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Statute of Limitations in an Arbitration Clause [Ober|Kaler]

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Construction contracts routinely include arbitration clauses to ensure that complex and often technical disputes are resolved by an arbitrator who possesses the requisite knowledge and expertise.

One might assume that an arbitration proceeding must be commenced within the general limitations period set forth in the Maryland Code. There is an argument, however, that Maryland's general statute of limitations would not bar a demand to arbitrate even though the claim would otherwise be time-barred if brought as a civil action in a circuit court.

Indeed, many courts in other states, construing statutes of limitations similar to Maryland's, have concluded that their respective statutes of limitations do not apply to arbitration. A drafter of a construction contract should take care, therefore, to ensure that the statute of limitations is expressly incorporated into its dispute resolution provision.

Section 5-101 of the Courts and Judicial Proceedings Article of the Maryland Code generally provides that “[a] civil action at law must be filed within three years from the date it accrues” The Maryland appellate courts have stated that this section, like all statutes of limitations, affects only the remedy and not the cause of action. More importantly, Section 5-101, by its own terms, applies only to a “civil action at law.” Arguably, an arbitration proceeding is not a civil action at law, and, therefore, an owner, a contractor, or a subcontractor may find him or herself drawn into arbitration to defend a claim previously thought to be stale.

While this might seem counterintuitive, the courts of other states have reached precisely this conclusion in construing similar statutes. In 1974, for example, the Supreme Court of Minnesota held in *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.* that Minnesota's general six-year limitations period on “actions” did not impact the right to demand arbitration because arbitration was not an “action” within the meaning of the applicable statute of limitations. The authors of this article have identified reported and unreported decisions in Connecticut, Florida, Massachusetts, Maine, and Washington that have reached the same result. The most recent of these concerned statutes closely resemble the text of Section 5-101. In 2010, a majority of the Supreme Court of Washington held in *Broom v. Morgan Stanley DW Inc.* that an arbitration is not an “action” within the meaning of the Washington statute of limitations. Similarly, in 2011 the District Court of Appeal of Florida, in the unreported *Raymond James Financial Services, Inc. v. Phillips* opinion, ruled that arbitration is not a “civil action or proceeding” as that phrase is used in the Florida statute of limitations.

Notably, at least two states – New York and Delaware – have enacted statutes to expressly extend the limitations period to arbitration, each of which provide that “[i]f, 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”

With no similar provision in the Maryland Code expressly extending the general statute of limitations applicable to a “civil action at law” to arbitration, and no reported opinion in the Maryland appellate courts requiring a

contrary conclusion, a party to a construction contract may find itself without a limitations defense in arbitration. It is therefore advisable, in order to preserve such a defense, to build that defense into the contract.

There are several possible approaches to accomplish this goal. At least one standard form contract frequently used in the construction industry follows this approach. Section 15.4.1.1 of the American Institute of Architects Document A-201—2007 expressly incorporates the limitations period. Alternatively, an attorney crafting an arbitration provision could look to the New York and Delaware statutes quoted above as a drafting guide.

As with the drafting of all provisions of a construction contract, an attorney should take great care when crafting an arbitration provision to manage and minimize risks. The drafter should tread carefully to avoid the ruling of a court—or an arbitrator—that his or her client has waived any limitations defense by entering into an agreement to arbitrate.