NOTE

CONTRACTING AROUND CPLR 202: "ACCRUAL" BORROWING STATUTE IN NEW YORK PRACTICE AND WHY ITS CURRENT APPLICATION IS UNWORKABLE

Benjamin J. Wisher[*]

Amongst New York's legal practitioners, it is common knowledge that a claim for relief arising under the breach of a contract must be interposed within six years.[1] However, many of these same practitioners are ignorant of New York's borrowing statute, which may change the applicable statute of limitations and have disastrous consequences for any unknowing attorney.[2] New York's borrowing statute states,

> 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 other words, "When a cause of action accrues outside New York and the plaintiff is a nonresident, section 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness."[4]

[*] Albany Law School Class of 2020, J.D. Candidate. The author can be contacted at bwisher@albanylaw.edu or (845)417-5684. A special thanks is given to Lianne Pinchuk, Visiting Assistant Professor of Law at Albany Law School, for her time as the adviser on this project. Thanks is also duly given to Patricia Reyhan, Distinguished Professor of Law Emerita at Albany Law School, and Patrick M. Connors, Albert and Angela Farone Distinguished Professor of Law, for creating and fueling my interest in this topic.

[1] *See* N.Y. C.P.L.R. 213 (McKinney 2019).

[2] *See* C.P.L.R. 202.

[3] *Id.*

[4] Norex Petrol. Ltd. v. Blavatnik, 16 N.E.3d 561, 563 (N.Y. 2014).

Recently, the disastrous consequences of CPLR 202's applicability were highlighted by the New York Court of Appeals in its examination of a breach of contract claim arising out of Ontario, Canada.[5] In *Ontario*, "SkyPower Corp., an Ontario renewable energy developer, entered into a nondisclosure agreement (NDA) with [D]efendants."[6] The NDA mandated that Defendants be allowed to review SkyPower's confidential information to evaluate a potential transaction with SkyPower and its majority shareholder.[7] If the transaction was to never come to fruition, the NDA also called for a method of destroying the confidential information conveyed to Defendants.[8] Defendants decided to forego the transaction with SkyPower and subsequently entered into an agreement with the Ontario government to develop a renewable energy project.[9] SkyPower alleged Defendants improperly utilized SkyPower's confidential and proprietary information in the energy project with the Ontario government in violation of the NDA.[10] Shortly after, "SkyPower filed for bankruptcy . . . and SkyPower's claims were assigned to [P]laintiff, the creditor of . . . an Ontario corporation" that took over SkyPower.[11] Plaintiff then commenced an action against Defendants in New York Supreme Court "for breach of contract and unjust enrichment."[12] "Defendants moved to dismiss the complaint," arguing that both causes of action were untimely in violation of the Ontario Limitations Act.[13]

The issue on appeal was whether the applicable statute of limitations was Ontario's two-year statute, in accordance with CPLR 202, or New York's six-year statute.[14] The New York Supreme Court and the appellate division held that Plaintiff's claims were time barred because CPLR 202 applied to the NDA and Plaintiff failed to timely commence its action in accordance with Ontario's statute of limitations.[15] On appeal to New York's highest court, the Court of

[5] *See* 2138747 Ont., Inc. v. Samsung C&T Corp., 103 N.E.3d 774, 775–76 (N.Y. 2018).

[6] *Id.* at 775.

[7] *Id.*

[8] *See id.*

[9] *Id.* at 775–76.

[10] *Id.*

[11] *Id.* at 776.

[12] *Id.*

[13] *Id.*; *see also* Limitations Act, S.O. 2002, c 24, sched. B, § 4 (Can.) ("[A] proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.").

[14] *2138747 Ont., Inc.*, 103 N.E.3d at 775–76; *see* Limitations Act § 4; C.P.L.R. 202; C.P.L.R. 213 (stating that a contract action in New York "must be commenced within six years" from the claim's accrual).

[15] *See 2138747 Ont., Inc.*, 103 N.E.3d at 776.

Appeals, looked to the actual language of the NDA to ascertain whether CPLR 202 was applicable.[16] The NDA contained a choice-of-law provision stating, "This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York."[17] Ordinarily, choice-of-law provisions only apply to substantive issues and do not impose procedural law.[18] "It is undisputed that had the NDA's choice-of-law provision incorporated only New York substantive law and contained a New York forum selection clause, New York would apply its own procedural law as the law of the forum . . . including CPLR 202."[19] In this case, both parties agreed that it was their intent for the choice-of-law provision to apply substantive and procedural law to any disputes arising under the NDA.[20] The Court of Appeals stated that "CPLR 202 is an abiding part of New York's procedural law"[21] and is "part of this State's procedural code."[22] Nothing in the NDA demonstrated any intent by the contracting parties to disregard CPLR 202 in any dispute arising under the contract.[23] "Here, the contracting parties chose New York's procedural law, and CPLR 202 is part of that procedural law. The borrowing statute therefore applies."[24] The Court of Appeals upheld the New York Supreme Court and Appellate Division decisions and deemed that Defendant's motion to dismiss was properly granted on

[16] *See id.* at 776, 778 ; *see also* Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." (citing Slatt v. Slatt, 477 N.E.2d 1099, 1100 (N.Y. 1985))). "The best evidence of what parties to a written agreement intend is what they say in their writing." *Id.* at 170 (quoting Slamow v. Delcol, 594 N.E.2d 918, 919 (N.Y. 1992)).

[17] *2138747 Ont., Inc.*, 103 N.E.3d at 776.

[18] *Id.* at 777 (citing Portfolio Recovery Assocs., LLC v. King, 927 N.E.2d 1059, 1061 (N.Y. 2010)).

[19] *Id.* at 778 (first citing Tanges v Heidelberg N. Am., 710 N.E.2d 250, 251–52 (N.Y. 1999); and then citing *Portfolio Recovery Assocs., LLC*, 927 N.E.2d at 1061).

[20] *See id.* at 777 (quoting 2138747 Ont., Inc. v. Samsung C&T Corp., 39 N.Y.S.3d 10, 14 (App. Div. 2016)).

[21] *Id.* at 777.

[22] *Id.* at 778 (quoting Ins. Co. of N. Am. v. ABB Power Generation, 690 N.E.2d 1249, 1252 (N.Y. 1997)) (citing Martin v. Julius Dierck Equip. Co., 374 N.E.2d 97, 99 (N.Y. 1978)).

[23] *See id.* at 780 ("[W]here a contract 'was negotiated between sophisticated, counseled business people negotiating at arm's length,' courts should be especially 'reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include' . . . . Hence, 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" (quoting Vt. Teddy Bear Co. v. 538 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004))).

[24] *Id.*

the grounds that Plaintiff's claim was time-barred by Ontario's two-year statute of limitations.[25]

Ontario displayed CPLR 202's cruel nature by demonstrating the borrowing statute's ability to tank a seemingly meritorious contract claim.[26] Many other litigants have suffered the same fate.[27] So, how can a contract be drafted to avoid CPLR 202's disastrous effects? In *Ontario*, the New York Court of Appeals purposefully avoided this question.[28]

This Note is comprised of three Parts. Part I analyzes whether simple New York contract principles could be utilized to circumvent CPLR 202's applicability. Part II does not attempt to circumvent CPLR 202, but rather attacks it head on by attempting to precisely discern whether its language can be manipulated to achieve a desired outcome. Most importantly, Part III argues that the current application of CPLR 202 is unworkable and courts need to approach this issue differently.

I. EXPRESS CONTRACT PROVISIONS

Many practitioners simply believe that parties could include express provisions in their contracts to circumvent CPLR 202. Among these ideas are (A) express provisions precluding CPLR 202's applicability to a certain contract; (B) express provisions enumerating a different limitation period than the one called for under CPLR 202; and (C) express provisions waiving a party's right to raise a statute of limitations defense that would render CPLR 202 useless. The potential effectiveness of these various methods is examined in detail throughout Part I.

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[25] *See id.*; *see also 2138747 Ont., Inc.*, 39 N.Y.S.3d 10 at 12 (stating that the alleged breach occurred in December 2008, and plaintiff learned of said breach in January 2010; but this action was not commenced until October 2014).

[26] *See, e.g.*, *2138747 Ont., Inc.*, 103 N.E.3d at 780.

[27] *See, e.g.*, Essex Capital Corp. v. Garipalli, No. 17 Civ. 6347 (JFK), 2018 U.S. Dist. LEXIS 212948, at *10 (S.D.N.Y. Dec. 18, 2018); Soloway v. Kane Kessler, PC, 88 N.Y.S.3d 885, 885 (App. Div. 2019); All Children's Hosp., Inc. v. Citigroup Glob. Mkts., Inc., 59 N.Y.S.3d 7, 8 (App. Div. 2017), *appeal denied*, 106 N.E.3d 750 (N.Y. 2018); Ctr. Lane Partners, LLC v. Skadden, Arps, Slate, Meagher, & Flom LLP, 62 N.Y.S.3d 341, 343 (App. Div. 2017), *appeal denied*, 94 N.E.3d 488 (N.Y. 2018).

[28] *See 2138747 Ont., Inc.*, 103 N.E.3d at 780 ("Inasmuch as the NDA did not expressly provide that disputes arising from the agreement would be governed by New York's six-year statute of limitations, or otherwise include language that expressed a clear intent to preclude application of CPLR 202, we, like the Appellate Division, have no occasion to address whether enforcement of such a contractual provision would run afoul of CPLR 201 or General Obligations Law § 17–103, or would otherwise violate New York's public policy against contractual extensions of the statute of limitations before accrual of the cause of action . . . . We therefore express no opinion on that issue."(internal citation omitted)).

A. Express Provision Precluding CPLR 202's Application

One idea to avoid CPLR 202's applicability to a contract is to simply include an express provision stating, "CPLR 202 will not apply to any disputes arising under this contract." More formally, such a contractual provision would probably be drafted as follows:

> Any litigation arising from this contract shall not be governed by CPLR 202 or any other borrowing statute. The parties agree that CPLR 213 will govern any litigation arising from this contract.

As expressed in *Ontario*, the New York Court of Appeals has intentionally avoided determining whether such a provision would achieve its goal.[29] This Section attempts to ascertain whether such a contractual provision is effective.

Any proper analysis of this provision's legal validity must start from the basic right to contract. "The right to contract is one of those fundamental rights in our society . . . and rightly receives primary credit for the establishment of a functional, market-based economy in which predictability is prized."[30] However, "the right to contract is not absolute."[31] Specifically, New York's jurisprudence is clear that parties may not draft contracts that contradict the State's public policy.[32] Contract provisions in violation of public policy will be deemed unenforceable.[33]

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[29] *See id.*

[30] David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 52 (2013); *see also* Robin West, *The Right to Contract as a Civil Right*, 26 ST. THOMAS L. REV. 551, 554 (2014) ("[T]he right to contract . . . comes from the civil rights traditions . . . ."); Justin M. Goins, Comment, *Rising in Defense of the Declaration: The Natural Scope of the Right to Contract*, 8 LIBERTY U. L. REV. 77, 79 (2013) ("Man's right to contract is among these natural rights.").

[31] St. Louis, Iron Mountain & St. Paul. Ry. Co. v. Paul, 173 U.S. 404, 409 (1899); *accord* Int'l Text-Book Co. v. Weissinger, 65 N.E. 521, 523 (Ind. 1902); Steele, Hopkins & Meredith Co. v. Miller, 110 N.E. 648, 650 (Ohio 1915); Rose v. Harllee, 48 S.E. 541, 543 (S.C. 1904); Megalopolis Prop. Ass'n v. Buvron, 494 N.Y.S.2d 14, 16 (App. Div. 1985).

[32] *See* Semans Family Ltd. P'ship v. Kennedy, 675 N.Y.S.2d 489, 492 (Civ. Ct. 1998) ("It is hornbook law that parties may not contract contrary to public policy." (citing Brown v. Supreme Court of the Indep. Order of Foresters, 68 N.E. 145, 146 (N.Y. 1903))); *see also* F.A. Straus & Co. v. Canadian Pac. Ry. Co., 234 N.Y.S. 622, 626 (Sup. Ct. 1929) ("[N]either by comity nor by will of the contracting parties can the public policy of a country be set at naught.").

[33] *See* Lanza v. Carbone, 13 N.Y.S.3d 472, 475 (App. Div. 2015) ("Although parties are usually free to chart their own contractual course, that is not the case in certain situations where public policy would be offended . . . . Further, as a general rule, illegal contracts are unenforceable . . . ." (first citing Welsbach Elec. Corp. v. MasTec N. Am., Inc., 859 N.E.2d 498, 500–01 (N.Y. 2006); then citing Vill. Taxi Corp. v Beltre, 933 N.Y.S.2d 694, 699 (App. Div.

This principle was recently applied by the New York Court of Appeals.[34] In *Deutsche Bank*, the defendant, Quicken Loans, sold mortgages to a non-party to the action, Morgan Stanley, under a contract dated June 1, 2006.[35] These same loans were then sold to a trust fund and the plaintiff, Deutsche Bank, was its trustee.[36] In 2013, a review of a sample of the mortgages revealed that the mortgages did not comply with the representations and warranties made by Quicken Loans in the contract.[37] Deutsche Bank commenced an action on August 30, 2013.[38] Quicken Loans moved to dismiss the complaint, alleging that the plaintiff's action was barred by CPLR 213.[39] In response, the plaintiff argued that the "accrual clause" of the contract was not triggered and, thus, the claim being brought had yet to accrue and, therefore, could not be precluded by New York's statute of limitations.[40] The trial court held that the accrual clause could not be enforced because it "could not serve to extend the statute of limitations."[41] The motion to dismiss was granted.[42] On appeal, the appellate division found that "the accrual clause was unenforceable because it violates New York public policy."[43]

At the Court of Appeals, Judge Fahey, the same author of the majority opinion in *Ontario*, insisted, "When the public policy favoring freedom to contract and the public policy prohibiting extensions of the limitations period before accrual of the cause of action come into conflict . . . the latter must prevail."[44] "We simply hold that . . . to postpone accrual of a breach of contract cause of action to a subsequent uncertain date, the accrual clause 'may not serve to

2011); and then citing Ungar v. Matarazzo Blumberg & Assocs., P.C., 688 N.Y.S.2d 588, 590 (App. Div. 1999))).

[34] *See* Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts., 112 N.E.3d 1219, 1220 (N.Y. 2018).

[35] *Id.* at 1221.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*; *see also* N.Y. C.P.L.R. 213 (McKinney 2019) (mandating that claims for breach of contract must be commenced within six years of the claim's accrual).

[40] *Deutsche Bank,* 112 N.E.3d at 1221–22.

[41] *Id.* at 1222.

[42] *Id.*

[43] *Id.* (citing Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts., 36 N.Y.S.3d 135, 139 (App. Div. 2016)).

[44] *Id.* at 1228.

extend the Statute of Limitations . . . .'"[45] The Court of Appeals affirmed the appellate division's decision.[46]

This case may severely undermine the legality of our current proposition: whether parties can contract to preclude the application of CPLR 202. *Deutsche Bank* clarifies that contracting parties may not "put off" the accrual date of a cause of action to extend the statute of limitations under CPLR 213.[47] Would the same logic extend to parties attempting to avoid a shorter limitations period? The logical answer is yes. Fundamentally, attempting to avoid an applicable, otherwise shorter limitations period, is the same as trying to extend the statute of limitations itself.

However, courts can distinguish *Deutsche Bank* in two ways. First, courts may narrow the holding of *Deutsche Bank* to only apply to situations in which the parties are attempting to extend the statute of limitations under CPLR 213—not CPLR 202. Second, courts may simply only apply *Deutsche Bank* to contracts which delay the accrual of the claim and not extend its logic, as this Note did, to contracts in which CPLR 202 is simply precluded.

If a court did take either of these avenues, it would still be required to analyze whether the contract provision precluding CPLR 202 violates other public policies, rendering the provision unenforceable anyway.[48] As expressed in *Ontario*, the public interests "supported" by CPLR 202 are twofold: (1) the prevention of forum shopping and (2) clarifying the law to "provide the certainty of uniform application to litigants."[49] Now the question is whether a provision precluding CPLR 202 would "injuriously affect, or subvert, the[se] public interests" as to render it unenforceable.[50]

1. Preventing Forum Shopping

Forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[51] "The primary purpose of CPLR 202 . . . is to prevent forum shopping by a

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[45] *Id.* at 1229 (quoting John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 104 (N.Y. 1979)).

[46] *See Deutsche Bank*, 112 N.E.3d at 1229.

[47] *Id.* (quoting *John J. Kassner & Co.*, 389 N.E.2d at 104).

[48] Kirshenbaum v. Gen. Outdoor Advert. Co., 180 N.E. 245, 246 (N.Y. 1932) ("Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect, or subvert, the public interests.").

[49] 2138747 Ont., Inc. v. Samsung C & T Corp., 103 N.E.3d 774, 780 (N.Y. 2018) (quoting Ins. Co. of N. Am. v. ABB Power Generation, Inc., 690 N.E.2d 1249, 1252 (N.Y. 1997)).

[50] *Kirshenbaum*, 180 N.E. at 246.

[51] *Forum-Shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019).

nonresident seeking to take advantage of a more favorable Statute of Limitations in New York."[52] Such a situation is easily imaginable. A Florida dentist performs an emergency tooth extraction while a New York businessman is vacationing in Miami. The operation is successful and the dentist bills the businessman $25,000. After waiting five years and one month for payment, the dentist consults a Florida attorney who notifies him that the Florida's five-year statute of limitations has expired,[53] but New York has a six-year statute of limitations in which this claim can still be interposed.[54] The dentist's claim is brought in New York Supreme Court, Albany County (the county in which the businessman lives). Unbeknownst to the Florida attorney, the action is still subject to the Florida statute of limitations pursuant to CPLR 202,[55] and the businessman quickly dispenses of the claim by dismissing the claim pursuant to CPLR 3211(a)(5).[56]

In the absence of CPLR 202, this action would be timely. Now imagine that the contract between the dentist and the businessman included a provision to preclude the application of CPLR 202 to any claim arising under the contract. Enforcing this provision would allow the dentist's claim to go forward. Allowing this $25,000 action to take up valuable court time and resources seems inefficient; especially since this dentist, presumably, does not even pay New York taxes. This is the very idea that CPLR 202 rests upon. "[T]hose who reside in and pay New York State taxes receive the benefit of the New York statute of limitations when they commence an action here."[57] This hypothetical dentist is not the only litigant looking to bring a claim in a New York court. In fact, approximately thirty-nine percent of contracts contain a forum-selection clause[58] and among this thirty-nine percent, "New York is the favored forum, accounting for 41 percent of the choices."[59] Thus, New York is the chosen forum for litigation in sixteen percent of all contract disputes.[60] One can infer from this data that New York courts are overwhelmed with cases, and as one New York judge stated, "We have too many cases

[52] Antone v. Gen. Motors Corp., Buick Motor Div., 473 N.E.2d 742, 745 (N.Y. 1984) (citing Nat'l Sur. Co. v. Ruffin, 152 N.E. 246, 247 (N.Y. 1926)).

[53] FLA. STAT. § 95.11(2)(b) (2019).

[54] N.Y. C.P.L.R. 213 (McKinney 2019).

[55] C.P.L.R. 202.

[56] *See* C.P.L.R. 3211(a)(5).

[57] DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 57, at 94 (6th ed. 2018).

[58] Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009).

[59] *Id.*

[60] This number was derived as follows: $0.39 \times 0.41 = 0.1599$ (approximately 16%).

and not enough court time, and so forth, to deal with them."[61] This high volume of cases also has a huge economic burden on the State.[62]

Allowing parties to preclude CPLR 202 in their contracts will increase the amount of cases and filings in New York courts because fewer claims will be in violation of the statute of limitations[63] and the State will have to take on these cases resulting in more congested dockets and further strain on New York taxpayers. Such an effect is highly injurious to public interest and would most likely render such a provision unenforceable.

As established, New York has a strong interest in limiting the amount of cases and filings within its courts. However, how does one align this interest with those perpetuated in Article 5, Title 14 of New York's General Obligations Law? For example, New York General Obligations Law section 5-1401 allows contracting parties to include New York choice-of-law provisions in their contracts for $250,000 or more.[64] "The goal of General Obligations Law § 5-1401 was to promote and preserve New York's status as a commercial center . . . ."[65] Similarly, "[s]ection 5-1401 embodies the legislature's desire to encourage parties to choose the New York justice system to govern their contractual disputes."[66] These goals are also furthered by section 5-1402.[67] This statute allows New York courts to exercise jurisdiction over parties that have included a New York forum selection clause in their contracts and the contract is for at least $1 million.[68]

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[61] Patricia Murphy, *Justice Suffers When There Are 'Too Many Cases, Not Enough Time'*, KUOW (Apr. 7, 2014, 10:23 AM), https://kuow.org/stories/justice-suffers-when-there-are-too-many-cases-not-enough-time/ [https://perma.cc/ML47-MEEA].

[62] *See* UNIFIED COURT SYSTEM, 2018-2019 BUDGET REQUEST, at xiii, https://www.budget.ny.gov/pubs/archive/fy19/exec/agencies/pdf/Judiciary.pdf [https://perma.cc/YS6A-6HKS] (stating a budget over $2.1 billion for the court system, which is over a $47 million increase from the previous fiscal year); *see also* N.Y.S. UNIFIED COURT SYSTEM, BUDGET: FISCAL YEAR 2018-2019 (2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/2018-19-UCS-GSC.PDF [https://perma.cc/Q38L-HD2Z] (stating a $788,508,198 budget for fringe benefits in 2018-2019, which is an increase of over $35 million dollars from the previous year).

[63] Numerous cases have been dismissed for violation of CPLR 202. *See, e.g.*, 2138747 Ont., Inc. v. Samsung C&T Corp., 103 N.E.3d 774, 775 (N.Y. 2018); Glob. Fin. Corp. v. Triarc Corp., 715 N.E.2d 482, 483–84 (N.Y. 1999).

[64] N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2019).

[65] IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 982 N.E.2d 609, 612 (N.Y. 2012).

[66] Ministers & Missionaries Benefit Bd. v. Snow, 45 N.E.3d 917, 920 (N.Y. 2015) (citing *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 611).

[67] *See* Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus., 51 N.Y.S.3d 818, 823 (Sup. Ct. 2017) (quoting *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 920); Credit Francais Int'l, S.A. v. Sociedad Financiera De Comercio, C.A., 490 N.Y.S.2d 670, 678 (Sup. Ct. 1985).

[68] N.Y. GEN. OBLIG. LAW § 5-1402(1).

Clearly there is a conflict between the policies supported by CPLR 202 and the statutes in Article 5, Title 14 of New York's General Obligations Law. Whether a contract provision precluding CPLR 202 violates public policy turns on which policies a court wants to promulgate. With all respect, it seems logical that a court would want to limit its docket and, thus would perpetuate the interests of CPLR 202 and deem the goals of the General Obligations Law subordinate. Based on this analysis, it is likely that a court would deem a contractual provision expressly precluding the application of CPLR 202 unenforceable because it violates New York's public policies (well, some of them anyway). A discussion of what the courts *should do* exists in Part III of this Note.

2. Clarifying the Law and Providing Uniformity

The second policy supported by CPLR 202 is "to add clarity to the law and to provide the certainty of uniform application to litigants."[69] Although the New York Court of Appeals has stated that CPLR 202 clarifies the law and provides uniformity,[70] I, and perhaps others, respectfully disagree. Without CPLR 202, all breach of contract claims would be subject to the six-year limitation enumerated in CPLR 213.[71] With CPLR 202 enacted, litigants must wrestle with whether CPLR 202 applies to their claim and, thus whether the claim is subject to an alternative time limitation.[72] Such an analysis requires the attorney to determine whether their client is a resident or non-resident of New York; whether the action accrued within or outside New York; and, if so, whether the foreign statute of limitations is shorter than New York's.[73]

Although the last inquiry should be of no issue for a trained legal professional, the first two inquiries are so complex that, usually, there is no clear conclusion. There is little clarity in the definitions required to analyze CPLR 202's applicability. This Note contains a deeper discussion of these "definitions" in Part II. If one of CPLR 202's goals was to provide clarity, it has fallen short.

Providing uniformity has also gone amiss. Uniformity is "characterized by a lack of variation."[74] With CPLR 202, litigants are

[69] Ins. Co. of N. Am. v. ABB Power Generation, Inc., 690 N.E.2d 1249, 1252 (N.Y. 1997) (citing Ling Ling Yung v. Cty. of Nassau, 571 N.E.2d 669, 670 (N.Y. 1991)).

[70] *See id.*

[71] *See* N.Y. C.P.L.R. 213 (McKinney 2019).

[72] *See* C.P.L.R. 202.

[73] *See id.*; Norex Petrol. Ltd. v. Blavatnik, 16 N.E.3d 561, 563 (N.Y. 2014).

[74] *Uniform*, BLACK'S LAW DICTIONARY (11th ed. 2019).

subjected to different time limitations. For instance, a Texas plaintiff bringing a breach of contract claim in New York must interpose his claim within four years of its accrual.[75] A Florida plaintiff must interpose within five years.[76] As we saw, a plaintiff from Ontario, Canada must interpose within two years.[77] This variation is the antithesis of the uniformity goal that CPLR 202 was meant to set forth.

Overall, a recap of this Section is warranted. The goal of limiting forum shopping in New York courts is furthered by CPLR 202's enactment but is a direct contradiction to the "open door" policies perpetuated by other statutes. Furthermore, the other goal of CPLR 202, "to add clarity to the law and to provide the certainty of uniform application to litigants,"[78] as dictated by the New York Court of Appeals, does not align with the statute's application. It is worth saying again, CPLR 202 obscures, not clarifies, New York public policy and procedure. Nonetheless, a contract provision precluding the application of CPLR 202 would oppose the goal of limiting forum-shopping and would likely be deemed unenforceable by a New York court.

B. Express Provision Enumerating the Time in Which a Claim May Be Brought

Some have insisted that contracting parties could avoid CPLR 202 by simply enumerating their own time limitation. The roots of this idea are found in CPLR 201.[79] A cause of action must be "commenced within the time specified in this article *unless . . . a shorter time is prescribed by written agreement*."[80]

From this basis, the question then becomes, from which period is this "shorter time" measured: the six-year time period as enumerated in CPLR 213,[81] or the borrowed statute of limitations in accordance with CPLR 202?[82] The following hypothetical is meant to provide a scenario in which this distinction matters.

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[75] TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (West 2019).

[76] FLA. STAT. § 95.11 (2019).

[77] *See* 2138747 Ont., Inc. v. Samsung C&T Corp., 103 N.E.3d 774, 776 (N.Y. 2018).

[78] Ins. Co. of N. Am. v. ABB Power Generation, Inc., 690 N.E.2d 1249, 1252 (N.Y. 1997) (citing Ling Ling Yung v. Cty. of Nassau, 571 N.E.2d 669, 670 (N.Y. 1991)).

[79] *See* N.Y. C.P.L.R. 201 (McKinney 2019).

[80] *Id. (*emphasis added); *see also* Snyder v. Gallagher Truck Ctr., Inc., 453 N.Y.S.2d 826, 827 (App. Div. 1982) ("Pursuant to CPLR 201, written agreements shortening the Statute of Limitations are authorized.").

[81] C.P.L.R. 213.

[82] C.P.L.R. 202.

A Texas building company contracts with a New York lumber mill to purchase one hundred support beams for the construction of numerous horse barns. In the contract, the parties include a New York choice of law provision[83] and a provision affixing a five-year time limitation to any claims arising under the contract.[84] The Texas building company sends full payment, $250,000, to the New York lumber mill. In return, the New York lumber mill only sends sixty support beams. The Texas company contacts the New York lumber mill notifying them of the forty missing beams in violation of the contract. In response, the lumber mill alleges they cannot produce the forty beams (for whatever reason). After much back and forth between the two parties, over a period of time approximating four years and six months, the Texas company commences an action in New York Supreme Court in the county in which the New York lumber mill is operating, alleging that the lumber mill breached the contract. At this point, it appears the action is timely commenced because it was interposed before the five-year time limitation pursuant to the contract and that contract provision does not violate CPLR 201[85] because, as aforementioned, New York has a six-year limitation on breach of contract claims.[86]

Unfortunately, it's not that simple. In its answer, the New York lumber mill asserts a statute of limitations defense. The Texas company moves to dismiss the statute of limitations defense pursuant to CPLR 3211,[87] pointing to the five-year time limitation enumerated in the contract and asserting that the contract provision does not violate CPLR 201[88] because it shortens the six-year limitation found in CPLR 213.[89] In response, the New York lumber mill files an opposition to the building company's motion to dismiss. In its opposition, the New York lumber mill concedes that contracting parties can shorten limitations periods pursuant to CPLR 201,[90] but the contract provision enumerating a five-year limitation failed to shorten the applicable time period.[91] Here, the lumber mill argues that the applicable statute of limitations is governed by CPLR 202 because the Texas company is a non-resident of New York and its

[83] *See* N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2019).
[84] *See* C.P.L.R. 201.
[85] *See id.*
[86] C.P.L.R. 213.
[87] *See* C.P.L.R. 3211(b).
[88] *See* C.P.L.R. 201.
[89] *See* C.P.L.R. 213.
[90] *See* C.P.L.R. 201.
[91] *See* C.P.L.R. 202, 213.

claim accrued outside of New York.[92] Thus, the applicable statute of limitations must be borrowed from the jurisdiction in which the claim arose.[93] In this case, that jurisdiction is Texas. Further in its papers, the New York lumber mill argues that the contract provision does violate CPLR 201 because it lengthens, not shortens, the applicable statute of limitations under CPLR 202, Texas's four-year limitation for breach of contract claims.[94] Thus, the lumber mill argues, the contract time limitation should be rendered unenforceable pursuant to CPLR 201, and the claim should be dismissed as untimely.

Although there has not been a case mirroring these facts, and this is a novel issue, it appears the lumber mill is correct in its analysis and application of the limitations provisions of the CPLR. The Texas company has not commenced its action within the applicable statute of limitations. The contract provision enumerating the five-year limitation violates CPLR 201 because the applicable time period, which must be shortened under CPLR 201, is in fact Texas's statute of limitations pursuant to CPLR 202.[95] Since the contract provision is in violation of CPLR 201 and 202, it is likely unenforceable and the claim is untimely.

For purposes of making these intricacies more complex, imagine the Texas company never paid and the lumber mill produced all one hundred beams. In this scenario, the lumber mill would become the plaintiff. The exact provision that was just deemed unenforceable and the exact claim that was just deemed untimely, would, theoretically, have opposite outcomes. The New York lumber mill would not be subjected to CPLR 202 because it is a resident of New York[96] and, thus, the time period enumerated in the contract, five years, would not violate CPLR 201 or 202 because it shortens the applicable statute of limitations—six years as enumerated by CPLR 213[97] and the provision would be enforceable. In this scenario, it is unsettling to think that between years four and five after an alleged breach, the New York lumber mill could interpose a claim against the Texas company and it would not be time barred, while the same claim interposed by the Texas company would be barred by CPLR 201 and 202. Such a result would rise to the level of transactional genius (or luck) on the part of the New York lumber mill's general counsel.

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92 *See id.*
93 *See id.*
94 TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (West 2019).
95 *See* C.P.L.R. 201–02; TEX. CIV. PRAC. & REM. CODE ANN § 16.004(a).
96 *See* C.P.L.R. 202 (stating that it only applies to nonresidents of New York).
97 *See* C.P.L.R. 201–02, 213.

This short hypothetical (perhaps more of a mental exercise) was created to outline the worst-case scenario for a non-resident plaintiff operating under a contract containing a provision enumerating a specific time limitation. Yes, it is a basic New York contract principle that parties may enumerate a shorter limitations period pursuant to CPLR 201. But, the parties should ensure that the enumerated time period shortens both the time limitation in CPLR 213 and the borrowed statute of limitations pursuant to CPLR 202, if applicable. Failure to do either one may render the provision unenforceable and result in a claim being adjudicated untimely. Although this conclusion is not law, it is derived from syllogism and provides courts a logical basis to strike down a provision that fails to shorten the correct time limitation and, also, enforce the very same provision when a New York resident plaintiff uses it.

C. Waiver of the Right to Assert a Statute of Limitations Defense

Some have put forth the waiver of the right to assert a statute of limitations defense as a remedy to section CPLR 202. "Parties may . . . agree to shorten the time period within which to commence an action, but are *not entirely free to waive or modify the statutory defense*."[98] "If the agreement to 'waive' or extend the Statute of Limitations is made at the inception of liability [the signing of the contract,] it is unenforceable because a party cannot 'in advance, make a valid promise that a statute founded in public policy shall be inoperative.'"[99] However, "if the agreement is made after the cause of action has accrued the Legislature has provided that it may be enforceable under certain circumstances."[100] To have an enforceable agreement that waives the statute of limitations defense in a breach of contract action, the agreement must be "made after the accrual of the cause of action, . . . with or without consideration," and be evidenced by a writing that is signed by the party it is being enforced against.[101] Let us apply these principles to the hypothetical in the previous Section. Imagine that when the parties were drafting the

[98] Bank of N.Y. Mellon v. WMC Mortg., LLC, 56 N.Y.S.3d 1, 5 (App. Div. 2017) (emphasis added).

[99] John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 103 (N.Y. 1979) (quoting Sharpley v. Abbott, 42 N.Y. 443, 452 (N.Y. 1870)) (first citing Crocker v. Ireland, 256 N.Y.S. 638, 639 (App. Div. 1932); and then citing Pine v. Okoniewski, 11 N.Y.S.2d 13, 15 (App. Div. 1939)).

[100] *Id.*

[101] *See* N.Y. GEN. OBLIG. LAW § 17-103 (McKinney 2019).

contract, instead of including a "shortened" period of limitations in the contract, the parties included a provision that waived both parties' rights to assert any statute of limitations defense in litigation arising under the contract. In this scenario, a New York Court would render such provision unenforceable and cite *Kassner*[102] because the parties made the promise to not assert a statute of limitations defense before any action under the contract accrued.[103]

However, if the parties agreed to waive the statute of limitations defense after the contract was breached and evidenced this new agreement with a signed writing, it would be enforceable.[104] Assuming that a defendant knows a plaintiff's claim is untimely, it is hard to imagine a situation in which the defendant would agree to waive a statute of limitations defense. Perhaps this would occur if the defendant was to receive vast consideration for its waiver and the defendant still believed it would win the action on the merits.

II. AN ATTEMPT TO MANIPULATE THE ELEMENTS OF CPLR 202

This Note has now analyzed three distinct ideas to subvert CPLR 202's application. None of these ideas have been fruitful, and it is apparent that, in the current state of the law, trying to preclude or ignore CPLR 202 is not useful. Instead, Part II attempts to manipulate the elements of CPLR 202 and identify whether such manipulation, if feasible, would lead to favorable outcomes. Recall the elements of CPLR 202: "When a cause of action *accrues outside New York* and the *plaintiff is a nonresident*, section 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness."[105]

A. Accrues Outside of New York

Originally, to determine where an action accrued, a New York court was to apply "the 'center of gravity' or the 'grouping of contacts'" tests[106] as expressed in *Auten v. Auten*.[107] Under this doctrine, "the

[102] *See id.*; *John J. Kassner & Co.*, 389 N.E.2d at 103 (quoting *Sharpley*, 42 N.Y. at 452) (first citing *Crocker*, 256 N.Y.S. at 639; and then citing *Pine*, 11 N.Y.S.2d at 15).

[103] *See John J. Kassner & Co.*, 389 N.E.2d at 103 (quoting *Sharpley*, 42 N.Y. at 452) (first citing *Crocker*, 256 N.Y.S. at 639; and then citing *Pine*, 11 N.Y.S.2d at 15).

[104] *See* GEN. OBLIG. LAW § 17-103.

[105] Norex Petrol. Ltd. v. Blavatnik, 16 N.E.3d 561, 563 (N.Y. 2014) (emphasis added).

[106] Auten v. Auten, 124 N.E.2d 99, 101 (N.Y. 1954).

[107] *See generally id.* (recognizing the use of the "center of gravity" and "grouping of contacts" theories).

courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'"[108] The New York Court of Appeals declined to extend this rule to determine accrual under CPLR 202.[109] Instead, in *Global Financial Corp.*, Chief Judge Kaye referred back to "the traditional definition of accrual."[110] For purposes of CPLR 202, "a cause of action accrues at the time and in the place of the injury."[111] "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss."[112]

However, in *Global Financial Corp.*, the Chief Judge did recognize an exception to this general rule.[113] Citing *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, a federal case brought under the Securities Exchange Act of 1934,[114] Chief Judge Kaye acknowledged that where a "plaintiff intentionally maintain[s] [a] separate financial base in [another state] . . . injury of losing . . . funds was felt in [that state], not [plaintiff's residence]."[115] In *Lang*, the plaintiff used funds held in a Massachusetts bank to open up a brokerage account at the defendant's firm in Boston.[116]

> Thus, Lang was investing through Paine Webber in Massachusetts money that, for the most part, he had previously kept in that state. The direct loss from the . . . transactions at issue here was imposed primarily on the balance of funds Lang had remaining in Massachusetts; any such injury was only indirectly felt in [plaintiff's residence]. Under these circumstances, . . . the place of injury . . . was Massachusetts, the situs of Lang's American bank account, his brokerage account, and the Paine Webber office through which all trades were placed, and not . . . his residence.[117]

On its face, the *Lang* exception appears to provide an avenue out of CPLR 202's tyrannical domain. However, often referred to as the

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[108] *Id.* at 101–02 (quoting Rubin v. Irving Tr. Co., 113 N.E.2d 424, 431 (N.Y. 1953)).
[109] *See* Glob. Fin. Corp. v. Triarc Corp., 715 N.E.2d 482, 485 (N.Y. 1999).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *See id.* (citing Lang v. Paine, Webber, Jackson & Curtis, Inc., 582 F. Supp. 1421, 1426 (S.D.N.Y 1984)).
[114] *Lang*, 582 F. Supp. at 1422.
[115] *Glob. Fin. Corp.*, 715 N.E.2d at 483, 485 (citing *Lang*, 582 F. Supp. at 1422).
[116] *See Lang*, 582 F. Supp. at 1423.
[117] *Id.* at 1426.

"financial base" exception,[118] the *Lang* exception has been eviscerated at every turn.[119] Specifically, the *Lang* exception has not been extended to New York nonresident corporations.[120] "[T]his exception applies only in the 'extremely rare case where the party has offered unusual circumstances evincing that the economic injury occurred at a place other than the plaintiff's residence.'"[121]

In *Stitching Pensioenfonds ABP*, the plaintiff, a Dutch corporation, sued the defendant for alleged fraudulent misrepresentations regarding the sale of Residential Mortgage-Backed Securities.[122] There was a dispute between the parties as to whether the claims were barred by CPLR 202.[123] The plaintiff argued that it was entitled to the financial base exception under *Lang*.[124] The transaction was completed in the United States with U.S. currency from U.S. bank accounts.[125] Further, the securities certificates were held in New York accounts and were managed by an investment advisor with a primary place of business in New York.[126] Despite all of these ties to New York, the court ruled that the plaintiff had failed "to offer any evidence of unusual circumstances,"[127] and allowing foreign corporations to take advantage of the *Lang* exception by simply doing their business through New York bank accounts "would allow the exception to swallow the rule and render New York's borrowing statute toothless."[128] The court declined to extend the *Lang* exception to the plaintiff under these circumstances.[129]

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[118] *See* Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG, No. 652665/2011, 2012 N.Y. Misc. LEXIS 5996, at *5 (Sup. Ct. Nov. 30, 2012) (quoting *Lang*, 582 F. Supp. at 1426).

[119] *See, e.g.*, Deutsche Zentral-Genossenchaftsbank AG v. HSBC N. Am. Holdings, Inc., No. 12 Civ. 4025(AT), 2013 WL 6667601, at *6 (S.D.N.Y. Dec. 17, 2013) (quoting *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *7); Robb Evans & Assocs. v. Sun Am. Life Ins., No. 10 Civ. 5999(GBD), 2013 WL 123727, at *1 (S.D.N.Y. Jan. 8, 2013); Am. Int'l Group, Inc. v. Countrywide Fin. Corp., 834 F. Supp. 2d 949, 959–60 (C.D. Cal. 2012) (quoting Baena v. Woori Bank, No. 05 Civ. 7018(PKC), 2006 WL 2935752, at *6 (S.D.N.Y. Oct. 11, 2006); *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *7.

[120] *See, e.g.*, *Deutsche*, 2013 WL 6667601, at *6 (quoting *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *7).

[121] *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *6 (quoting *Baena*, 2006 WL 2935752, at *6).

[122] *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *1–2.

[123] *See id.* at 3.

[124] *Id.* at 5 (quoting *Lang*, 582 F. Supp. at 1426).

[125] *Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *6.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 6–7 ("If merely using U.S. dollars in U.S. bank accounts and a New York based investment advisor was sufficient to constitute a separate financial base, it is difficult to imagine any major financial transaction that could not come within this exception.").

[129] *See id.* at 7.

Under *Lang*, it appears that this Dutch corporation should have been privy to the "financial base" exception, as the facts are similar to *Lang*.[130] It is apparent that the courts are interpreting the exception in *Lang* narrowly to be more feasible for individual plaintiffs as opposed to foreign corporations. The unusual circumstances required for an *individual* to take advantage of the *Lang* exception are obviously evidenced in *Lang* itself. So the question remains: what unusual circumstances would allow a *foreign or non-resident corporation* to take advantage of the *Lang* exception? This question has gone unanswered by New York courts.[131]

The takeaways from this analysis on "accrual" are as follows: when drafting a contract for a non-resident individual, a natural person not living in New York, be aware of the "financial base" exception articulated in *Lang*. Try to have the non-resident client mirror the facts in *Lang* as closely as possible to ensure, in the event of litigation in a court applying CPLR 202, the court will find that the "accrual" of the client's claim occurred in the client's New York financial base; thus not exposing the client to CPLR 202 and a shorter statute of limitations. This approach may save the nonresident client's claims from being barred by a statute of limitations defense where the claims are untimely in the client's resident jurisdiction.

If the client is a non-resident corporation, meaning it is not incorporated in New York nor maintains its principal place of business in New York, there is no articulable guideline to avoid CPLR 202 under *Lang*. In this situation, as in all situations, the best practice is to interpose the claim as soon as possible to ensure it is timely with New York's statute of limitations and the client's resident jurisdiction's statute of limitations. Do not let your client be the plaintiff in a case where the New York Court of Appeals declines to extend *Lang* to foreign corporations. Let that be *the rule in someone else's case*.[132]

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[130] *Compare* Lang v. Paine, Webber, Jackson & Curtis, Inc., 582 F. Supp. 1421, 1426 (S.D.N.Y. 1984) (applying the financial base exemption when a Canadian citizen opened up a brokerage account in Massachusetts with U.S. Dollars held in U.S. bank accounts, which was managed by an investment fund in Massachusetts), *with Stichting Pensioenfonds ABP*, 2012 N.Y. Misc. LEXIS 5996, at *6–7 (rejecting the financial base exemption when a Dutch company purchased security certificates in the United States with U.S. Dollars, which were held in U.S. bank accounts and managed by an investment fund in New York).

[131] *See* Deutsche Zentral-Genossenchaftsbank AG v. HSBC N. Am. Holdings, Inc., No. 12 Civ. 4025(AT), 2013 WL 6667601, at *6 (S.D.N.Y. Dec. 17, 2013).

[132] Credit for this rule is duly given to Patrick M. Connors, Albert and Angela Farone Distinguished Professor of Law at Albany Law School.

B. Residence

The meaning of the term "resident" as used in CPLR 202 is distinct from the meaning of "domiciliary."[133] "[T]he determination of whether a[n] [individual] is a New York resident, for purposes of CPLR 202, turns on whether he has a significant connection with some locality in the State as the result of living there for some length of time during the course of a year."[134] Remember, "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff *resides* and sustains the economic impact of the loss."[135]

However, the New York Court of Appeals has declined to answer, for purposes of CPLR 202, whether a corporation resides in its state of incorporation or the state in which its principal place of business is located or both.[136] In *Global*, the "defendant retained the plaintiff to perform certain consulting services" and the duties of this relationship were evidenced in a contract dated February 1, 1988.[137] "On November 6, 1989, [the] plaintiff demanded payment of over nine million dollars for services rendered, which [the] defendant refused" to pay.[138] The plaintiff commenced an action in the Southern District of New York to recover the nine million dollars from the defendant.[139] The federal court dismissed the action because the complaint failed to address how the federal court had subject matter jurisdiction over the dispute.[140] "Three months later, [the] plaintiff brought" the same action "in New York Supreme Court, New York County."[141] The defendant moved to dismiss the state action, arguing that the plaintiff's claims were barred by CPLR 202 because the plaintiff's claims were untimely under Delaware law, the state in which plaintiff was incorporated, and Pennsylvania law, the state in which the plaintiff maintained its principal place of business.[142] Opposing the motion, the plaintiff argued that CPLR 202 was not applicable

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[133] *See* Antone v. Gen. Motors Corp., Buick Motor Div., 473 N.E.2d 742, 746 (N.Y. 1984).

[134] *Id.* (first citing *In re* Estate of Newcomb, 84 N.E. 950, 954 (N.Y. 1908); and then citing Hurley v. Union Trust Co., 280 N.Y.S. 474, 479 (App. Div. 1935)).

[135] Glob. Fin. Corp. v. Triarc Corp., 715 N.E.2d 482, 485 (N.Y. 1999) (emphasis added).

[136] *See id.*; *see also* Portfolio Recovery Assocs., LLC v. King, 927 N.E.2d 1059, 1061 (N.Y. 2010) (using the state of incorporation to discern where the plaintiff resided, but there was no clear articulation of whether the state of incorporation is always where a non-resident corporation resides for purposes of CPLR 202).

[137] *Glob. Fin. Corp.*, 715 N.E.2d at 483.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

because the claim accrued in New York[143] and the action was commenced timely within the six-year period enumerated by CPLR 213.[144]

At the Court of Appeals, as previously mentioned, Chief Judge Kaye wrote that "a cause of action accrues at the time and in the place of the injury."[145] Furthermore, in this case, the alleged damages are purely economic, and "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss."[146] The court held that the plaintiff's claim did not arise in New York and, since the alleged injury was purely economic, the claim accrued where the plaintiff resides.[147] However, the court did not determine which state the plaintiff was actually a resident of because it found that both the Delaware and Pennsylvania statutes of limitation had run out.[148] "Thus, we need not determine whether it was in Delaware or Pennsylvania that plaintiff more acutely sustained the impact of its loss."[149]

In *Portfolio*, approximately eleven years later, the New York Court of Appeals implied that a non-resident corporation resides in the place where it is incorporated.[150] In April 1989, the "defendant . . . opened a credit card account with . . . . Discover Bank."[151] Sometime thereafter, Discover Bank assigned the defendant's account to Portfolio Recovery Associates, LLC, the plaintiff.[152] On, April 1, 2005, six years after the credit card account was cancelled, the plaintiff brought an action against the defendant for the outstanding balance of the credit card account.[153] The defendant moved to dismiss the claim, arguing that it was time-barred by CPLR 202 because the plaintiff's claim was untimely according to Delaware law, the state in which the plaintiff was incorporated.[154] The defendant was correct, and the court held that the plaintiff's claims were in fact time-barred by CPLR 202 and Delaware's three-year statute of limitations.[155]

143 *See id.* at 484.
144 *See id.*
145 *Id.* at 485.
146 *Id.*
147 *See id.*
148 *Id.*
149 *Id.*
150 *See* Portfolio Recovery Assocs., LLC v. King, 927 N.E.2d 1059, 1061 (N.Y. 2010).
151 *Id.* at 1060.
152 *Id.*
153 *Id.*
154 *See id.*
155 *See id.* at 1061.

Although the Court of Appeals did use the state of incorporation to discern where the plaintiff resided in *Portfolio*, there has been no clear articulation of whether the state of incorporation is always where a non-resident corporation resides for purposes of CPLR 202. Thus presently, attorneys are left unknowing which standard applies. For instance, a corporation incorporated in Delaware with its principal place of business in Texas may face a real conundrum when brining a breach of contract claim in New York. Since the claim is subject to CPLR 202, the courts will have to enforce the foreign statute of limitations. But which is it? The statute of limitations from Delaware or Texas? Delaware has a three-year statute of limitations for breach of contract claims based on a written contract[156] while Texas's calls for a four-year time period.[157] As the Court of Appeals has not clarified which location determines a corporation's residence for purposes of CPLR 202,[158] legal practitioners will probably have to wait for a case with these types of facts to decide this issue.

III. A DIFFERENT APPLICATION OF CPLR 202 IS NEEDED

These writings have highlighted CPLR 202's complexity and determined that CPLR 202 is unavoidable under its current application. Although its ruthless application has severely limited forum-shopping, it has also eroded, what I believe is, a stronger state interest, "New York's status as a commercial center."[159] This argument is best set forth by Judge Wilson in *Deutsche Bank*:

> [We] have created bad law: bad because it neither hews to the intent of the contracting parties nor of the investors in securities issued thereby; bad because it serves no public policy; bad because it disserves a very important public policy—the preservation of New York's role as the commercial center of the nation . . . . By contradicting the parties' unambiguous agreement for amorphous public policy reasons

156 DEL. CODE ANN. Tit 10, § 8106 (2019).

157 TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a) (West 2019).

158 *See* Glob. Fin. Corp. v. Triarc Corp., 715 N.E.2d 482, 485 (N.Y. 1999).

159 IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., 982 N.E.2d 609, 612 (N.Y. 2012); Ministers & Missionaries Benefit Bd. v. Snow, 45 N.E.3d 917, 927 (N.Y. 2015) (Abdus-Salaam, J., dissenting) (quoting *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612).

> whose sweep is unknown, today's decision undermines a public policy whose sweep undergirds our economy."[160]

Judge Wilson is correct. New York needs a different approach to CPLR 202. Of course, it is not the province of the courts to rewrite the law. That authority lies with the legislature.[161] The courts are to *interpret* the law.[162]

However, there is no need to wait on the legislature to act. The answer to this problem has already been established in the common law. The answer lies with *Lang*. Recall that in *Lang*, Judge William C. Conner of the Southern District of New York narrowed the applicability of CPLR 202.[163] Overall, *Lang* stands for the proposition that when a plaintiff alleges economic damages in a breach of contract claim, and for purposes of the contract's transactions he maintains a separate "financial base",[164] the plaintiff's contract claims accrue in the jurisdiction of that "financial base."[165] In *Lang*, the plaintiff used funds held in a Massachusetts bank to open up a brokerage account at defendant's firm in Boston.[166]

> Thus, Lang was investing through Paine Webber in Massachusetts money that, for the most part, he had previously kept in that state. The direct loss from the . . . transactions at issue here was imposed primarily on the balance of funds Lang had remaining in Massachusetts; any such injury was only indirectly felt in [plaintiff's residence]. Under these circumstances . . . the place of injury . . . was Massachusetts, the situs of Lang's American bank account, his brokerage account, and the Paine Webber office through which all trades were placed, and not . . . his residence.[167]

Now is the best time to broaden the scope of *Lang* in New York's common law. First, in *Lang*, Judge Conner utilized the correct test for determining where a cause of action accrues for purposes of CPLR

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[160] Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts., 112 N.E.3d 1219, 1236, 1243 (N.Y. 2018) (Wilson, J., dissenting).

[161] *See* N.Y. CONST. art. III, § 1.

[162] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[163] *See* Lang v. Paine, Webber, Jackson & Curtis, Inc., 582 F. Supp. 1421, 1425–26 (S.D.N.Y. 1984).

[164] *See id.* at 1426.

[165] *See id.*

[166] *See id.* at 1423, 1426.

[167] *Id.* at 1426.

202: the "place of injury" test.[168] In fact, Judge Conner applied this test before the New York Court of Appeals adopted it.[169] Second, although the New York Court of Appeals has not utilized the *Lang* exception since Judge Conner's decision, *Lang* has not been overruled by New York or federal courts.[170] Third, and most importantly, the New York Court of Appeals has purposely left room for the *Lang* exception to flourish. For example, in *Global*, Chief Judge Kaye wrote that "the place of injury *usually* is where the plaintiff resides and sustains the economic impact of the loss."[171] Here, Chief Judge Kaye has expressed the general rule, but has explicitly left room for an exception to this rule. *Lang* is the exception that fits.

Allowing the *Lang* exception to take root in New York's common law provides relief to the issues raised by Judge Wilson. Primarily, contracting parties will finally have an articulable guideline to follow if they want to avoid CPLR 202. Also, and just as important, allowing an exception to CPLR 202 will give courts the ability to promulgate the legislature's intent of maintaining New York's title as the pinnacle of the commercial world.

[168] *Id.* at 1425.

[169] *See id.* The New York Court of Appeals did not adopt this rule until 1999. *See* Glob. Fin. Corp. v. Triarc Corp., 715 N.E.2d 482, 485 (N.Y. 1999).

[170] *See, e.g.*, *Glob. Fin. Corp.*, 715 N.E.2d at 485 (citing *Lang*, 582 F. Supp. at 1426).

[171] *Id.* (emphasis added).