Time Bars: Contractual Time Limits for Commencing Arbitration

What are contractual time bars?
Contractual time limits or "time bars" for commencing arbitration are common in the natural resources and commodities industries. Such time bars often operate to dramatically shorten the statutory limitation period within which claims could otherwise be brought. This note looks at the important issues related to these contractual time bars under English law.

As an example, time bars for commencing quality and/or condition claims under the FOSFA Arbitration Rules can be as short as 14 days from the date of the analysis certificate. The Hague-Visby Rules set a 12 month time bar for cargo claims. By contrast the normal statutory period for commencing such claims under the English Limitations Act is 6 years from the date of the breach. A table setting out the time limits applicable under some important sets of arbitration rules is attached below. (Note: always check the relevant up to date contract/arbitration rules for the relevant time limits).

The consequences of failing to abide by contractual time limits are usually serious. A claimant that fails to commence arbitration in time risks losing the right to claim.

The case for contractual time bars
The rationale for contractual time bars is straightforward. Shorter time periods allow for greater commercial certainty allowing parties to continue to trade without the potential threat of unknown claims. In many claims, particularly those relating to the quality and condition of goods, short time bars are also considered necessary to ensure that the relevant evidence supporting the claim is not lost (for example as a result of destruction or degradation of samples).

Potential difficulties in practice
In most cases contractual time bars operate perfectly well. In some cases, however, they can create difficulties for parties who must submit claims early or risk losing the right to claim.

The recent spate of claims commenced following the widespread contamination of Ukrainian sunflower oil in 2007/8 show the difficulties that can arise. In 2008, a random analysis by a French company revealed that a batch of Ukrainian sunflower seed oil was contaminated with mineral (machine) oil. The contamination could not have been discovered using standard testing methods. Following notification by the EU rapid alert system it became clear that similar contamination was widespread.

Due to the nature of the contamination, in many cases it was only discovered after the contractual time bars had expired. Indeed in some cases the contaminated oil had entered the food chain and had to be withdrawn from supermarkets. Buyers have argued that the strict application of short time bars would be unfair in these circumstances.

Discretion to permit late claims
Any potential unfairness is often addressed by giving arbitrators the discretion to permit late
claims to proceed. For example, in an appeal arising from one of the Ukrainian sunflower oil cases, a FOSFA Board of Appeal considered that while short time limits for quality claims are sensible for claims in respect of the usual or customary contractual specifications they are not designed to cover cases where an entirely alien and potentially toxic substance, for which no testing could be reasonably foreseen, has been introduced into the oil. In such cases blind insistence on these limits could lead to a manifestly unjust result.

Arbitration Act 1996
The English Courts may also grant relief under Section 12 of the English Arbitration Act 1996. That section permits the English Courts to extend the time period for commencing arbitration if satisfied that the circumstances 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 where the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

Conclusion
Parties should be wary of the short time limits for the commencement of certain types of arbitration claims. Failing to commence arbitration within the agreed time limits could result in the loss of the right to claim.

Time bar clauses are contractual restrictions and can therefore be varied or even entirely excluded by if the parties agree to do so. Parties in a string of contracts should, however, always ensure that matching time bar obligations apply up and down the string of contracts.

Example of Time Limits in Some Standard Arbitration Rules

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