Commercial arbitration held to be improper medium for determining violations of state antitrust laws.

In *Matter of Aimcee Wholesale Corp.*,[146] the Court of Appeals was presented with the issue of whether or not disputes raising questions of state law antitrust violations should be submitted to arbitration when the parties have previously agreed to submit all controversies arising out of or relating to their commercial dealings to arbitration.

In holding that, in spite of the presence of a broad arbitration agreement, alleged violations of state antitrust laws are non-arbitrable disputes and solely for a court to determine, the Court stated "the enforcement of our State's antitrust policy should not be left within the purview of commercial arbitration." [147] Commercial arbitration was characterized as an improper instrument for the determination of antitrust controversies "which are of such extreme importance to all of the people of this State." [148]

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[144] 57 Misc. 2d 320, 292 N.Y.S.2d 572 (Sup. Ct. Rensselaer County 1968).
[145] 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶7101.08 (1967).
[146] 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).
[147] *Id.* at 624, 237 N.E.2d at 225, 289 N.Y.S.2d at 971.
[148] *Id.*, 237 N.E.2d at 224, 289 N.Y.S.2d at 969.

In an earlier case, *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[149] the second circuit reached a similar conclusion regarding the arbitration of a federal antitrust claim. It was there stated:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus the plaintiff asserting his rights under the Act has been likened to a private attorney general who protects the public's interest. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage, . . . in fashioning a rule to govern the arbitrability of antitrust claims we must consider the rule's potential effect.[150]

Although there is a modern trend in favor of arbitration, as perhaps best expressed in the *Prima Paint* case,[151] it is clear that in certain matters of public policy illegality must still be left to the courts.[152] While arbitration affords contracting parties with a speedy, inexpensive and expert resolution of disputes, questions which have far reaching consequences affecting the total community should not be left to private determination.

CPLR 7501: Availability of provisional remedies in case where a court compels arbitration.

In *Hutton & Co. v. Bokelmann*,[153] plaintiff moved for a temporary injunction and defendants moved for a stay pending arbitration. Plaintiff, a member of the New York Stock Exchange, sought to enjoin defendant Bokelmann, its former employee, from working for defendant Hirsch & Co., another Exchange member. Under the rules of the Stock Exchange, arbitration was required at the instance of any one of the three parties. Defendant's motion was deemed to be one to compel arbitration under CPLR 7503 and was granted. The court stated that it might "in the meantime, grant provisional remedy or temporary injunctive relief" [154] but saw no reason to grant such relief in this case. The court's statement initiates discussion as to whether a court may grant provisional remedy or temporary injunctive relief in a case where it has compelled arbitration.

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[149] 391 F.2d 821 (2d Cir. 1968).
[150] *Id.* at 826-27.
[151] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). For the New York development, see *In re* Exercycle Corp., 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961) and Durst v. Abrash, 22 App. Div. 2d 39, 253 N.Y.S.2d 351 (1st Dep't 1965).
[152] *See* 7B McKINNEY'S CPLR 7501, supp. commentary 89 (1968).
[153] 56 Misc. 2d 910, 290 N.Y.S.2d 415 (Sup. Ct. N.Y. County 1968).
[154] *Id.* at 911, 290 N.Y.S.2d at 416.