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Arbitration—Consolidation Of Arbitration Proceedings Under New York Law

Erratum

On page 136 which read: "implimentation" should have read: "implementation"

THE COURT OF APPEALS, 1962 TERM

ARBITRATION

CONSOLIDATION OF ARBITRATION PROCEEDINGS UNDER NEW YORK LAW

Symphony Fabrics Corporation entered into a contract with Barbara Dance Frocks to supply Barbara with a quantity of a certain type of fabric, specifying the chemical makeup and the dimensions of the fabric, to be delivered during an approximate two month period during 1961. Two days later Symphony contracted with Bernson Silk Mills to purchase the same type of fabric during the same period. Both contracts embodied broad arbitration clauses, and differed only in volume and price of the fabric. Barbara discovered, after using the fabric in its products, latent defects in it, and notified Symphony that it intended to hold Symphony liable. Symphony notified Bernson of its intention to hold that supplier liable for any damages caused Symphony due to the defects, and refused to pay for the fabric. Bernson commenced an arbitration proceeding before the American Arbitration Association, and arbitrators were agreed upon. Bernson demanded the purchase price, Symphony defending upon the unsuitability of the fabric for its intended purpose, and demanding a presently incalculable amount of damages. Later Barbara began an arbitration proceeding against Symphony. Symphony requested, in writing to the Association, that the proceedings be consolidated. The Association referred them to "an appropriate court" for a consolidation order, stating that an arbitrator may consolidate proceedings only with consent of all parties—Bernson objected. The Supreme Court, Special Term, denied Symphony's motion for consolidation. The Appellate Division, First Department, reversed, one justice dissenting, and certified a question as to the propriety of its reversal to the Court of Appeals. On appeal that Court did not answer the question, but *held*, the Supreme Court has the power to consolidate arbitration proceedings even where the parties are not identical, and the Appellate Division did not abuse its discretion in directing consolidation. *In the Matter of Symphony Fabrics Corp. [Bernson Silk Mills]*, 12 N.Y.2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963).

Resort to commercial arbitration is increasing, perhaps, as Justice Breitell of the Appellate Division, First Department, suggests, because of court congestion resulting from the growth in numbers of accident cases on court calendars.¹ New York's arbitration statutes underwent a revision with the enactment of the Civil Practice Law and Rules (CPLR) which in many ways clarified and in some ways broadened the older Civil Practice Act provisions.² The

1. Breitell, *The Quandry in Litigation*, 25 Mo. L. Rev. 225, 230-31 (1960). See also Weinstein, *Notes on Proposed Revision of the New York Arbitration Law*, 16 Arbitration J. 61, 63-65 (1961).

2. See the discussion and notes on the Tentative Draft, Second Preliminary Report of the Advisory Committee on Practice and Procedure 130 (1958). See generally Falls, *Arbitration Under the New Civil Practice Law and Rules in New York*, 17 Arb. J. 197 (1962).

CPA provisions had been a forerunner and model for other state acts,³ but were, in 1957, termed a "hodgepodge of patchwork legislation."⁴ As an adjunct and alternative to commercial arbitration, the CPLR as well contains a simplified procedure which attempts to provide both the advantages of arbitration and of judicial proceedings.⁵

Judicial reasoning allowing consolidation of arbitrations under the Civil Practice Act (CPA) may be summarized directly from the statutes involved: "Arbitration . . . shall be deemed a special proceeding."⁶ "[S]pecial proceedings may be consolidated whenever it can be done without prejudice to a substantial right."⁷ Implimentation of this two-step reasoning must be viewed in light of a legislative purpose stated to be ". . . to provide for greater flexibility and freedom for the prompt administration of justice within the sound discretion of the Court."⁸ Discretion has been exercised to grant the motion, *depending upon the facts of the cases*, where the same parties were involved in two or more arbitration proceedings.⁹ However, the statutes have been interpreted not to allow consolidation of an arbitration and a court action between the same parties.¹⁰ Prior to the instant case, consolidation had not been allowed where the parties to the two disputes were not identical. Reference is found to an unreported New York Supreme Court decision that a party "could not be compelled to arbitrate 'in a joint and single proceeding with petitioners which have separate and independent agreements.'"¹¹ The Court of Appeals in the instant case had no difficulty in arriving at an opposite conclusion as to the power of the courts from the uncomplicated CPA sections involved.

The CPLR presents a much more difficult problem than did the CPA regarding consolidation of arbitration proceedings. Section 7502(a) states:

3. Second Preliminary Report of the Advisory Committee on Practice and Procedure 130 (1958). See also Weinstein, *supra* note 1, at 61.

4. Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 690 (1957).

5. N.Y. CPLR §§ 3031-37. These sections were preceded by N.Y. Civ. Prac. Act §§ 218-b, 218-c, enacted N.Y. Sess. Laws 1961, ch. 863, discussed in Note, 75 Harv. L. Rev. 1666 (1962); Note, 36 St. Johns L. Rev. 110 (1961).

6. N.Y. Civ. Prac. Act. § 1459.

7. N.Y. Civ. Prac. Act § 96. The policy argument for consolidation is expressed in Peterfreund, *Civil Practice*, 34 N.Y.U.L. Rev. 1563, 1593 (1959).

8. C. W. Lauman & Co. v. State, 2 Misc. 2d 693, 695, 153 N.Y.S.2d 813, 815 (Ct. Cl. 1956). But, to the effect that consolidation of arbitrations may amount to changing the terms of the agreement(s) between the parties, see *In the Matter of Symphony Fabrics Corp.* [Bernson Silk Mills, Inc.], 16 A.D.2d 473, 474-76, 229 N.Y.S.2d 200, 202-04 (1st Dep't 1962) (Eager, J. dissenting).

9. See, e.g., cases cited in instant case at 412, 190 N.E.2d at 419, 240 N.Y.S.2d at 26. See especially *In the Matter of Stewart Tenants Corp.* [Diesel Construction Co.], 16 A.D.2d 895, 229 N.Y.S.2d 204 (1st Dep't 1962) (per curiam), denying consolidation of arbitrations between the same parties where the agreements provided for hearings before different tribunals, even though the issues involved were interrelated.

10. *Big W. Constr. Corp. v. Horowitz*, 278 App. Div. 977, 105 N.Y.S.2d 827 (2d Dep't 1951).

11. *In the Matter of Franc, Strohmenger & Cowan Co.* [Designs by Stanley, Inc.], 14 Misc. 2d 370, 371, 135 N.Y.S.2d 842, 843 (Sup. Ct. 1954), quoting an earlier Supreme Court, Special Term order of DiFalco, J. regarding the same litigation.

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. . . . All subsequent applications shall be made by motion in the pending action or the special proceeding.

It would seem to be the clear purport of this language that arbitration itself is not a special proceeding. The note of the draftsmen to the original draft of the section would appear to agree,¹² as does Professor Weinstein.¹³ Professor Weinstein, however, concludes that the arbitration becomes "a judicial [special?] proceeding" once the first application is made to a court.¹⁴ This does not necessarily follow from the wording of the section. A possible view is that a proceeding collateral to or parallel with the arbitration is commenced by the application, but that the arbitration itself remains independent and non-judicial.¹⁵ If the arbitration is not a special proceeding, the consolidation section, section 602(a), would not apply. But if it is a special proceeding, the power to allow consolidation still does not follow as a matter of course. It is possible to interpret CPLR article 75 as listing all of the further applications presentable to a court which are contemplated by the last sentence of section 7502(a). If these remedies are deemed exclusive, a motion under section 602(a) is not possible.¹⁶ The applications contained in article 75, to compel¹⁷ or stay arbitration,¹⁸ to confirm an award,¹⁹ or to vacate or modify an award,²⁰ are quite explicit. None appears broad enough to embody consolidation. Although the application to compel arbitration comes closest, it contains the requirement that "a valid agreement was made or complied with."²¹ That provision is interpretable as allowing a form of specific performance of an express agreement. An express agreement to arbitrate two separate controversies jointly would present no question of consolidation. A question of the power to consolidate only arises where there is no agreement to arbitrate two or more disputes together. Further, the applications to a court which are mentioned are of a particular nature. None is of a sort which, if granted, would change the format or internal procedures of an

12. Second Preliminary Report of the Advisory Committee on Practice and Procedure 134 (1958).

13. Weinstein, *supra* note 1, at 66. See also Falls, *supra* note 2, at 202.

14. Weinstein, *supra* note 1, at 66.

15. The Court of Appeals, in 1924, expressed the interesting view that "an order to proceed to arbitrate" consummated one special proceeding, while the arbitration as such constituted "another special proceeding." *Hosiery Manufacturers Corp. v. Goldston*, 238 N.Y. 22, 25-26, 143 N.E. 779, 782-84 (1924). See discussion in Falls, *supra* note 2, at 204-05.

16. This argument is buttressed by the drafters' desire to make the arbitration article of the CPLR completely independent. See Weinstein, *supra* note 1, at 63: "Since it was likely, too, that the arbitration provisions would be separately printed for [the non-lawyer arbitrator's] guidance, an attempt was made to have the arbitration article stand as independently as possible"

17. N.Y. CPLR § 7503(a).

18. N.Y. CPLR § 7503(b).

19. N.Y. CPLR § 7510.

20. N.Y. CPLR § 7511.

21. N.Y. CPLR § 7503(a).

arbitration. Consolidation could well affect the manner in which an arbitration is or must be conducted.

Section 602(a), if relevant at all, causes further difficulty, stating "when actions²² involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated. . . ." CPA section 96 was quite simple—special proceedings could be consolidated. If an arbitration has become a special proceeding with the first application, some stretch of the imagination is required to say that it is "before a court" in any normal sense in order to satisfy section 602(a). The section would seem to apply only to those actions or special proceedings conducted before a court in their entirety.²³

The drafters of the CPLR recognized in the use of arbitration a "desire to settle . . . differences out of court."²⁴ Adopting this view, a court may be well justified in restricting its interference to those activities specifically provided by statute. Unless courts take an extremely liberal view of the pertinent CPLR sections, and the changes from the CPA, the instant case may have been rendered academic. Since no evidence of an intention to deny consolidation of arbitration proceedings has been found,²⁵ it may be assumed that this problem was overlooked in the redrafting. The present trend of greater reliance upon arbitration in commercial circles may make this an important oversight.

Richard S. Mayberry

CONFLICT OF LAWS

CONFLICT OF LAWS—TRADITIONAL LEX LOCI DELICTI RULE REJECTED— "MOST SIGNIFICANT CONTACTS" RATIONALE DETERMINES EFFECT OF FOREIGN GUEST STATUTE

Two New York residents took a weekend automobile trip. It was to begin and end in New York. In fact, their trip terminated in Ontario, Canada, when defendant, driver and owner of the car, lost control causing the car to leave the road and strike a stone wall. Plaintiff, a guest passenger, brought an action in New York for personal injuries suffered as a result of defendant's negligence. From a dismissal of the complaint by the New York Supreme Court on the ground that Ontario's guest statute barred recovery¹ and an affirmance thereof

22. N.Y. CPLR § 105(b), defining "action" to include special proceeding.

23. See N.Y. CPLR § 105(f) for the statutory definition of "court."

24. Second Preliminary Report of the Advisory Committee on Practice and Procedure 134 (1958).

25. No mention is found in any of the annual Committee reports, or in the Weinstein article (*supra* note 1).

1. Highway Traffic Act, Rev. Stat. Ont. 1960, c. 172, § 105(2): "Notwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of, any person being carried in, or upon, or entering or getting onto, or alighting from such motor vehicle."