

Should Arbitration Agreements Fix the Time for the Award?

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A desire for the speedy resolution of a dispute often impels parties to opt for arbitration instead of court trial. This expectation is based upon the likelihood of an earlier hearing date, proceedings involving less restrictive rules of evidence and procedure, and finality of an award that is typically non-appealable.

Among these considerations is that an arbitrator, particularly one who is not required to explain the decision through a reasoned opinion, will generally render an award relatively quickly after the hearing is concluded.

Parties, by reason of economic or other considerations, however, may wish to assure that the decision will be made by a certain date. In such circumstances, they include in the arbitration agreement a provision setting a deadline for the issuance of an award.

What happens, however, when the arbitrator does not render a decision within the time specified in the agreement? Has the arbitrator lost all authority to act, and will a delayed award be enforced?

A recent case of first impression in the Court of Appeals in Texas (*Sims v. Building Tomorrow's Talent*, No. 07-12-001170-CV, 4/30/14) addressed this very issue.

The parties had set forth an expedited process and schedule for arbitration that included a "deadline for [the arbitrator's] reasoned written ruling containing both findings of fact and

conclusions of law' to be issued 'within 14 days of the defendants/counter-plaintiffs'... written submission."

The arbitrator did not issue a ruling within the time specified. After many months of imploring, plaintiff Doris Sims notified the arbitrator that his authorization to serve was withdrawn and later sued him for breach of contract and fraud. One of the opposing parties, Matthew Gay, intervened, claimed that he had not agreed to the withdrawal of the arbitrator and requested that the court order the arbitrator to issue a ruling on liability within seven days and a written award within 60 days.

The trial court, in response, entered an order directing the issuance of a written decision on liability within 14 days and a written award within 60 days. Sims objected to this order on the ground that the court was "replacing agreements and deadlines entered into by the parties in the proposed arbitration guidelines."

The arbitrator did not comply with the court order and ultimately issued an award on liability some 19 months after the initial agreed-to deadline and a final award as to damages one year beyond the trial court's deadline. Nonetheless, the trial court confirmed this late award.

In reversing the trial court's confirmation order, the appellate court noted that although this was an issue of first impression in Texas, it was covered by statute, which provided that an "arbitrator shall make an award within the time established by the agreement to arbitrate, or if a deadline is not established by agreement within the time ordered by the court." The statute further provides for extensions by the parties in writing. The court concluded, therefore, that the arbitrator had no authority to enter an arbitration award, whether it was issued later than the date set in the arbitration agreement or the trial court's order.

The Pennsylvania Uniform Arbitration Act (PUAA) is similar in this regard. At Section 7310(b), it provides:

"Time Limitation.—The award shall be made within the time fixed by the agreement, or if not fixed by the agreement, within such time as is ordered by the court on application of a party. The parties by written stipulation may extend the time either before or after the expiration thereof."

It would appear, therefore, that under the PUAA, a Pennsylvania court would have reached the same result. This would not be surprising as the Texas arbitrator had failed, over a period of more than two years, to comply with the timing requirements of both the arbitration agreement and the court order.

But what if the arbitrator had missed the contractual deadline by only a few days and no violation of a court order was involved? Would a court in those circumstances conclude that this requirement was not an essential element of the agreement, and that the late award was of minimal import?

Might a court further consider whether in seeking to assure an expedited decision, the parties had imposed an unrealistic time limit that may not have been conveyed to the prospective arbitrators?

In fact, parties and arbitrators often fail to focus on such constraints until after the proceedings have commenced.

Finally, what will happen if, for reasons beyond the arbitrator's control, external circumstances make it impossible to fulfill the contractual requirement of timeliness? What if Hurricane Sandy suddenly strikes and the arbitrator cannot access materials during the final days before the deadline? Or, what if sudden illness requires that the arbitrator desist from all activity for a period of time? Will the contractual obligations be, like the Laws of the Medes and the Persians, unalterable so that no authority may revise them in response to changed circumstances?

In short, if equity would suggest that an extension would be warranted, should a court have the authority to grant one beyond the period specified in the arbitration agreement without the concurrence of all of the parties?

As noted above, the language of the PUAA, on its face, would not appear to allow such court action, as it states only that "the parties by written stipulation may extend the time either before or after the expiration thereof."

However, the Revised Uniform Arbitration Act (RUAA), which has been adopted in New Jersey but not in Pennsylvania, adopts broader language. The RUAA provides that, "The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered." This language appears to allow the extension of the period by a court without the concurrence of all of the parties.

Although the official comments to the RUAA do not confirm the purpose of this expanded language, the comments in support of adoption of the RUAA in Pennsylvania by the Uniform Law Commission and the Pennsylvania Bar Association do note that this section does "clarify that either the court or the parties to an arbitration proceeding may extend the time in which an arbitration award must be made after the time otherwise specified or ordered." This comment, therefore, suggests greater statutory flexibility so that a court is empowered to extend the time specified for decision in certain circumstances.

One other point should be noted. In Pennsylvania, the PUAA only applies to statutory arbitration. When common-law arbitration under Subchapter B of the arbitration statute is involved, however, (i.e., when no mention is made that it is subject to statutory arbitration), only certain provisions of the PUAA are deemed applicable (Section 7342); and, Section 7310(b) of the PUAA relating to the extension of the time for issuance of awards is not among them. Does this mean that when common law arbitration is involved, a court lacks the authority to extend the period for an arbitration award under any circumstances or, conversely, has unlimited authority to do so? From the statutory framework, it is difficult to tell.

What the above discussion should reflect, however, is that in entering into an arbitration agreement, consideration should be given to what constraints, if any, should be imposed on an arbitrator with respect to timeliness of the award. In addition, if some time limit is to be imposed,

should provisions be included that allow for modification, without consent of all parties, through judicial order, if unexpected circumstances warrant the equitable extension of this period?

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