IADC Committee Newsletter

ALTERNATIVE DISPUTE RESOLUTION

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This newsletter discusses a practical problem that can arise under the law of several States, when an arbitration agreement is subject to that State's law but is silent as to the statute of limitations.

An Unfortunate Surprise: When an Arbitration Agreement Exposes Your Client to the Threat of Litigation in Perpetuity

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ABOUT THE COMMITTEE

The Alternative Dispute Resolution Committee serves all members who use mediation and arbitration to resolve disputes, as well as those who have become mediators or arbitrators in their own practices. The Committee publishes newsletters and is developing as a global resource for our international members, corporate counsel and insurance executives, to offer expertise on negotiating and drafting alternative dispute resolution provisions and on the effective use of alternative forms of dispute resolution.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Many attorneys and clients perceive of arbitration as a way to secure a predictable dispute resolution mechanism, and would be surprised to learn that a string of State court appellate opinions have turned that predictability on its head. A significant number of courts have held that, under certain circumstances, the statute of limitations does not apply to claims brought in arbitration. This result can indeed be "an unfortunate surprise," subjecting a client to the threat of litigation in perpetuity. This newsletter surveys the recent jurisprudence on this issue and suggests a statutory approach to provide more certainty to litigants.

There are three circumstances in which courts must determine whether the statute of limitations applies in arbitration: (1) a State statute expressly addresses whether the statute of limitations applies to arbitration; (2) the parties' arbitration agreement incorporates a State statute or creates a private statute of limitations; and (3) a State statute is silent as to whether the statute of limitations applies, and the arbitration agreement is silent as well.

New York and Georgia are two examples of States where statutes expressly state that the statute of limitations applies to arbitration proceedings. Under both States' statutes, any claim that would be time barred in court is also time barred in arbitration. N.Y. C.P.L.R. § 7502(b); Ga. Code Ann. § 9-9-5. Thus, based on the New York and Georgia statutes, the applicable State statute of limitations should apply in an arbitration, unless the parties' contract states otherwise.

The second category of cases involves the circumstance where the State statutory law is silent as to whether the statute of limitations applies in arbitration, but the parties' arbitration agreement sets forth a limitations period. It is well-recognized that parties can contractually incorporate a statute of limitations into their arbitration agreement. *See, e.g.*, *NCR Corp. v. CBS Liquor Control, Inc.*, 847 F. Supp. 168, 173 (S.D. Ohio 1993) ("There is no doubt that the [parties] could have lawfully incorporated into [their arbitration agreement] either an express limitation on claims or incorporated a statute of limitations by reference . . . ."), *aff'd* 43 F.3d 1076 (6th Cir. 1995). Even in States where a statute expressly applies the State statute of limitations to arbitration, it would be a careful practice to include a provision in the arbitration agreement incorporating the State statute.

It is the third category of cases which presents problems. In this category of cases, the State statute is silent as to whether the statute of limitations applies in arbitration, and the arbitration agreement is either silent as to that issue as well, or fails to properly incorporate the statute of limitations. Courts usually resolve this situation by interpreting the language of the relevant statute of limitation. For example, a statute might limit the period of time in which an "action" may be brought, but the statute might not define "action." Thus, the court must decide whether arbitration is properly classified as an "action" under the statute. The Florida Court of Appeals recently addressed this question in *Raymond James Financial Services v. Phillips*, --- So.3d ----, ---- (Fla. Dist. Ct. App. 2011), *available at* 2011 WL 5555691.[1] In that case, the parties' contract included a provision stating the parties' did not intend to waive any statute of limitations defense, but the court held that provision failed to incorporate the Florida statute of limitations. Thus, the court interpreted the statute's language, which states, "A *civil action or*

[1] This case has not yet been released for publication, meaning the Florida Court of Appeals could at any time amend the decision.

proceeding, called 'action' in this chapter, . . . shall be barred unless begun within the time prescribed in this chapter . . . ." *Id.* at *3 (citing Fla. Stat. § 95.011). The court examined the dictionary definition of "civil action or proceeding," the legislature's intent, and Florida's common law to determine that "civil action or proceeding" meant an action brought in court, not arbitration. *Id.* at *3–*5. The court therefore permitted the claims to proceed to arbitration even though the claims would have been barred if brought in court.

Several other State courts have reached the same or a similar conclusion. Indeed, State courts in California, Connecticut, Idaho, Indiana, Maine, Massachusetts, Michigan, Minnesota, North Carolina, and Washington have all decided that arbitration is not an "*action*" for purposes of the statute of limitations. *See* Craig P. Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 Franchise L.J. 26, 30 (2012); David A. Weintraub, *When Do Statutes of Limitations Apply in Arbitration?*, 81-Oct. Fla. B.J. 25, 25–28 (2007).

Refusing to apply the statute of limitations in arbitration might be a necessary conclusion under the law of these States, but the result can obviously expose a party to litigation in perpetuity, which is at odds with the practical and policy rationale underpinning arbitration; as well as the policy rational that supports the very concept of statutes of limitation. This is an outcome to be avoided if at all possible.

The ideal solution would be for other States to follow the examples of New York and Georgia. Their statutes provide clarity, certainty, and flexibility to litigants. These statutes create a clear default rule – that the statute of limitations applies to arbitration – but also allow the parties to modify the time limitation in their arbitration agreement. Most importantly, these statutes foreclose the possibility that a client may unwittingly subject itself to the threat of litigation in perpetuity.

In the meantime, however, the practitioner should be sure that he/she clearly understands how the law of the State governing the arbitration agreement that they are dealing with treats statutes of limitation in an arbitration setting – lest their clients get "an unfortunate surprise."

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