The Arbitration Newsletter

(Published by Whitaker, Chalk, Swindle and Sawyer, L.L.P.)
(John Allen Chalk, Sr., Editor)

November, 2010

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The Arbitration Newsletter is published periodically by Whitaker, Chalk, Swindle and Sawyer, L.L.P., Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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ARBITRATION AGREEMENTS AND STATUTES OF LIMITATIONS

Arbitration is a creature of contract. The arbitration proceedings are governed by the arbitration agreement. However, merely providing in the arbitration agreement that the laws of the State of Texas are applicable to a claim or dispute may not be enough to enforce Chapter 16 of the Texas Civil Practice and Remedies Code—Limitations. This issue arose recently in the state of Washington when the Washington Supreme Court, in *Broom v. Morgan Stanley DW, Inc.*, held that arbitration is not subject to that state's statute of limitations because arbitration is not an "action" as provided in the statute of limitations.[2]

A. *Broom v. Morgan Stanley DW, Inc.*

The Brooms filed a notice of claim against Morgan Stanley with the National Association of Securities Dealers in accordance with the parties' arbitration agreement.[3] Morgan Stanley moved to dismiss the claims as being barred by the statute of limitations.[4] The arbitrators agreed with Morgan Stanley and dismissed the claim.[5] The Brooms filed a complaint with the court and moved to vacate the arbitration award arguing that the state statute of limitations does not apply to arbitration.[6] The trial court agreed with the Brooms and vacated the award; the court of appeals affirmed the trial court.[7]

Although the arbitration agreement did not state that the claims were subject to Washington state statute of limitations, Morgan Stanley argued that arbitral proceedings are

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's legal counsel.

[2] *Broom v. Morgan Stanley DW, Inc.*, 236 P.3d 182, 188 (Wash. 2010).

[3] *Id.* at 183.

[4] *Id.*

[5] *Id.* at 183–84.

[6] *Id.* at 184.

[7] *Id.*

"actions" governed by the state statue of limitations.[8] The Washington statute of limitations provides statutory limitations for bringing an "action."[9] A review of Washington precedent supported the court's decision that the term "action" does not include arbitrations.[10] The court stated that Washington's statutes of limitations refer only to "actions" and make no mention of arbitrations.[11] However, under the Washington Arbitration Act (WAA), by which the arbitration agreement is governed, arbitration is referred to as "arbitration," "hearing," or "proceeding," and lawsuits are referred to as "civil actions," "actions," or "suits."[12] Further, under the Revised Uniform Arbitration Act (RUAA), arbitrations are referred to as "arbitration proceedings," and lawsuits are referred to as "judicial proceedings" or "civil actions."[13] Neither the WAA nor RUAA refers to arbitration as an "action" or makes state statute of limitations applicable to arbitrations.[14] Based on this statutory interpretation, the court stated that the legislature did not intend for arbitrations to be deemed equivalent to judicial "actions" and held that arbitration is not an "action" subject to the state statute of limitations. Thus, the Brooms' claim was not barred.[15] In response to an argument that this interpretation would subject parties to stale claims, the court stated that "parties may agree contractually to the applicability of state statute of limitations."[16]

B. Texas Law

Similar to the Washington statute of limitations, Chapter 16 of the Texas Civil Practice and Remedies Code (TCPRC) provides statutes of limitations for a "suit" or "action."[17] Chapter 16 does not mention "arbitration" or "arbitration proceeding."[18] Further, the Texas General Arbitration Act (TGAA) makes no mention of the Texas statutes of limitations and refers to arbitrations as a "claim," "controversy," "issue," or "proceeding," as opposed to an "action" or "suit."[19] Some provisions of the TGAA require certain procedures to be administered in the same manner as a "civil action pending in the district court."[20] Therefore, a Texas court could determine that the legislature did not intend for arbitration to be treated the same as a "suit" or "action" under the Texas statute of limitations.

Currently, no case law in Texas interprets the meaning of "suit" or "action" as used in Chapter 16 of the TCPRC, and the terms are not defined in the TCPRC. Therefore it is imperative that arbitration agreements include a clause that adopts the state statutes of limitations or provides for the parties' agreed limitations periods to avoid this ambiguity. Failing to include

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[8] *Id.* at 186.
[9] WASH. REV. CODE §§ 4.16.005–.370.
[10] *Broom*, 236 P.3d at 187–88.
[11] *Id.*
[12] *Id.* at 188.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] TEX. CIV. PRAC. & REM. CODE §§ 16.002–.072.
[18] *Id.*
[19] TEX. CIV. PRAC. & REM. CODE §§ 171.002–.096.
[20] *Id.* at §§ 171.049–.052 (providing that witness oaths, depositions, subpoenas, and witness fees shall be provided in same manner as a "civil action pending in a district court").

a statute of limitations clause within an arbitration agreement may render a statute of limitations' defense ineffective if the arbitrator or a court determine that arbitration is not within the scope of TCPRC Chapter 16.

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