Is Your Petition to Compel Arbitration Barred by the Statute of Limitations?

Judge Abraham J. Gafni (Ret.)
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Contracting parties recognize that a lawsuit in court for breach of contract must generally be commenced before the statute of limitations had expired. But what if the claimant, pursuant to a mandatory arbitration provision, fails to demand arbitration of a dispute before the statute of limitations had expired on its substantive claim for breach of contract. Has the claimant waived its right to compel arbitration?

This issue was addressed recently by the Appellate Court of Maryland in *Park Plus v. Palisades of Towson*, 478 Md .35, 272 A. 3d 309 (2022). And, as will be noted, there have been differing opinions among the limited numbers of state courts, including Pennsylvania, that have addressed this very question.

The matter involved a contract for Park Plus to furnish and install a parking system in a luxury apartment building owned by Palisades. As the court pointed out, agreements to arbitrate are now commonplace and parties are free to structure them to suit their needs. Thus, they may specify how to initiate the arbitration process, the number and identity of arbitrators, the scope and extent of discovery, the locale of the proceeding and the extent to which the rules of evidence may apply. Nonetheless, they often fail to recognize that by creating their own procedures they are, in effect, “agreeing to curtail the role that courts may play in resolving their dispute.”

Included in the contract was a mandatory arbitration provision that contained no mention of a limitations period within which the demand for arbitration must be made.

Over an extended period of years, starting in 2010, the parties had disagreements over whether there was a breach and whether there would be arbitration. Ultimately, in 2016, Palisades filed a petition in the court seeking to enforce the arbitration agreement.

Parks Plus opposed the petition to compel arbitration, contending that it was untimely as it was subject to the three-year statute of limitations provided under Section 5-101 of the Maryland statute which provides: "A civil action at law shall be filed within three years from the date it accrues unless another provision of the code provides a different period of time within which an action shall be commenced."

Palisades (in addition to contending that any three-year period would have commenced at a later time by reason of other circumstances) argued that as there was no time limitation in the contract within which arbitration must be demanded, Section 5-101's three-year period did not apply.

The court of appeals recognized that it has a limited role in such disputes. Its enforcement power applies to determining whether an arbitration agreement for a specific dispute exists. If the court finds that it does, it must enforce it by ordering the parties to arbitrate, "even if it believes that 'the claim lacks merit or bona fides' or that 'a valid basis for the claim sought to be arbitrated has not been shown.' Put simply, if the right to arbitrate exists, the MUAA (Maryland Uniform Arbitration Act) provides the equitable remedy for enforcing it, and the court's work at that stage is done."

Part of the court's consideration as to whether the arbitration should be ordered included not only whether the arbitration agreement applied to this dispute, which was here undisputed, but also whether, by reason of the passage of more than three years, "the statute of limitations operated as a waiver of Palisades' right to arbitrate." Other Maryland cases had considered the waiver issue, but these had been based on varying references in the arbitration agreement to the limitations statute itself, to "a reasonable time" or where the parties had determined for themselves in the agreement "how much time must pass

before the right to arbitrate is waived." Park Plus contended, therefore, that when, as here, the contract is silent on the subject, the statute "steps into the void and extinguishes the right to arbitrate just as a contractual limitation would."

In rejecting this argument, the court noted that historically, statutes of limitation have been understood to extinguish the remedy for enforcing the right, not the right itself.

Thus, if there had been no arbitration provision in the contract, and Palisades had filed a complaint in court instead of a petition to compel arbitration, the court might rule that the statute of limitations extinguished the remedy of a circuit court action, resulting in its dismissal. Because the parties had included an arbitration provision, however, the court's role was limited; the only substantive right with which it was concerned was the contractual right to arbitrate. It was not empowered to rule on the underlying claim or remedy.

The court found that under the statute's "plain language, the object of the limitations period—that is, the 'thing' that must be filed within the prescribed three-year period—is a 'civil action at law.'" A civil action at law would be "filed in a court of law and the remedy would be monetary damages." Construing the limitations statute and the MUAA together, the court concluded that the statute only applied to civil actions in law—not to petitions to compel arbitration.

In short, the court understood that "the court's task is to determine whether an agreement to arbitrate the dispute exists. Section 5-101 neither extinguishes the substantive contractual right to arbitrate nor the remedy conferred by the MUAA—an order compelling arbitration—to enforce that right. We, therefore, hold that when the contract is silent on the issue, a petition to compel arbitration is not subject to a defense under Section 5-101."

(Of course, once the arbitration was commenced, this would not bar a subsequent finding by the arbitrator that the claim is untimely, nonetheless, based on other actions that may have been taken by the parties).

How, then, should this issue relate to the drafting of an arbitration agreement?

Generally, it must first be noted that neither the Federal Arbitration Act nor the Revised Uniform Arbitration Act mentions the issue of statutes of limitation. Moreover, only a few state courts have addressed this issue, and there is no unanimity among them. One group has concluded that statutes of limitations do apply to arbitration proceedings, while another has ruled that they do not. Yet a third group, which includes Pennsylvania, has granted arbitrators the power to decide in the cases before them whether the statute of limitations should be applied, just as a court did in the *Parks Plus* case in Maryland.

The Pennsylvania case in the Superior Court was *Morse v. Fisher Asset Management,* 206 A. 3d 521 (Pa. Super. 2019). There, the arbitration agreement did not "expressly incorporate a statute of limitations into the arbitration clause of their agreement." Similarly, there was no limitations provision in the controlling JAMS rules, although those rules did recognize that statute of limitations arguments may arise in defending claims. Nonetheless, the Superior Court held that "where an arbitration clause provided that an arbitrator has the power to consider all issues, the issue of applicability of the statute of limitations came within the arbitrator's purview."

In summary, the issue of limitations is one that should be considered by counsel when preparing arbitration agreements. Among the questions to be asked:

- Do you want to include a limitations period in your arbitration agreement? If so, how extensive should it be?
- Do you want to include provisions consistent with a state's statute of limitations?
- Do the rules of the chosen ADR provider say anything about limitations?
- Do the statutes of the state or decisions of courts in the jurisdiction grant arbitrators authority or discretion in this regard?

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