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## CPLR 7501: Availability of Provisional Remedies in Case Where a Court Compels Arbitration

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In an earlier case, *American Safety Equipment Corp. v. J.P. Maguire & Co.*,<sup>149</sup> 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.<sup>150</sup>

Although there is a modern trend in favor of arbitration, as perhaps best expressed in the *Prima Paint* case,<sup>151</sup> it is clear that in certain matters of public policy illegality must still be left to the courts.<sup>152</sup> 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*,<sup>153</sup> 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"<sup>154</sup> 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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<sup>149</sup> 391 F.2d 821 (2d Cir. 1968).

<sup>150</sup> *Id.* at 826-27.

<sup>151</sup> *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).

<sup>152</sup> See 7B MCKINNEY'S CPLR 7501, *supp.* commentary 89 (1968).

<sup>153</sup> 56 Misc. 2d 910, 290 N.Y.S.2d 415 (Sup. Ct. N.Y. County 1968).

<sup>154</sup> *Id.* at 911, 290 N.Y.S.2d at 416.

Under the CPLR, arbitration per se is not a special proceeding as it was under the CPA.<sup>155</sup> The first application to a court in connection with an arbitration, not made in a pending action, is properly made by commencing a special proceeding. Assume that X applies to a court to compel arbitration, thus, commencing a special proceeding. May the plaintiff be granted a provisional remedy? Examination of the provisional remedies articles of the CPLR (60-65) discloses that provisional remedies are not granted in all cases. For an illustration, a preliminary injunction under CPLR 6301 may be granted in any action "where it appears that the defendant threatens or is about to do . . . an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual. . . ." The subject of this special proceeding is to compel arbitration and it would appear that a preliminary injunction would not be available.

If X serves Y with a notice of intention to arbitrate and Y applies to a court to stay arbitration this would be the first application to a court arising out of an arbitrable controversy and would commence a special proceeding. Here, X would be the respondent and, while provisional remedies are available to defendants or respondents under CPLR 6001, they would not be available here for the same reasons as stated above, *i.e.*, because the only subject of the special proceeding would be to stay arbitration.

However, if in violation of his agreement to arbitrate, X brings an action in court and Y moves to compel arbitration, may a provisional remedy be granted the plaintiff? Here it appears that the subject of X's action is not to compel arbitration, but to get a money judgment, or to obtain specific property. The court would have jurisdiction to grant provisional relief under the express terms of articles 60-65.<sup>156</sup>

It seems an anomaly that by adhering to his contract and seeking arbitration a plaintiff will be unable to get provisional relief, while if he brings an action he may get provisional relief even if the defendant compels arbitration.

It might be argued, when the subject of the special proceeding is to compel arbitration, that if provisional relief is not given, the arbitrator's award might be made a nullity, and, therefore, the court should look to such consequences before denying relief. However, the express terms of the provisional remedies sections seem

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<sup>155</sup> SECOND REP. 134. See also 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶7502.04 (1968).

<sup>156</sup> For a case decided under the CPA, when arbitration itself was a special proceeding, see *American Reserve Ins. Co. v. China Ins. Co.*, 297 N.Y. 322, 79 N.E.2d 425 (1948). Plaintiff brought suit and procured an *ex parte* warrant of attachment. Defendant moved to vacate and set aside the warrant. The Court granted the stay but refused to vacate the warrant, stating that a stay of the action was the exclusive remedy against one who brought an action in violation of his arbitration agreement.

to prevent granting relief in a case where claimant adheres to his contract and seeks arbitration. The sections apparently do not forbid provisional remedies where the claimant goes to court first in contradiction of his agreement to arbitrate.

*CPLR 7503(c): Conflict as to service resolved in second department.*

Under CPLR 7502 a special proceeding is 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. After a notice of intention to arbitrate is served, CPLR 7503(c) allows an application to stay the arbitration to be served. A conflict has arisen as to whether the application to stay may be served on the attorney named in the notice of intention to arbitrate or whether it must be served on a party.

*Matter of Bauer*,<sup>157</sup> a fourth department case, held that service has to be made on a party. *Appis v. Employers Liability Assurance Corp.*,<sup>158</sup> a Westchester County case, held that the claimant's attorney was designated as his representative in the notice of intention to arbitrate and therefore service by certified mail on the attorney was within the intentment of 7503(c).

In *Statewide Insurance Co. v. Lopez*,<sup>159</sup> the appellate division, second department, has resolved the conflict for its own department by holding that service must be made upon a party. The court explained that while under the CPA arbitration was itself a special proceeding, commenced when a notice to arbitrate was served, such is no longer the case. Today, if there is no action pending, a special proceeding must be initiated to bring before a court the first application arising out of an arbitrable controversy. Since, as a general rule, initiatory process must be served upon the party over whom jurisdiction is sought, service upon his attorney was deemed a jurisdictional defect.

GENERAL MUNICIPAL LAW

*GML § 50-i: Construed in a wrongful death action.*

Section 67 of the Town Law provides that any claim against a town "for damages for wrong or injury to person or property or for the death of a person" must be made and served in compliance

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<sup>157</sup> 55 Misc. 2d 991, 287 N.Y.S.2d 206 (Sup. Ct. Wyoming County 1968); see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 344-45 (1968).

<sup>158</sup> 56 Misc. 2d 969, 290 N.Y.S.2d 617 (Sup. Ct. Westchester County 1968).

<sup>159</sup> 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968).