Arbitration. The parties agree that any and all claims or disputes that may arise regarding the duties and obligations of this agreement, or the parties’ relationship in general, shall be resolved through arbitration conducted pursuant to the rules of the American Arbitration Association in the State of Illinois and in accordance with Illinois law. Such arbitration shall be final and binding on the parties.  

By electing to waive their right to litigation, parties have also waived the protections and obligations in the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules. They have placed their fate in the hands of an arbitrator, subject only to the procedural protections of the Illinois Uniform Arbitration Act.  

Contrary to what many lawyers think, it’s not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That’s why you should consider including a clause limiting your client’s exposure in your arbitration agreements.

By Edward J. Underhill

Using arbitration clauses in business contracts is a common litigation-avoidance technique. Arbitration agreements usually don’t include specific terms governing the arbitration, since their main purpose is to express the parties’ intent to waive their right to a lawsuit. A typical arbitration clause is no more specific than this:

1. The application of the general statute of limitations to claims asserted in arbitration primarily relates to commercial claims, which are often the subject of arbitration clauses in many types of business contracts. The legal principles discussed are not likely to have much application to tort claims, as a tortfeasor and an injured party are unlikely to have entered into an arbitration agreement prior to the occurrence of the tort.  
2. This sample arbitration clause is based on many such clauses reviewed by the author and closely matches many “sample” clauses suggested by numerous legal and arbitration websites.
3. 710 ILCS 5/1 et seq. or possibly, the Federal Arbitration Act, 9 U.S.C. § 1 et seq.
California, Washington, and Florida, have concluded that general statutes of limitation do not apply to arbitrations unless the parties state otherwise. And at least two other states, New York and Georgia, have amended their codes of civil procedure to make general statutes of limitation apply to arbitrations.

Neither the Illinois Code of Civil Procedure nor the Illinois Uniform Arbitration Act contains such a provision, and the Illinois Supreme Court has not ruled on the issue. Consequently, Illinois lawyers who draft arbitration clauses that don’t expressly incorporate the general statute of limitations (or another specific claim-expiration period) into their arbitration agreements may be exposing their clients to never-ending arbitration claims. They also may be exposing themselves to claims by clients who argue they should have been told they were giving up a statute-of-limitations defense.

This article looks at cases in other jurisdictions and at Illinois statutes that apply to statutes of limitations. It then offers pointers for advising clients and drafting agreements that limit their exposure to arbitration claims.

Statutes of limitation and arbitrations: the national trend

The cold death of a missed statute of limitation has, of course, resulted in many reported cases, much of them focused on determining when the cause of action accrued and whether it was filed on time. As recent cases from outside Illinois show, there is a less obvious but equally dangerous way for lawyers to run afoul of statutes of limitation – by failing to expressly incorporate them into the arbitration agreements, perhaps on the assumption that arbitration claims are automatically subject to them. The Florida appellate court is the latest to reject this assumption, holding in Raymond James Financial Services, Inc. v. Phillips,1 that Florida’s general statutes of limitation apply only to “a court proceeding and not arbitration.”

In reaching its decision, the Florida court noted similar decisions reached by courts in other jurisdictions, including the Washington Supreme Court’s decision a year earlier in Broom v. Morgan Stanley DW Inc.2 The Florida appellate court in Raymond James also found it instructive that at least two states (New York and Georgia) had amended their civil procedure acts to make demands for arbitration subject to the general statutes of limitations.3

The analysis of the Florida and Washington courts tracks the decisions of other courts that have reviewed this question,4 including the 2007 decision of the Supreme Court of California in Wagner Construction Co., v. Pacific Mechanical Corp.5

Indeed, courts throughout the country, including those of Michigan and Minnesota,6 have consistently held the expiration of a statute of limitation is neither an automatic bar to claims asserted in arbitration nor a proper basis for a party to refuse to arbitrate a claim. Whether the Illinois Supreme Court is likely to follow the reasoning of the California, Washington, and Florida courts may depend upon the similarity between the controlling Illinois statutes and those reviewed by courts outside of Illinois.

What is the Illinois “statute of limitations” and to what does it apply?

The general statute of limitations in the Illinois Code of Civil Procedure identifies approximately 30 categories of “actions” and when they must be commenced. The term “action” is not defined, although it is used in every section of the statute.

For example, the section providing the statute of limitation for filing a claim for breach of a written contract states, “Except as provided in Section 2-725 of the Uniform Commercial Code...actions on...written contracts...shall be commenced within 10 years next after the cause of action accrued...” (emphasis added). Similarly, the statute of limitation for a claim for fraud is found in the “Five year limitation” section of the Statute of Limitations, which states, “…actions on...all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued” (emphasis added).

Since the term “actions” is not defined in the general statute of limitations, an Illinois court might conclude (as the Florida appellate court did in Raymond James regarding the term “proceeding”) that the phrase is ambiguous. Appar-ently, no Illinois appellate opinion defines the phrase. But a look at the Illinois Code of Civil Procedure and case law interpreting it does shed some light.

The Code eschews the term “actions” for the singular “action.” Though it does not define either term, the Code in sec-

Illinois lawyers who draft arbitration clauses that don’t expressly incorporate the general statute of limitations may face claims by clients angry about losing that defense.

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1. 735 ILCS 5/13-101 et seq.
3. 2011 WL 5555691 (Fla. App. 2d Dist.).
4. 7. Id. at *5.
5. 8. 169 Wash.2d 231, 244, 236 P.3d 182, 188 (2010).
6. 9. N.Y. CPLR § 7502 (b); Official Code of Georgia § 9-9-5.
7. 10. See, for example, the opinion of the U.S. District Court for the Southern District of Ohio, in NCR Corp. v. CBS Liquor Control, Inc., 874 F. Supp. 168, 172 (1993) wherein the court held that “[t]he effect of a statute of limitations is to bar an action at law, not arbitration.”
8. 11. 41 Cal. 4th 19, 157 P.3d 1029 (2007).
10. 13. That the general statute of limitations is a part of the Illinois Code of Civil Procedure would likely be an important factor in any analysis of this issue undertaken by the Illinois courts, as the Code does not, by law, apply to arbitrations. Indeed, making the procedures required by the Code applicable to arbitrations would defeat the purpose of the Illinois Uniform Arbitration Act.
12. 15. It should be noted that several Illinois statutes that create rights not otherwise known at common-law, such as the Illinois Wrongful Death Act and the Illinois Franchise Act, contain their own time restrictions for asserting claims.
14. 17. 735 ILCS 5/13-205 (five-year limitation).
15. 18. 735 ILCS 5/2-201.
This indicates an “action” can only be a court proceeding where a complaint is filed. That interpretation is consistent with the 9th edition of Black’s Law Dictionary, which defines “action” as a “civil or criminal judicial proceeding” and states “it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.”

At least one Illinois appellate opinion supports this definition, Peoples Gas Light & Coke Co., v. Austin, which holds an “action is commenced when the complaint is filed...and the filing of a complaint determines whether an action is instituted during the period prescribed by a statute of limitations.” citing section 2-201(a) of the Code. Surprisingly, arbitration agreements consistent with the parties’ terms to avoid lawsuits and the Code’s procedural obligations. Illinois courts have repeatedly held that the “object of arbitration is to avoid formalities, delay, and expenses of litigation in court” (emphasis added). By passing the IUAA, the Illinois legislature chose to provide specific legal safeguards to parties who agree to arbitration, including the right to a hearing, the right “to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing,” and the right to be represented at the hearing by an attorney. The IUAA, however, does not give arbitrating parties any of the rights granted by the Illinois Code of Civil Procedure, including the right to assert a statute of limitation as a bar to a claim asserted in arbitration.

Based on a plain reading of the Illinois Statute of limitations, the Illinois Code of Civil Procedure, and the Illinois Uniform Arbitration Act, and giving the terms used in those statutes their ordinary, common-sense meaning, the general statute of limitations apparently does not apply to arbitrations conducted under Illinois law.

no other reported appellate opinions define “action” as it is used in the Code. Based on the Code and Black’s definitions, making a demand for arbitration would not constitute commencement of an “action” because it does not require filing a complaint. Moreover, arbitrations are not judicial proceedings. They do not result in a judgment or a decree. By the plain language of both the Illinois Code of Civil Procedure and the general statute of limitations, the general statute applies only to “actions,” and arbitrations are not “actions.”

The Illinois Uniform Arbitration Act

The Illinois Uniform Arbitration Act also does not apply the general statute of limitations to Illinois arbitrations. On the contrary, section 1 of the IUAA states, “A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract....”

Thus, the IUAA endorses the use of

The UCC four-year statute of limitations: an exception?

Adding to the complexity of the analysis, however, is the “Statute of Limitations in Contracts for Sale” found in section 2-725 of the Uniform Commercial Code (the “UCC”), None of the out-of-state court decisions on the issue involves contracts for the sale of goods.

This is an important distinction for Illinois lawyers. The four-year statute of limitations for claims relating to contracts for the sale of goods is part of the Illinois UCC in ILCS Chapter 810 and thus outside the general statute of limitations. The statute of limitation for the sale of goods under the UCC states, “An action for the breach of any contract for sale must be commenced within four years after the cause of action has accrued” (emphasis added).

Unlike the general statute of limitations and the Code, the Illinois UCC does contain a loose definition of the term “action.” According to section 5/1-201(b)(1), “Action” means “in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined” (emphasis added). Thus, while the definition of “action” under the UCC refers to judicial proceedings, its broad introductory language (“in the sense of”) coupled with the concluding clause of that definition (“any other proceeding in which rights are determined”) makes a strong argument that an “action” includes an Illinois arbitration.

Although there are no reported Illinois cases indicating that claims brought to enforce rights created under the UCC, including, for example, the implied warranties of merchantability and fitness for particular purpose (rights unknown at common law) found in Article II of the UCC would be “special statutory actions,” this seems the likely conclusion. Consequently, it may well be that under Illinois law, the general statute of limitations would not apply to claims asserted in arbitration, while the UCC-created statute of limitations in contracts for sale would. Thus, a respondent in an arbitration involving the sale of goods could assert the UCC statute of limitations as a bar to an implied warranty claim while a respondent defending a fraud claim could not assert as an affirmative defense the five-year time restriction imposed by section 5/1-205 of the general statute of limitations.

22. Id.
23. 710 ILCS 5/1 et seq.
24. Id.
26. 710 ILCS 5/5 (b).
27. 710 ILCS 5/6.
28. 810 ILCS 5/2-725.
29. Id.
30. 810 ILCS 5/1-205(b)(1).
31. A definitive analysis of whether “action” under the UCC includes arbitrations is beyond the scope of this article. But an examination of several of the definitions contained in Section 2-725 of the UCC, including the terms, “right,” “remedy,” and “aggrieved party,” suggest that “action” is indeed intended to include non-judicial proceedings such as arbitration. See Hawkland’s Uniform Commercial Code Series, [Rev] Article 1, [Rev] Section 1-205.5, “Enforceability of UCC rights and obligations,” at Rev. Art. 1-294 (Callaghan) (“Taken together, these definitions make clear that the word “right,” at least as used in Section 1-305(b), has a broad scope, which ranges over all manner of procedures and remedies, judicial and extra-judicial.”) But see, also, infra note 34.
32. 810 ILCS 5/2-314.
33. 810 ILCS 5/2-315.
34. It’s possible the North Carolina court might not agree with this conclusion. See, for example, Cameron v. Griffith, 91 N.C. App. 164, 165, 370 S.E.2d 704 (1988).
Tips for advising clients and drafting agreements

In light of the uncertainty of the law, Illinois lawyers should consider taking the following steps before drafting or reviewing Illinois arbitration clauses.

• First and foremost, don’t assume the general statute of limitations automatically applies to Illinois arbitration claims. Until the Illinois Supreme Court rules or the legislature resolves the issue by amending the Code of Civil Procedure or the Uniform Arbitration Act to apply the general statute of limitations to claims asserted in arbitration, Illinois attorneys should err on the side of extreme caution.

• In considering whether to propose or accept an arbitration clause as part of a commercial contract, advise clients that it is far from certain under current Illinois law that they can assert the time restrictions contained in the general statute of limitations to bar stale demands for arbitration.

• Drafters of arbitration agreements should consider whether it benefits their client to include a clause expressly stating that all Illinois statutes of limitations apply to claims asserted in arbitration. They should also consider the wisdom of providing a shorter time-period for asserting arbitration claims. Remind your client that it’s impossible to predict whether they will be the claimant or respondent in arbitration, so the goal should be consistency and predictability in drafting the appropriate clause.

• If you decide to include a time limitation for making a demand, consider adding a clause to the arbitration agreement along these lines:

  The parties further agree that any and all demands for arbitration must be properly and fully made within two years of the date on which the right to assert the demand first arose, but in any event all time restrictions or limitations for the commencement of civil actions contained in the Illinois statutes, including the General Statute of Limitations (hereinafter, the “operative time limitations”), shall strictly apply to any and all claims asserted in any arbitration initiated by a party to this agreement with the same force and effect as if the claim had been asserted in a civil action or judicial proceeding, and failure to initiate arbitration of a claim i.e., failure to deliver the proper and complete application for the demand for arbitration (with all necessary fees) to a qualified arbitration organization operating within the State of Illinois, within the two-year time-period or the operative time limitations shall constitute an irrevocable waiver of the right to assert such a claim. The parties further agree the duly appointed arbitrators or a court of competent jurisdiction shall be authorized to dismiss any claim asserted in an arbitration based on the claimant’s failure to assert or initiate such claim within the two-year limitations period or the operative time limitations.

• Finally, if your client is a party to an arbitration agreement that does not expressly incorporate the general statute of limitations (including the UCC’s) or a shorter time-period for making a demand for arbitration, consider how that could affect any claims and their defenses.

Conclusion

Until the Illinois Supreme Court or the legislature decides that the general statute of limitations applies to arbitration claims, the only way to be certain is to expressly make it a part of the arbitration agreement.

Commercial lawyers often resist drafting arbitration clauses that are too specific. This is partly because their clients want to avoid intimidating customers, employees, or business partners with pages of what they view as non-essential boilerplate. After all, the very purpose of an arbitration clause is to make it easy for parties to agree to forego their right to file a civil lawsuit in lieu of a simpler dispute-resolution process. But it’s a topic you need to consider and discuss with your client.