The Enforceability and Applicability of a Statute of Limitations in Arbitration

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Arbitration clauses within franchise agreements typically identify the forum in which future disputes will be resolved. Although many franchise agreements contain choice of law provisions, they rarely contain language specifying which state statute of limitations, if any, will apply to the dispute. The absence of such language, much to the surprise of the parties to these agreements, may lead to a court or arbitral ruling that statutes of limitations do not apply to the parties' dispute.

Equally surprising to the parties may be who is determined to be the decision maker on statutes of limitations. Specifically, before the issue of whether a party can rely on a statute of limitations as a defense in arbitration is decided, a determination must be made as to whether a court or the arbitrator will resolve the issue.

Why is a statute of limitations defense enforceable in court but not in arbitration? And why is there conflict over whether a court or an arbitrator determines the enforceability of a statute of limitations defense in arbitration? To answer these questions, a review of the significant differences that exist between the court process and the arbitration process is appropriate. The key features of the arbitration process can be summarized as follows:

- The purpose of arbitration is to promote speed and efficiency;
- Arbitrators are not bound by formal rules of procedure and evidence;
- Discovery is generally limited in arbitration (e.g., depositions are often not permitted or are limited in number, and written interrogatories are generally not allowed);
- Arbitrators are not required to sacrifice speed and/or informality in order to permit a party to introduce every piece of relevant evidence; and
- Arbitrators will often favor the broad principles of "justice and equity" at the expense of the "law."

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Given that the stated purpose of arbitration is to promote speed and efficiency, and not to be preoccupied with formal rules, it should not come as a surprise that statute of limitations defenses are not presumptively enforceable in arbitration. As discussed more thoroughly below, a statute of limitations may only apply in arbitration in limited circumstances, such as when (1) a state statute expressly provides for their applicability, (2) a state statute implicitly provides for their applicability, or (3) the parties expressly agree, by contract, that they will be applied in arbitration. Further, because of the strong policy favoring arbitration, it is also not surprising that, absent a clear intent from the parties otherwise, the arbitrator is the decision maker on the applicability of statute of limitations.

This article will discuss and examine (1) whether statute of limitations issues are presumptively arbitrable, (2) whether the arbitrability of a statute of limitations issue is affected by a choice of law clause selecting the law of a state that provides for judicial determination of statute of limitations issues, (3) the limited circumstances in which a statute of limitations defense may be applied and enforced in arbitration, and (4) whether a provision in a franchise agreement that attempts to modify a statutory limitations period is enforceable.

Who Decides the Applicability of Statute of Limitations Periods?

One of Congress's stated purposes in enacting the Federal Arbitration Act (FAA) was to move parties "out of court and into arbitration as quickly and easily as possible."[1] Since the enactment of the FAA, the Supreme Court has without exception supported arbitration, which has led to a dramatic increase in the number and scope of arbitrations. Correspondingly, however, there has been an increase in the amount of litigation over whether parties have agreed to arbitrate certain issues, such as the timeliness of claims. Although arbitration is intended to provide an efficient mechanism for resolving disputes, too often the parties engage in extensive litigation over the proper forum for resolving their dispute. This trend is evidenced by the increasing number of disputes that arise over whether parties have agreed to arbitrate the applicability of time bars or have instead intended those decisions to be made by a court. The conflicts over statute of limitations issues have undermined Congress's goal of moving parties into arbitration, as parties often spend substantial time and money in court litigating this and other preliminary issues.

Although the Supreme Court has long had a liberal policy favoring arbitration agreements, the question of whether the parties have submitted a particular dispute to arbitration—that is, the question of arbitrability (the threshold issue that must be decided by a court before there can be any arbitra-

tion)—is an issue for a court to decide.[2] "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the Court, not the arbitrator."[3]

An area of uncertainty, however, is whether the applicability of a statute of limitations or time bar defense in arbitration is an issue that is presumptively arbitrable. The Supreme Court has stated that "the FAA's primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms."[4] Thus, in deciding whether the timeliness of a claim in arbitration is an issue for a court or an arbitrator to decide, the fundamental question is whether the parties intended the time bar to be an "arbitrability" issue.[5] After all, the intent of the parties generally controls what is to be arbitrated.[6]

If the parties clearly intend that a particular issue be resolved by the courts before there is any duty to submit to arbitration, then the courts should respect that intent by deciding the issue.[7] Therefore, if an arbitration agreement clearly and unequivocally states that any statute of limitations defense shall be determined by a court, and not an arbitrator, the intent of the parties should be honored. On the other hand, if it is ambiguous whether the parties intend a given issue to be an "arbitrability" issue, the court should attempt to make a sensible determination about their intent.[8] In making such an inquiry, the court should construe the parties' intentions "generously" in favor of arbitrability.[9] In other words, any ambiguity regarding the parties' intent should be resolved in favor of arbitration.[10]

Case law demonstrates that there is a presumption that it is up to an arbitrator, and not a court, to decide time bars and statute of limitations issues.[11] Illustrative of this presumption is *Conticommodity Services v. Philipp & Lion*, where Conticommodity moved to stay arbitration on the ground that Philipp's demand for arbitration was untimely under the one-year limitation period incorporated in the parties' agreement. Philipp responded that the timeliness of its demand for arbitration was an issue for the arbitrator, and not the court, to decide.[12] Relying upon the strong public policy favoring arbitration, the Second Circuit agreed, holding that "the arbitrator, not the court, should determine the effect of the one-year limitation."[13]

Under *Conticommodity*, if (1) the parties have entered into a valid arbitration agreement and (2) the arbitration agreement covers the subject matter of the underlying dispute, it will be presumed that the parties agreed to have an arbitrator decide all the remaining issues necessary to reach a decision on the merits of the dispute, including any issues regarding the application of a statute of limitations.[14] Put differently, the signing of a valid agreement to arbitrate the merits of a franchise dispute presumptively pushes the parties across the "arbitrability" threshold. It is then presumed that other issues relating to the dispute, such as a statute of limitations defense, are for the arbitrator to decide.[15]

The presumption that an arbitrator, and not a court, determines whether a statute of limitations defense may be applied in arbitration is consistent with both the federal policy favoring arbitration and common sense about the likely intent of parties who have agreed to arbitrate the subject matter of the underlying dispute. Parties who have agreed to arbitrate a given subject most likely intended and expected that the arbitrator will resolve all issues that arise concerning that subject. If the parties intended otherwise, presumably they would have clearly expressed their contrary intent in the franchise agreement.[16]

From a common sense perspective, where the parties have clearly agreed to arbitrate the subject of the underlying dispute, it is unlikely that they intended other issues related to the dispute, such as the timeliness of the submission of the claim, to affect the "arbitrability" of the dispute. Such intent is particularly unlikely where the arbitration clause is broad in scope.[17] In addition, statute of limitations issues are often inextricably intertwined with the underlying facts of the case. This can make it difficult to resolve a statute of limitations defense except in the context of the final arbitration hearing.[18] Therefore, it makes sense to have an arbitrator, and not a court, decide issues of timeliness.

If the parties clearly intend that a particular issue be resolved by the courts before there is any duty to submit to arbitration, then the courts should respect that intent by deciding the issue.

Choice of Law Provisions May Affect the Arbitrability of Statutory Time Bars

As noted, franchise agreements are often silent or unclear as to the scope of the parties' intention to arbitrate a statute of limitations defense. In such instances, parties often attempt to rely on a contractual choice of law provision to demonstrate that the parties intended, through their general choice of a state's law, to adopt law requiring that a court, and not the arbitrator, decide the issue of whether statute of limitations are applicable in arbitration.[19] This has the potential effect of creating tension between the franchise agreement's arbitration provision and its choice of law provision.

For example, § 7502(b) of the New York Civil Practice Law and Rules is one of the few state statutes that provides threshold statute of limitations issues are for a court to decide. This statute provides, in pertinent part:

> If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court . . . .

In New York, where "parties broadly agree[] to arbitrate 'any controversy' arising from their contracts, they may—as with any contract—add qualifications to that clause by providing that New York law will govern the agreement and its enforcement."[20] Moreover, under New York law, contracting "parties are at liberty to include a choice of law provision in their agreement" expressing an intention to have the courts determine statute of limitations issues.[21] Thus, a choice of law provision in a franchise agreement that states New York law shall govern both the "the agreement and its enforcement" adopts as "binding New York's rule that threshold Statute of Limitations questions are for the courts" to determine.[22]

It is easy to see how a New York choice of law provision can conflict with an arbitration provision when deciding who should resolve a statute of limitations issue. A choice of law provision in a franchise agreement that states "the validity, effect, interpretation and enforcement of this Agreement shall be governed by the laws of the State of New York" may be in conflict with that franchise agreement's arbitration provision that states that "any dispute, controversy, or claim arising out of or relating to the Agreement, or the breach, termination or validity thereof . . . shall be finally settled or determined by arbitration in accordance with the rules of the American Arbitration Association." The latter provision supports the position that *any* disagreements arising out of the franchise agreement, which would include disputes about whether a claim in arbitration is time barred as well as disputes about who should decide whether the time bar should be applied, shall be decided by the arbitrator. The former provision cuts the other way, suggesting that because a party can assert a statute of limitations defense in *court* as a bar to arbitration, a party is permitted to have a *court* decide timeliness issues.[23] The provisions are arguably in conflict because if the former provision permits a court to decide the timeliness of a claim, then the timeliness dispute would not be "finally settled or determined by arbitration," contrary to the latter provision.

Given that the purpose of arbitration is to promote efficiency and speed, it should not come as a surprise that statute of limitations defenses are not presumptively enforceable.

Notwithstanding a potential conflict between an arbitration provision and a choice of law provision in a franchise agreement, courts have held that a choice of law provision will generally not impute an intention on the part of the parties to have the courts determine the issue of whether a claim has been timely asserted.[24] This, of course, is because of the FAA's broad policy favoring arbitration and, in the absence of clear language otherwise, all controversies, including issues of timeliness, are to be resolved by the arbitrator.[25] Thus, if there does not exist a specific and clear statement from the parties to a franchise agreement that the issue of whether a claim is time barred should be withheld from the arbitrator, the issue of timeliness will rest with an arbitrator and not the court.[26]

Illustrative of this point is *Bechtel Do Brasil Construcoes Ltda. v. UEG AraucAria Ltda.*,[27] in which Bechtel sought to stay an arbitration commenced by UEG, arguing that UEG's claims for breach of contract, negligence, and fraud were time barred under both Brazilian and New York law. In support of its motion to stay the arbitration, Bechtel argued that § 7502(b) prevented the arbitrator from deciding the issue of whether defendant's claims were time barred. The district court determined that under the section, it had the authority to determine the statute of limitations issue.[28] The court held that, although the "scope of arbitrable issues" is normally one reserved for the arbitrators themselves, the choice of law clause in the party's contract evidenced their selection of New York law, which permits the court to decide the timeliness of an action.[29]

On appeal, the Second Circuit reversed and found that the district court had erred in deciding the statute of limitations issue. The Second Circuit determined that "the provisions in question do not modify the parties' fundamental and broad commitment to arbitrate *any* dispute relating to the agreement."[30] The court of appeals found it significant that the contractual provision did not specifically mention "timeliness" and, as a result, determined that it was "presented with no clear statement that a statute of limitations defense should be withheld from the arbitrator."[31] In sum, the Second Circuit concluded that although the agreements "could be read to include C.P.L.R. 7502(b)," that conclusion was not "without doubt," especially since the agreements did not expressly commit issues related to "enforcement" to the courts.[32] An ambiguity of this sort "must be resolved in favor of arbitration."[33]

Do Choice of Law Clauses Trump Arbitration?

Bechtel is consistent with *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[34] where the agreement at issue included a choice of law provision that specified the agreement was to be governed by New York law. The agreement also contained an arbitration provision that required any controversy to be arbitrated in accordance with the NASD rules.[35] The brokerage house contended that the choice of law provision evidenced the parties' intent to exclude punitive damages from arbitration because an arbitrator may not award punitive damages under New York law. The Supreme Court disagreed and held that a choice of law provision, without more, cannot impute a specific intent to the parties to exclude punitive damages.[36] The Court's ruling was premised, in large part, on the "national policy favoring arbitration."[37]

Does this mean that a choice of law provision should be ignored? No, obviously not. However, courts are generally in agreement that a generic choice of law clause, standing alone, is insufficient to support a finding that contracting parties

intended to have a court, and not an arbitrator, determine statute of limitation issues. As noted by the Supreme Court in *Mastrobuono*, a New York choice of law provision, when accompanied by a broad arbitration provision, "encompasses substantive principles that New York courts would apply, but not . . . special rules *limiting the authority of the arbitrators*."[38] The choice of law provision is merely "a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to a dispute arising out of the contractual relationship."[39] It is insufficient, by itself, to demonstrate an intent of the parties to depart from the FAA's default rules and strong policy favoring arbitration.[40] These cases do, however, leave open the possibility that a party could rely on a choice of law provision, in conjunction with additional language in the franchise agreement, to demonstrate that it was the intent of the parties to have the court—and not an arbitrator—decide statute of limitations issues.

Statutes of Limitations Are Enforceable in Arbitration Only in Certain Circumstances

After determining whether a court or an arbitrator will decide if a claim is time barred, the next step is to decide whether a statute of limitations defense is even applicable in arbitration. There are generally three circumstances in which a statute of limitations may be applied to a claim brought in arbitration: (1) where state law expressly provides that a statute of limitations is enforceable in arbitration, (2) where state law implicitly provides that a statute of limitations is enforceable in arbitration, or (3) where the parties expressly agree, by contract, that a statute of limitations is enforceable in arbitration.

The first circumstance under which a statute of limitations may apply in arbitration is where state law expressly provides for their application.[41] For example, New York and Georgia are the only two states known by the authors to have statutes that specifically bar a claim from being brought in arbitration if it cannot be brought in court.[42] Georgia's statute specifically provides:

> (a) If a claim sought to be arbitrated would be barred by limitation of time had the claim sought to be arbitrated been asserted in court, a party may apply to the court to stay arbitration or to vacate the award, as provided in this part. The court has discretion in deciding whether to apply the bar. A party waives the right to raise limitation of time as a bar to arbitration in an application to stay arbitration by that party's participation in the arbitration.
>
> (b) Failure to make this application to the court shall not preclude a party from asserting before the arbitrators limitation of time as a bar to the arbitration. The arbitrators, in their sole discretion, shall decide whether to apply the bar. This exercise of discretion shall not be subject to review of the court on an application to confirm, vacate, or modify the award except upon the grounds hereafter specified in this part for vacating or modifying an award.[43]

Similarly, New York's statute states:

> If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.[44]

These statutes give assurance to parties that when a dispute is arbitrated in New York or Georgia, and the procedural law of one of those states applies, any claim that would be barred in court would also be barred in arbitration. When drafting an arbitration provision, it is important to consider including a choice of law provision that applies the law of a state that expressly allows the parties to enforce a statutory limitations period in arbitration.

The second circumstance in which a statute of limitations may apply in arbitration is where the application is implicit in the statutory language that governs the dispute.[45] Although a state statute may not expressly provide for their application, the language of a state statute may implicitly allow for a statute of limitations defense to be enforced in arbitration. For example, many statutes of limitation—such as Minnesota Statute § 541.05—are expressly limited to "actions":

> Subdivision 1. Six-year Limitation. Except where the Uniform Commercial Code otherwise prescribes, the following *actions* shall be commenced within six years: (1) upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed . . .[46]

Much like similar statutes from other states, the clear language of the Minnesota statute states that contract "actions" shall be commenced within six years. The statute is silent as to whether it also applies to arbitrations. The issue then becomes whether the term "action" encompasses and includes "arbitration" for statute of limitations purposes. This is an important analysis that should be considered and conducted by all drafters of franchise agreements because it may help dictate the state law chosen by the parties to govern their relationship or applicable contract.

Numerous courts across the country have concluded that arbitrations are not "actions."[47] For example, in *Carpenter v. Pomerantz*, the defendant filed a demand for arbitration approximately six-and-a-half years after his employment relationship with the plaintiff ended. The plaintiff moved to stay the arbitration on the ground that the defendant's claims were time barred by Massachusetts' six-year limitation period for contract claims. The trial court stayed the arbitration and held that by failing to assert his claims within the six-year limitation period, the defendant lost his rights to demand arbitration.

On appeal, the appellate court noted that neither the American Arbitration Association rules nor the underlying employment agreement provided a time within which a demand for arbitration must be made.[48] The court also noted, after reviewing the specific language of the applicable statute of limitations, that the statute referred to "actions" and not arbitrations.[49] The court went on to state that when referring to "statutes of limitations, the word 'action' has been consistently construed to pertain to court proceedings."[50] Based upon its analysis, the appellate court reversed the order staying the arbitration and concluded that the defendant had not waived his right to arbitration. The court also held that the question of the timeliness of defendant's demand was a matter for the arbitrator to decide.[51]

Similarly, in *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, the Minnesota Supreme Court found that

> [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 [Minn. Stat. § 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.[52]

Following *Har-Mar*, the Minnesota Court of Appeals held in *Vaubel Farms, Inc. v. Shelby Farmers Mutual* 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."[53]

The results have been similar in other jurisdictions. Other states that have addressed the issue of whether an arbitration is an action include California, Connecticut, Idaho, Indiana, Maine, Massachusetts, Michigan, North Carolina, and Washington. Courts in these states have all determined that an action is limited to a judicial proceeding, which does not include arbitration.[54] Presumably, courts have reached this conclusion after determining that if the legislature had intended that "actions" include arbitrations, a simple definition could have been adopted.

Notwithstanding the Supreme Court's directive that contracts should be enforced, courts have gone in different directions as to whether parties can agree to alter a liminations period.

The impact of these decisions is that many claims that were previously considered barred by state statute of limitations provisions may, in fact, be viable claims in arbitration. This has the effect of subjecting parties against whom the subject claims are made to uncertainty and an increased risk of liability.

To avoid the risk that a statute of limitations would not be applied in arbitration, the franchise agreement should expressly incorporate the statute of limitations. Alternatively, of course, the clause requiring arbitration can be eliminated from the contract, leaving the parties to resort to a civil action to resolve their dispute.

The third circumstance in which a statute of limitations may be applied in arbitration is where the parties' franchise agreement expressly so provides.[55] To eliminate the risk of not having a statute of limitations applied in arbitration, an agreement can specify—as part of the arbitration clause or otherwise—that the statute of limitations of a specific state shall apply or set forth a specific limitations period.[56] Including such language in an arbitration provision is prudent until appropriate legislation is enacted that specifically states that proceedings that would otherwise be time barred in court are similarly barred in arbitration.

Modification of Statutory Time Limits May Be Void as Against Public Policy

Over a hundred years ago, in *Baltimore & O.S.R. Co. v. Voigt*, the Supreme Court discussed the concept of public policy in contract law. The *Baltimore* Court stated

> [i]t must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy unless it clearly appears that they contravene public right to the public welfare.[57]

Notwithstanding the Supreme Court's directive that contracts between parties should be enforced, courts have gone in different directions on whether parties can agree to alter a statute of limitations period.

Generally, unless otherwise voided by public policy, parties may contractually shorten a statute of limitations time period as long as the modified time period is reasonable. For example, in *Garrison v. Bally Total Fitness Holding Corp.*, an Oregon federal court held that the parties' contractual provision that shortened the statute of limitations period to eighteen months was reasonable.[58] The plaintiffs in *Garrison* contended that the eighteen-month limitation should be void as a matter of public policy. The district court disagreed and indicated that so long as the time frame is reasonable, Oregon courts will uphold the parties' agreement to shorten the time frame to bring a cause of action.[59] Many courts in other states—including Alaska, California, Colorado, Hawaii, Illinois, New Hampshire, Pennsylvania, Utah, Washington, and Wyoming—have similarly allowed contracting parties to shorten a statute of limitations period.[60]

Not all states will allow parties to circumvent a legislated limitations period. In many states, if a contract seeks to define a specific limitations period and that time period is shorter

than the applicable state's limitations period, it may be void as against public policy. For example, Florida Statute § 95.03 states that "[a]ny provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void."[61]

The Florida statute was applied in *Randall v. Lady of America Franchise Corp.*,[62] to prevent a franchisor from relying upon a two-year limitations period contained in the franchise agreements between the plaintiffs and the franchisor. In response to the franchisees' claims under the Florida Franchise Act, the franchisor argued that the claims were barred by the two-year limitations provision in the applicable franchise agreements. The franchisees countered that the limitations provision was void as a matter of law under Florida Statute § 95.03. The court concluded that the success of the franchisees' argument was dependent upon whether the franchisees' claims under the Florida Franchise Act were ones "arising out of a contract," as required by the statute. The court determined that "[b]ecause recovery under the Florida Franchise Act presupposes that the parties have entered into a franchise relationship, actions under the Act necessarily 'aris[e] out of the contract' governing that relationship."[63] As a result, the court held that the franchisor's attempt to shorten the limitations period was void under Florida Statute § 95.03.[64]

Oregon Mutual Insurance Co. v. Brady,[65] an Idaho federal district court case, is also instructive on this point. In *Brady*, the insured argued that a two-year statute of limitations provision in an insurance policy was void as a matter of public policy because it conflicted with Idaho's five-year statutory limitations period for contract claims. The court noted that if

> the Idaho Legislature [had] intended to allow for a shorter statute of limitations in insurance contracts, it would have provided for such by prescribing a different limitations period for insurance policies and/or expressly allowing parties to agree to deviate from the five-year statute of limitations by contracting otherwise. It has not done so.[66]

As a result, the court found that a contractual two-year limitations period that shortened the statute for insurance policy claims was void as against public policy.[67]

Courts that have prohibited the shortening of a statute of limitations period have generally done so on the basis that a party is being prevented from taking advantage of statutory rights.[68] As the Supreme Court stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, if certain terms of an arbitration agreement serve to act "as a prospective waiver of a party's right to pursue statutory remedies . . , we would have little hesitation in condemning the agreement as against public policy."[69]

Courts have also voided a shortened statute of limitations provision after expressing concern with the lack of economic bargaining power on behalf of the franchisee. For example, in *Graham Oil Co. v. ARCO Products Co.*,[70] the Ninth Circuit noted that "[i]f franchisees could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections." The Ninth Circuit went on to hold that an arbitration clause that shortens the statute of limitations for filing claims under the Petroleum Marketing Practices Act (PMPA) violates the statute and is, therefore, unenforceable.[71]

Lengthening the statute of limitations by contract may also be against public policy on the ground that parties to a contract cannot agree among themselves to circumvent the law that has been set forth.[72] For example, in *West Gate Village Association v. Dubois*,[73] the plaintiff sought to extend the three-year statute of limitations to six years by an agreement between the parties. The New Hampshire Supreme Court determined that the agreed-upon extension was void as against public policy because the plaintiff was

> seeking to circumvent the legislature's declaration of public policy . . . by contractually extending the three-year statute of limitations before any cause of action exists. Such an agreement "is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative."[74]

Other courts have refused to extend a limitations time period on similar grounds, or because the time period of extension was not finite and, therefore, not reasonable.[75]

The above cases demonstrate that before drafting an agreement that modifies the limitations period, one should consider whether the courts in that jurisdiction have determined that such a clause is void against public policy.

Conclusion

The conflicts and litigation over statute of limitations issues have undermined the goals of arbitration, as parties spend substantial time and money litigating the issue. One can hope that such conflicts will soon be resolved, so that parties can more easily proceed to the merits of their cases. In the meantime, in order to eliminate the risk (and cost) of not having a statute of limitations enforced in arbitration, the parties should include language in the arbitration provision identifying the limitations that will govern any future dispute. If a party attempts to alter or modify a statutory limitations period by contract, careful consideration should be given to whether doing so is against public policy.

Endnotes

1. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

2. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (citing AT&T Techs. v. Commc'n Workers of Am., 475 U.S. 643, 649 (1986)).

3. *AT&T Techs.*, 475 U.S. at 649.

4. Bechtel Do Brasil Construcoes Ltda. v. UEG AraucAria Ltda., 638 F.3d 150, 154 (2d Cir. 2011) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989)).

5. *Bechtel*, 638 F.3d at 154; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56–57 (1995).

6. *AT&T Techs.*, 475 U.S. at 648.

7. *See Howsam*, 537 U.S. at 85; *AT&T Techs.*, 475 U.S. at 648; PaineWebber, Inc. v. Elahi, 87 F.3d 589, 599 (1st Cir. 1996). It is worth noting that some courts have held that unless the parties clearly and unmistakably intended the applicability of a time bar to be resolved by an arbitrator, the issue should be decided by the court. Specifically, the Third, Sixth, Seventh, Tenth, and Eleventh Circuits have held the trial court, not an arbitrator, must resolve issues of untimeliness in arbitration under the auspices of the National Association of Securities Dealers (NASD). *See also* PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1379 (3d Cir. 1993) (trial court should bar arbitration if claim submitted to arbitration under NASD undisputedly arose out of events more than six years prior to filing of arbitration); Roney & Co. v. Kassab, 981 F.2d 894, 899 (6th Cir. 1992) (trial court should decide whether action to enforce arbitration clause is barred by time limitation defense); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 (7th Cir. 1992) (trial court must determine whether § 10304 of NASD Code bars the arbitrator from exercising jurisdiction); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, 78 F.3d 474, 481 (10th Cir. 1996) (§ 10304 of the NASD Code defines the arbitrators' substantive jurisdiction and the trial courts must decide whether a claim is time barred under that provision); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 384 (11th Cir. 1995) (§ 10304 of the NASD Code is a substantive eligibility requirement and the trial court may conduct a "mini-trial" on timeliness of arbitration claims). These cases are, however, distinguishable because they were decided in the narrow context of whether an action is time barred under § 15 of the NASD Code.

8. *Elahi*, 87 F.3d at 599.

9. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

10. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

11. *Howsam*, 537 U.S. at 84 (the "presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability'"); *Moses H. Cone*, 460 U.S. at 25 (same); Klay v. United Health Group, Inc., 376 F.3d 1092, 1009 (11th Cir. 2004) (courts are empowered to resolve disputes solely involving whether claim should be resolved in court or arbitration; arbitrator is empowered, absent contrary agreement, to determine whether particular claim may be successfully litigated at all due to statute of limitations, laches, justiciability, etc.); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 121 (2d Cir. 1991) ("any limitations defense—whether stemming from the arbitration agreement, arbitration association rule, or state statute—is an issue to be addressed by the arbitrators"); Conticommodity Serv. v. Philipp & Lion, 613 F.2d 1222, 1224–25 (2d Cir. 1980) ("In the absence of express language in the contract referring to a court questions concerning the timeliness of a demand for arbitration, the effect of a time limitation embodied in the agreement is to be determined by the arbitrator."); Wagner Constr. Co. v. Pac. Mech. Corp., 58 Cal. Rptr. 3d 434, 436 (2007); O'Neel v. Nat'l Assoc. of Secs. Dealers, Inc., 667 F.2d 804, 807 (9th Cir. 1982) (holding that the validity of time-barred defenses to enforcement of arbitration agreements should generally be determined by the arbitrator rather than by the court); PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1200 (2d Cir. 1996) (if a "claim is untimely, [plaintiff's] remedy is to defend the arbitration action on timeliness grounds, not to enjoin arbitration altogether" or to seek other equitable relief from this court); *But cf.* Bryan Cnty. v. Yates Paving & Grading Co., 281 Ga. 361, 362–63 (Ga. 2006) (holding that the trial court has the discretion to consider "certain procedural mechanisms [such as *res judicata* issues] that may eliminate substantive claims from consideration by an arbitrator, even though such mechanisms would effectively dispose of the underlying claims on the merits.").

12. *Conticommodity Serv.*, 613 F.2d at 1224–26.

13. *Id.*

14. PaineWebber, Inc. v. Elahi, 87 F.3d 589, 599 (1st Cir. 1996).

15. *Id.*

16. *Id.*

17. *See AT&T Techs.*, 475 U.S. at 650 (a presumption that a grievance is to be submitted to arbitration "is particularly applicable where the [arbitration] clause is . . . broad").

18. *In re* Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 253 (N.Y. 2005).

19. *Elahi*, 87 F.3d at 593; *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989).

20. *Diamond Waterproofing*, 4 N.Y.3d at 253 (quoting Smith Barney, Harris Upham & Co., Inc. v. Luckie, 85 N.Y.2d 193, 202 (N.Y. 1995)).

21. *Id.*; *Luckie*, 85 N.Y.2d at 201.

22. *Diamond Waterproofing*, 4 N.Y.3d at 253.

23. N.Y.C.P.L.R. 7502(b).

24. Bechtel Do Brasil Construcoes Ltda. v. UEG AraucAria Ltda., 638 F.3d 150, 156 (2d Cir. 2011); *see also Elahi*, 87 F.3d at 593; PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1198–99 (2d Cir. 1996).

25. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (courts are obligated to construe the parties' intentions "generously" in favor of arbitrability).

26. *Bechtel*, 638 F.3d at 156; *see also Bybyk*, 81 F.3d at 1198–99.

27. 638 F.3d at 154.

28. *Id.* at 153.

29. *Id.*

30. *Id.* at 155 (emphasis in original).

31. *Id.* at 156.

32. *Id.* at 158.

33. *Id.*

34. 514 U.S. 52, 53 (1995).

35. *Id.* at 58–59.

36. *Id.* at 62–64.

37. *Id.*

38. *Id.* at 64 (emphasis added).

39. *Id.* at 59.

40. *See* Action Indus. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 342–43 (5th Cir. 2004); Ford v. Nylcare Health Plans of the Gulf Coast, Inc., 141 F.3d 243, 249 (5th Cir. 1998) (holding that a contract's choice-of-law provision did not determine the scope of an arbitration clause); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) ("an arbitration clause and a generic choice-of-law clause . . . [do not] demonstrate a clear intent to displace the FAA's vacatur standards and replace them with ones borrowed from [state] law); Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002) ("a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration"); *see also* UHC Mgmt. Co. v. Computer Scis. Corp.,

148 F.3d 992, 997 (8th Cir. 1998) (same); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937 (6th Cir. 1998) (same); Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 382–83 (4th Cir. 1998) (same); Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129, 134–35 (2d Cir. 1996) (same); PaineWebber, Inc. v. Elahi, 87 F.3d 589, 593–94 (1st Cir. 1996) (same).

41. David A. Weintraub, *When Do Statutes of Limitations Apply in Arbitration?*, 81:9 Fla. B.J. 25 (Oct. 1, 2007), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/6bf69830a26b1a01852573630053b020?OpenDocument.

42. *See* Ga. Code Ann. § 9-9-5; N.Y. C.P.L.R. 7502 (McKinney).

43. Ga. Code Ann. § 9-9-5.

44. N.Y. C.P.L.R. 7502(b).

45. Weintraub, *supra* note 41.

46. Minn. Stat. Ann. § 541.05(1).

47. *See, e.g.*, Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 218 N.W.2d 751 (Minn. 1974); Son Shipping Co. v. DeFosse & Tanghe, 199 F.2d 687, 688 (2d Cir. 1952); Carpenter v. Pomerantz, 634 N.E.2d 587, 590 (Mass. App. Ct. 1994).

48. *Carpenter*, 634 N.E.2d at 589.

49. *Id.* at 590.

50. *Id.* (citations omitted).

51. *Id.*; *see also* Shafnacker v. Raymond James & Assoc., Inc., 683 N.E.2d 662, 666–67 (Mass. 1997) ("the filing of a claim for arbitration is not an 'action' within the meaning of [Massachusetts statutes of limitation]").

52. *Har-Mar, Inc.*, 218 N.W.2d at 755.

53. 679 N.W.2d 407 (Minn. Ct. App. 2004).

54. *See* Broom v. Morgan Stanley DW, Inc., 236 P.3d 182 (Wash. 2010) (holding that a private arbitration, unlike a traditional lawsuit in court, is not an "action"; therefore, state statute of limitations did not bar claims in arbitration); Manhattan Loft, LLC v. Mercury Liquors, Inc., 173 Cal. App. 4th 1040, 1051 (Cal. App. 2d Dist. 2009) (arbitration is not an action); Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154, 167 (Me. 1976) ("[a]rbitration is not an action at law and the statute [of limitation] is not, therefore an automatic bar to the [f]irefighter's recovery"); Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co., 197 A.2d 83 (Conn. 1963) ("[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 limitations"); Moore v. Ominicare, Inc., 118 P.3d 141, 153 (Idaho 2005) ("Idaho Code § 12-121 permits 'the judge' to award attorney fees to the prevailing party 'in any civil action.' The arbitration panel was neither a court nor a judge, and the arbitration proceedings were not a civil action."); *In re* Cameron, 370 S.E.2d 704 (N.C. Ct. App. 1988) ("an arbitration is neither an 'action' nor a 'judicial proceeding,' but a non-judicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary"); Kent Cnty. Deputy Sheriff's Ass'n v. Kent Cnty. Sheriff, 616 N.W.2d 677, 683 (Mich. 2000) ("'arbitration is not a 'civil action'"—decided outside the context of a statute of limitations issue); Ward v. Thomas, Nos. 238523, 239424, 2003 Mich. App. LEXIS 2080 (Mich. Ct. App. Aug. 26, 2003) (arbitration is not an action as described in the statute; rather "an arbitration agreement is a contract by which the parties forgo their rights to proceed in a civil court in lieu of submitting their dispute to a panel of arbitrators").

55. Weintraub, *supra* note 41.

56. NCR Corp. v. CBS Liquor Control, Inc., 874 F. Supp. 168, 172–73 (S.D. Ohio 1993), *aff'd*, 43 F.3d 1076 (6th Cir. 1995) (the parties "could have lawfully incorporated . . . either an express limitation on claims or incorporated a statute of limitations by reference . . . .).

57. Baltimore & O.S.R. Co. v. Voigt, 176 U.S. 498, 505 (1900).

58. *See* No. 04-1331-PK, 2005 U.S. Dist. LEXIS 31724, at *7 (D. Or. Nov. 23, 2005).

59. *Id.*; *see also* Miller v. Aqua Glass, Inc., No. 07-3088-CL, 2008 U.S. Dist. LEXIS 72363, at *12–13 (D. Or. Feb. 20, 2008) (citing Farsi v. Sterling Jewelers, Inc., No. CV07-131-PK, 2007 U.S. Dist. LEXIS 59084 (D. Or. Aug. 9, 2007) ("parties may agree to a shorter limitations period, so long as the period is reasonable" and finding that a one-year statute of limitations period is reasonable); Beck v. Gen. Ins. Co., 18 P.2d 579, 583 (Or. 1933) (holding that two-year limitations period is reasonable); Ausplund v. Aetna Indem. Co., 81 P. 577 (Or. 1905) (upholding a six-month contractual time period).

60. *See, e.g.*, Fireman's Fund Ins. Co. v. Sand Lake Lounge, 514 P.2d 223, 226 (Alaska 1973) (confirming that parties to a contract may, under the UCC, reduce the limitations period to not less than one year from the time the cause of action accrues); Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc., 38 Cal. App. 4th 1532, 1548 (Cal. App. 2d Dist. 1995) (parties to a contract can shorten California's four-year limitations period to three months); Zalkind v. Ceradyne, Inc., 194 Cal. App. 4th 1010, 1030 (Cal. Ct. App. 2011) (stating that parties to an agreement can establish a shorter time period than is provided in the statute of limitations, provided that the period fixed is not so unreasonable as to show imposition or undue advantage in some way); Manion v. Roadway Package Sys., 938 F. Supp. 512, 516 (C.D. Ill. 1996) (under Pennsylvania law, parties can shorten a statute of limitations as the court could not "say that the 90-day statute of limitation period in the Contract was unreasonable"); Hepp v. United Airlines, Inc., 540 P.2d 1141 (Colo. Ct. App. 1975); Grant Family Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co., 155 P.3d 537, 539 (Colo. Ct. App. 2006) (allowing parties to a contract to require that actions founded on the contract be commenced within a shorter period of time than what is provided for in the applicable statute of limitations); Silverhorn v. Pac. Mut. Life Ins. Co., 23 Haw. 160 (Haw. 1916) (the time agreed to in the contract must be a reasonable time in which to commence the action); Medrano v. Prod. Eng'g Co., 774 N.E.2d 371, 375–76 (Ill. App. Ct. 2002) (an agreement for a one-year time frame to bring an action was not unreasonable); Clark v. Lund, 184 P. 821 (Utah 1919); Letourneau v. FedEx Ground Package Sys., No. 03-530-B, 2004 U.S. Dist. LEXIS 6165, at *3–4 (D.N.H. Apr. 7, 2004) (no explanation was provided as to why ninety days to require a claim for arbitration to have been made is unreasonable and rejecting argument that the arbitration agreement cannot be enforced because it is contrary to public policy); Syrett v. Reisner McEwin & Assocs., 24 P.3d 1070 (Wash. Ct. App. 2001) (six months' limitation agreement to bring suit was not unreasonable); Nuhome Invs., LLC v. Weller, 81 P.3d 940, 946 (Wyo. 2003) (noting that "[s]everal of our sister states have similarly allowed contracting parties to shorten the period for bringing an action, provided the shorter period is reasonable").

61. *See also* Wille v. Geico Cas. Co., 2 P.3d 888 (Okla. 2000).

62. 532 F. Supp. 2d 1071 (D. Minn. 2007).

63. *Id.* at 1093.

64. *Id.*

65. No. 1:08-cv-225 ESL, 2010 U.S. Dist. LEXIS 18553 (D. Idaho Mar. 2, 2010).

66. *Id.* at *12.

67. *Id.* at *13 (quoting City of Weippe v. J.R. Yarno, 486 P.2d 268, 270 (Idaho 1971) ("It is established law in Idaho that statutes of limitations may not be contractually shortened by the parties.")); *see also* Wagner Constr. Co. v. Pac. Mech. Corp., 58 Cal. Rptr. 3d 434, 436 (2007); Lindsey v. Farmers Ins. Co. of Or., 170 Ore. App. 458, 12 P.3d 571 (Or. Ct. App. 2000).

68. *See, e.g.*, Gildea v. Bldg. Mgmt., No. 10 Civ. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662, at *10–11 (S.D.N.Y. Aug. 16, 2011).

69. 473 U.S. 614, 637 n.19 (1985); *see also* Ragone v. Atl. Video, 595 F.3d 115, 125 (2d Cir. 2010).

70. 43 F.3d 1244, 1247 (9th Cir. 1994).

71. *Id*. at 1246–48.

72. Shaw v. Aetna Life Ins. Co., 395 A.2d 384, 386–87 (Del. Super. Ct. 1978).

73. West Gate Village Ass'n v. Dubois, 145 N.H. 293 (N.H. 2000).

74. *Id.* at 298–99 (citing John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 103 (N.Y. 1979)) (noting that "[i]f the agreement to 'waive' or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot 'in advance, make a valid promise that a statute founded in public policy shall be inoperative'").

75. *See* Abiele Constr. v. N.Y. City Sch. Constr. Auth., 648 N.Y.S.2d 468, 470 (N.Y. App. Div. 2d Dep't 1996) (contract provision purporting to extend statute of limitations from four to six months was invalid, since limitations period could not be extended prior to accrual of cause of action); T & N PLC v. Fred S. James & Co., 29 F.3d 57, 62 (2d Cir. 1994) (applying New York law) (standstill agreement executed by insurer and insured was invalid and unenforceable since it purported to toll statute of limitations indefinitely); Bayridge Air Rights, Inc. v. Blitman Constr. Corp., 587 N.Y.S.2d 269, 270–71 (N.Y. 1992) (provision in agreement purporting to indefinitely extend statute of limitations for disputes arising from agreement was invalid because it failed to specify the time period of the extension in finite terms); 15 Arthur Linton Corbin, Corbin on Contracts § 83.8, at 289–90 (Rev. ed. 2000) ("Because the purpose of a statute of limitations is to prevent the bringing and enforcement of stale claims. . . ,' courts do not enforce parties' agreement to lengthen the limitations period.") (citing *Shaw*, 395 A.2d at 386); 54 C.J.S. *Limitations of Actions* § 65 (2011) ("The public policy of some states prevents one from contractually extending a statute of limitations period. . . .").