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# Who Decides Arbitral Timeliness?

Amer Raja
*American University Washington College of Law*

Shanila Ali
*American University Washington College of Law*

# WHO DECIDES ARBITRAL TIMELINESS?

*By Amer Raja and Shanila Ali*[1]



## Introduction

Timeliness, the period of limitation for bringing claims in arbitration, is often raised as a defense either in arbitration proceedings or in court. Being a condition precedent to arbitration, it is often unclear whether timeliness is in itself arbitrable. Such lack of clarity bolsters the accrual of uncertainties as to whom of the tribunal or the court should determine the outcome of a question.

In determining the arbitrability of an issue, the U.S. Supreme Court has generally held that the question turns upon what the parties agreed about that specific matter.[2] Therefore, whether an issue is to be decided by the arbitrator or a court is ultimately a matter of the parties' contractual intent[3] and parties are required to submit to arbitration only those disputes they have agreed to be arbitrable.[4]

In practice however, parties many times fail to include express provisions regarding limitations issues in the arbitration agreement, notably

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[1] American University Washington College of Law, J.D. Candidates 2013.

[2] Specifically, the question is the following: did the parties agree to submit the arbitrability question itself to arbitration? First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[3] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995).

[4] *See First Options*, 514 U.S. at 947 (holding that because one party did not clearly agree to submit the question of arbitrability to arbitration, the issue was subject to review by courts).

timeliness. Thus, a court faced with a motion to compel or stay arbitration must determine who the parties intended to decide such issues. Today, in the absence of an express agreement between the parties as to the arbitrability of pre-arbitration issues, resolution of the "who decides" issue may ultimately depend on which federal court is making the determination. Circuit courts are split as to who should resolve the timeliness question.[5] Traditionally, in the First, Second, Fifth, Eighth and Ninth circuits, the trend had been that the arbitrator would decide matters of timeliness, at least when governed by the National Association of Securities Dealers rule (hereinafter "NASD").[6] On the other hand, the Third, Sixth, Seventh, Tenth, and Eleventh circuits decided that, under the NASD rule, courts should determine timeliness.[7]

In 2002, the Supreme Court rendered a decision that put to rest the interpretation of timeliness in the context of the NASD rule—but it was unclear how the courts would interpret it with regards to arbitration clauses outside the NASD's realm.[8] Today, there is still dissonance among the courts on how to approach the issue.[9] In *Bechtel v. UEG Araucária*,[10] the most recent decision addressing the arbitrability of timeliness, the U.S. Court of Appeals for the Second Circuit decided that the question was for the arbitrators, not courts, to decide. However, because that decision was not based on Supreme Court precedent, the issue of timeliness in non-NASD context still remains unresolved in other circuits.

This Article will examine developments in American jurisprudence as to arbitral timeliness and attempt to reconcile each court's approach to that issue. Part I will provide the historical context of timeliness as a procedural or substantive arbitrability issue. Part II will discuss the current trend towards timeliness as a procedural issue. Finally, Part III argues that federal courts should adopt the current trend of addressing timeliness as a procedural issue to be settled by the arbitrator in order to preserve the sanctity of the arbitration process.

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5 Lawrence W. Newman, Charles M. Davidson, *Arbitrability of Timeliness Defenses: Who Decides?* 14 J. Int'l Arb. 137, 138 (1997).

6 *Id.* at 142.

7 These courts considered timeliness a component of arbitrability. *Id.* at 141.

8 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

9 However, some courts have tried to reconcile these constructions across provisions regarding choice of law.

10 Bechtel do Brasil v. UEG Araucária, 638 F.3d 150 (2d Cir. 2011).

## I. Is Timeliness an Issue of Procedural or Substantive Arbitrability?

The tension between submitting the interpretation of time-barred claims to arbitrators or the courts mired many of the arbitration disputes leading up to *Howsam v. Dean Witter Reynolds, Inc*.[11] Traditionally, the Federal Circuit Courts have held that timeliness is an issue of substantive arbitrability to be decided by the courts. In *Howsam* however, the Supreme Court established a new presumption that issues regarding the timeliness of a claim should be submitted to the arbitration tribunal—absent some provision indicating otherwise.[12]

### A. Traditional Judicial Approach to Timeliness as a Substantive Arbitrability Issue

The Third, Sixth, Seventh, Tenth and Eleventh circuits have traditionally treated timeliness as an issue of substantive arbitrability and thus as a jurisdictional prerequisite that must be satisfied for a dispute to be eligible for arbitration.[13] These Circuits have held that the courts, instead of arbitrators, must determine arbitrability in the first instance.[14] To determine the arbitrability of an issue, these jurisdictions ask whether the agreement creates a duty for the parties to arbitrate the particular grievance, which ultimately turns on an interpretation of the parties' intent.[15] Courts have typically engaged in a two-step analysis to resolve this question.[16]

First, under the Supreme Court precedent *AT&T Technologies, Inc. v. Communications Workers of America*, the issue of whether the parties have agreed to arbitrate their dispute is for the courts to decide.[17] The Court in *AT&T Technologies, Inc.,* reasoned that because arbitration

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11 Newman & Davidson, *supra* note 5, at 137.

12 *Howsam,* 537 U.S. at 85.

13 Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 476 (10th Cir. 1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F. 3d 381, 383-84 (11th Cir. 1995); PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1378 (3d Cir. 1993); Roney and Co. v. Kassab, 981 F. 2d 894, 898 (6th Cir. 1992); Edward D. Jones & Co. v. Sorrells, 957 F. 2d 509, 512-13 (7th Cir. 1992).

14 *Id.*

15 *Id.*

16 Newman & Davidson, *supra* note 5, at 139.

17 *See* AT&T Tech., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

is a matter of contract, parties could only submit to arbitration those disputes that both parties have agreed to be arbitrated.[18] Courts should hesitate to interpret silence or ambiguity on who should decide arbitrability as giving the arbitrators that power, for "doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[19]

Second, the Third, Sixth, Seventh, Tenth and Eleventh circuits have examined the arbitration provisions to determine whether there is "clear and unmistakable" evidence of the parties' intent to arbitrate the time-bar issue.[20] In instances where the arbitration clauses' language was ambiguous (i.e. where the clause failed to expressly allocate to the arbitrators the determination of statute of limitations defenses), these courts have generally held that clear and unmistakable evidence of such intent to arbitrate was absent and that the issue of timeliness thus belonged to the court.[21]

The Tenth Circuit in *Cogswell v. Merrill Lynch* accordingly held that it was the district court, and not the arbitrator, who had jurisdiction to determine whether the parties' claims were time-barred by §15 of the NASD Code.[22] After finding that there was not a "clear and unmistakable" expression of the parties' intent to give the arbitrator the power to decide whether § 15 bars it from exercising jurisdiction,[23] the court held that it could not compel arbitration because more than six years had elapsed, causing the claim to be time-barred.[24]

The courts in the Third, Sixth, Seventh, Tenth and Eleventh circuits reconciled their decision of timeliness as a judicial determination with

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18 *See id.* ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.").

19 First Options of Chicago, Inc. v. Kaplan*,* 514 U.S. 938, 945 (1995).

20 *E.g.*, Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 476 (10th Cir. 1996) (citing *First Options,* 514 U.S. at 945).

21 *Id.* at 478 ("If we conclude the agreement is silent, ambiguous, or devoid of "clear and unmistakable" evidence the parties intended the arbitrators to determine the applicability of § 15 of the NASD Code, we must conclude the parties intended for the court to decide whether it applies").

22 *Cogswell*, 78 F.3d at 478.

23 *Id.* at 481 (holding that the plaintiff had not identified any evidence tending to show the clear and unmistakable intent of the parties to have the arbitrator decide the issue of timeliness).

24 *Id.*

other circuits holding that arbitrators should decide by applying the Supreme Court's reasoning in *First Options of Chicago, Inc.*:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. . . . In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement,-for in respect to this latter question the law reverses the presumption."[25]

The Supreme Court has held that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."[26] However, this presumption in favor of arbitration is not applicable when the question to be resolved is who decides the arbitrability question itself.[27]

### B. Recent Judicial Approach to Timeliness as a Procedural Issue: the Howsam and Bechtel decisions

In *Howsam v. Dean Witter Reynolds, Inc.,* the Supreme Court opted to treat timeliness as a procedural issue reserved for the determination of the arbitrators.[28] The case involved claims arising from a dispute between a private investor, Howsam, and Dean Witter, the brokerage firm that had provided her financial advice.[29] In particular, Howsam claimed that the firm had misrepresented the economic value of the partnerships she was told to invest in.[30] The dispute continued and Howsam eventually opted for arbitration before the National Association of Securities Dealers (hereinafter "NASD") under the NASD Code of Arbitration Procedure (hereinafter "NASD Code").[31] The issue arose when Dean Witter sought a declaration in Federal District Court that arbitration was no longer

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25 First Options of Chicago, Inc. v. Kaplan*,* 514 U.S. 938, 943 (1995).

26 Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (U.S.N.C. 1983).

27 Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).

28 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

29 *Id.* at 81.

30 *Id.*

31 *Id.* at 82.

feasible because the dispute accrued more than six years before the initiation of arbitration—thus rendering the entire arbitral proceedings time-barred under Section 10304 of the applicable NASD Code.[32] Indeed, Section 10304 provides that no dispute "shall be eligible for submission . . . where six years have elapsed from the occurrence or event giving rise to the dispute."[33] The district court dismissed the action, finding that courts had no jurisdiction to interpret the NASD Code. On appeal, the Court of Appeals for the Tenth Circuit reversed the lower court and held that the parties had not clearly and unmistakably allocated the issue of arbitrability itself to the arbitrators.[34] Thus, because the Court found that the determination of whether the arbitration was time-barred inherently affected the dispute's arbitrability, it also ruled that the issue was within the primary jurisdiction of the courts as the parties had not expressly and unequivocally allocated the question to the tribunal.[35]

Granting certiorari, the Supreme Court ultimately reversed the Tenth Circuit, reasoning that as a question inherently procedural in nature, timeliness was for the strict determination of the arbitrators.[36] The Court's rationale stressed that the timeliness of the arbitration was a *procedural* condition precedent to arbitration that did *not* involve a decision of whether the parties were bound by the arbitration clause of their agreement.[37] Rather, the time limit rule "closely resembles" gateway questions that the Court has not found to be questions of arbitrability[38] and that are inherently part of the dispute itself, to be determined by the tribunal. In reaching its conclusion, the Court also considered that requiring the timeliness issue to be determined by the courts would delay and antagonize the purpose of arbitration clauses in the first place: mechanisms that bypass the court system to provide quick and effective remedies.[39] Finally, the Court emphasized that because NASD arbitrators are more experienced, they are more apt to interpret and apply their own timeliness rule.[40]

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32 *Id.*

33 NASD Code of Arbitration Procedure § 10304 (1984).

34 Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 964 (10th Cir. 2001), *rev'd*. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

35 *Id.*

36 *Howsam*, 537 U.S. at 79.

37 *Id.*

38 *Id.* at 85.

39 *Id.*

40 *Id.* at 85.

In spite of the Court's clear ruling in *Howsam*, the federal circuits are still divided on the issue of the arbitrability of timeliness, some questioning the precedential value of the decision, which was rendered in the NASD context. Thus, the decisions that elected to follow the procedural approach remain particularly relevant to understand the import of *Howsam*. In 2011, in *Bechtel v. UEG Araucária,* the U.S. Court of Appeals for the Second Circuit decided that the issue was one for the arbitrators, not the courts to decide.[41] Although the *Bechtel* decision sprung from a jurisdiction that has traditionally viewed questions of timeliness as the type that should be submitted to the arbitrator, this decision could highlight the shift initiated by *Howsam* towards time-bars as a procedural issue of arbitrability.[42] In *Bechtel*, Bechtel do Brasil, Bechtel Canada, and Bechtel International ("Bechtel") had entered in 2000 into an agreement with UEG Araucária ("UEGA") for services regarding the construction of a power plant in Araucária, Brazil.[43] The agreement, construed together with governing—procedural and substantive—law provisions indicated that the parties intended to submit disputes arising from the breach or execution of their contract to arbitration.[44] Additionally, the agreement provided that its provisions should be interpreted under New York law.[45]

In late 2002, Bechtel completed its construction and examination of the power plant and notified UEGA.[46] UEGA certified its acceptance of the power plant, but due to extraneous circumstances, did not start

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41 Bechtel do Brasil v. UEG Araucária, 638 F.3d 150, 156 (2d Cir. 2011).

42 Newman & Davidson, *supra* note 5, at 142.

43 *Bechtel,* 638 F.3d at 152.

44 Art. 37.2. of the Contract read: "Any 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 in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC") then in effect (the "Rules"), except as these rules may be modified herein." Art. 37.2.2 read: "Any 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." The Contract also contained a "Law and Procedure" section specifying that "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 laws rules" and "the law governing the procedure and administration of any arbitration instituted pursuant to Clause 37 is the law of the State of New York." *Id.*

45 *Id.*

46 *Id.*

operating the power plant until December 2006.[47] In 2008, one of the mechanical components of the power plant failed, and UEGA filed for arbitration based on a claim of deficiency in Bechtel's services and for negligent misrepresentation.[48] Bechtel asserted the defense that UEGA's claim was time-barred and therefore could not be asserted in arbitration. Bechtel based this defense on a New York Civil Practice Law and Rules provision which states:

> If, at the time that a demand for arbitration was made or 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.[49]

As a result, the issue of arbitrability of the timeliness of a claim came before the courts.[50] The district court determined that arbitration should be permanently stayed because UEGA asserted its claim after the time-bar in New York, which prevented it from compelling Bechtel to submit to arbitration.[51] The United States Court of Appeals for the Second Circuit reversed the decision and ordered that the question of timeliness be submitted to the arbitrator—not the court. The reversal was motivated by the Court's reasoning that the arbitrator would have to decide the issue of whether an arbitration claim was time-barred,[52] as the issue of when the limitation time starts to run constitutes an element of the dispute that cannot be separated from the rest of the arbitration claims.

Although *Bechtel* did not cite to Supreme Court precedent in reaching its ruling, the Supreme Court's reasoning in *Howsam* is particularly useful in analyzing *Bechtel*. Indeed, both cases are similar in that they involve disputes regarding the terms of a time-provision not explicitly included in those terms. Second, although *Howsam* specifically implicates a NASD rule—and *Bechtel* does not—the timeliness issues are both determinative of the arbitrator's ability to rule on the matter. Third, as in *Howsam*, the parties in *Bechtel* agreed prior to the dispute to submit

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47 *Id.*

48 *Id.*

49 New York Civil Practice Law and Rules § 7502(b).

50 *Bechtel*, 638 F.3d at 152.

51 *Id.* at 153-54.

52 *Id.* at 152.

*all* claims to arbitration.[53] This means that, according to the executed agreement, the parties in *Bechtel* did not intend to reserve a special exception for timeliness to be submitted to the court.[54] Moreover, the decision to include an arbitration clause reflected the parties' interest in the efficient resolution of any potential disputes, as the Court described in *Howsam.*[55] For these reasons, the *Bechtel* decision further supports the assertion laid out in *Howsam,* that issues regarding the timeliness of claims should be submitted to the arbitrator as a procedural condition precedent to arbitration, rather than a substantive question of arbitrability beyond the arbitrators' reach.

## II. The Judicial Shift Towards Framing the Issue of Timeliness as One of Procedural Arbitrability

Until recently, various circuit courts approached questions regarding the arbitrability of timeliness claims differently.[56] Since *Howsam* however, the presumption of submitting claims of timeliness to the arbitrator seems to be finally somewhat influencing the approaches of the various Federal circuits.

Although the courts have indicated in the past that they "do not establish a bright line rule that timeliness questions must inexorably go to the arbitrator,"[57] circuit courts now seem to look for contractual provisions granting jurisdiction to the court over time-bar issues.[58] In the absence of such contractual provisions, the courts appear to be allowing the claims to go through the arbitration procedure. This reflects both the presumption outlined in *Howsam* with regards to the specific NASD rule, but also places emphasis on the parties' ultimate decision to arbitrate.[59] By leaving open the option of contracting otherwise, the courts seem to sidestep the issue of a *de facto* bar on timeliness claims, and establish a more predictable structure that would allow parties to enter contracts with more certainty of being able to avoid excessive litigation costs.

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53 *Id.*

54 *Id.*

55 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).

56 Newman & Davidson, *supra* note 5, at 141-42.

57 United Steel Workers of America v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417, 424 (6th Cir. 2007).

58 *Id.*

59 *Id.*

One of the more prominent cases following *Howsam*, *United Steel Workers of America v. Saint Gobain Ceramics & Plastics, Inc.*, involved a labor dispute between the United Steel Workers of America and a manufacturing company.[60] The case employed the *Howsam* presumption structure and indicates explicitly in dicta that "parties who wish to steer timeliness disputes to the courts remain free to do so and nothing in this opinion is to the contrary."[61] The parties in this case however, were silent on the issue of timeliness when they established the arbitration procedure to resolve their grievances. Through this ruling the presumption outlined by the Supreme Court in *Howsam* was extended to the timeliness claims in other arbitration disputes—ones that do not necessarily implicate the NASD rule.[62]

This development is a stark departure from the previous approach that the Sixth Circuit had taken on issues of arbitrability. The Sixth Circuit, along with the Third, Seventh, Tenth and Eleventh circuits traditionally submitted claims to the courts for determination on the timeliness issue.[63] Although the Sixth Circuit has not expressed a prohibition on submitting such claims to the courts, it becomes an exception that must have been clearly outlined by the parties. The presumption requires the contracting party seeking court assistance to rebut the notion that the issue of timeliness should be submitted to the arbitrator. The court in the *United Steel Workers* case based this determination on the notion that:

> [I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e. whether prerequisites such as time limits, notice, laches, estoppels, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[64]

By grounding its decision in the Revised Uniform Arbitration Act, the court further bolsters its approach to timeliness as a procedural issue and indicates an authentic and authoritative source on practices

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60 *Id.* at 417.

61 *Id.* at 424.

62 *Id.* at 425.

63 Newman & Davidson, *supra* note 5 at 141.

64 *United Steel Workers of America*, 505 F.3d at 424 (citing RUAA sec. 6 cmt. 2, ULA at 13).

and procedures in arbitration.[65] Consequently, the Sixth circuit's shift in approach can be said to indicate the growing trend to abandon timeliness as a question of arbitrability and instead focusing on timeliness as a question of procedure.

## III. Why Timeliness as a Procedural Arbitrability Issue Preserves The Effectiveness of the Arbitral Process

The trend towards approaching timeliness as procedural arbitrability is consistent with the international endorsement of the arbitration process. As a procedural issue, time-bar defenses are directed to arbitrators to resolve, thereby deferring to arbitration questions that would otherwise be litigated in courts. In the international context, arbitration is a flexible form of alternate dispute resolution meant to benefit all parties to a contract. The objective of arbitration is to eliminate some of the costs associated with traditional litigation while expediting the resolution to a claim. When parties enter litigation to determine the timeliness of a claim as an eligibility issue, they effectively eliminate the advantages of an arbitration clause. The cost-savings and efficiencies that are the pinnacle of the arbitration process are countered by the litigation delays and costs of a court determining whether a claim is arbitrable. Furthermore, procedural issues are intertwined with the merits of the dispute, thus, reservation of procedural issues for the courts provides opportunity for inefficiencies that stem from duplication of efforts.

A jurisdictional characterization of timeliness shifts the authority to determine the scope of arbitrators' power from the arbitrators themselves to the court. Deference to the courts to resolve timeliness defenses establishes precedent for the courts to decide on other limitation defenses. Such precedent threatens the sanctity of the arbitration process, as it exponentially expands the power of courts to stay arbitration proceedings. The current trend towards deferring time-bar defenses to arbitrators can preserve the sanctity of the arbitration process by increasing court predictability. Once parties are aware that the courts will defer time-bar defenses to arbitrators, they are able to forgo costly litigation in favor of arbitration to settle such claims.

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[65] *Id.*

## Conclusion

The Supreme Court in *Howsam* held that arbitrators should decide the issue of timeliness.[66] However, that decision was rendered in the narrow context of the NASD Code, which differs from other arbitral codes. In instances in which parties have agreed that the arbitration is to be governed by rules containing limitations, timeliness provisions could be treated as evidence of the parties' intent regarding the arbitrability of those limitations. Otherwise, there may still be a question as to their intent regarding the determination of limitations to arbitration. Resolving the issue of whether the arbitrator or the courts decide on whether a claim is timely ultimately turns on the parties' intent—or the lack thereof. Although parties to a contract are free to vest the arbitrators with the power to determine issues of arbitrability, parties often either fail to foresee this issue or to make their intent clear.

Absent a clear expression of the parties' intent, courts may engage in varied analyses to reach different and unpredictable results. The parties' agreement to arbitrate under rules containing limitations provisions may or may not be construed as evidence of their intent to resolve limitations issues in the courts. Given the variety of decisions, those drafting arbitration agreements must give thoughtful consideration to how the parties' intent in an arbitration agreement will be expressed, particularly with respect to any threshold matter they prefer courts, rather than the arbitration panel, to determine.

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[66] Section 15 establishes a limitation of six years as an explicit procedural guideline for arbitration. National Association of Securities Dealers Rule 15.