Standard New York Choice of Law Provisions May Apply Foreign Laws to Bar Claims

By William J. Hine and Sevan Ogulluk

Parties in countless commercial transactions include provisions calling for their agreements to be "governed by, construed and enforced in accordance with laws of the State of New York."[1] But recent decisions by New York's courts illustrate how such standard provisions often pose as traps for the unwary, and could actually lead to the unintended and counterintuitive application of foreign laws to a resulting dispute and extinguish claims as untimely.

Specifically, although parties may agree to a broadly drawn choice of law clause applying New York's substantive and procedural laws, a claim filed by a party that is squarely within New York's statute of limitations period may nonetheless be time-barred. The "procedural" limitations period of a sister state or a foreign country may apply while, at the same time, New York's "substantive" law applies to the same dispute (per agreement). This is the case even where the parties are contractually bound to litigate in New York courts. And, as if that weren't confusing enough, drastically different limitations periods may apply depending on the nature of the claim, which of the contracting parties is suing, and where they are located.

Moreover, clever parties wishing to prospectively contract their way around these results may be unable to do so. So much for predictability, upholding the parties' intent and encouraging them to use New York courts as their forum for dispute resolution. All thanks to the interplay of New York's "borrowing statute" and confusing jurisprudence about choice-of-law provisions.

The "Borrowing" Statute

Figuring out the statute of limitations periods applicable to potential disputes is not as straightforward as it appears. Practitioners often assume that courts will apply the limitations periods of the jurisdictions in which they sit. But pursuant to so-called "borrowing statutes" of New York and other states, courts often apply limitations periods that are drastically different (and usually far shorter) than the periods in their home states (and in cases involving choice of law clauses in agreements, what the contracting parties intended).

Borrowing statutes, like New York's, require a court to "borrow" or apply, under certain circumstances, the statute of limitations of another jurisdiction. These borrowing statutes have generally been enacted to prevent forum shopping by non-resident plaintiffs who come to (in this case) New York to take advantage of more favorable limitations periods than available to them elsewhere.[2] Under these circumstances, courts will generally evaluate a plaintiff's claims under the statute of limitations of the plaintiff's home jurisdiction, and apply the shorter period pursuant to New York's borrowing statute, Civil Practice Law and Rules § 202, to bar claims. That statute—which has remained substantially unchanged for well over a century—provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.[3]

In sum, New York's borrowing statute gives preferential treatment to residents, while requiring that a claim brought by a non-resident on a cause of action accruing outside of the state be timely under the law of both New York and the jurisdiction where the cause of action accrued. Thus, if the plaintiff is a New York resident, New York's own statute of limitations generally applies.[4] Disputes that involve foreign (i.e., non-New York) parties, however, may trigger New York's "borrowing" statute which, in turn, may determine the applicable statute of limitations.

Broad Choice-of-Law Provisions May Not Preclude "Borrowing"

The borrowing statute analysis is complicated with the interplay of contractual choice-of-law and forum selection clauses, leading to anomalous results and warranting particular attention. Recent decisions emphasize that even where contracting parties agree to apply New York law to their dispute and agree to a forum selection clause requiring them to litigate in New York, they may still find themselves locked into the borrowing statute and therefore subject to an entirely different limitations period which may unexpectedly bar their claims. The analysis turns largely on the citizenship of the litigants and the location where the claim accrued.

New York's intermediate appellate court recently addressed these points in *2138747 Ontario, Inc. v. Samsung C & T Corp.*[5] That case involved a non-disclosure agreement (NDA) signed by five companies based in multiple jurisdictions, which included a familiar choice-of-law clause requiring it to be "governed by, construed and enforced in accordance with the laws of the State of New York."[6] The Ontario-based plaintiff sued, in New York, defendants

based in New Jersey and Korea for breach of the NDA. The alleged breach occurred in 2009, but the action was filed in 2014. Although the claim would have been timely under New York's six-year limitations period, New York's borrowing statute applied Ontario's two-year limitations period instead, rendering plaintiff's claims time-barred. In a unanimous decision, the *Ontario* appellate court held that "a broadly drawn contractual choice-of-law provision" providing "for the agreement to be 'governed by, construed and enforced' in accordance with New York law," does not "preclude the application of New York's borrowing statute . . . ."[7] It explained that "[t]he borrowing statute is considered a [procedural] statute of limitations provision and not a [substantive] choice-of-law provision."[8] It emphasized that although choice-of-law provisions generally do not encompass procedural issues, use of the word "enforced" in the provision of the NDA required application of New York procedural law, of which "the borrowing statute is itself a part . . . ."[9]

mer is a statute of limitations. This distinction reflects the competing public policy concerns of preventing forum shopping, while also providing certainty and encouraging commercial parties to choose New York law.

Contracting Around Borrowing Statutes May Prove Difficult

Notably, applying the borrowing statute to the facts of *Ontario* results in the application of four different statutes of limitation to claims brought by parties to the NDA, who were based in Korea, New Jersey, New York, and Ontario. This is clearly not the result envisioned by these contracting parties, who no doubt strived for uniformity and predictability.

Contracting parties wishing to sidestep borrowing statutes and avoid these headaches may find it difficult to do so. Indeed, the appellate court in *Ontario* suggested that parties may not be able to lawfully contract around

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This treatment of the borrowing statute is to be distinguished from other recent decisions implicating the state's "substantive" statutory choice of law rules. In this latter context, the New York Court of Appeals has reiterated that when parties contract for a particular substantive law to apply, courts need not follow the state's statutory choice-of-law directive and may simply apply the parties' selected substantive law. In *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*[10] the "Court held that, where parties include a New York choice-of-law clause in a contract, such a provision demonstrates the parties' intent that courts not conduct a conflict-of-laws analysis."[11] The Court therefore did not engage in such analysis since "to find. . .that courts must engage in a conflict-of-laws analysis despite the parties' plainly expressed desire to apply New York law would frustrate the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law."[12] Taking this logic a step further in *Ministers & Missionaries Ben. Bd. v. Snow*[13] the Court of Appeals held that a New York choice of law clause "obviates the application of both common-law conflict-of-laws principles and statutory choice-of-law directives, unless the parties expressly indicate otherwise."[14] The Court of Appeals' rationale for applying a borrowing statute differently from a substantive choice-of-law statute is that while the latter is simply a codification of New York common law principles on conflict of laws, the former is a statute of limitations. This distinction reflects the competing public policy concerns of preventing forum shopping, while also providing certainty and encouraging commercial parties to choose New York law.

New York's borrowing statute, but left that question open. In the wake of the uncertainty that is now occasioned by use of choice-of-law provisions, parties should consider some practical issues while negotiating their agreements, especially in complex transactions where parties are based and claims may accrue in multiple jurisdictions.

First, although the court's decision in *Ontario* stressed that use of the word "enforced" in the NDA's choice-of-law clause signaled the parties' intention to apply New York's procedural law (and therefore the borrowing statute), the omission of that word would not necessarily have rendered a different result. The court could have applied New York's borrowing statute (and Ontario's limitations period) even in the absence of the agreement since "the plaintiff is a nonresident alleging an economic claim that took place outside of New York, the time limitations provisions in the borrowing statute apply, *regardless of* whether the parties' contractual choice-of-law agreement can be broadly construed to include the application of New York's procedural, as well as substantive law."[15] Thus, stripping words like "enforced" or "procedural" from standard provisions such as the one used in the *Ontario* NDA will not avoid New York's borrowing statute, which applies even in absence of agreement. Indeed, the whole point of the statute is to keep at bay a forum-shopping plaintiff not bound by any agreement (a policy goal which is now arguably turned on its

head with its application to contracting parties such as those in *Ontario*).

Drafters seeking predictability and uniformity may also wish to specify or modify limitations periods in their contract. But such efforts may also prove difficult, as New York courts have long recognized that "[b]ecause of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense."[16] For example, parties may wish to tailor choice-of-law provisions to expressly provide that the parties agree to apply New York's six-year statute of limitations to their contract-based disputes. But the court in *Ontario* raised the specter that such provisions could be considered "an unenforceable extension of the otherwise applicable statute of limitations."[17] That is because, under New York law, an agreement to waive or extend the statute of limitations for contract claims made in advance and before a claim has accrued is generally unenforceable pursuant to section 17-103[1] of the General Obligations Law, which requires such agreements to be adopted after the cause of action has accrued.[18] Thus, using the facts in the *Ontario* case to illustrate the point, such a provision applying New York's six-year period may be held unenforceable since it could be viewed as impermissibly "extending" Ontario's two year limitations period, made applicable by the borrowing statute.

By contrast, New York does allow for parties to agree to shorten limitations periods.[19] And where the limitations period is reduced, New York courts will enforce it, as long as the shortened time period is reasonable.[20] This standard is context-dependent but is generally met when "the plaintiff had a reasonable opportunity to commence its action within the period of limitation."[21] In the context of commercial contracts a shorter limitations period that nevertheless gives each party the reasonable opportunity to bring suit is more likely to be enforceable (at least under New York law). Although courts may, on occasion, be reluctant to enforce provisions shortening the time to sue, contracts routinely include provisions shortening the time within which a party may file a lawsuit.

Another possible alternative would be to specify application of the limitations period of a jurisdiction other than New York. Thus, parties could choose New York substantive law, and then add another provision specifying that the law of some other state would determine the applicable limitations period. For good measure, they may even specify that "none of the provisions of Article 2 of New York's Civil Practice Laws and Rules shall apply to any action arising out of this agreement." Given New York's policy favoring enforcement of the parties' choice of law, it is likely that such a provision would be enforced, so long as it was not deemed counter to New York public policy.[22]

But parties wishing to embrace the laws of other jurisdictions to escape the labyrinth of New York's rules on limitations periods may find themselves in similar positions. First, many states have borrowing statutes similar to New York's. For example, the borrowing statute in Delaware—a common corporate domicile and favored forum for commercial litigation—directs its courts to compare the relevant limitations periods in Delaware with the limitations period in the state in which the cause of action arose, and then apply the shorter period.[23] Indeed, the court in *Ontario* noted that even foreign jurisdictions (including Ontario) may have similar statutes.[24] Yet, other jurisdictions may have unique borrowing statutes that may lead to opposite and even more unconventional results. Oklahoma's borrowing statute, for example, requires courts in that state to compare the relevant statute of limitations in Oklahoma with those in the jurisdiction in which the claim accrued and apply the *longer* period, an approach that runs counter to traditional borrowing statutes like those found in Delaware and New York. [25] And Virginia's borrowing statute applies only to breach of contract actions, which can result in cases where a non-contract claim is governed by Virginia's limitations period, while a contract-based claim is governed by another state's shorter limitations period.[26]

Second, many other states also have statutes limiting parties' freedom to modify limitations periods. For example, Arizona, Texas, Washington, Vermont and other states have statutes that set minimum time periods applicable to efforts by contracting parties to shorten the time to sue.[27] And some other states refuse to enforce any agreements shortening applicable limitations periods.[28] Clearly, then, parties cannot avoid these issues altogether by simply circumventing New York law.

Conclusion and Practical Considerations

How and to what extent choice of law provisions are given effect across various jurisdictions is a critical consideration during contract negotiations, especially for transactions involving multi-jurisdictional parties and the prospect of litigation. Given that the application of a borrowing statute may result in the unexpected outright dismissal of a case, it is important for parties to understand the implications choice-of-law and forum selection clauses may have in the context of their specific transaction, should litigation arise. Efforts to contract around borrowing statutes such as New York's may not be successful (and may even run afoul of other statutes). Moreover, not all states have borrowing statutes, and not all are uniform. Evaluating litigation options prospectively will require detailed analysis of issues such as the claims involved, the applicable limitations periods in all relevant jurisdictions, where claims will be deemed to have accrued, and the citizenship of parties. And when the likelihood of litigation does arise, parties need to be vigilant in analyzing the limitations periods of the jurisdictions implicated, considering the possibility that they may be required to bring claims earlier than they might otherwise have expected.

Endnotes

1. *2138747 Ontario, Inc. v. Samsung C & T Corp.*, 39 N.Y.S.3d 10, 12 (N.Y. App. Div. 2016).
2. *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999).
3. CPLR 202 (McKinney).
4. If a New York plaintiff has secured its claim through an assignment from a foreign party, however, a court may apply the borrowing statute and cause the assignee's claims to be governed by the limitations period in the assignor's home state. *Portfolio Recovery Assocs. v. King*, 14 N.Y.3d 410, 416-18 (2010).
5. 39 N.Y.S.3d 10 (N.Y. App. Div. 2016).
6. *Id.* at 11.
7. *Id.*
8. *Id.* at 13.
9. *Id.* at 14.
10. 20 N.Y.3d 310 (2012).
11. *Ministers & Missionaries Ben. Bd. v. Snow*, 26 N.Y.3d 466, 468 (2015), *reargument denied*, 26 N.Y.3d 1136 (2016).
12. 20 N.Y.3d at 316.
13. 26 N.Y.3d 466 (2015).
14. *Id.* at 468.
15. 39 N.Y.S.3d at 11.
16. *John J. Kassner & Co., Inc. v. City of New York*, 46 N.Y.2d 544, 550 (1979).
17. 39 N.Y.S.3d at 13.
18. Section 17-103[1], which prescribes the exclusive method of extending or waiving the statute of limitations, provides in pertinent part: "A promise to waive, to extend, or not to plead the statute of limitations applicable to an action arising out of a contract . . ., if made after the accrual of the cause of action and made . . . in a writing signed by the promisor . . . is effective . . . in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise." *See Kassner*, 46 N.Y.2d at 552 (contractual clause could not extend statute of limitations because it was adopted before the cause of action on the contract had accrued).
19. CPLR 201: "An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action."
20. *See Kassner*, 46 N.Y.2d at 550-51 ("The parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. . . . Thus, an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable . . . provided it is in writing (CPLR 201)") (internal citations omitted).
21. *Exec. Plaza, LLC v. Peerless Ins. Co.*, 22 N.Y.3d 511, 519 (2014).
22. *See, e.g., Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (2010) for the proposition that a choice of law provision can encompass the limitations period if there is express intention to do so in the parties' agreement.
23. *See* 10 Del Ch. 8121: "Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose . . . . Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."
24. 39 N.Y.S.3d at 15.
25. *See Consolidated Grain & Barge v. Structural Sys.*, 212 P.3d 1168, 1174 (Okla. 2009) (recognizing Oklahoma as having "a borrowing statute with the opposite effect of most borrowing statutes that select the earliest time bar").
26. *See Hansen v. Stanly Martin Cos.*, 266 Va. 345, 352 (Va. 2003) (Virginia borrowing statute, Va. Code Ann. § 8.01-247 (West), resulted in application of Maryland limitations period to breach of contract claims brought in Virginia based on a contract that applied Maryland substantive law. However Virginia limitations period applied to tort claims arising out of the same operative facts).
27. *See, e.g., W.J. Kroeger Co. v Travelers Indem. Co.*, 541 P.2d 385, 387 (Ariz. 1975) ("A.R.S. s 20-1115 provides that no insurance policy operative in this state shall contain a condition limiting the time within which an action may be brought to a period of less than two years for this type of policy"); Tex. Civ. Prac. & Rem. Code Ann. §16.070(a) ("a person may not enter a stipulation, contract or agreement that purports to limit the time in which to bring suit. . .to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state."); *Stellar J. Corp. v. Argonaut Ins. Co.*, No. 3:12-CV-05982 RBL, 2014 WL 1513292, at *2 ("Under Washington law, a limitation period cannot be less than one year from the date the cause of action accrued") (citing R.C.W. 48.18.200 which governs insurance contracts); *Gilman v. Maine Mutual Fire Ins. Co.*, 830 A.2d 71, 75 (Vt. 2003) ("Policy provisions establishing limitation periods by contract are valid and enforceable against an insured if the limitation period is not less than 'twelve months from the occurrence of the loss, death, accident or default.'") (citing 8 V.S.A. § 3663).
28. *See, e.g.*, Fla. Stat. Ann. § 95.03 ("Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void."); Ala. Code § 6-2-15 ("Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void."); Idaho Code Ann. § 29-110(1) ("Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho."); Miss. Code. Ann. § 15-1-5 ("The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract."); *Lillibridge v. Nautilus Ins. Co.*, No. CIV. 10-4105-KES, 2013 WL 870439, at *5 (D.S.D. Mar. 7, 2013) ("The South Dakota legislature has stated that the parties may not shorten the length of time a party has to bring a cause of action by contractual agreement and any provision in a contract that does so is void.").

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