The Curious Status of Statute of Limitations Defenses in Arbitrations in New York

By Boaz S. Morag and Paul-Angelo dell'Isola

Statutes of limitations occupy an unusual status in arbitrations generally, and in particular, in arbitrations seated in New York. The first question is whether statutes of limitations apply at all to such arbitrations, and if so, which jurisdiction's limitation period governs.

Do Statutes of Limitations Apply?

Most jurisdictions outside the United States have confirmed the applicability of statutes of limitations to arbitral proceedings.[1] In the United States, the Federal Arbitration Act (FAA) is silent as to the timeliness of a claim. Several state courts hold (or enforced awards have concluded) that statutes of limitations do not apply in arbitration because an arbitration is not a "suit" or "action."[2] Other states make clear that statutes of limitations apply equally to arbitrations as to court proceedings.[3]

New York is a hybrid of sorts. On the one hand, CPLR 7502(b) and 7503(b) offer the respondent in a pending or threatened New York-seated arbitration recourse to a special proceeding before a New York court to decide whether the arbitration is or would be timely under the statute of limitations.[4] On the other hand, if application to the New York court is not timely pursued, CPLR 7502(b) directs that the statute of limitations defense may be raised before the arbitrators "who may, *in their sole discretion, apply or not apply* the bar."[5] Accordingly, statutes of limitations definitely apply to claims subject to arbitration seated in New York only insofar as a defending party is able to and asserts the time bar defense in court at the outset.[6] Otherwise, owing to the discretion conferred on arbitrators to "not apply the [statutory time] bar," the Appellate Division has observed that parties "may have resolved by arbitration what they could be time-barred from having adjudicated at law."[7]

A further complication is that this mechanism to obtain judicial intervention to consider limitations defenses of otherwise arbitrable claims does not apply to all New York-seated arbitrations. Rather, recourse to a New York court to decide the timeliness of an arbitrable claim depends on (a) whether CPLR 7502(b) applies, and (b) whether the judicial proceeding can be brought and pursued in New York state court.

Article 75 of the CPLR applies to a New York-seated arbitration in three circumstances: (1) where the arbitration does not implicate interstate commerce and the FAA and federal arbitration law are inapplicable;[8] (2) where the parties have expressly agreed that New York arbitration law will govern their arbitration;[9] and (3) where the parties have adopted New York arbitration law by implication.[10] In *In re Smith Barney, Harris Upham & Co., Inc. v. Luckie* ("*Luckie*"), the New York Court of Appeals ruled that parties choose New York arbitration law when they agree to arbitrate in New York and also agree in a choice-of-law clause that their agreement will not only be governed and interpreted under New York law, but also "enforced" under New York law.[11]

Access to federal versus state court impacts whether a judge will decide the limitations issue because the federal courts in New York reject *Luckie* and construe choice-of-law provisions (even using the word "enforced") as "addressing only substan-

tive rights and obligations, and not the state's allocation of power between alternative tribunals."[12] Under federal law, therefore, absent a clear and unmistakable intention to have a judge decide timeliness issues that a choice of New York law does not provide, it is for the arbitrators to decide the applicability of a statute of limitations.[13]

Consequently, in arbitrations subject to the FAA and where recourse to federal courts exists based on diversity of citizenship, for example, the federal courts in New York will not consider the limitations issue and refer that issue to the arbitrators. Conversely, if the parties have adopted New York arbitration law expressly or implicitly through their choice-of-law clause, and the special proceeding provided for under CPLR 7502(b) is not subject to removal to federal court, a state Supreme Court justice, rather than the arbitrators, will apply the statute of limitations and decide whether a claim is statutorily time-barred.

A recent empirical study by the International Commercial Disputes Committee of the New York City Bar Association (the "ICDC Report") shows that approximately 23% of New York-seated tribunals in the population of available awards declined to apply any statutory limitation period, consistent with the discretion afforded to arbitrators by CPLR 7502(b) or based on a determination that statutes of limitations simply do not apply in arbitrations.[14] Notably, this percentage is higher than in U.S. arbitrations seated outside New York. Abroad, the contrast is even more stark, as the ICDC Report does not identify in the awards surveyed even one rendered by a tribunal seated outside the United States that concluded that the limitations period does not apply in arbitration or that the tribunal should exercise discretion "not to apply" the time bar.[15]

Which Limitation Period Governs?

Even when New York arbitral tribunals apply statutes of limitations, the question arises: which jurisdiction's limitations period governs? The choice of applicable limitations period can be critical where the limitations period of more than one jurisdiction is potentially applicable and where a claim could be time-barred under the shorter period. Particularly in disputes over cross-border contracts, the applicable limitations period may be that of three different jurisdictions: (1) the arbitral seat, consistent with the prevailing U.S. and New York view that statutes of limitations are procedural and governed by the law of the forum where the litigation is pending;[16] (2) the jurisdiction whose law governs the merits of the claim, reflecting the approach of most non-U.S. jurisdictions that treat time-bar issues as substantive ones inseparable from the law giving rise to the claim;[17] and (3) where the claim accrued, triggered under CPLR 202 (the New York borrowing statute),

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when the claimant resides and the cause of action accrued outside New York,[18] a definite possibility given that parties with no connection to New York may choose New York law to govern their contracts, which may well provide for performance and thus the accrual of claims elsewhere.[19]

In determining which jurisdiction's limitations period governs, a question arises whether a choice-of-law clause in the contract includes the statute of limitations of the chosen jurisdiction. New York courts hold that choice-of-law clauses generally do not refer to the statute of limitations of the chosen jurisdiction because statutes of limitations "are considered procedural" and "pertain[] to the remedy rather than the right."[20] However, the New York Court of Appeals held in *2138747 Ontario, Inc. v. Samsung C & T Corp.* that a clause that provides that a contract shall be "enforced" in accordance with New York law "evinces the parties' intent to apply New York's procedural law," which not only includes the New York statute of limitations, but also its borrowing statute, CPLR 202.[21]

The ICDC Report found that where more than one jurisdiction's limitations period was potentially relevant, arbitral tribunals in New York applied the limitations period provided for under the law of the jurisdiction that governs the claim in 18% of the reported awards.[22] In these cases, tribunals effectively treated the limitation period as an element of the substantive law that gives rise to the claim, deviating from the rule in New York courts that limitations periods are "procedural" and separable from the law governing the claim.[23]

By contrast, in only 5% of the awards did the tribunal rule that the law of the arbitral seat determines the applicable limitations periods.[24] Adopting the law of the seat to govern limitations where a different law governs the substance of the claims thus remains the minority position in New York-seated arbitrations, despite being the prevailing rule in New York court litigation.

The ICDC Report also discusses awards where arbitrators engaged in more complex analyses incorporating choice-of-law principles to decide the applicable limitations period. A typical fact pattern involved starting with the chosen governing law, then applying that law's borrowing statute or conflicts rules, which pointed to a different jurisdiction's shorter limitation period. Roughly 9% of New York-seated tribunals adopted this approach.[25] This approach introduces even more complexity, with the ICDC Report documenting instances of tribunals disagreeing when to apply conflicts principle or borrowing statutes. For instance, one tribunal applied New York's borrowing statute to bar a claim under Brazil's shorter limitation period, despite a New York choice-of-law clause not providing for "enforcement" under New York law and excluding "choice-of-law or conflicts of law principles," after deciding that CPLR 202 is "a stable fixture of New York's procedural law" rather than a conflicts principle.[26] By contrast, another tribunal declined to apply the New York borrowing statute, finding that the New York choice-of-law clause "provid[ed] little insight into whether the parties intended to be bound by procedural limitations," and that "it is doubtful [CPLR 202] ... ha[d] any applicability to the adjudication of a dispute by a private arbitrator."[27]

Key Takeaways

Thus, the circumstance that more than one jurisdiction's limitations period is potentially applicable, and could result in a claim being deemed time-barred, creates in practice possibly divergent outcomes depending on whether (i) a New York court or arbitrators decide the issue, (ii) arbitrators choose to apply the statute of limitations, and (iii) which jurisdiction's limitations period is found to be applicable.

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Endnotes

1. Gary Born, International Commercial Arbitration § 19.11 (3d ed. 2021) ("The better view – which is mandated by the New York Convention, the FAA and the policies underlying statutes of limitations – is that limitations periods apply in arbitration.").
2. These states include Connecticut, Maine, Maryland, Massachusetts, Minnesota, North Carolina, and Vermont. *See* Statutes of Limitations in Arbitration in the United States at 6–7, N.Y.C. Bar (Sep. 29, 2025) ("ICDC Report"), https://www.nycbar.org/reports/report-on-the-statutes-of-limitations-in-arbitration-in-the-united-states/.
3. These states include Washington and Texas. *See* ICDC Report at 8.
4. CPLR 7502(b), 7503(b), 7503(c) (McKinney 2025).
5. CPLR 7502(b) (McKinney 2025).
6. At the post-award stage, courts may deem that a party's failure to seek a stay under CPLR 7503(b) waives judicial review of the arbitrators' decision concerning a time bar defense. *Cf. Fava v. Morgan Stanley Smith Barney, Inc.,* No. 651919/2020, 2020 WL 6047834, at *2 (N.Y. Sup. Ct. Oct. 9, 2020) (rejecting vacatur of award where respondent had "the option under CPLR § 7503 to 'apply to stay arbitration on the ground that a valid agreement was not made, but [] chose not to pursue that option.'").
7. *Steiner v. Wenning*, 386 N.Y.S.2d 429, 434 (App. Div. 1976).
8. *See, e.g., Crespo v. Kreisel Co., Inc.*, 657 N.Y.S.2d 321, 323 (Sup. Ct. 1997) (dispute between superintendent and real estate management company not subject to the FAA); *Laszlo N. Tauber & Assocs. I, LLC v. Am. Mgmt. Assoc.*, 757 N.Y.S.2d 553, 554 (App. Div. 2003) (dispute between landlord and tenant for lease of commercial building in Manhattan not subject to the FAA).
9. *See, e.g., In re Rom Reinsurance Mgmt. Co., Inc. v. Cont'l Ins. Co., Inc.*, 982 N.Y.S.2d 73, 74 (App. Div. 2014) (agreement that "'the arbitration laws of New York State' shall govern the parties' arbitration" constituted a clear intention to have the arbitration laws of New York, including Article 75, govern exclusively); *Cnty. of Nassau v. Chase*, 402 F. App'x 540, 541–42 (2d Cir. 2010) (confirming award pursuant to Article 75, not the FAA, where contract specifies that any appeal from an arbitration award is to be governed exclusively by New York State law).
10. *See* Boaz S. Morag & Katie Gonzalez, *CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters*, 52 Int'l L. 265, 284–85 (2019).
11. *In re Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193, 198, 202–04 (1995), *cert. denied*, 516 U.S. 811 (1995).
12. *Bechtel do Brasil ConstruçõesLtda. v. UEG Araucária Ltda.*, 638 F.3d 150, 157–58 (2d Cir. 2011).
13. Courts have held that the potential for different outcomes in federal vs. state court based on whether CPLR 7502(b) applies does not violate the *Erie* doctrine, which requires the application of state substantive law and federal procedural law in federal diversity cases. *See HD Brous & Co. v. Mrzyglocki*, No. 03 CIV.8385(CSH), 2004 WL 376555, at *11–13 (S.D.N.Y. Feb. 26, 2004) (declining to apply CPLR 7502(b) based on federal arbitrability rules; noting in dictum that CPLR 7502(b) is not outcome determinative for Erie purposes because it "only empowers New York courts to consider petitions asserting that arbitration claims are time barred" and "the outcome should not be different if a court considers the defense as opposed to an arbitrator").
14. *See* Annex II of ICDC Report.
15. ICDC Report at 11-12. The sample reviewed in the ICDC Report is not necessarily representative of all arbitral practice as the Jus Mundi database is largely derived from awards that have been made public through court filings.
16. The traditional approach has undergone substantial change in many U.S. states in recent decades. *See* ICDC Report at 3-5.
17. George A. Bermann, Chapter 3: *Matching Twilight Issues with National Law*, in Twilight Issues in International Arbitration: Latent Choice Of Law Challenges 33, 49 (2023).
18. CPLR 202 (McKinney 2025) (requiring claims to be timely under both New York law and the law where the cause of action accrued if it accrued in favor of a non-New York resident).
19. N.Y. G.O.L. 5-1401(1).
20. *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416-17 (2010).
21. *2138747 Ontario, Inc. v. Samsung C & T Corp.*, 31 N.Y.3d 372, 378 (2018).
22. *See* Annex II of ICDC Report.
23. The New York view that statutes of limitations issue are "procedural" and governed by the law of the forum is mitigated by New York's borrowing statute, CPLR 202, under which a claim must be timely under both New York law and the law where the cause of action accrued if it accrued in favor of a non-New York resident. *See supra* note 18.
24. *See* Annex II of ICDC Report.
25. *See id.*
26. S*ee Perlatop, S.A. v. HRC Fortaleza Entretenimentos Ltda.*, ICDR Case No. 01-20-0005-4253, Final Award, ¶¶ 1-4, 32-69, 139-43 (Dec. 29, 2021) (*citing 2138747 Ontario, Inc. v. Samsung C & T Corp.*, 31 N.Y.3d 372, 378).
27. *Pac. Pacific Grp. Int'l, Inc. v. NGC Network Asia LLC*, ICDR Case No. 50-181-T-00079-07, Partial Award of Arbitrator, ¶¶ 33, 37, 40 (June 11, 2009).