



POWER TO THE ARBITRATOR

STATE SUPREME COURT PROVIDES GUIDANCE ON CONTRACTUAL CLAIMS

By JARED COHANE

Congress enacted the Federal Arbitration Act in 1925 to establish arbitration as an alternative to the “costliness and delays of litigation.”

For most individuals or businesses, saving money by avoiding costly litigation is of primary concern. Arbitration can present a viable alternative to court under the right circumstances, but in recent years, arbitration has not always proven to be the most cost-effective and efficient process.

If arbitration is an appealing option, the inclusion of a broad arbitration clause encompassing any dispute between contracting parties should be clearly set forth in the contract. However, where the breadth of an arbitration clause is vague or unclear, the issue of what exactly is subject to arbitration can create traps for the unwary in different jurisdictions.

If I did not agree to arbitrate a certain issue or dispute, is that submitted to the arbitrator to decide? Is court intercession necessary? If I do not run to court to address what is subject to arbitration, what are the risks?

The answer to these questions will depend upon the jurisdiction governing the parties’ contract. In Connecticut, at least, the answers to these questions just got a little clearer thanks to the Connecticut Supreme Court’s ruling in *Bacon Construction Company v. Department of Public Works*, 294 Conn. 695 (2010).

‘Termination’

Bacon Construction involved a dispute between a masonry trade contractor and the

Connecticut Department of Public Works arising out of the construction of a prison in the early 1990s. Connecticut has a limited waiver of sovereign immunity for construction contract disputes between the state and a contractor under Connecticut General Statutes §4-61.

In order to bring an action against the state, either in superior court or in arbitration, the contractor must provide notice of its claim within two years of termination of the contract or issuance of a certificate of acceptance by the state, whichever event is earlier.

In addition, the contractor must commence an action on the claim within three years of termination or issuance of a certificate of acceptance, depending upon which event occurs first.

Although Bacon completed its work in 1996, the state never issued a certificate of completion and did not terminate Bacon’s contract for default or convenience. Bacon asserted, therefore, that its claim was still timely even though it last worked on the job in 1996, filed notice of claim in 2004, and demanded arbitration in 2005.

In April 2006, the arbitrator appointed to decide the dispute conducted a preliminary telephone conference with the parties, during which the state asserted that the arbitrator lacked authority to consider Bacon’s claims under §4-61 because Bacon had not filed notice of its claim and had not commenced the arbitration within the three years from completion of the work.

The state’s argument was premised upon the meaning of the term “termination.” The state contended “termination” meant the

end of performance, while Bacon contended that “termination” had the common meaning used in the construction industry and in the construction contract itself – meaning termination of the performance for either default or convenience.

Significantly, the state asked the arbitrator to decide if the statute of limitations defense applied to Bacon’s claims before proceeding with the arbitration on the merits. Bacon agreed to this proposal, and after evidentiary proceedings, the arbitrator determined that, among other things, Bacon’s claim was timely because the state had neither issued a certificate of acceptance of the work, nor terminated the contract.

The arbitrator accepted Bacon’s interpretation of “termination” – the construction industry meaning of the word – as the owner’s act of terminating the contract, either for default or for convenience.

The arbitration proceeded to a second set of hearings on the merits of Bacon’s claims, with Bacon prevailing. Bacon then sought to confirm the award of the arbitrator.

The state moved to vacate the award, arguing, among other things, that the arbitrator did not have subject matter jurisdiction to issue the award because Bacon’s claims were untimely under §4-61 and, therefore, barred by the doctrine of sovereign immunity.

The trial court confirmed the award, adopting the arbitrator’s reasoning that the



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claims were timely under §4-61. The state, undaunted, appealed and the case was transferred to the Connecticut Supreme Court.

Final Authority

During oral argument before the Connecticut Supreme Court, a great deal of the questioning and argument centered around the meaning of the term “termination” as used in the statute and in the contract.

However, the ultimate decision, affirming the trial court’s decision confirming the arbitration award, addressed the issue of arbitrability. In Connecticut, the superior court, not the arbitrator, has primary authority over the question of what is subject to arbitration under an arbitration agreement.

Where one party wants to challenge whether an issue is arbitrable, there are two potential procedures.

First, a party may refuse to submit to the arbitration and file an application in superior court seeking a judicial determination of what is arbitrable. The second approach,

which can be far riskier, is to object to the arbitrability of a dispute in the arbitration in an effort to preserve the objection for later judicial review, but proceed with the arbitration subject to the objection.

If the second approach is taken, the party seeking to preserve the objection for later judicial review must proceed with caution so as to not affirmatively, or even implicitly, waive judicial review by their acts or omissions.

In *Bacon*, the state chose the second option, and was primed to preserve the issue of arbitrability for subsequent judicial review by initially raising its sovereign immunity defense before the arbitrator. Had the state said nothing more, the issue would have been preserved for judicial review.

However, as the Connecticut Supreme Court noted, the state agreed that the arbitrator would be the final authority on that issue. Specifically, the state, in its arbitration answering statement, stated the issue of sovereign immunity “may be heard and fully

determined by this arbitration.” The state Supreme Court concluded that the unequivocal declaration by the state demonstrated it intended to be bound by the arbitrator’s decision and constituted a waiver of judicial review of the issue of arbitrability.

We believe this case adds clarity to two distinct issues.

First, with reference to public contracts with the state of Connecticut, absent a termination for convenience or default or the issuance of a certificate of acceptance, the three-year statute of limitations to commence arbitration (or file suit) against the state does not begin to run.

Second, with reference to the procedure for challenging arbitrability, while a party may attempt to preserve the issue of arbitrability for judicial review and still proceed with the arbitration, conduct that indicates empowerment of the arbitrator to decide the issue of arbitrability, whether express or implicit, can make the arbitrator’s ruling on the issue final and binding. ■