# The Arbitrability Of Statutes Of Limitations In Reinsurance Disputes

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Whether a particular jurisdiction's statute of limitations provides a reinsurer with a valid basis to deny payment of a cedent's claim is sometimes a hotly-contested issue. Where a dispute is litigated in state or federal court, a reinsurer may argue that the relevant limitations period of that jurisdiction relieves the reinsurer of its indemnity obligations for a claim. By contrast, where a reinsurance agreement mandates that the parties resolve their claim-related disputes in arbitration, a cedent may assert that the panel is not bound to apply the statute of limitations law of any particular state, particularly where the agreement contains an "honorable engagement" clause or similar language. Other provisions, such as "governing law" or "choice of law" clauses, may also factor into the applicability of a time-bar defense in arbitration.

But even aside from the merits of a defense founded upon statute of limitations, a threshold question remains: is this an issue left for arbitrators to address, or one that must be decided by a court of competent jurisdiction? A relatively recent New York state court decision – *Matter of Rom Reinsurance Mgt. Co., Inc., et al. v. Continental Ins. Co.*, 115 A.D.3d 480 (1st Dep't 2014) ("*Matter of Rom*") – is instructive in this regard.[1] Indeed, despite the fact that the reinsurance agreements involved in that case required the parties to arbitrate claim-related disputes, a New York appellate court construed the operative contract wording as mandating that the reinsurers' statute of limitations defense be resolved in court, and not before the panel.[2] Although, for the reasons discussed below, the issue was ultimately left for arbitration, the analysis that underlies the *Matter of Rom* decision is relevant for all reinsurance professionals, whether involved in dispute resolution, claims handling, or underwriting.

## I. <u>Who Decides Statute of Limitations or Timeliness Issues</u>

Certain states have enacted laws that bar a claim from being brought in arbitration if that claim would be time-barred under the operative jurisdiction's statute of limitations.[3] For example, Section 7502(b) of the New York Civil Practice Law and Rules ("CPLR") 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 on an application to the court…[4]

CPLR 7503 further states:

> Where there is no substantial question whether a valid agreement [to arbitrate] was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court…
>
> [a] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.[5]

*See also* GA Code Ann. § 9-9-5 (providing that a party may seek to stay arbitration of a particular claim where that claim would be barred by the applicable limitations period had it been asserted in court).[6] In arbitrations governed by laws of this kind, and depending on the particular contract wording involved, a party may contend that the applicability of a statute of limitations or timeliness defense be determined by a court of appropriate jurisdiction, and seek to stay the arbitration proceeding on this basis.

State law that treats statute of limitations in this fashion differs from the general view that timeliness issues are to be resolved in arbitration, assuming of course that the relevant contract contains a binding arbitration agreement.[7] As noted by the United State Supreme Court, "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are [generally] for the arbitrators to decide."[8] Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), which applies to many reinsurance disputes, statute of limitations is presumptively reserved for arbitrators.[9] This is consistent with the liberal policy favoring the enforcement of arbitration agreements, as well as the FAA's stated purpose of moving parties "out of court and into arbitration as quickly and easily as possible."[10]

However, contracting parties, in the reinsurance context or otherwise, are typically free to include provisions which mandate that the law of a particular jurisdiction governs or applies to their agreement (or portions thereof), including the agreement to arbitrate. Where the arbitration clause is broadly worded with respect to the issues to be arbitrated, disagreements may arise as to whether the proper forum for addressing a statute of limitations or time-bar defense is in arbitration or court.[11]

## II. The Importance of Contract Wording to the Arbitrability Question

Case law interpreting the arbitrability of a statute of limitations or time-bar defense reflects the significance of contract wording on the determination of this issue.

Approximately 9 years before the decision in *Matter of Rom*, New York's highest court, the Court of Appeals, addressed whether a court or arbitrator should resolve a statute of limitations defense asserted in a commercial dispute between a cooperative and contractor emanating from the September 11, 2001 terrorist attacks.[12] In that case – *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247 (2005) – the subject agreement provided that "[a]ny controversy or Claim arising out of or related to the Contract" would be submitted to arbitration, and further stated that the agreement "shall be governed by the law of the place where the Project is located", which was New York.[13] After the cooperative demanded arbitration, asserting claims of breach of contract and negligence, the contractor filed a petition in court to stay the arbitration on the grounds that the claims were time-barred under the applicable New York limitations period.[14] The cooperative cross-moved to dismiss the petition, arguing that, under the FAA (which governed the dispute), the timeliness issue was reserved for the arbitrator to determine.[15]

The Court of Appeals began its analysis by noting the general view that statute of limitations is presumptively an issue to be decided by arbitrators under the FAA, absent explicit language to the contrary.[16] Focusing on the operative wording in the contract at issue – the arbitration and choice of law provisions – the court held that the latter failed to expressly adopt New York's rule that timeliness questions be determined outside of arbitration, given the absence of clear language indicating that the subject agreement would be *enforced* pursuant to New York law.[17] Without such language, the court found that the applicability of the statute of limitations defense was to be decided by the arbitrators, consistent with the parties agreement that "any controversy" between them "arising out of or related to" the operative contract be resolved in that forum.[18] The fact that the choice of law provision stated that the agreement "shall be governed" by New York law was insufficient, in the Court of Appeals' view, to rebut the presumption of arbitrability afforded to timeliness issues under the FAA.[19]

Other state and federal courts have addressed the interplay between choice of law provisions and arbitration clauses with different wording, yet reached the same result as the court in *Matter of Diamond Waterproofing*.[20] For example, in *N.J.R. Associates*, a dispute arising under a partnership agreement, the court held that the following provision was insufficient to remove statute of limitations from the arbitration proceeding: "This Agreement shall be governed by, and construed in accordance with, the laws and decisions of the State of New York."[21] The court found that this specific language lacked the critical "enforcement" element necessary to manifest a clear intent by the parties to decide timeliness issues in court, as opposed to the arbitral forum.

Moreover, even where an agreement is ambiguous on the arbitrability of statute of limitations or time-bar issues, courts have shown a willingness to resolve any such ambiguities in favor of arbitration. In one federal court case, for instance, the relevant arbitration clause provided that "[a]ny dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof … shall be finally settled by arbitration" and further stated that "[a]ny arbitration proceeding or award rendered hereunder and the validity, effect and interpretation of this agreement to

arbitrate shall be governed by the laws of the state of New York."[22] The subject agreements also contained governing and procedural law provisions which stated:

> The law which is to apply to the Contract and under which the Contract is to be construed is the law of the state of New York without regard to the jurisdiction's conflicts of law rules…
>
> The law governing the procedure and administration of any arbitration…is the law of the State of New York.[23]

Reading these provisions together, the court found that the subject contracts were ambiguous as to the proper forum in which to resolve timeliness issues related to disputes and claims arising under the contracts.[24] In light of that ambiguity, and relying on Supreme Court precedent, the court held that the statute of limitations defense must be resolved by the arbitrators.[25]

## III. The Matter of Rom Decision and its Significance

In *Matter of Rom*, the cedent commenced arbitration proceedings to recover unpaid balances purportedly due under various reinsurance agreements.[26] In addition to addressing panel selection, the arbitration clauses in the agreements expressly stated that the arbitration was governed by the laws of New York state.[27]

The reinsurers moved to stay the arbitration on the grounds that New York's six-year statute of limitations operated to bar the cedent's breach of contract claims. The cedent opposed the stay application and cross-moved to dismiss the petition and compel arbitration under the FAA, which indisputably governed the dispute. The cedent further argued that, under the FAA, the statute of limitations defense must be determined by the panel.[28] The trial court ruled in the cedent's favor, finding that the arbitration clauses did not express an intent to have New York law – and specifically sections 7502(b) and 7503 of the CPLR – govern the enforcement of timeliness issues.[29] Accordingly, the court held that "all issues regarding the application of the statute of limitations shall be determined by the arbitrators."[30]

On appeal, the New York Appellate Division, First Department, reversed the trial court's decision in full.[31] Significantly, the court interpreted the subject arbitration clauses as providing that "the arbitration laws of New York State shall govern the parties arbitration", which it found constituted "critical language" concerning the enforcement and application of New York law on the arbitrability of the statute of limitations issue.[32] Therefore, the court held that the reinsurer's time-bar defense was properly before the court.[33] The cedent's motion for re-argument of the issue was denied without further explanation.

The *Matter of Rom* case was then remanded to the trial court, which ultimately denied the reinsurers' petition to stay the arbitration, finding that their participation in the arbitrator selection process precluded them from seeking a stay on statute of limitations grounds, pursuant to CPLR 7503(b), or from having that issue resolved outside of

arbitration.[34] On appeal, the New York Appellate Division, First Department, affirmed the trial court's decision, but noted that although the reinsurers waived their right to have the court decide the statute of limitations defense, the issue was open for determination by the arbitration panel.[35]

The *Matter of Rom* case involved a scenario that arises from time to time in reinsurance and other business disputes. It is not uncommon for reinsurance and other commercial agreements to contain, on the one hand, broadly worded clauses addressing the matters to be arbitrated between the parties and, on the other, various provisions that provide that the operative agreement and/or the arbitration is to be governed by the law of particular jurisdiction (in many cases, New York). As those in the reinsurance community well know, the precise wording used in a reinsurance contract may vary. Thus, in these situations, it is crucial for the reinsurance professionals involved to understand the impact of the specific contract wording on the arbitrability of an issue like statute of limitations or time-bar.

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[1] *Matter of Rom Reinsurance Mgt. Co., Inc., et al. v. Continental Ins. Co.*, 115 A.D.3d 480 (1st Dep't 2014) ("*Matter of Rom*").
[2] *Id.* at 481-82.
[3] N.Y. C.P.L.R. §§ 7502(b), 7503(a)-(b); GA CODE ANN. § 9-9-5. *See also* Lara K. Richards & Jason W. Burge, *Analyzing the Applicability of Statutes of Limitations in Arbitration*, 49 Gonz. L. Rev. 214, 225-27 (2014); Craig P. Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 Franchise L.J. 26, 27-28 (Summer 2012).
[4] § 7502(b).
[5] § 7503(a)-(b).
[6] GA Code Ann. § 9-9-5.
[7] *See, e.g.*, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002); *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005).
[8] *Howsam*, 537 U.S. at 85 (citation omitted).
[9] *N.J.R. Assoc. v. Tausend*, 19 N.Y.3d 597, 601-02 (2012); *Matter of Rom*, 115 A.D.3d at 481.
[10] *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24. *See also* Miller & Danysh, 32 Franchise L.J. at 26-27.
[11] *Howsam*, 537 U.S. at 83.
[12] *Matter of Diamond Waterproofing Sys., Inc.*, 4 N.Y.3d at 252-53.
[13] *Id.* at 250.

[14] *Id.* at 250-51.
[15] *Id.* at 251.
[16] *Id.* at 252.
[17] *Id.* at 253.
[18] *Id.*
[19] *Id.*
[20] *N.J.R. Assoc.*, 19 N.Y.3d at 601-02 (collecting cases); *Bechtel Do Brasil Construcoes Ltda, et al .v. UEG Araucaria Ltda*, 638 F.3d 150, 156-58 (2d Cir. 2011).
[21] *N.J.R. Assoc.*, 19 N.Y.3d at 602.
[22] *Bechtel*, 638 F.3d at 152.
[23] *Id.*
[24] *Id.* at 156-58
[25] *Id.* at 158.
[26] *In the Matter of ROM Reins. Mgt. Co., et al. v. Continental Ins. Co.*, No. 654480/12, at **1-2 (Sup. Ct., N.Y. Cty, Apr. 22, 2013).
[27] *Id.* at *2.
[28] *Id.*
[29] *Id.* at **2-3.
[30] *Id.* at *3.
[31] *Matter of Rom*, 115 A.D.3d at 481-82.
[32] *Id.*
[33] *Id.* at 482.
[34] 128 A.D.3d 570, (1st Dep't 2015).
[35] *Id.*