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Application to Compel Arbitration Under New York CPLR 7503: What Does It Mean to Be "Aggrieved"?

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Under both New York and federal law, a party is entitled to seek an order to compel arbitration if it is "aggrieved" by another party's failure to arbitrate a dispute despite being bound to do so. But what does it mean for a party to be "aggrieved" for those purposes? Specifically, is it necessary for a lawsuit to have been commenced by the recalcitrant counter-party? Or is it enough that a party simply refuses to engage in arbitration voluntarily?

New York State law, in particular, is not settled on this basic question, which creates a dilemma for a party seeking to arbitrate against a party that is unresponsive and declines to engage. What happens if you demand arbitration against another party and there is no response? If the putative respondent is clearly a party signatory to an applicable arbitration agreement, most administered arbitration rules enable you to proceed with the arbitration whether or not the respondent participates, provided adequate notices are given. But what if the unresponsive counterparty is not a signatory to the arbitration agreement in question or if there is another reason to question that agreement's binding effect? Is there no relief under New York State law? The answer is unclear.

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The pertinent provision of New York's Civil Practice Law & Rules ("CPLR") affords little guidance on its face. CPLR 7503(a) provides in pertinent part:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate.

Relatively recently, Justice Ostrager of the Supreme Court (New York County) -- a trial-level court -- dealt with this provision in *KPMG LLP v. Kirschner*, 2018 NY Slip Op. 32661(U) (Sup. Ct., Oct. 16, 2018). On August 3, 2018, KPMG commenced a special proceeding in New York seeking to compel arbitration against the trustee of certain litigation trusts based on claims arising from the bankruptcies of Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC. On August 6, 2018, the trustee filed suit against KPMG in a California Superior Court. The trustee then argued that the special proceeding in New York must be dismissed because, *inter alia*, KPMG lacked standing to seek the relief in question -- that is, it was not "aggrieved" at the time it commenced that proceeding because no litigation had yet been commenced by the trustee with respect to the claims at issue, which would arguably have been in contravention of the parties' agreement to arbitrate.

KPMG argued that there was no litigation prerequisite to filing a CPLR 7503(a) petition and that, in any case, at the time of the trustee's dismissal motion, KPMG was aggrieved by the August 6 lawsuit. The Court disagreed, holding that it did "not have jurisdiction to adjudicate such a petition from a non-aggrieved party" because *at the time of filing* of the special proceeding in New York, there was no pending derogatory litigation. The timing of the lawsuit vis-à-vis the petition was the key to the determination of KPMG's status as an "aggrieved" party under

CPLR 7503(a), and "preemptive" compelling of arbitration apparently would not be permitted. (Notably, however, the KPMG Court dismissed the petition in question without prejudice, and left open the door for KPMG to re-file, considering that standing had been established shortly after the proceeding in question was first commenced.)

In so holding, the KPMG Court relied on *Koob v. IDS Fin. Servs.*, 213 A.D.2d 26, 30-31, 629 N.Y.S.2d 426, 431 (1st Dept. 1995), an intermediate appellate court decision, wherein the court stated that it was "apparent from the structure of article 75 . . . that, in the absence of prolixity, a party to an arbitration agreement is not aggrieved until litigation of an issue within the operation of the arbitration provision is attempted." *Koob,* 213 A.D.2d at 30-31, 629 N.Y.S.2d at 431.

But shortly prior to the *KPMG* decision, and also after *Koob*, another trial level court in the same appellate jurisdiction did *not* require litigation as a prerequisite for an application to compel arbitration pursuant to CPLR 7503. *See Matter of Berdon LLP v. Stenger*, 2018 NY Slip Op. 31947(U), ¶ 2 (Sup. Ct., N.Y. Co., Aug. 13, 2018). In *Berdon*, the petitioner sought to compel mediation -- and if that failed, arbitration, as required by the parties' agreement -- pursuant to CPLR 7601 or, in the alternative, CPLR 7502. However, the Court *sua sponte* evaluated the application to compel with reference to CPLR 7503(a). Petitioner had commenced the proceeding to compel arbitration after Respondent had failed to respond to multiple letters demanding payment for outstanding invoices, but no litigation had been commenced by the Respondent. The Court held that "[w]here there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation [of time], the court shall direct the parties to arbitrate." *Id.*

The *Berdon* court relied on the simple and relatively uncontroversial premise that "the judicial inquiry [when compelling arbitration] ends once it is determined that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement," and so when those criteria are met, the arbitration should move forward. *Id*., *quoting Liberty Mgt. & Constr. Ltd. V Fifth Ave. & Sixty-Sixth St. Corp.*, 208 A.D.2d 73, 80, 620 N.Y.S.2d 827 (1st Dep't 1995). The Court apparently did not even consider the question of whether the petitioner was timely "aggrieved" to warrant examination.

Comparing the analyses in *Berdon* and *KPMG* makes it apparent that the significance of the "aggrieved" element of CPLR 7503(a) is unsettled.

Unfortunately, the corresponding federal law does not afford further insight regarding the proper construction of the state law. The Federal Arbitration Act's language is clearer than that in the New York statute. It provides that arbitration may be compelled where a party is "aggrieved by the alleged *failure, neglect, or refusal of another to arbitrate* under a written agreement for arbitration." 9 U.S.C. § 4 (emphasis added); *see also, e.g., Avant Petroleum, Inc. v. Pecten Arabian, Ltd.*, 696 F. Supp. 42, 45 (S.D.N.Y. 1988) (refusal to arbitrate at any point sufficient to allow party to move to compel arbitration).

It remains to be seen how New York courts will treat the *Berdon*-type petitioner going forward, given the language of the CPLR and the *KPMG* holding.