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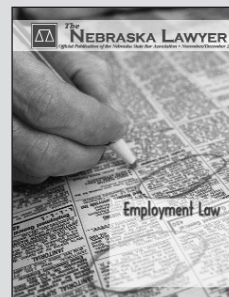
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When Do Statutes of Limitation Apply in Arbitration?¹

by David A. Weintraub



Construction contracts, attorney-client fee agreements, employment agreements and stock brokerage agreements are examples of contracts that frequently contain arbitration clauses. Some of these contracts are negotiated at arm's length. Others are not. Typically, the arbitration clauses within the contracts identify the forum in which future disputes will be resolved. The Financial Industry Regulatory Association (hereafter "FINRA")², the American Arbitration Association and JAMS are the major administrators of private arbitrations.

While many of these contracts contain choice of law provisions, it is rare for these contracts to contain language specifying which state's statutes of limitation, if any, will apply to the putative dispute. The absence of such clauses, much to the surprise of the parties to such contracts, may lead to an arbitral ruling that statutes of limitation do not apply to the parties' dispute. This often unintended result can be avoided by the simple inclusion of a contractual provision identifying the limitations that will govern future disputes.

David A. Weintraub



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The relevant case law reflects that statutes of limitations generally apply in arbitration only under limited circumstances. Courts generally recognize that significant differences exist between the court process and the arbitration process. The arbitration process requires "expeditious and summary hearing, with only restricted inquiry into factual issues."³ For many, the purpose of arbitration is to promote speed and efficiency, and arbitrators are not bound for formal rules of procedure and evidence.⁴ Additionally, "arbitrators are not required to sacrifice speed or informality in order to permit a party to introduce every piece of relevant evidence."⁵ Although exceptions exist, depositions are generally not permitted in arbitration.⁶ The Florida Supreme Court has stated that, "[a]rbitration is an alternative to the court system and limited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative."⁷ Given the significant differences between the court process and the arbitral process, it should not come as a surprise that differences would extend into issues such as statutes of limitation.

WHEN DO STATUTES OF LIMITATION APPLY IN ARBITRATION?

A. Express Application of Statutes of Limitation

The first circumstance under which statutes of limitation apply is where a state statute expressly provides for their application. Nebraska has no such statute. These statutes exist, by way of example, in New York and Georgia. See Official Code of Georgia §9-9-5 and New York C.P.L.R. §7502. The New York and Georgia statutes expressly provide that if a claim would be time barred in court, it would also be time barred in arbitration. Accordingly, assuming that a dispute will be arbitrated in Georgia or New York, and assuming that the procedural law of these states applies, parties can be assured that a claim that would otherwise be barred in court, would also be barred in arbitration. Unless and until a similar statute is enacted in Nebraska, significant uncertainty will continue to exist in this State.

B. Implicit Application of Statutes of Limitation

The second circumstance under which a statute of limitations would apply in a private arbitration is where a statute of limitation's application is implicit in the statutory language. All of Nebraska's applicable limitations are expressly limited to "actions". See, e.g., Neb. Rev. Stat. §25-202 - §25-212 (2006), §25-214 (2006), §25-219 (2006), §25-222 - §25-224 (2006). The issue, accordingly, is whether arbitrations are actions. Let's first look at the law outside Nebraska.

Numerous courts have concluded that arbitrations are not actions. Some of these cases have been decided within the context of issues related to statutes of limitation, whereas some cases have been decided in other contexts. The principal case addressing this issue in Minnesota is *Har-Mar Inc. v. Thorsen & Thorsen, Inc.*, 218 N.W. 2d 751 (MN 1974). The *Har-Mar* court stated, "[b]ased upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term 'action,' we feel compelled to hold that §541.05(1) was not intended to bar arbitration of Thorsen's fee dispute solely because such claim would be barred if asserted in an action in court." This doctrine has reflected Minnesota law for more than 20 years. In 2004, another Minnesota court held that "because arbitration proceedings are not 'suits' because they are not proceedings in a court of law, the district court properly determined that the two-year contractual limitation for 'suits' is inapplicable to this arbitration proceeding."⁸ The results are similar in other states.

In *Son Shipping Co. v. DeFosse & Tanghe*,⁹ the Second Circuit, in the context of The Carriage of Goods by Sea Act held, "[i]t is true that the demand was not made within the one year limitation upon suits, contained in Section 1202(6) of the above Act, but there is, nevertheless, no time bar because arbi-

tration is not within the term 'suit' as used in that statute." In *Carpenter v. Pomerantz*,¹⁰ a Massachusetts court stated, "[a]s used in statutes of limitation, the word 'action' has been consistently construed to pertain to court proceedings." In *Lewiston Firefighters Assn. v. City of Lewiston*¹¹ a Maine court held that "[a]rbitration is not an action at law and the statute is not, therefore, an automatic bar to the Firefighter's recovery." In *Skidmore, Owings & Merrill v. Connecticut General Life Insurance Co.*,¹² the Connecticut court held that "[a]rbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation." In a concurring opinion, an Idaho court in *Moore v. Omnicare, Inc.*,¹³ stated that "[t]he arbitration panel was neither a court nor a judge, and the arbitration proceedings were not a civil action. A civil action is commenced by filing a complaint with the court." In Indiana, the court in *Pathman Const. Co. v. Knox County Hospital Ass'n*,¹⁴ stated:

[T]o broaden the scope of "action" to include any dispute seems unrealistic, especially in light of the consideration above that one purpose of arbitration is to reduce litigation... [and thus] [t]he term "action" in its usual sense, at least its usual legal sense, means a suit brought in court, a formal complaint within the jurisdiction of a court of law.

Pathman and *Moore* were decided outside the context of the statute of limitations.

Michigan law is equally clear that arbitrations are not "actions". *Kent County Deputy Sheriffs Association v. Kent County Sheriff and Kent County Board of Commissioners*, 463 Mich. 353, 616 N.W.2d 677, 683 (Mich. 2000) ('arbitration is not a "civil action" - not decided within the context of a statute of limitations issue); *Ward v. Thomas*, 2003 Mich. App. LEXIS 2080 (Mich. Ct. App. 2003) ('arbitration is not a "civil action" - not decided within the context of a statute of limitations issue).

In *Gregory v. Ohio Bureau of Workers Compensation*,¹⁵ an Ohio court stated:

In determining legislative intent, a court must give effect to the words the legislature used, not deleting words used, nor inserting words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77, 80-81. In that regard, R.C. 1.42 specifies that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Applying those parameters to the issue before us, we note "action" is defined in R.C. 2307.01:

"An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense."



WHEN DO STATUTES OF LIMITATIONS APPLY IN ARBITRATION?

In *Miele vs. Prudential-Bache Securities, Inc.*, 656 So.2d 470, 473 (Fla. 1995), the Florida Supreme Court addressed the meaning of the phrase "action" in the context of §768.73(2), Florida Statutes (1991). This statute, which has since been superseded, directed the payment of a portion of any punitive damage judgment to the State of Florida General Revenue Fund. Because the statute facially applied only to "actions", the question before the Court was whether any portion of an arbitration award for punitive damages was payable to the Fund. The Court held that no portion of an arbitration award for punitive damages was payable to the Fund. This holding was based on the Court's analysis that arbitrations, within the context of §768.73(2), Florida Statutes (1991), were not "actions". The Court also considered the *Black's Law Dictionary* definition of "action", and concluded that the authors contemplated a proceeding filed in a court.

More recently, the Fifth District Court of Appeals, in *Martin Daytona Corporation v. Strickland Construction Services*, 941 So.2d 1220 (Fla. 5th DCA 2006), held that the phrase "actions", within the context of Rule 1.010, Florida Rules of Civil Procedure, applies to arbitration proceedings. The issue arose in relation to Rule 1.525, Florida Rules of Civil Procedure. This Rule requires that motions for attorneys' fees and costs be served within 30 days after filing of a judgment. The court reasoned that the Florida legislature's enactment of §768.737, Florida Statutes (1999), evidenced a legislative intent to adopt a different view than that of the *Miele* court in regard to "actions". This author believes that the *Martin Daytona* court's reasoning is flawed. First, if the legislature had intended an across the board desire that the phrase "actions" include arbitrations, a simple definition could have been adopted. It was not. Instead, the legislature enacted a narrow statute limited to one issue - the pleading and availability of punitive damage claims. Second, by suggesting that the Florida Rules of Civil Procedure apply to arbitrations, Pandora's box is effectively opened. As previously noted, the arbitral process is intended to be different from the court process. The Rules of Civil Procedure were never intended to apply to arbitration. One cannot reasonably argue that some Rules of Civil Procedure apply to arbitration where they may make sense, and others do not. As an example, one cannot reasonably argue that the discovery rules contained in the Rules of Civil Procedure apply to private arbitrations. Finally, if the Florida legislature genuinely intended for arbitrations to be considered "actions" in all contexts, statutes similar to those in existence in Georgia or New York would have been adopted. They were not. Instead, one narrow statute was enacted related to punitive damages.

Turning to Nebraska law, the term "action" is defined in Neb. Rev. Stat. §25-520.02 (2006), Nebraska Statutes. This Nebraska statute provides,

The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement.

Under Nebraska law, "statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (Neb. 1994). It appears from this statutory definition, combined with Nebraska rules for statutory interpretation, that arbitrations are not actions. Assuming that a Nebraska court would construe these statutes consistent with this interpretation, Nebraska attorneys need to be especially careful when drafting arbitration provisions. In order to address this issue, drafters can simply eliminate arbitration provisions. Alternatively, and as discussed in greater detail below, drafters can incorporate statutes of limitation expressly into contracts.

C. Contractual Statutes of Limitation

The third circumstance under which statutes of limitation would apply in arbitration is where the parties' contract expressly provides. Unless dictated otherwise by public policy, attorneys may include contractual language expressly providing that statutes of limitation shall apply in arbitration. Such clauses can specify a specific state's statute of limitation, or define a specific limitations period. This principle is illustrated in *NCR Corporation v. CBS Liquor Control, Inc.*, 874 F.Supp. 168, 173 (S.D. Ohio 1993), aff'd 43 F.3d 1076 (6th Cir. 1995). The court stated that the parties "could have lawfully incorporated... either an express limitation on claims or incorporated a statute of limitations by reference but they did not do so." The inclusion of such an express limitation would be relatively simple in any contract.


In the securities context, this author is unaware of any FINRA rule which would preclude the inclusion of such contractual language. The absence of such contractual language in broker-client agreements is surprising, considering the considerable effort that brokerage firms make to include detailed arbitration clauses in client agreements. These arbitration clauses exist exclusively to serve the brokerage firm's interests, that is, to enable them to force clients to arbitration disputes. Under existing FINRA policy, investors have a unilateral right, without the need for a contractual arbitration clause, to force a brokerage firm to arbitrate a dispute.¹⁶

Because an investor may request that any dispute be arbitrated, an investor has no reason to agree to a written arbitration agreement. Notwithstanding the existence of an arbitration agreement in almost every brokerage firm's standard con-

WHEN DO STATUTES OF LIMITATION APPLY IN ARBITRATION?

tract, this author has never seen a brokerage firm contract that provides for the application of a specific state's statute of limitations.

Conclusion

In order to eliminate the risk of having to defend against claims that one would ordinarily believe are time barred, this author recommends the enactment of appropriate legislation providing that actions that would otherwise be barred in court also be barred in arbitration. Until such legislation is enacted, it would be appropriate to draft arbitration provisions that specifically provide for the application of statutes of limitation in arbitration. 

Endnotes

¹ A prior version of this article was originally published in The Florida Bar Journal, Volume 81, No. 9, October 2007.

² FINRA previously consisted of the regulatory arms of both the National Association of Securities Dealers and the New York Stock Exchange.

³ *Legion Ins. Co. v. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987).

⁴ As an example, NASD Rule 12604 (2007) provides, "(a) The panel will decide what evidence to admit. The panel is not required to

follow state or federal rules of evidence."

⁵ *Roberts v. A.G. Edwards & Sons, Inc.*, 2007 U.S. Dist. LEXIS 11853 (S.D. Tex. 2007).

⁶ Section 12510, NASD Code of Arbitration Procedure (2007) provides, "Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses;
- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- To expedite large or complex cases; and
- If the panel determines that extraordinary circumstances exist."

⁷ *Miele v. Prudential-Bache Securities, Inc.*, 656 So.2d 470, 473 (Fla. 1995)

⁸ *Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407 (Minn. App. 2004).

⁹ 199 F.2d 687, 688 (2nd Cir. 1952).

¹⁰ 36 Mass. App.Ct. 627, 634 N.E.2d 587, 590 (Mass. App. 1994).

¹¹ 354 A.2d 154, 167 (Maine 1976).

¹² 25 Conn. Sup. 76, 197 A.2d 83 (1963); see also *Dayco Corp. v. Fred T. Roberts & Co.*, 472 A.2d 780, 783 - 784 (Conn. 1984)

¹³ 118 P.3d 141 (Idaho 2005).

¹⁴ 164 Ind.App. 121, 326 N.E. 2d 844 (Ind.App. 1975).

¹⁵ 115 Ohio App.3d 798, 686 N.E.2d 347 (1996).

¹⁶ §12200 NASD Code of Arbitration Procedure (2007).