"When, If Ever, Is It Too Late To Bring A Demand For Arbitration?"

(Part 2 of 2)

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Last month's article addressed some of the differences between arbitration and litigation and specifically: the fact that arbitrations are not bound by the same statutory deadlines for filing lawsuits; and, the fact that parties to an arbitration agreement are free to specify a deadline by which arbitration claims must be filed. We closed with the observation that because of these two distinctions, there can be uncertainty regarding when an arbitrable claim expires, but there is also an opportunity for strategic draftsmanship. This month's installment addresses how to limit the uncertainty and how a contractor might consider modifying a subcontract to limit the contractor's exposure to subcontractor claims.

To reduce the uncertainty, a draftsman of a contract that includes an arbitration clause, might also include language along these lines,

> A demand for arbitration shall be made within a reasonable time after the claim, dispute, or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute, or other matter in question would be barred by the applicable statutes of limitations.

By using language like that, the parties have agreed by contract that an arbitration claim cannot be brought any later than the deadlines specified in the Florida statutes.

Alternatively, it may be preferable to specify a shorter deadline to file a demand for arbitration than that which would be applicable for a litigated claim. See Pilitz v Bluegreen Corporation, 2011 WL 3359641 *6 (M.D. Fla. 2011) ("Arbitration clauses limiting the applicable statute of limitations are repeatedly upheld by Florida courts."); Sanders v. Comcast Holdings, LLC, 2008 WL 150479 (M.D. Fla. 2008) (1 year contractual limitation to bring arbitration enforced rather than 4 year statutory limitation period). A contractor may want to specify in its subcontracts that all claims are to be decided via arbitration and that any demand for arbitration must be filed within one year (maybe even less). That way, the contractor can obtain closure within 1 year, rather than waiting the 4 years allowed if the claim is to be decided via litigation or if the contract utilized the text provided above. In addition, by specifying that all claims will be decided by arbitration and that any arbitration must be made within 1 year, the contractor might escape liability entirely if an inattentive or uninformed subcontractor incorrectly believes that it has the "normal" 4 years to pursue its claim as allowed by Section 95.11(3).

If the parties have specified arbitration but failed to specify what limitation periods apply, then it is up to the arbitrator to decide whether the arbitration demand was seasonably filed or is time barred. See O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So.2d 181 (Fla. 2006); See also Page v. Industrial Services, Inc., 2003 WL 21701140 (Mich. App.) (timeliness of a plaintiff's claim is a question to be decided by the arbitrator); Public Health Trust of Dade County v. M.R. Harrison Const. Corp., 415 So.2d 756 (Fla. 3d DCA 1982) (whether arbitration demand is timely within meaning of contract provision is for the arbitrator); NCR Corporation v. CBS Liquor Control, Inc., 874 F. Supp. 168, 173 (S.D. Ohio 1993) (absent an express limitation period, arbitration claim must be brought within a reasonable time); Broom v. Morgan Stanley DW Inc., 236 P. 3d 182 (Wash. S. Ct. 2010) (parties did not explicitly state in their agreement that statutory limitation applied and arbitrator that applied statutory limitation period did so in error).

When the parties have not specified what limitation period applies to their arbitrable claims, the arbitrator is to make the decision regarding whether the demand was made timely. The courts do not provide much guidance regarding whether a claim is timely or not, and an arbitrator asked to determine whether a claim is time–barred

might be tempted to simply apply the same deadlines contained in the statutes as being "reasonable" under the logic that "if it's good enough for the Legislature, then it's good enough for me". However, based on the Washington Supreme Court's decision in Broom, an arbitrator seeking to utilize the same limitations period as set forth in the statutes may want to explain that he/she is not blindly applying the statutory specified limitation period, but has determined independently that the same amount of time is "reasonable" under the circumstances.

There is no consensus regarding whether arbitration or litigation is "better", as each has its benefits and detriments. Having the ability to specify your own limitation period to bring an arbitration claim is just another factor to consider when deciding whether to agree to arbitration, rather than litigation. Hopefully, this two–part article has provided the reader with additional information to be considered when deciding whether to include an arbitration clause in a contract.

The reader also now has a sure–fire pick up line to use at the next Bennigan's Happy Hour. Try this, "Hey, foxy momma. When, if ever, is it too late to bring a demand for arbitration?" Let me know how that works out for you.

*George Spofford is a shareholder in the Tampa office of the GrayRobinson law firm. Spofford has represented the construction industry since 1985 and serves as General Counsel to the UUCF. GrayRobinson, P.A. (**gray–robinson.com**) is a full–service business law firm with over 250 attorneys and 10 offices across Florida. If any member has specific questions relating to this topic or any topic they would like to see addressed in future editions, please feel free to contact George at (813) 273–5000 or **george.spofford@gray–robinson.com**.*

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Machinery Company; Pensacola Concrete Construction Company, Inc.; Professional Shoring & Supply; and Utility Service Company, Inc. and Honorary Gold Sponsor: Ring Power Corporation.

Finally, this grand convention would not have been possible without the hard work of this year's Convention Committee: Paula Lieser, Chairperson; Lauren Atwell; Kim Bryan, Bill Davis; Larry Falls; and Chris Stewart. We also would like to thank the Chapter Executive Directors and UUCF staff for their hard work: Kathy Blackman; Sharon Fugatt; and Misty McKendree; and UUCF staff Bruce Kershner, Julie Kershner and Tresa Crocker. Each one is to be commended for the many hours worked, creativity and team work. We couldn't have done it without them.

Special thanks to **Valenti, Trobec & Woody, Inc.** for Co–sponsoring the Hospitality Room on Thursday, July 19; and **Glenn Rasmussen, P.A.** for Co–sponsoring the Hospitality Room on Saturday, July 21, 2012. The Hospitality Room gave the attendees a place to relax, socialize, bid on the Silent Auction items, purchase tickets for the Chinese Raffle and the 3 – 0 in the Ninth Inning drawing.

Thursday, July 19, marked the start of the convention with the UUCF Executive Committee and Board of Director's Meetings. Many issues were discussed.

Thursday evening, the Welcome Cocktail Reception was held. During the Welcome Cocktail Reception, Paula Lieser welcomed everybody to the 2012 Convention.

First thing Friday morning, attendees had their choice of going to the Round Table Discussion or attending the Optional Event.

At the Optional Event, attendees were presented with a show from Premier Jewelry and samples of Thirty One items with a chance to purchase the items.

Others attended Contractor's Day which was co–sponsored by **Forsberg Construction, Inc. and Utility Service Company, Inc.** The day was full of roundtable discussions, presentations and guest speakers geared specifically for contractors. Vendors also set up displays and were on hand to discuss their latest products and promotions, as well as reinforce relationships with our members.

Sunshine 811 provided information about their new "Safety Matters" program available for free on–line (**www.Sunshine811.com**). "The program's six chapters offer detailed information on locate tickets, an intense review of the tolerance zone, white lining and some common–sense safety recommendations to make the call–before–you–dig process go smoothly. This program is recommended for professional excavators, locators and employees or contractors of companies/utilities that own underground facilities. Sunshine 811 is currently attempting to qualify the program with the CILB so that state certified contractors can earn continuing education by taking the course. It's an easy course that you can introduce to the person in your office responsible for calling in tickets, with your foremen, superintendents or operators.

We were also fortunate to have several representatives from FDOT attend and invited open discussion on many areas of interest for the group. Many found this incredibly

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