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CPLR 7503(c): Application To Stay Arbitration Must Be Received within Ten Days

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tained in *Jonathan Logan Inc. v. Stillwater Worsted Mills, Inc.*[167] and its progeny,[168] judicial alternatives to automatic preclusion are indeed welcomed.

CPLR 7503(c): Application to stay arbitration must be received within ten days.

Inasmuch as the ten-day preclusionary caveat contained in CPLR 7503(c) has been construed as a statute of limitations,[169] there is a great danger that the right to assert threshold objections to arbitration[170] may be lost by the failure to act promptly. Hence, questions relating to when the ten-day period begins to run[171] and how the requisite special proceeding[172] is timely commenced[173] are of critical importance to the practitioner. Unfortunately, the amount of litigation generated by this section is disheartening.[174] The latest issue to become the focal point of judicial controversy concerns a determination of the last date on which a timely application for a stay of arbitration can be received by the party demanding arbitration.

In *Glens Falls Insurance Co. v. Anness*[175] the Supreme Court, New York County, ruled that service of a notice of petition for a stay of arbitration was effected on the date of mailing—not on the date of actual receipt. The court reasoned that a contrary holding would compel a party to post his moving papers at least three days before the ten-day period expired in order to insure timely receipt. And, the court rea-

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167 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

168 *See, e.g.*, Knickerbocker Ins. Co. v. Gilbert, 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970); General Accident Fire & Life Assurance Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (parties are not permitted to extend the ten-day period by written agreement).

169 Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

170 *See* note 158, *supra*.

171 *See* Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969); Cosmopolitan Mut. Ins. Co. v. Moliere, 31 App. Div. 2d 924, 298 N.Y.S.2d 561 (1st Dep't 1969) (ten-day period begins to run when the notice of intention to arbitrate is actually received).

172 CPLR 7502(a): "A special proceeding shall be 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. . . ."

173 It has been held that the moving papers cannot be served on a party's attorney. State-Wide Ins. Co. v. Lopez, 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968). *But see* Bauer v. MVAIC, 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969). And, it is generally acknowledged that the three-day time extension under CPLR 2103(b) is inapposite. Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969).

174 7B McKINNEY'S CPLR 7503(c), supp. commentary at 132 (1970).

175 62 Misc. 2d 592, 308 N.Y.S.2d 893 (Sup. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 173 (1970).

soned that if the ten-day period is indeed a statute of limitations, then the movant should be afforded a *full* ten days in which to act.

In *Knickerbocker Insurance Co. v. Gilbert*[176] the opposite position was taken by the Appellate Division, First Department. A notice of intention to arbitrate was served on December 1, 1969. On December 11, petitioner posted by certified mail a notice of petition for a stay of arbitration which was received on the following day. Service was deemed untimely on the ground that the moving papers were not received within ten days after service of the notice of intention to arbitrate.

The court compared the situation at hand to cases holding that the ten-day period did not begin to run until the notice of intention to arbitrate was actually received[177] and concluded that since the legislature employed identical language in both parts of CPLR 7503(c) the constructions should be identical. In so doing, the court utilized cases which attempted to afford the practitioner a full ten days in which to act as a postulate for an outcome which drastically reduces the number of days in which to act. But, practical considerations were of little import to the court inasmuch as "[e]xpediency and convenience have no place in determining questions of jurisdiction."[178]

In view of the stringent constructions placed on CPLR 7503(c),[179] it is extremely unfortunate that the *Knickerbocker* court refused to offer some relief to the belabored practitioner. It would have facilitated greatly the processing of an application to stay arbitration if the First Department had sanctioned a procedure whereby the attorney could mail the moving papers on the tenth day and use the return receipt as evidence that they were in fact mailed on that date. As the law stands under *Knickerbocker*, the attorney must either mail his moving papers at least three days before the expiration of the ten-day period or abandon the mailing provision altogether in favor of personal delivery.

New York City Civil Court Act

CCA 404: Execution within New York City of contract to send child to summer camp is not a transaction of business.

"CCA § 404 *is* CPLR § 302, tailored to fit the jurisdiction of the Civil Court."[180] It follows, therefore, that case law arising under CPLR

176 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970).

177 *See* cases cited note 171 *supra*.

178 35 App. Div. 2d at 21, 312 N.Y.S.2d at 408.

179 *See, e.g.*, Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969); General Accident & Life Assurance Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969).

180 29A McKinney CCA, commentary at 103 (1963).