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Article 52

CPLR 7511: Arbitrator's Award Difficult To Set Aside

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In a recent case, *Matter of Bauer*,[212] the petitioners served MVAIC with a notice of intention to arbitrate. Within 10 days thereafter, MVAIC served notice that it would apply for an order staying the arbitration. This notice was served on the petitioner's attorney. The court found that such service was null. Since the application to stay the arbitration was the first application to a court arising out of this arbitrable controversy, it had to be served in accordance with CPLR 403 or CPLR 7503. In other words, since it was not merely a motion, but rather the commencement of a special proceeding, service had to be made in the same manner as a summons or by registered mail or certified mail, return receipt requested.

CPLR 7511: Arbitrator's award difficult to set aside.

Generally, an arbitrator's award is not reversible by a court for errors of law or fact.[213] CPLR 7511(b) provides grounds for vacating an award where a party's rights have been prejudiced by (1) corruption, fraud or misconduct, (2) partiality of an arbitrator appointed as neutral, or (3) where an arbitrator exceeded his powers, or so imperfectly executed them, that a final and definite award was not made.

In *Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd.*,[214] the appellate division, first department, reversed an order vacating and setting aside an arbitration award to a buyer of defective goods. The amount of the award was in excess of four times the purchase price of the goods shipped, notwithstanding that the contract purported to limit the amount of the buyer's damages to the difference in value between the goods specified and the goods actually delivered. The court, in determining whether the arbitrator exceeded his power under 7511(b), first examined the arbitration clause,[215] finding it to be a broad arbitration clause. The court then examined the clause which purported to limit damages and decided that it would not be irrational for the arbitrator to find this clause un-

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[212] 55 Misc. 2d 991, 287 N.Y.S.2d 206 (Sup. Ct. Wyoming County 1968).

[213] *E.g.*, *In re* Wilkins, 169 N.Y. 494, 62 N.E. 575 (1902); *In re* Colletti, 23 App. Div. 2d 245, 248, 260 N.Y.S.2d 130, 133 (1st Dep't), *aff'd*, 17 N.Y.2d 460, 213 N.E.2d 894, 266 N.Y.S.2d 814 (1965).

[214] 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1st Dep't 1968).

[215] "ARBITRATION. Any controversy or claim arising out of or relating to this contract shall be settled by arbitration." *Id.* at 305, 287 N.Y.S. 2d at 767. This is a broad arbitration clause. In New York, where there is a broad arbitration clause, the rules of law which apply are those that the arbitrator deems appropriate. *In re* Exercycle Corp., 9 N.Y.2d 329, 334, 174 N.E.2d 463, 464, 214 N.Y.S.2d 353, 355 (1961).

conscionable.[216] It was reasoned that since the arbitrator had authority to decide controversies over this contract, he had the power to decide the conscionability of this clause and to declare it ineffective.[217]

The dissent stated that in spite of the broad powers of an arbitrator it appeared that the arbitrator here had clearly exceeded his power by disregarding the terms of the contract.

The *Granite* case emphasizes that one who decides to agree to arbitration is giving up the procedural and substantive law of the State.[218] Therefore, the practitioner would do well to explain these practical consequences to his client before arbitration is agreed to.

The benefit of avoiding court delay by arbitration may be outweighed by an unexpected award which is difficult, if not impossible, to vacate.

ARTICLE 81 — COSTS GENERALLY

CPLR 8101: Costs allowed on application to confirm arbitration award.

CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless [in the court's discretion it is] not equitable. . . ."

In a recent case, *Terenzi v. Aetna Casualty & Surety Co.*,[219] an application to confirm an arbitration award arising out of an uninsured automobile policy endorsement, was opposed solely with respect to costs. The supreme court, New York County, held that since the insurer had brought the proceeding to vacate the insured's demand for arbitration it would not be inequitable to

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[216] The court stated: "Of course, we do not know the bases for the arbitrator's decision. But, considering the arguments presented here, and at Special Term, it is quite clear that the arbitrator, in essence, did no more than a court of law could do in the circumstances." 29 App. Div. 2d at 306, 287 N.Y.S.2d at 768.

[217] 29 App. Div. 2d at 308, 287 N.Y.S.2d at 770 (dissenting opinion). Judge Steuer cited *In re* Cash Register Co., 8 N.Y.2d 377, 383, 171 N.E.2d 302, 305, 208 N.Y.S.2d 951, 955 (1960), for the proposition that the arbitrator cannot give a completely irrational construction to the contract. The majority cited the same case and declared that it could not be said that the arbitrator, in finding the clause unconscionable, was acting irrationally. 29 App. Div. 2d at 305-06, 287 N.Y.S.2d at 768.

[218] *See In re* Staklinski, 6 N.Y.2d 159, 188 N.Y.S.2d 541 (1959), where an arbitrator's award of specific performance was affirmed in a personal services contract dispute.

[219] 56 Misc. 2d 177, 288 N.Y.S.2d 786 (Sup. Ct. N.Y. County 1968).