

Delay in Commencing an Arbitration

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1. INTRODUCTION

Judge Martyn Zeidman recently commented: “As stated in Magna Carta, justice delayed is justice denied”.¹ The Limitation Acts are intended to prevent justice being delayed. They do this by preventing a claimant from proceeding with a case where the limitation period has expired. They do not, except in a few cases,² extinguish the right of action, but bar a remedy. They are therefore, except in those few cases, procedural rather substantive defences.

Issues of limitation should not be raised in a statement of case. It is for the respondent to raise any issue of limitation within the defence and for the issue to be dealt with by the claimant in a reply.³ The respondent must specifically plead a defence of limitation. The burden then shifts to the claimant to show that the cause of action arose within the relevant limitation period.

The Limitation Acts were conceived out of the equitable doctrine of laches, which still has a role to play where a party seeks an equitable remedy. Equitable remedies include an order for specific performance, an injunction and rectification of a contract. The doctrine of laches states that “equity aids the vigilant, not the indolent”⁴ and that “delay defeats equity”. Therefore, a claim for an equitable remedy will not be granted if the claimant has delayed in commencing a claim, even though the statutory limitation period has not expired.

In addition to the Limitation Acts and the doctrine of laches, contractual limitation provisions may provide a defence. They may either bar a claimant’s right to bring a claim or may extinguish it. The distinction between contractual limitation and statutory limitation is important because the court has power to extend time limits for a failure to comply with contractual limitation periods. Only in limited circumstances can it extend statutory periods.

Arbitration Act 1996 ss.12 to 14 deal with the commencement of arbitration proceedings and issues of limitation: section 12 with the court’s power to extend contractual time limits for beginning arbitral proceedings; section 13 states that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings; section 14 deals with the commencement of proceedings.

2. COMMENCING AN ARBITRATION

The commencement of the arbitration is the first formal step that a claimant must take and in many regards is the most important. The claimant who serves a defective notice

¹ *R v. Sulkin and Kayman* Snaresbrook Crown Court (unreported) September 10, 2001. Article 29 of Magna Carta states: “we will not deny or defer to any man either justice or right.” Of its 37 Articles “to be kept in our Kingdom of England forever”, only three are still in force. The rest have been repealed over the centuries.

² The exceptions relate to land, chattels and defective products.

³ *Ogunsanya v. Lambeth Area Health Authority* (unreported) July 3, 1985.

⁴ *Vigilantibus et non dormientibus lex succurrit*: see *Marquis of Cholmondeley v. Lord Clinton* (1820) 2 Jac & W 1 at 140.

of commencement may find that the notice has no effect and, if the limitation period has subsequently expired, has no remedy. Almost every set of institutional or *ad hoc* rules includes a provision regarding the commencement of the arbitration. Commencement of an arbitration is, for instance, dealt with in Article 3 of the UNCITRAL Arbitration Rules, under which a notice of commencement must include:

- (a) a demand that the dispute be referred to arbitration;
- (b) the names and addresses of the parties;
- (c) a reference to the arbitration clause or the separate arbitration agreement that is invoked;
- (d) a reference to the contract out of or in relation to which the dispute arises;
- (e) the general nature of the claim and an indication of the amount involved, if any;
- (f) the relief or remedy sought;
- (g) a proposal as to the number of arbitrators (*i.e.* one or three), if the parties have not previously agreed thereon.

Similar provisions are included in the ICC Arbitration Rules Article 4. The arbitration is deemed to commence when its Secretariat receives a request for arbitration, which must include:

- (a) the name in full, description and address of each of the parties;
- (b) a description of the nature and circumstances of the dispute giving rise to the claims;
- (c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
- (d) the relevant agreements and, in particular, the arbitration agreement;
- (e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and
- (f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

Where neither the contract nor the arbitration rules contain any express provision dealing with commencement, then, where the seat of the arbitration is in England, Wales or Northern Ireland, the Arbitration Act 1996 ss.14 (3) to (5) apply⁵:

- (3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.
- (4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an

⁵ These subsections replace Limitation Act 1980 s.34.

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arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

- (5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

The contract in which the arbitration clause is found may also include conditions precedent for the commencement of the arbitration. Within the new FIDIC forms of contract a claim is first submitted to the engineer for assessment. Thereafter a dispute is referred to a Dispute Adjudication Board which is required to give its decision within 84 days. If either party is dissatisfied with that decision, it must give notice of dissatisfaction within 28 days. The parties thereafter have 56 days in which to attempt amicable settlement. Only after all these steps have taken place may a party commence arbitration. If a party fails to refer the dispute to the Board, or to give notice of dissatisfaction within those time periods, the decision of the engineer or Board becomes final and binding.

A party which attempts to commence arbitration proceedings prematurely will find that the arbitral tribunal lacks jurisdiction to proceed. It may then have to recommence the whole dispute process from the beginning. Where limitation periods are critical, this may bar the claim.⁶

3. EXTENDING PERIODS FOR COMMENCEMENT

Arbitration Act 1996 s.12 deals with the court's power to extend time for the commencement of arbitration proceedings. The court may order an extension only if satisfied (section 12(3)):

- (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
- (b) that the conduct of one of the parties makes it unjust to hold the other party to the strict terms of the provision in question.

Section 12 is concerned not with the Limitation Acts but only with contractual time limits.

*Harbour & General Works v. Environment Agency*⁷ illustrates the need to comply with contractual time bar provisions. The claimant entered into a contract with the respondent based on ICE Conditions of Contract (6th edition). The claimant issued a notice to refer a dispute to arbitration but the notice was eight days late. The Court of Appeal refused to extend the time. Waller L.J. stated⁸:

The sub-section is concerned with party autonomy. Its aim seems to me to be to allow the Court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply, or to put it the other way round, the section is concerned not to allow the Court to interfere with a

⁶ See *Harbour & General Works v. Environment Agency* [2000] 1 W.L.R. 950 discussed below.

⁷ [2000] 1 W.L.R. 950.

⁸ [2000] 1 Lloyd's Rep. 65 at 81.

contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply;—it then being for the Court finally to rule as to whether justice requires an extension of time to be given.

The Court of Appeal concluded on the facts that there were no circumstances which would allow them to extend the period for commencement.⁹ It also considered the “final and binding” nature of the engineer’s decision and concluded that, where a decision had become final and binding, it could not be reopened by an arbitrator unless the contract provided otherwise. Waller L.J. found that an arbitrator would have no jurisdiction to consider a decision which had become final and binding under the ICE Conditions of Contract.

Similarly, in *Thyssen Inc v. Calypso Shipping Corp SA*¹⁰ the court again refused to extend time for the commencement of an arbitration where the claimant had commenced proceedings in the courts of the United States within the contractual time limits but had not issued a notice of arbitration. Steel J. held that it was not enough for the claimant to commence proceedings. The claimant had to commence proceedings correctly. The proposition that instituting proceedings in any jurisdiction in the world would have the effect of preventing discharge of liability by passage of time was absurd.

4. COMMENCEMENT AND LIMITATION BEFORE THE ARBITRATION ACT 1996

Before the Arbitration Act 1996 the law regarding commencement was uncertain. The courts were inconsistent as to whether strict compliance with the requirements of Limitation Act 1980 s.34 was required. This inconsistency arose because of the decision of *Vosnoc Ltd v. Transglobal Projects Ltd*.¹¹ The claimant sent a letter to the defendant, which stated: “By this letter the dispute between our respective companies is referred to the arbitration of three arbitrators in London . . . ” Judge Jack took a restrictive approach to the Limitation Act provisions and held that an arbitration could not be started in any other way but in strict accordance with the provisions of section 34(3), holding that a notice to commence arbitration must include an implied request that an arbitrator be appointed by the recipient. He also departed from established authority and stated that, unless strict compliance with the requirements of section 34 was observed, the carefully drafted provisions would be rendered otiose.

Support for Judge Jack’s interpretation is found in *Mustill & Boyd*¹²:

It is important to bear in mind that each of the forms of notice contemplated by s.34(3) is concerned with the appointment of an arbitrator by the defendant. A notice by the claimant that he himself has appointed an arbitrator is not a sufficient compliance with the statute, and still less is a mere notice of claim. The latter might, depending on the terms of the contract, be sufficient to prevent the claim from becoming barred by a contractual limitation clause, but it would not be relevant to a statutory time limit.

⁹ See also *Metalfer Corp v. Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd’s Rep. 632; *Cathiship SA v. Allanasons Ltd (The Catherine Helen)* [1998] 3 All E.R. 714; and *Vosnoc Ltd v. Transglobal Projects Ltd* [1998] 1 Lloyd’s Rep. 711.

¹⁰ [2000] 2 All E.R. (Comm) 97.

¹¹ [1998] 1 Lloyd’s Rep. 711.

¹² *Mustill & Boyd, Commercial Arbitration*, Butterworths 2nd ed., 1989, p. 199.

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However, in *The Smaro*¹³ and *The Baltic Universal*¹⁴ the Commercial Court held that a failure to comply strictly with the provisions of section 34 did not preclude a party from commencing an arbitration, if it was clear that this was its intent.

In *The Smaro* the question was whether or not the defendant had validly commenced arbitration against the sellers of the vessel. Rix J. considered the conflicting cases of *Nea Agrex SA v. Baltic Shipping Co Ltd*¹⁵ and *Vosnoc*. On the facts, he concluded that the telex and notices sent to the arbitrator and copied to the claimant's solicitors were in their context sufficiently clear and unambiguous to leave a reasonable recipient with no reasonable doubt that they were intended to operate as a call for the appointment of an arbitrator. He held that an arbitration had therefore been commenced by Roussos against the claimant on the basis that there was implicitly or in substance a request to the claimant to appoint an arbitrator.

In *The Baltic Universal*, a dispute arose out of the carriage of a cargo of fruit on the vessel *Baltic Universal* from Seattle to Rotterdam. The cargo was discharged on January 10, 1996. The claimant alleged that, owing to poor stowage, fruit was damaged during the course of the voyage. The bills of lading under which the cargo was carried incorporated the Hague Rules applying a 12 month time bar in Article III Rule 6. The bills also incorporated the charterparty arbitration clause, which required the parties to agree on a single arbitrator or each to appoint an arbitrator who would then appoint a third. On January 9, 1997, the cargo owners notified the owners' P&I club that, in view of the expiration of the statutory time bar, "we have appointed Mr Michael Baskerville . . . as arbitrator on behalf of our clients . . . in connection with all disputes arising under the three bills of lading." The P&I club (relying on *Vosnoc*) argued that, as the letter sent on January 9 did not request them to appoint an arbitrator, it was not effective to start arbitration proceedings with the result that the claim was time barred. Moore-Bick J. held: that the letter of January 9 was sufficient to commence arbitration; the claim was not time-barred; *Nea Agrex SA* was binding authority for the proposition that a notice in writing which, read in its context, made it clear by whatever language that the sender was invoking the arbitration agreement and was requiring the recipient to take steps in response to enable the tribunal to be constituted, was sufficient to satisfy the requirements of Limitation Act 1980 s.34(3) and Article III r 6. The cargo owners did not have to call expressly on the respondent to appoint its arbitrator or seek agreement to refer disputes to a sole arbitrator. In context, the letter was sufficient notice that the cargo owners were referring the dispute to arbitration and required the shipowners to take appropriate action. Accordingly, *Vosnoc* was wrong to hold that, in a case such as the present, the claimant must expressly call on the defendant to appoint its arbitrator in order to commence an arbitration.

5. COMPARISONS WITH ARBITRATION ACT 1996 s.14

In considering Arbitration Act 1996 s.14 the courts have ignored pre-1996 cases and looked only at the principles underlying the Act.

In *Seabridge Shipping AB v. AC Orsleff's EFTS A/S*,¹⁶ Thomas J. considered the Departmental Advisory Committee (DAC) Report of June 1989.¹⁷ The implementation of the 1996 Act came about in no small part because of perceived defects in the existing law. The Act was intended to be an expression of the law in a logical format, and in

¹³ *Charles M. Willie & Co. (Shipping) Ltd v. Ocean Laser Shipping Ltd & George Roussos Sons SA (The Smaro)* [1999] 1 Lloyd's Rep. 225.

¹⁴ *Allianz Versicherungs-Aktiengesellschaft v. Fortuna Co. Inc. (The Baltic Universal)* [1999] 1 W.L.R. 2117.

¹⁵ [1976] 1 Q.B. 933.

¹⁶ [2000] 1 All E.R. (Comm) 415.

¹⁷ Published in (1989) 13 *Arbitration International* 275.

language sufficiently clear and free from technicalities to be readily comprehensible to a lay person.¹⁸ If the courts were simply to apply the earlier law, they would undermine the whole purpose of the Act. The facts were that the respondent, AC, owned a ship which was chartered to SS. The owners of cargo brought a claim against SS who sought an indemnity against AC. SS sought to invoke the arbitration procedure by sending a fax to the arbitrator requesting him to act, with a copy to AC, requesting their agreement to the appointment. The arbitrator held that the notice was invalid. SS appealed. Thomas J. considered two issues. Did the fax satisfy the requirements of section 14? Can an arbitration be commenced in a manner other than that expressly permitted by section 14?

Thomas J. found that the fax did comply with the requirements of section 14. The Act intended to make the law of arbitration clear and more straightforward and where appropriate to avoid excessive technicalities. He therefore considered that it would be a retrograde step to look at pre-1996 cases to interpret the Act and that a court should rely on “the user-friendly language of the Act”. He concluded that section 14 should be interpreted broadly and flexibly.

A strict technical approach to this section has no place in the scheme of the 1996 Act . . . In my view this notice was objectively clear in requesting the owners to appoint an arbitrator or to agree to the appointment of Mr Oakley; it was a notice to the owners. It therefore was plainly within section 14(4) of the Act.

Having concluded that the fax from AC was sufficient to commence the arbitration, Thomas J. declined to decide whether the commencement mechanism of section 14 was a complete code but said:

. . . it seems that in cases where a party has given notice to the other party, making it clear objectively that it is a reference of the matter to arbitration, that it is likely that these will be met by the construction of s.14 which is broad enough to include an implied request to appoint an arbitrator. If there are circumstances which cannot properly be met in this way, then the question must remain open as to whether an arbitration could be commenced in a way not expressly set out in s.14. It is not necessary for me to decide that question.

However, given the fact that the Arbitration Act, 1996 is intended for use by the layman and is written in “user-friendly language” capable of application by international traders and businessmen, it is difficult to see why it should have been intended that methods for commencing an arbitration other than those set out in s.14 were to be permitted. The section is very clearly expressed, easy to follow and apply, and provides for certainty. From it, the requirements of the law of England and Wales are readily ascertainable without resort to pre-Act authority. As in my view the section should be construed broadly, it is difficult to envisage an apparent justification for providing for other means outside the Act which will only make for complexity and uncertainty and diminish the easy ascertainability of the law of arbitration where the Act, as in this case, expressly deals with the subject matter.

6. CONCLUSION

As *Mustill & Boyd* now notes, the Arbitration Act 1996 has given English arbitration law “an entirely new face, a new policy, and new foundations.”¹⁹ In *Patel v. Patel*²⁰ Lord Woolf stated:

I would accept that the Act was intended to make the law of arbitration clear and more straightforward. Furthermore, the Act makes the law less technical than it has been hitherto. If it is appropriate for me to say so, the underlying spirit of the new Arbitration Act is very

¹⁸ Paragraph 108 of the Report.

¹⁹ Preface to the *2001 Companion, Mustill & Boyd*, Butterworths, April 2001.

²⁰ March 24, 1999, New Law Cases, No. 299035206.

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much in accord with the underlying spirit of the new procedural rules which will be applicable to the civil courts in this jurisdiction from April 26, 1999. It sets out in readily understandable terms to parties to an arbitration what is required of them.

It would therefore be a retrograde step if reference was had to pre-Act cases when interpreting the provisions of the Arbitration Act 1996. *Seabridge* and *Harbour & General Works v. Environment Agency* are therefore excellent examples of the courts taking a purposive approach to the interpretation of the Arbitration Act 1996 and construing the wording of the Act in accordance with the overriding principles found within it. As arbitration is to be used both by commercial and lay people, the courts can be expected to give a natural interpretation to the wording of the Act. “Technical” arguments, based on pre-1996 case law, are likely to fall on deaf ears.