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complaining and defending attorneys would be well advised to prepare strongly developed allegations concerning *forum non conveniens* as well as jurisdictional contacts in framing their pleadings.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Contract statute of limitations applied to demand for arbitration.

CPLR 7502(b) permits the statute of limitations to be asserted as a defense to a demand for arbitration when the defense would have barred an action on the underlying claim had it been commenced in a state court.¹¹³ The defense must be asserted promptly after receipt of a demand for arbitration, for failure to act quickly may result in a waiver of the defense.¹¹⁴ Although the procedure for asserting the time-bar defense is well established, the criteria for determining the statute of limitations applicable to an arbitration proceeding have been less clearly delineated.¹¹⁵ Recently, in *Paver & Wildfoerster v. Catholic High School Association*,¹¹⁶ the Court of Appeals held that arbitration will be time barred only if on no view of the facts could the claim withstand a time-bar challenge in an action at law.¹¹⁷

In *Paver*, the appellant-architects designed and supervised the construction of the respondent school association's high school. The contract contained a broad arbitration clause which referred all future disputes arising under the contract to arbitration. When the building began to leak, the school association demanded arbi-

¹¹³ CPLR 7502(b) provides in pertinent part:

If, 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

Where compliance with time limitations is a condition precedent to arbitration, the timeliness of a demand for arbitration will be determined by the court. *See Board of Educ. v. Heckler Elec. Co.*, 7 N.Y.2d 476, 481-82, 166 N.E.2d 666, 668-69, 199 N.Y.S.2d 649, 652-53 (1960).

¹¹⁴ Service of a demand for arbitration or notice of intention to arbitrate is a common procedure for the commencement of arbitration proceedings. The demand or notice usually contains the 20-day preclusion caveat specified in CPLR 7503(c). Failure to move to stay the arbitration within the allotted 20 days or participation in the arbitration proceedings waives the defense that ". . . a valid agreement was not made or has not been complied with and . . . [also waives] the bar of a limitation of time . . ." CPLR 7503(c).

¹¹⁵ *Compare Naetzker v. Brocton Cent. School Dist.*, 50 App. Div. 2d 142, 376 N.Y.S.2d 300 (4th Dep't 1975) (applied tort limitation period in barring arbitration of a claim for architect's malpractice), *with In re Threese Sofia Bros.*, 190 Misc. 891, 76 N.Y.S.2d 237 (Sup. Ct. N.Y. County 1947) (applied contract statute of limitations although damage was caused by negligence).

¹¹⁶ 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976). Chief Judge Breitel authored the majority opinion.

¹¹⁷ *Id.* at 677-78, 345 N.E.2d at 570, 382 N.Y.S.2d at 26-27.

tration, contending that the leaks were caused by the architects' malpractice.¹¹⁸ In moving for a stay of arbitration pursuant to CPLR 7503(b), the architects claimed that the 3-year statute of limitations for tort malpractice barred arbitration of the school association's claim.¹¹⁹ Noting that the claim sounded both in contract and in tort, the Court of Appeals denied the stay and applied the longer contract limitation period.¹²⁰

In so holding, the *Paver* Court implicitly overruled a recent appellate division case, *Naetzker v. Brocton Central School District*,¹²¹ which bore a striking resemblance to *Paver*. In *Naetzker*, architects' malpractice allegedly resulted in a leak in plaintiff's school building.¹²² The appellate division, in affirming the trial court's order granting the architect's motion for a stay of arbitration, held that the plaintiff's claim was grounded in malpractice.¹²³ Consequently,

¹¹⁸ In 1968, shortly after construction had been substantially completed, respondent discovered serious leaks in the edifice. Both the architects and builder were notified of the defects. After several unsuccessful attempts by the builder to correct the problems, an independent waterproofing company was consulted. In 1973, the respondent, having been informed by the consultant that the architects were responsible for the leaks, demanded arbitration pursuant to the contract. Prior to consulting the waterproofer, the association had had no indication that the architects were at fault. *Id.* at 672-73, 345 N.E.2d at 566-67, 382 N.Y.S.2d at 22-23.

¹¹⁹ The architects contended that the action was barred by CPLR 214(6) which permits 3 years for the commencement of an action in malpractice. The association simultaneously commenced an action under CPLR 7503(a) to compel arbitration, claiming that the 6-year contract limitation period of CPLR 213(2) controlled. The supreme court, on the association's motion, consolidated the two proceedings and ordered arbitration. The appellate division affirmed the lower court's order. 38 N.Y.2d at 671-72, 345 N.E.2d at 566, 382 N.Y.S.2d at 22-23.

¹²⁰ 38 N.Y.2d at 672, 345 N.E.2d at 566, 382 N.Y.S.2d at 23. The dissent, authored by Judge Cooke and concurred in by Judge Fuchsberg, found the school association's claim to be time barred. In accepting the architects' contention, the dissent concluded that the underlying claim was in malpractice. The basis of the dissent's position was that the common law duty of architects to exercise reasonable care and skill in performing their duties is identical to the implied contractual obligations of the architects. As a result, no matter how the claim is labeled, it remains an action in malpractice subject to a 3-year statute of limitations. *Id.* at 679, 345 N.E.2d at 571, 382 N.Y.S.2d at 27 (dissenting opinion). See *Naetzker v. Brocton Cent. School Dist.*, 50 App. Div. 2d 142, 376 N.Y.S.2d 300 (4th Dep't 1975). *But see* *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953). In applying the contract period of limitations to an action for breach of implied warranty of fitness for a particular purpose, the *Blessington* Court stated that

although such a breach of duty may rest upon, or be associated with, a tortious act, it is independent of negligence, and so such a cause of action gets the benefit of the six year limit . . . as being on an implied contract obligation or liability.

Id. at 147, 111 N.E.2d at 422-23.

¹²¹ 50 App. Div. 2d 142, 376 N.Y.S.2d 300 (4th Dep't 1975).

¹²² *Id.* at 143, 376 N.Y.S.2d at 304. The architects contracted to supervise construction of the school district's building. Subsequent to the completion of construction and certification by the architects, leaks developed. When the school district demanded arbitration, the architects moved for a stay pursuant to CPLR 7503(b) on the ground that the statute of limitations had run. *Id.* at 144, 376 N.Y.S.2d at 304.

¹²³ *Id.* at 147, 376 N.Y.S.2d at 305. The court considered application of the statute of limitations in arbitration cases to be a twofold process: First, characterization of the action to

the *Naetzker* court applied the 3-year tort malpractice statute of limitations and barred the school district's demand for arbitration.¹²⁴ In reaching this decision, the *Naetzker* court applied to arbitration proceedings the rule developed in *Webber v. Herkimer & Mohawk State Railroad*¹²⁵ and traditionally applied to actions at law.¹²⁶ In *Webber*, plaintiff-passenger, who had been injured as a result of defendant-railroad's alleged negligence, attempted to bring an action for breach of defendant's implied contractual obligation of due care. The Court of Appeals, however, considered the "essence" or "reality" of the action rather than its form in determining the applicable limitation period.¹²⁷ Since the "essence" of the action in *Webber* was tortious, the Court utilized the tort statute of limitations.¹²⁸ Although the *Paver* Court could have adopted this logic, it refused to be guided by *Naetzker*, a decision it apparently believed to be an unwarranted extension of *Webber*. The *Paver* Court readily distinguished *Webber* and its progeny, noting that these cases were conventional actions at law, primarily based on personal injury claims, whereas *Paver* involved arbitration of a claim for property damage.¹²⁹ It was the opinion of the Court that in an arbitration proceeding, the mere fact that a plaintiff could have based his claim in tort should not preclude an action framed in contract if the facts would so permit.¹³⁰

It is submitted that the major factor considered in the *Paver* Court's rationale was the arbitrator's ability to examine the entire "complex of facts"¹³¹ unrestrained by judicial rules of evidence and

define the proper limitation period; and, second, determination of whether the action accrued within that period. Concluding that regardless of the allegations involved, it was the gravamen of the action which controlled the selection of the limitation period, the court applied the 3-year malpractice statute of limitations. Consequently, since the action was founded in malpractice and the time of accrual was not within the limitation period, the court granted the stay of arbitration. *Id.* at 145-48, 376 N.Y.S.2d at 305-08.

¹²⁴ *Id.* at 147-48, 376 N.Y.S.2d at 306.

¹²⁵ 109 N.Y. 311, 16 N.E. 358 (1888).

¹²⁶ *See, e.g.,* Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937); Gottfried v. Gottfried, 269 App. Div. 413, 422, 56 N.Y.S.2d 50, 58 (1st Dep't 1945); Policemen's Benevolent Ass'n v. Hitt, 75 Misc. 2d 565, 570, 348 N.Y.S.2d 456 (Sup. Ct. Westchester County 1972); Bort v. Sears, Roebuck & Co., 58 Misc. 2d 889, 890, 296 N.Y.S.2d 739, 741 (Syracuse City Ct. 1969).

¹²⁷ 109 N.Y. at 314-15, 16 N.E. at 359-60.

¹²⁸ *Id.* at 314, 16 N.E. at 359.

¹²⁹ 38 N.Y.2d at 675-76, 345 N.E.2d at 569, 382 N.Y.S.2d at 24-25.

¹³⁰ *Id.* at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 25-26.

¹³¹ *See id.* at 677, 345 N.E.2d at 570, 382 N.Y.S.2d at 26. Arbitrators determine the admissibility of evidence in arbitration proceedings. *See* AM. ARB. ASS'N VOL. LAB. R. 28 (1975); AM. ARB. ASS'N COMM. R. 30 (1973); W. Sturges, *Arbitration — What is It?*, 35 N.Y.U.L. REV. 1031 (1960). In cases where an objection to evidence is raised on the grounds of relevance, arbitrators have a tendency to accept it "for what it's worth." Costikyan, *Some Observations on Arbitrators*, 151 N.Y.L.J. 40, Feb. 27, 1964, at 1, col. 5.

procedure. Since the arbitrator may resolve disputes and fashion remedies not available in an action at law, the courts, in determining whether a stay of arbitration should be granted, should not attempt to force the conflict into the mold of a traditional cause of action. Consequently, the Court refused to label the action as one in malpractice; instead, after viewing all the facts, it determined that although the damage was caused by the architects' negligence, the claim was not barred by the malpractice statute of limitations since it was also "substantially related to the subject matter of the substantive agreement."¹³²

Paver establishes the limitation period controlling arbitrable disputes as that time within which an action could have been commenced in court under any possible theory of suit. The decision, however, is limited to those instances where the contract itself does not provide a shorter limitation period.¹³³ The Court's selection of a generous limitation period¹³⁴ is consistent with the current judicial trend encouraging arbitration as a means of reducing congestion in the court system. The approach taken by the Court will encourage insertion of specific time limits in contracts calling for

¹³² 38 N.Y.2d at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 26. The *Paver* decision is analogous to decisions involving arbitration of disputes arising under the uninsured motorist endorsements on insurance policies. Typical of that line of cases are *In re Ceccarelli*, 204 N.Y.S.2d 550 (Sup. Ct. Kings County 1960), and *In re Travelers Indem. Co.*, 226 N.Y.S.2d 16 (Sup. Ct. Kings County 1962). In both cases the policyholders failed to demand arbitration within the statutory period applicable to tort actions. The insurers alleged that failure to make timely demand precluded arbitration. The courts rejected the insurers' contention and directed the parties to proceed to arbitration. The court reasoned that although the tortious act of the uninsured motorist was the cause of the injury for which the claim was made under the endorsement on the insurance contract, the action was based on the contractual relationship between the insurer and policyholder, and hence required application of the 6-year statute of limitations. *Accord*, *MVAIC v. McDonnell*, 23 App. Div. 2d 773, 258 N.Y.S.2d 735 (2d Dep't 1965); *MVAIC v. Goldberg*, 65 Misc. 2d 778, 317 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1970); see Comment, *Arbitration, Statute of Limitations and Uninsured Motorist Endorsements*, 19 CLEV. ST. L. REV. 528 (1970); *The Biannual Survey*, 40 ST. JOHN'S L. REV. 122, 128 (1965).

In *Paver*, the injury, allegedly caused by tortious malpractice, gave rise to a dispute under the terms of the construction agreement. The *Paver* Court viewed the dispute as cognizable in contract, and consequently, held the 6-year contract limitations period applicable. The factual setting in the uninsured motorist cases may, however, be distinguished. In the motorist cases, it was a third party's act that caused the injury, whereas in *Paver*, it was the act of a party to the contract that produced the damage.

¹³³ Where a specific time within which arbitration must be commenced is included in a contract, it has been held that failure to comply therewith acts as a bar to the action. See *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*, 305 N.Y. 36, 110 N.E.2d 545 (1953).

¹³⁴ In cases where the courts must decide between applicable limitation periods, they have a tendency to resolve the issue in favor of the longer time period. Comment, *Arbitration, Statute of Limitations and Uninsured Motorist Endorsements*, 19 CLEV. ST. L. REV. 528, 530 (1970). See, e.g., *Dentists' Supply Co. v. Cornelius*, 281 App. Div. 306, 119 N.Y.S.2d 570 (1st Dep't), *aff'd*, 306 N.Y. 624, 116 N.E.2d 238 (1953). *Contra*, *Carr v. Liphshie*, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1st Dep't 1959) (per curiam), *aff'd mem.*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961).

arbitration and may also induce increased care in drafting and utilizing arbitration clauses in form contracts.

A better solution, however, would be legislative enactment of a single statute of limitations provision applicable to all arbitration proceedings.¹³⁵ This would be the simplest method of standardizing the period of limitations for commencement of arbitration. It is a logical extension of *Paver's* attempt to eliminate the difficulties inherent in characterizing such actions as *ex contractu* or *ex delicto*, and would provide greater certainty than *Paver's* selection process.

COURT OF CLAIMS ACT

Ct. Cl. Act § 10: Six-month limitations period and date of judgment time of accrual applied to Dole claims.

Section 10 of the Court of Claims Act establishes jurisdictional notice requirements for the assertion of causes of action against the State.¹³⁶ Under subdivision 3 of section 10, a prospective plaintiff has 90 days within which to file either a claim or a notice of intention to file a claim for any action against the State grounded in tort.¹³⁷ Subdivision 4 provides a 6-month time period to file a notice of intention or a claim against the State for contract actions and any other claim not specifically covered by the other provisions of section 10.¹³⁸ Since the landmark decision in *Dole v. Dow*

¹³⁵ See also *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 530, 566 (1973). A provision defining the limitation period for commencing arbitration proceedings at either 3 or 4 years could easily be inserted in CPLR 7502(b). A statutory amendment would provide a more effective resolution of this issue than does *Paver's* case law solution for the simple reason that the appropriate statute of limitations would be defined with absolute certainty. Indeed, one student author has suggested enactment of a single statute of limitations for both contract and tort claims in all proceedings. Comment, *Tort in Contract: A New Statute of Limitations*, 52 ORE. L. REV. 91 (1972).

¹³⁶ N.Y. CT. CL. ACT § 10 (McKinney 1963). When asserting any cause of action against the State, compliance with article II of the Court of Claims Act, which includes § 10, is a prerequisite for subject matter jurisdiction. *Id.* § 8.

¹³⁷ *Id.* § 10(3) states:

A claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the state while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

¹³⁸ *Id.* § 10(4) provides:

A claim for breach of contract, express or implied, and any other claim not otherwise provided for by this section, over which jurisdiction has been conferred upon the court of claims, shall be filed within six months after the accrual of such claim, unless the claimant shall within such time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two years after such accrual.

The other provisions of § 10 set notice and limitation periods for actions involving State appropriation of lands or a right, title, or interest in land, *id.* § 10(1); a wrongful death