

CPLR 8101: Costs Allowed on Application To Confirm Arbitration Award

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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

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).

allow costs. In an earlier case, *Kavareş v. MYAIC*,²²⁰ where confirmation of an arbitration award was not opposed, it was held to be inequitable to allow court costs.

The *Terenzi* court relying on CPLR 8201 allowed \$25 court costs, the amount awarded in a special proceeding for proceedings before a note of issue is filed.

BUSINESS CORPORATION LAW

BCL § 307: Applicable in quasi in rem situation.

In 1965, Section 307(a) of the Business Corporation Law was amended to provide as follows:

In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign corporation not authorized to do business in this state is subject to a like jurisdiction. In any case, process against such foreign corporation may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.²²¹

In the first case found construing this section, *Petrossi v. Ontario Properties, Inc.*,²²² the supreme court, Monroe County, held that "other jurisdiction" means quasi in rem. In *Petrossi*, a mortgage foreclosure action, plaintiff claimed that his lien on property located in New York was preferred to defendant's. Service of process upon the defendant foreign corporation through substituted service upon the Secretary of State was held to be proper even though the corporation was not doing business in this state.

It is interesting to note that CPLR 314 permits service on a foreign corporation to cut off an interest in or lien upon property in this state. However, the use of BCL § 307 is preferable to CPLR 314, because under section 314 service of process without the state must be made by personal service upon the corporation.

DOMESTIC RELATIONS LAW

DRL § 211: Motion to dismiss for insufficiency deemed premature until termination of conciliation proceedings or expiration of 120 days.

DRL § 211 provides that a complaint in a divorce action may not be served until the expiration of 120 days from the date of service of the summons or until the expiration of conciliation proceedings.

²²⁰ 29 App. Div. 2d 68, 285 N.Y.S.2d 983 (1st Dep't 1967).

²²¹ N.Y. Sess. Laws 1965, ch. 803 (emphasis added).

²²² 55 Misc. 2d 601, 285 N.Y.S.2d 928 (Sup. Ct. Monroe County 1968).