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Failure to Apply for Stay of Arbitration After Receiving Notice of Intention to Arbitrate

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ARTICLE 75—ARBITRATION

Demand for arbitration — CPLR 7503(c): Two notices held to constitute a valid demand.

CPLR 7503(c) makes provision for service of a notice of intention to arbitrate. If the requirements of the section are complied with, and the recipient of the notice fails to request a stay of arbitration within ten days of service, the recipient will be precluded from objecting to the validity of the alleged agreement to arbitrate. He will also be denied the right to object on the ground of non-compliance with the alleged agreement. However, where the court finds that the notice has been insufficient, the ten-day limitation will not apply.[275]

In the case of *Passik v. MVAIC*[276] the petitioner served a demand for arbitration. The notice failed to state a lack of insurance and thus was insufficient. Two weeks later a letter was received by MVAIC which incorporated the initial notice and added the denial of insurance coverage by petitioner's carrier. The court held that both documents must be read together and denied MVAIC's motion to stay the arbitration; the ground of the denial was that the motion was made after the expiration of the ten-day limitation period. The court reasoned that the purpose of 7503(c) is to give notice of the proposed arbitration to the other party. Therefore, if before an insufficient demand is acted upon, a further notice is given and together the two notices comply with 7503(c), the ten-day limitation period will commence to run only after service of the second of the two papers.

While this case does indicate a judicial effort to uphold the claimant's notice of arbitration, the practitioner is cautioned to conform the first notice to the requirements of CPLR 7503(c). The general indication from the cases is that the courts will not often be so indulgent.[277]

Failure to apply for stay of arbitration after receiving notice of intention to arbitrate.

CPLR 7503(3) provides: "A party may serve upon another party a notice of intention to arbitrate . . . stating that unless the party served applies to stay the arbitration within ten days after such service *he shall thereafter be precluded from objecting that a valid agreement to arbitrate was not made. . . .*" (Emphasis added.)

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[275] Hesslein & Co., v. Greenfield, 281 N.Y. 26, 22 N.E.2d 149 (1939).
[276] 42 Misc. 2d 447, 248 N.Y.S.2d 256 (Sup. Ct. 1964).
[277] Porteck v. MVAIC, 19 App. Div. 2d 802, 243 N.Y.S.2d 255 (1st Dep't 1963); Double E Food Mkts., Inc. v. Beatson, 18 App. Div. 2d 976, 238 N.Y.S.2d 280 (1st Dep't 1963) (memorandum decision); Herzberg v. MVAIC, 42 Misc. 2d 790, 249 N.Y.S.2d 588 (Sup. Ct. 1964).

In *Application of Ledo Realty Corp.*,[278] the petitioner Ledo (the owner of real estate) had served a notice of intention to arbitrate on the respondent Casualty Co., a surety under a contract between petitioner and a contractor. The respondent did not apply for a stay of arbitration within the ten-day period and thereafter petitioner moved for an order to compel arbitration which the court granted. Respondent then moved to vacate the order on the ground it was not subject to an arbitration agreement. The court granted the motion and held that the ten-day caveat of CPLR 7503(c) does not preclude the court from determining whether a valid agreement to arbitrate was made. Here, the respondent surety had not signed the contract between petitioner and the contractor which contained the arbitration agreement, and its surety bond did not provide for arbitration. Therefore, no valid agreement had been made under which respondent could be compelled to arbitrate.

The court's decision in the instant case is salutary in that it does not allow legal issues to be withdrawn from the court's scrutiny merely because of a procedural slip-up in failing to respond within the ten-day limitation period of 7503(c). However, the decision appears to run against the express language of the statute. The statute clearly indicates that the failure to apply for a stay of arbitration within ten days will bar the subsequent raising of *all* pre-arbitration issues.[279]

Because of the extremely rapid response required by the ten-day limitation, the courts have been somewhat hostile to requests that the respondent be held to forfeit his day in court by omitting to move promptly against a demand to arbitrate.[280] However, the past decisions allowing the raising of pre-arbitration questions have been based on the insufficiency of the notice of intention to arbitrate.[281] None have held that where the notice of intention to arbitrate is sufficient and the party notified fails to respond within the ten-day period he may still raise pre-arbitration questions.[282]

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[278] 43 Misc. 2d 380, 251 N.Y.S.2d 99 (Sup. Ct. 1964).

[279] CPLR 7503(c). Besides the objection to the invalidity of the arbitration agreement the other pre-arbitration objections (threshold questions) apparently barred under 7503(c) are whether the arbitration agreement was complied with and whether the claim sought to be asserted is barred by the statute of limitations. See MVAIC v. McCabe, 19 App. Div. 2d 349, 243 N.Y.S.2d 495 (1st Dep't 1963); 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7503.26 (1964); WACHTELL, NEW YORK CIVIL PRACTICE UNDER THE CPLR 360 (1963).

[280] 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7503.29 (1964).

[281] Matter of Hesslein & Co. v. Greenfield, 281 N.Y. 26, 31, 22 N.E.2d 149, 151 (1939); 8 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 280.

[282] *But see* Matter of Bernson Silk Mills v. Siegel & Co., 256 App. Div. 617, 11 N.Y.S.2d 74 (1st Dep't 1939).

The court's interpretation of the statute may render uncertain the finality of arbitration proceedings. If a party were allowed to raise pre-arbitration questions at any time after the ten-day period allowed by statute, the opposing party could never rely on the conclusiveness of an arbitration award granted him. For example, in *Schafran & Finkel, Inc. v. Lowenstein & Sons, Inc.*,[283] after the entire arbitration controversy had been completed and an award rendered for defendant, the plaintiff was allowed to bring an independent equitable action to enjoin the confirmation of the award, even though plaintiff had received notice of the arbitration but had failed to take any action.[284] Moreover, the court's interpretation of CPLR 7503(c) may tend to subvert the main advantage of arbitration—the speed with which an arbitration controversy can be concluded.

Although in the instant case the equities favored permitting respondent to raise the invalidity of the arbitration agreement (his default was inadvertent) and while there is a strong public policy to have such legal questions as the validity of arbitration agreements determined by the courts, it cannot be said that the ten-day period allowed by CPLR 7503(c) for interposing such objections is unreasonable. That fact and the advantages of stable and speedy arbitration proceedings, should result in rejection of objections to the arbitration unless raised within the ten-day period. In any event, practitioners will be on perilous ground if they withhold their objections in simple reliance upon the instant case. They should act immediately after their client receives a notice of intention to arbitrate, regardless of the fact that the claimant's demand for arbitration appears wholly unfounded.

Injunction issued barring the prosecution of foreign action brought in violation of agreement to arbitrate in New York.

May a party be enjoined from bringing an action in a foreign jurisdiction in violation of an agreement to arbitrate disputes in New York?

In *H. M. Hamilton & Co. v. American Home Assur. Co.*,[285] plaintiff sought injunctive relief restraining defendants from further pursuing their legal action against plaintiff in the state of Georgia.

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[283] 280 N.Y. 164, 19 N.E.2d 1005 (1939); 16 N.Y.U.L. REV. 641 (1939).

[284] The court of appeals based the decision on the insufficiency of the notice to inform the plaintiff of the consequences of his failure to answer within the ten days. CPLR 7503(c) makes such information mandatory in the notice and it was contained in the notice in the instant case. However, even in the instant case the court indicated that the notice may have been insufficient too for failing to appraise respondent of the issues sought to be arbitrated. Application of Ledo Realty Corp., 43 Misc. 2d 380, 382, 251 N.Y.S.2d 99, 101 (Sup. Ct. 1964).

[285] 21 App. Div. 2d 500, 251 N.Y.S.2d 215 (1st Dep't 1964).