terized accounting as "first and final" and should have made a provision for substitution of trustee in absence of a motion to that effect after accounting had been settled.

J. A. Davis, New York City, for petitioner-respondent.

Edward A. Lipton, pro se.

Before KUPFERMAN, J. P., and EVANS, FEIN, MARKEWICH and BLOOM, JJ.

MEMORANDUM DECISION.

Judgment (denominated an order of the Supreme Court, New York County, entered July 26, 1978, unanimously modified on the law and the facts to delete the words "first and final" with respect to the accounting provided for in the first decretal paragraph, and to delete the last decretal paragraph, and otherwise affirmed without costs and without disbursements.

The trustee, a member of the Bar, had a long-standing friendly relationship with the settlor (life beneficiary) and remaindermen of a trust that was informally administered. Nonetheless, the beneficiaries are entitled to an accounting to the best of the trustee's ability to make it.

The order entered was not in accord with the opinion at Special Term. The accounting provided for should not have been characterized as "first and final", nor should there have been a provision for substitution of the trustee. The matter of a substitution is one that can be considered by the court if a motion is made to that effect after the accounting has been settled. The fact that provision is made for an accounting does not of and in itself in any way raise any question as to the good faith of the trustee. The accounting in accordance with the order at Special Term, as herewith modified, shall be made within sixty days of the service of a copy of the order entered herein with notice of entry.

Robert R. COOPER et al.,
Petitioners-Appellants,

v.

ATELIERS de la MOTOBECANE, S. A.,
Respondent-Respondent.

Supreme Court, Appellate Division,
First Department.

March 8, 1979.

Petitioners filed application for permanent stay of arbitration. The Supreme Court, New York County, Louis Grossman, J., entered judgment dismissing petition, and petitioners appealed. The Supreme Court, Appellate Division, First Department, held that: (1) French corporation's responses to petitioners' notice of their desire to sell stock did not constitute "written notice demanding arbitration" within meaning of arbitration provision; (2) petitioners did not waive shareholders agreement's requirement that written notice demanding arbitration be given within ten days after giving of notice by petitioners of their desire to sell; (3) whether condition precedent to arbitration was complied with was matter for courts to determine; (4) New York courts could properly pass on arbitration issue, despite fact that agreement provided for arbitration in Zurich, Switzerland; and (5) French corporation was subject to in personam jurisdiction of New York courts.

Judgment reversed, application granted, and arbitration stayed.

1. Arbitration ⇐23.1

Where shareholders agreement contained provision for arbitration if either party did not wish to proceed by formula for determining price of shares, where provision required "written notice demanding arbitration" within ten days after giving of notice of desire to sell, and where, in response to petitioners' notice of desire to sell,

French corporation stated that it reserved its rights to have recourse to arbitration while seeking additional information and later stated that it would be compelled to demand arbitration if ongoing discussions did not result in agreement, neither response constituted "written notice demanding arbitration" within meaning of arbitration provision.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arbitration ⇐23.3

Where shareholders agreement contained provision for arbitration if either party did not wish to proceed by formula for determining price of shares to be sold and where provision required written notice demanding arbitration within ten days after giving of notice by proposed seller of his desire to sell, fact that parties negotiated as to price beyond ten-day period did not constitute waiver of requirement that written notice demanding arbitration be given within ten days.

3. Arbitration ⇐23.1, 23.15

Where shareholders agreement contained provision for arbitration in the event that either party believed formula for determining price at which stock would be sold did not give proper weight to known adverse or favorable factors and where party who did not wish to proceed by formula was required to give written notice demanding arbitration within ten days after giving of notice by proposed seller of his desire to sell, ten-day notice requirement was a condition precedent to arbitration, and thus whether it was complied with was a matter for courts to determine, despite fact that shareholders agreement contained general arbitration clause without ten-day limitation period.

4. Arbitration ⇐23.15

Fact that shareholders agreement provided for arbitration in Zurich, Switzerland, did not preclude New York courts from passing on issue concerning whether condition precedent to arbitration was satisfied, where petitioners, who sought permanent stay of arbitration, were individual residing in New York and New York corporation, where dispute related to purchase of stock in New York corporation and arose under agreement for formation of New York corporation, where agreement itself provided that agreement would be construed in accordance with New York law, and where provision of agreement prescribing rate of interest referred to prime rate charged by New York bank.

5. Corporations ⇐665(3)

Where petitioners, who sought permanent stay of arbitration, were an individual residing in New York and a New York corporation, where dispute related to purchase of stock in a New York corporation and arose under agreement for formation of New York corporation, where shareholders agreement provided that agreement would be construed in accordance with New York law, and where portion of agreement relating to determination of price at which stock would be sold contained provision prescribing rate of interest which referred to prime rate charged by New York bank, French corporation was subject to in personam jurisdiction of New York courts under long-arm statute with respect to disputes arising under agreement. CPLR 302(a), par. 1.

J. D. Jacobs, New York City, for petitioners-appellants.

R. K. Bernstein, New York City, for respondent-respondent.

Before SULLIVAN, J. P., and LANE, MARKEWICH, SILVERMAN and BLOOM, JJ.

MEMORANDUM DECISION.

Judgment (denominated order), Supreme Court, New York County, entered November 22, 1978, dismissing petition for a stay of arbitration, is unanimously reversed, on the law, and petitioners' application for a permanent stay of arbitration is granted and the arbitration is stayed, with costs to petitioners-appellants.

A shareholders agreement between parties involving the formation of a N York corporation (hereinafter "Motobec America") contained a general arbitrat clause providing for arbitration in Zuric Switzerland. The agreement contained a provision whereby any stockholder other than respondent Ateliers de la Motobecane, S. A. (hereinafter "French Motobecane") could sell its shares to French Motobecane and Motobecane America by giving written notice of its intention to do so. The price would be determined as provided for in Exhibit F to the agreement. Exhibit F contained a formula for determining the price, but also contained a provision for arbitration in the event that either of the parties believed the formula did not give proper weight to known adverse or favorable factors. In such case, the party who did not wish to proceed by the formula was required to give written notice demanding arbitration within ten days after the giving of the notice by the proposed seller of his desire to sell. Petitioners gave notice of their desire to sell by mail on April 13, 1978. Respondent French Motobecane did not within ten days demand arbitration. Instead, on April 21, 1978, respondent French Motobecane wrote stating that it lacked "certain important information which would enable us to determine whether or not the use of the formula will lead to an equitable valuation of the Company's Shares. While awaiting this additional information, we must reserve our rights to have recourse to arbitration for the determination of the value." Discussions apparently ensued between the parties and on June 30, 1978 French Motobecane wrote saying, "Unless the friendly discussions which are presently taking place do result in an agreement on such price, we are compelled to demand arbitration under Exhibit F of the Agreement." Not until September 1, 1978 did French Motobecane unequivocally demand arbitration.

[1] In our view, neither the reservation of the right to arbitration on April 21, 1978 nor the conditional demand for arbitration on June 30, 1978 constituted "written notice demanding arbitration" within the meaning of Exhibit F.

[2] Nor do we think that the fact that the parties negotiated as to price thereafter constituted a waiver of the requirement that written notice demanding arbitration be given within ten days.

[3] In our view since this ten days is a condition precedent to arbitration under Exhibit F, and thus whether it was complied with is a matter for the courts to determine. See, e. g., *Matter of Oman Realty Corp. v. Pedone*, 35 N.Y.2d 943, 944, 323 N.Y.S.2d 549, 550, 335 N.E.2d 854, 855 (1974). Nor do we think that the presence of the general arbitration clause without a ten day limitation period in the main agreement requires that this question be left to the arbitrators. Although Exhibit F provides for an arbitration pursuant to the terms of the main agreement, it imposes the additional condition precedent of the demand for arbitration within ten days with respect to issues under Exhibit F. The arbitration demanded here is clearly limited to the issues covered by Exhibit F, the purchase price of the shares.

[4] Although the agreement provides for arbitration in Zurich, we think the New York courts may properly pass on this issue. As to the objection of *forum non conveniens*, it appears that petitioners are an individual residing in New York and a New York corporation; the dispute relates to the purchase of stock in a New York corporation and arises under an agreement for the formation of a New York corporation and governing the relations of the shareholders to that corporation; and the main agreement itself provides that the agreement shall be construed in accordance with the laws of the State of New York. Further, Exhibit F in prescribing the rate of interest refers to the prime rate charged by the First National City Bank of New York.

[5] For much the same reasons, we think that at least as to disputes arising under this agreement, respondent French Motobecane was subject to *in personam* jurisdiction of the New York courts under the long-arm statute CPLR § 302(a) 1.

404 N.E.2d 741
49 N.Y.2d 819

Robert R. COOPER et al., Respondents.

v.

ATELIERS de la MOTOBECANE, S.A., Appellant.

Court of Appeals of New York.

March 18, 1980.

Order reversed, with costs, and the judgment of Supreme Court, New York County, denying the application for a stay of arbitration, reinstated (see *United Nations v. Norkin*, 45 N.Y.2d 358, 408 N.Y.S.2d 424, 380 N.E.2d 253). 68 A.D.2d 819, 414 N.Y.S.2d 147.

All concur.

404 N.E.2d 741
49 N.Y.2d 822

In the Matter of Frank P. DiMARSICO, M. D., Appellant,

v.

Hon. Robert P. WHALEN, M. D., as Commissioner of Health of the State of New York et al., Respondents.

Court of Appeals of New York.

March 18, 1980.

Order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (68 A.D.2d 971, 414 N.Y.S.2d 785), to which we add only that the power of the Commissioner to revoke prescription forms under Public Health Law §3338(5) extends to any person who fails to comply with Article 33 whether that person be licensed pursuant to that Article or a physician who is permitted to dispense controlled substances, because he is a licensed practitioner, without a separate Article 33 license (see Sections 3302[28], 3331).

All concur.