PositivelyNeutral™

Arbitration and Mediation for Attorneys and Their Business Clients

Rob Harris

robert.harris@positivelyneutral.com

www.positivelyneutral.com

914.482.2448

“A man needs to know his [statute of] limitations.”
–Clint Eastwood

Those who include arbitration provisions in commercial contracts follow one of two paths. In most instances, the parties agree to arbitrate in accordance with the rules of a leading arbitration provider such as the American Arbitration Association. Providers such as AAA have a developed, robust set of rules that are continually reviewed and updated to reflect material legal decisions and evolving thoughts regarding the appropriate guidelines that should govern an arbitration.

In other cases, parties craft arbitration rules the parties believe are most appropriate for their contractual relationship. Sometimes they start from scratch, but more often the parties begin by incorporating the rules of an arbitration provider. They then supplement the provider’s rules with specifics that the parties desire to make part of their agreement. Frequent topics include the size of the arbitration panel (1 or 3 arbitrators), the experience and qualifications of those who will be deemed to be satisfactory arbitrators, and the scope and nature of discovery that will be permitted in the arbitration. Recognizing that parties may want to tailor arbitration provisions to address particular contractual circumstances, AAA makes available a ClauseBuilder® Tool that contracting parties can use to assist them in drafting an arbitration agreement.[1]

One topic not typically addressed by either an arbitration provider's rules or the parties' contract embellishments is the statute of limitations. Providers such as AAA do not address limitations periods presumably because of a desire not to intrude upon substantive law established by state or federal courts and legislatures. As for the attorneys drafting arbitration agreements, I suspect they typically do not address statutes of limitation because they are unaware there is an issue requiring attention.

But there is.

Picture the following:

> *Your client, George Workerbee, seeks to bring a claim against his longtime software development partner, John Entrepreneur. George informs you that seven years ago John misappropriated a corporate opportunity by bankrolling his daughter-in-law in the development of an artificial intelligence protocol. At the time, AI's commercial viability was speculative, but now John's stake in the AI protocol is worth millions, and George wants his share.*
>
> *You are justifiably skeptical, wondering why George sat on his hands for years. Clearly, this claim will be met with a defense that it is barred by the statute of limitations.*
>
> *But then George hands you the parties' ten year old partnership agreement, and you notice that it contains an arbitration provision.*

Is George out of luck, or not?

Courts in a number of states have held that statutes of limitations do not apply to arbitration. These courts have deemed the language of such statutes—referencing "civil actions"— to be limited to judicial proceedings, i.e. not arbitration.

A recent decision from Maryland drives home the point. As the court explained in *Park Plus, Inc. v. Palisades of Towson, LLC*, 478 Md. 35 (2022), "[w]hen parties agree to arbitrate a dispute, whether they realize it or not, they are also agreeing to curtail the role that courts may play in resolving their dispute." Thus, for the Maryland court, the issue of timeliness was one of contract; if the parties did not contractually agree to limit the time in which an arbitration claim could be brought, the statute of limitations—which applied only to judicial actions—would not serve to preclude the claim.

Other states, such as New York, have attempted to address the issue by statute. NY CPLR §7502(b) empowers a party to run to court to challenge an untimely claim brought in arbitration. But suppose an attorney is unaware of that statutory right and proceeds to file an answer to the arbitration demand? While §7502(b) still permits the party to assert the untimeliness of the claim in arbitration, the law says it is up to the arbitrators "***in their sole discretion*** [to] apply or not apply the bar." Wow…talk about abdicating to an arbitrator the right to invoke his or her sense of equity to decide the substantive claims of parties.

The takeaways are obvious and simple:

First, determine the legal landscape in the states where you practice. What do the courts and legislature say about statutes of limitation and arbitration?

Second, add the statute of limitations issue to the checklist of provisions for potential inclusion in arbitration contracts. If the parties (or at least your client) contemplate stale claims being subject to rejection for untimeliness, include language providing that an arbitration demand must be asserted before the expiration of the statute of limitations applicable to such a claim.

---

[1] https://www.clausebuilder.org/

Rob Harris is a full time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a long time panelist for the American Arbitration Association.