Are You SOL in Trying to Enforce a Statute of Limitations in Arbitration?

November 01, 2019

By: Lance Currie and Monica Gaudioso

Statutes of limitations can be a defendant's best friend. They add certainty by requiring a plaintiff to bring a claim within a certain time period or lose the chance to bring the claim at all. Thus, businesses can rest easy that old disputes are unlikely to show back up years later. But with arbitration's steadily rising status as the preferred forum for resolving disputes, is it safe to assume a statute of limitations will apply in your arbitration proceeding? Surprisingly, no.

There is a growing trend upsetting the certainty of statutes of limitations in arbitration. Multiple courts have held that statutes of limitations simply do not apply in an arbitration proceeding without some contractual provision stating the applicable statute of limitations applies in arbitration. One of the earliest cases came out of Connecticut, where the court in *Skidmore, Owings and Merrill v. Connecticut General Life Insurance Co.*, 197 A.2d 83 (Conn. Super. Ct. 1963), held that filing a claim in arbitration did not constitute an "action" as that term was used in the applicable statute of limitations. *Id.* at 86. The court found that, because "[a]rbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any statute of limitations." *Id.* at 87–88. Other courts in other states and jurisdictions have followed this reasoning. *See NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172 (S.D. Ohio 1993) ("[T]he effect of a statute of limitations is to bar an action at law, not arbitration."); *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 754 (Minn. 1974) ("Based upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term 'action,' we feel compelled to hold § 541.05(1) was not intended to bar arbitration of [the] fee dispute solely because such claim would be barred if asserted in an action in court.").

As noted in *Skidmore*, a few states have expressly addressed this issue by statute. For example, New York has enacted a statute stating arbitrators can apply a statute of limitations. N.Y. C.P.L.R. § 7502(b). The New York statute is not robust, however, giving an arbitrator sole discretion on whether to apply a statute of limitations at all, and that decision is not reviewable or appealable. *Id.* Washington's Supreme Court held statutes of limitation do not apply in arbitration in 2010, but Washington has since enacted a statute expressly making statutes of limitation applicable to arbitrations. WASH. REV. STAT. § 7.04A.090(3). Texas has not yet enacted a statute expressly applying statutes of limitations to arbitration proceedings.

There is a further wrinkle: even if a statute of limitations applies in arbitration, *which* state's statute of limitation applies? In many states, a contract's standard choice-of-law clause will not incorporate the chosen state's procedural law. And more often than not, courts have found that statutes of limitation are procedural. For this

reason, your contract's choice-of-law clause alone will not ensure claims are governed by your chosen state's statutes of limitations. This can lead to dramatically different results than originally anticipated–for example, the statute of limitation for a breach of contract claim in Illinois is 10 years, compared to 4 years in Texas.

So, how do companies protect themselves from these limitations pitfalls? The best practice is to incorporate the statute of limitations you want applied expressly in your contract's arbitration clause. For example, you could include a provision like the following: "Any demand for arbitration under this Agreement shall be made before the applicable statute of limitations to a claim under Texas law has run." Or, the parties could make up their own statute of limitations: "Any demand for arbitration under this Agreement shall be made within two years of accrual of any claim hereunder, or the claim is waived." But absent similar language, silence can lead to risk of claims much longer than expected.