THE PROBLEM OF LIMITATION PERIODS IN INTERNATIONAL COMMERCIAL ARBITRATION – WHAT IS THE PRESCRIPTION?

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Abstract

Limitation periods are a vital component of any developed legal system. In spite of being fundamental to most systems of law, there is little clarity as to the applicable limitation regime in 'international' transactions. This confusion arises from the fact that certain countries treat limitation as an issue of procedure, thereby subject to the laws of the forum, whereas other countries treat it as an issue of substance, and therefore subject to the law applicable to substantive issues. In recent years, some countries like England and Singapore have (statutorily) sought to treat limitation as an issue of substance, thereby requiring it to be regulated by the law applicable to substantive issues. While there are several policy factors that justify treating limitation as an issue of substance, such treatment may not be entirely appropriate or efficient in the context of international commercial arbitration. In this paper, the author advocates eschewing (in the context of international commercial arbitration) the traditional classification of limitation periods as substantive or procedural. Instead, the author puts forth the case for granting international arbitral tribunals the discretion to determine the appropriate limitation regime.

I. Introduction

The law of limitation has been justified as representing the "deepest instincts of man".[1] For an issue that is purportedly so fundamental, there is a surprising lack of consensus on the appropriate treatment that is to be accorded to it. This lack of consensus has additional ramifications in the field of international arbitration, which depends on international uniformity in order to function smoothly. Some countries have attempted to bridge the divide and work towards achieving uniformity in this regard. These attempts were made in the context of litigation before State courts and have been extended to international arbitration. However, they fail to account for special considerations that apply within the sphere of international arbitration.

This paper endeavours to highlight these special considerations and suggests a preferred approach in handling issues of limitation. First, this paper discusses the problematic traditional approaches to issues of limitation, including their relevance in international arbitration. Second, this paper critiques the modern-day approach to issues of limitation in litigation and international arbitration. Third, this paper concludes by arguing for a more nuanced approach to issues of limitation within the context of international commercial arbitration, with a view towards maximizing efficiency.

II. The Problem

Statutes of limitation are important to any system of law. As summed up by the United States Supreme Court, "*Statutes of limitation … are … approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their*

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1 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

foundation. They stimulate to activity and punish negligence….".[2]

As one would expect, statutes of limitation differ considerably in different countries.[3] This leads to uncertainty regarding the appropriate limitation regime in the sphere of international commerce. Essentially, questions arise as to which country's limitation law should apply when the transaction is 'international' in nature. The differences arise not only with respect to the length of the limitation period, but also with respect to the point in time when the limitation period begins to run.[4] Some countries like France adopt a subjective standard to determine when the period begins to run- i.e., it begins when the creditor becomes aware of the non-conformity of the goods.[5] Other countries like Germany usually provide that the period of limitation begins to run at the time of handing over the goods.[6] The difference in the approach of various countries is stark when one considers that Germany and France have the same limitation period of two years for seeking a remedy for non-conformity of goods, but this two year limitation period begins to run at different points in time.

While these differences contribute to the uncertainty regarding limitation periods in cross-border transactions, they are not the root of the problem. Cross-border litigation and conflict of laws rules are developed enough by now to enable choice between various possible applicable laws. Instead, the root of the problem lies in the way that countries classify statutes of limitation.[7]

It is settled that the forum applies its own rules to issues of procedure, and the law applicable to the merits (the *lex causae* or law governing the contract) to issues of substance.[8] The problem with limitation is that some countries classify it as a procedural issue and therefore seek to apply their own rules, while others classify it as an issue of substance and therefore seek to apply the law applicable to substantive claims.[9]

In general, the traditional view in common law countries was to consider limitation as a procedural issue. The approach in these jurisdictions was to focus on the formulation of the limitation statute. Statutes that barred the remedy without extinguishing the right were considered procedural, and those that extinguished the right were considered substantive.[10] Since

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2 Wood v. Carpenter, 101 U.S. 135, 139 (1879) (U.S.).

3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2669 (2d ed. 2014) [*hereinafter* "Born"].

4 Ingeborg Schwenzer & Simon Manner, *'The Claim Is Time-Barred': The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 298 (2007) [*hereinafter* "Schwenzer & Manner"].

5 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1648(1) (Fr.).

6 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 438 ¶ 2 (Ger.), *translation available at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1571.

7 BORN, *supra* note 3.

8 JAMES J. FAWCETT & JANINE M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 75 (14th ed. 2008); LUTHER L. MCDOUGAL III ET AL., AMERICAN CONFLICTS LAW 403 (5th ed. 2001) [*hereinafter* "McDougal et al."].

9 Yugraneft Corporation. v. Rexx Management Corporation, [2010] S.C.R. 16 (Can.) [*hereinafter* "Yugraneft"].

10 Huber v. Steiner [1835] All ER 159; McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd. (1991) 174 CLR 1, 41 (Austl.); LAW COMMISSION OF INDIA, REPORT NO. 193, TRANSNATIONAL LITIGATION-CONFLICT OF LAWS OF LIMITATION 20 (2005) [*hereinafter* "Report 193"]. An example of a provision that merely bars the remedy would be one which stipulates that no action may be brought beyond the prescribed period of limitation. *See, e.g.*, English Limitation Act 1980, c. 80, § 2 (Eng.). On the other hand, an example of a provision that extinguishes the right would be one which extinguishes the cause of action itself: *see, e.g.,* TEX. BUS. & COM. CODE § 24.010(a)(1) (West 2009).

the English statute addressed limitation in terms of "non-enforceability" of rights,[11] several common law countries came to treat limitation as an issue of procedure.[12] On the other hand, civil law countries usually considered it to be an issue of substantive law.[13]

Classifying limitation one way or another is not an inconsequential matter. Take for example the following scenario. In a litigation initiated five years after the accrual of the cause of action, Equatoriana is the forum, and the law of Mediterraneo is the governing law of the contract. The law of Equatoriana prescribes a limitation period of two years, whereas Mediterraneo prescribes a period of six years. If the issue of limitation is a procedural issue, the law of Equatoriana applies and the claim is time-barred. If the issue is one of substance, the law of Mediterraneo applies and the claim is not barred. Therefore, either classification would favour one party at the cost of the other.[14]

The problem of classification of limitation statutes is not exclusive to court litigation. Statutes of limitation are also relevant in international arbitration.[15] Other than a few heavily criticized decisions within the United States,[16] decisions and commentaries in almost every jurisdiction have agreed that statutes of limitation apply in arbitration.[17] The application of limitation periods in international arbitration also comports with the expectations of commercially aware parties who want the predictability that limitation periods offer.[18]

Accordingly, the problem of classification remains equally prevalent in international arbitration. If anything, the problem is compounded by the number of laws that can possibly impact an arbitral proceeding.[19] In litigation before courts, the court has to choose only between the law of the forum and the law applicable to the merits. An international arbitral tribunal, on the other hand, does not have a forum per se.[20] It must consider the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] (in most cases), the *lex arbitri*, the law and policies in force at the seat of the arbitration, the governing law of the contract, the law applicable to the arbitration agreement, and the law and policies in force at the place where enforcement of the award is likely to be sought.[21]

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11 English Limitations Act 1980, c. 80 1623 (Eng.).

12 SINGAPORE ACADEMY OF LAW, REPORT OF THE LAW REFORM COMMITTEE ON LIMITATION PERIODS IN PRIVATE INTERNATIONAL LAW, ¶ 6 (2011) [*hereinafter* "Law Reform Committee"].

13 Schwenzer & Manner, *supra* note 4, at 293.

14 *See, e.g.,* Case No. 7375 of 1996, Partial Award, 11 Int'l Arb. Rep. A1 (ICC Int'l Ct. Arb.) [*hereinafter* "ICC Case No. 7375"].

15 BORN, *supra* note 3, at 2220.

16 *See, e.g.*, Broom v. Morgan Stanley DW Inc., 236 P.3d 182, 188 (Wash. Sup. Ct. 2010), ¶ 26; Lewiston Firefighters Association v. City of Lewiston, 354 A.2d 154 (Maine Sup. Ct. 1976); Cameron v. Griffith, 370 S.E.2d 704 (N.C.App. Ct. 1988). These decisions, among others, were criticized as being 'fundamentally inconsistent' with the text and purpose of statutes of limitation, and for being the outcome of an outdated judicial suspicion towards arbitration; *See* Gary B. Born & Adam Raviv*, Arbitration and The Rule of Law: Lessons from Limitations Periods*, 27 AM. REV. INT'L ARB. 373 (2017) [*hereinafter* "Born & Raviv"].

17 Born & Raviv, *supra* note 16, at 387.

18 *Id.* at 373, 388.

19 BORN, *supra* note 3, at 2668.

20 Klaus-Peter Berger, *Re-examining the Arbitration Agreement: Applicable Law - Consensus or Confusion?, in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 306 (Albert Jan van den Berg ed., 2006).

21 Veijo Heiskanen, *And/Or: The Problem of Qualification in International Arbitration,* 26(4) ARB. INT'L 441(2010).

What then are the consequences of an arbitrator preferring one approach of classification over another, and preferring one limitation regime over another? As mentioned, limitation periods are fundamental to any system of law. There are important policies underlying the application of limitation laws; respondents are protected from stale claims, claimants are enjoined to be expeditious, important evidence is preserved, and finality is promoted.[22] However, these policy considerations require that *a* limitation regime be applied, but not that any *particular* State's limitation regime be applied. Hence, the application of a 'foreign' law on limitation periods should not by itself offend a State or its public policy (especially if State courts reject purely parochial interpretations of public policy, as they should).[23] This is reflected in the modern trend where States allow limitation periods to be governed by the (usually foreign) law applicable to the merits, as described in detail below.

In such a scenario, it can be argued that the application of limitation periods in international arbitration is not such a complicated issue. After all, the arbitrator's primary duty is to render an enforceable award.[24] The grounds for non-enforcement in international arbitration are extremely limited. Hence, following an 'incorrect' classification of limitation periods would be unlikely to threaten the enforceability of the award.[25] As stated earlier, non-enforcement on grounds of public policy would also be unlikely.

Despite this, classification of limitation as procedural or substantive continues to have important ramifications in international arbitration.[26] It has important effects on the parties whose claim may turn out to be time-barred or within time, based solely on such classification. Importantly, this kind of lack of consensus leads to "unacceptable uncertainty" in international commerce.[27] Further, arbitration statutes contain distinct provisions on the source of a tribunal's authority to determine procedural issues and the source of a tribunal's authority to determine substantive issues.[28] This distinction could potentially have an impact on the scope of the tribunal's power to determine these issues. For instance, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"] allows procedural aspects of the arbitration to be determined, in the absence of party consensus, by the tribunal at its discretion.[29] On the other hand, if the parties have not chosen the law applicable to substantive issues, Article

22 LAW REFORM COMMITTEE, *supra* note 12, ¶ 47.

23 Schwenzer & Manner, *supra* note 4, at 293, 299; LAW REFORM COMMITTEE, *supra* note 12, ¶¶ 30, 47.

24 JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1263 (2012); AUDLEY SHEPPARD, *Applicable Substantive Law*, *in* ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND 237 (2013).

25 Benjamin Hayward, *New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations*, 26(3) J. INT'L ARB. 434 (2009).

26 *See, e.g.,* ICC Case No. 7375, *supra* note 14.

27 Schwenzer & Manner, *supra* note 4, at 293.

28 Benjamin Hayward, *supra* note 25, at 418; *see, e.g.,* the distinction between Section 34 and Section 46 of England's Arbitration Act, 1996 and the distinction between Section 19 and Section 28 of India's Arbitration and Conciliation Act, 1996.

29 United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, art. 19, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006) UN Doc. A/Res/61/33 [*hereinafter* "UNCITRAL Model Law"]: "Determination of rules of procedure (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate…".

28 requires the tribunal to undertake a conflict of laws analysis to determine this law.[30]

III. The Problematic Solution

Today, it cannot be said that countries have remained unresponsive to the issue of classification of limitation periods. There is now some consensus that limitation should be treated as a substantive issue governed by the law applicable to the contract, and not by the law of the forum. England's Foreign Limitation Periods Act, 1984 provides that where the law of a foreign country is to be applied in the determination of any matter, the foreign country's law on limitation will also apply.[31] Section 13 of England's Arbitration Act, 1996 extends this provision to arbitration proceedings in England. Singapore has followed suit by virtue of Section 3 of its Foreign Limitation Periods Act, 2012 and Section 8A of its International Arbitration Act (Revised Edition 2002). This approach is also followed in the European Union, where the Rome I and Rome II Regulations provide that limitation issues are governed by the substantive law applicable to contractual and non-contractual obligations.[32]

In Australia, the old view considering limitation as a procedural issue was overturned by the Australian Law Reform Commission and by legislation in the major states.[33] In New Zealand, Part 2A was added to the Limitation Act, 1950 in 1996, which provides for the application of the limitation law contained in the substantive law applicable to the contract. This provision applies to arbitration as well.[34]

In Canada, the Supreme Court decided to treat limitation as a substantive issue governed by the law applicable to the merits.[35] In the United States, at least seventeen states have classified limitation as an issue governed by substantive law.[36] In some states like Michigan, West Virginia, and Rhode Island, the transition from the old view was imposed by state Supreme Courts.[37] Other states like Oregon, Colorado, and Washington adopted the Uniform Conflict of Laws Limitation Act, 1982 which classifies limitation as an issue that is governed by the law governing other substantive issues in the claim.[38] The Law Commission of India, in its 193rd Report, recommended that India abandon the procedural classification of limitation and follow the substantive classification.[39] However, the recommended legislative changes to India's Limitation

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30 *Id.* art. 28: "Rules applicable to substance of dispute (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute…(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable…".

31 Foreign Limitation Periods Act 1984, c. 16, § 1 (Eng.).

32 Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177/6), art. 12(1)(d); Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, 2007 O.J. (L 199/40), art.15(h).

33 *See, e.g.*, Choice of Law (Limitation Periods) Act 1996 (Qld) § 5 (Austl.); Choice of Law (Limitation Periods) Act 1993 (Vic.) § 5 (Austl.); Queensland Law Reform Commission, Review of the Limitation of Actions Act 1974 (Qld), 15 (1998), *available at* https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0003/372522/r53.pdf.

34 Limitation Act 1950, § 28C(1) (N.Z.).

35 Tolofson v. Jensen, [1994] (3) S.C.R. 1022 (Can.).

36 REPORT 193, *supra* note 10, at 38.

37 Sutherland v. Kennington Truck Service Ltd., 562 N.W. 2d 466 (Mich, Sup. Ct. 1997); McKinney v. Fairchild International Inc, 487 S.E. 2d 913 (W. Va.); Cribb v. Augustin, 696 A 2d 285 (Rh I. 1997).

38 William Tetley Q.C., *A Canadian looks at American conflict of law Theory and Practice, Especially in the light of American Legal and Social Systems* 38, Col. J. TRANSNAT'L L. 299 (1999); Schwenzer & Manner, *supra* note 13, at 293.

39 REPORT 193, *supra* note 10, at 56.

Act, 1963, are yet to be made.[40] This trend towards treating limitation as a matter of substantive law has been approved in commentaries and in arbitral awards.[41]

There are several reasons for this shift in attitude, and the shift itself is commendable - at least within the sphere of court litigation. The most important concern that seemingly drove the shift was that a procedural classification of limitation periods encouraged forum shopping.[42] Plaintiffs would attempt to circumvent the application of an 'unfavourable' foreign limitation law by characterizing limitation as a procedural issue subject to the laws of the forum, following which they would choose that particular forum.[43] Classifying limitation as substantive, and thus tying it to one system of law, prevents this kind of forum shopping.

Further, as described by Mason, CJ in his minority opinion in *McKain* v. *Miller*,[44] the common law distinction between statutes that barred the remedy and statutes that extinguished the right (which was the only real basis of a procedural classification) was both "*artificial and semantic*". No matter how the statute is phrased, limitation has quite a drastic effect on the rights of the parties. There is, after all, no right without a remedy.[45] The distinction was the remnant of an anachronistic English view which attempted to avoid the application of foreign laws as far as possible.[46] Moreover, the limitation regime of the law applicable to the contract is often more in line with the expectations of the parties.[47] Given that limitation has a drastic effect on the rights of the parties (as mentioned above), the parties would naturally expect limitation to be governed by the law which governs their other rights. This is more so the case as the forum is usually chosen for reasons of convenience, and without an expectation that such a choice would alter the rights of the parties.[48]

Along with the shift towards a 'substantive' classification, the modern trend is to move away from a 'rules-based classification', wherein the classification of the statute of limitation depends on its precise wording and whether the wording extinguishes the right or merely bars the remedy. In addition to the artificiality of this distinction between right and remedy, the problem with a rules-based classification is that it can theoretically lead to the application of more than one law, or to the application of no law.[49] For instance, if the limitation law of the forum is classified as procedural on the basis of its wording, and the limitation law in the applicable law

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40 *See, e.g.,* NNR Global Logistics (Shanghai) Co. Ltd. v. Aargus Global Logistics Pvt. Ltd., 2012 SCC OnLine Del 5181 (India). In this case, the Court took note of the Law Commission's suggestions, but went on to find that the law of limitation was procedural in nature.

41 BORN, *supra* note 3, at 2669; Daniel Huser, *Determining the Relevant Limitation Period for International Sales Contracts Before International Arbitral Tribunals,* 33(4) ASA BULLETIN, 839 (2015); Case No. 16247, Final Award, ICC Bull. No. 1, 2016 (ICC Int'l Ct. Arb); Case No. 12700 of 2004, Final Award (ICC Int'l Ct. Arb).

42 THE LAW COMMISSION OF ENGLAND, REPORT NO. 194, CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW 3 (1982).

43 FRANCO FERRARI, FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT: SETTING THE STAGE 2 (2013).

44 *McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd.*, (1991) 174 CLR 1, 41 (Austl.).

45 MCDOUGAL III ET AL., *supra* note 8, at 430.

46 George Panagopoulos*, Substance and Procedure in Private International Law*, 1 J. PRIV. INT'L L. 69, 71 (2005) [*hereinafter* "Panagopoulos"].

47 BORN, *supra* note 3, at 2670.

48 FILIP DE LY, *Conflicts of Law in International Arbitration- An Overview*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 6 (Franco Ferrari & Kröll Stefan eds., 2010) [*hereinafter* "Filip De Ly"].

49 Panagopoulos, *supra* note 46, at 69, 74 (2005).

regime (i.e., as per the governing law of the contract) is classified as substantive on the same basis, both laws would apply to the issue of limitation. The forum's procedural limitation law would apply as part of the procedural law and the foreign substantive limitation law would apply as a part of the law applicable to the contract. Conversely, if the limitation law of the forum was classified as substantive, and the law of limitation under the regime of the governing law of the contract was classified as procedural, neither law would apply to the issue of limitation.[50] This is because the forum can apply only its own procedural rules, and only the substantive law contained in the applicable law.

Instead, the modern approach is to follow an 'issue-based classification', where the *issue* of limitation is classified as substantive or procedural (usually substantive, as indicated above), irrespective of the precise wording of the statute of limitation involved. Under this classification, there are only two possible outcomes - the application of either the law of the forum, or application of the law of the contract.[51]

It is submitted that if a classification is required, this modern trend of an 'issue-based' classification is a step in the right direction. It is the more rational option (given the artificial distinction drawn in a 'rules-based' classification) and leads to greater predictability. However, the modern trend towards classifying the issue of limitation as 'substantive', and thereby tying limitation to the law of the contract in all cases, may not be entirely appropriate within the sphere of international commercial arbitration.

States have, in a rather ham-fisted manner, used policy concerns that apply in court litigation to justify a shift in the attitude in international arbitration. The common underlying concern expressed by all the authors, jurists, and law commissions cited above was that a 'procedural' classification leads to forum shopping. While this is true when it comes to litigation, it is completely inapplicable when it comes to international arbitration.[52] International arbitration functions entirely on the consent of all parties, and a claimant cannot simply 'shop' for a forum that suits him. Rather, the seat of the arbitration is agreed upon by the parties or decided by the tribunal appointed by the parties. One party cannot unilaterally choose the seat. Therefore, it cannot be said that forum shopping in this context is a concern in international arbitration.

Moreover, no guidance is provided to the arbitrators to handle situations where the parties have made a choice of law which does not include provisions on limitation. For instance, such a situation can arise if the parties make a choice in favour of the United Nations Convention on Contracts for the International Sale of Goods ["**CISG**"]. The CISG does not contain provisions on limitation.[53] The gap-filling mechanism under Article 7(2) of the CISG cannot be resorted to either,[54] because the CISG was never intended to govern limitation periods.[55] A tribunal would

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50 LAW REFORM COMMITTEE, *supra* note 12, ¶¶ 10, 11.

51 *Id.*, ¶ 12.

52 RICHARD H. KREINDLER, *Arbitral Forum Shopping*, *in* PARALLEL STATE AND ARBITRAL PROCEDURES, IN INTERNATIONAL ARBITRATION 171 (Bernardo M. Cremades & Julian D.M. Lew eds., 2005).

53 PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 72 (1986).

54 United Nations Convention on Contracts for the International Sale of Goods art. 7(2), Jan. 1, 1988, 1489 U.N.T.S 3, provides that: "Questions concerning matters governed by this Convention which are not expressly settled in it are

possibly have to resort to private international law (i.e., a conflict of laws analysis) in order to find the appropriate limitation regime.[56]

Similar situations can arise where parties make a choice of law in favour of 'the general principles of law' or where they choose more than one system of law to govern their contract. It may be difficult to find rules on limitation within a system as vague as 'the general principles of law'. It can, of course, be argued that the UNIDROIT Principles of International Commercial Contracts ["**UNIDROIT Principles**"] (which contain provisions on limitation) represent 'the general principles of law'.[57] However, given that the UNIDROIT Principles were drafted by a small group of primarily European scholars, equally valid arguments may be raised that they do not truly represent 'general' principles of law. Further, given the variations in the limitation regime of various countries (as described above), it is difficult to see how there can be a 'general' principle of limitation law.

Therefore, treating limitation as a matter of substantive law does not always obviate the need for a conflict of laws analysis. While State courts have relatively well-established rules of private international law, arbitrators are not bound to apply any particular system of private international law. As such, they may face issues such as the 'conflict of conflict of laws' (an analysis of which country's rules of conflict of laws are to be applied, before undertaking the actual conflict of laws analysis) in addition to the general complexity of undertaking a conflict of laws analysis.[58]

Additionally, treating limitation periods as a part of substantive law has one consequence that does not seem to have been considered at length. Article III of the Convention provides that, "*[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*…". Under this provision, States are required to recognize or enforce foreign arbitral awards in accordance with their own *rules of procedure*. Such rules of procedure should logically include rules regarding limitation; States would want to impose some limitation period for the enforcement of an arbitral award.[59] In the words of the Supreme Court of Canada in *Yugraneft Corp.* v. *Rexx Management Corp.* ["**Yugraneft**"], the Convention "*was intended to allow Contracting States to impose time limits on the recognition and enforcement of foreign arbitral awards*".[60] In *Yugraneft*, the Court was content to reject domestic categorizations of limitation periods as substantive, and adopt an independent procedural classification for the sake of Article III. However, *Yugraneft* aside, the effect of a blanket categorization of limitation periods as substantive is still not entirely clear. Would national courts follow the Canadian Supreme Court and impose a limitation period as a procedural rule under Article III of the

to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." (emphasis supplied). Thus, the language of the provision makes it clear that the provision may be resorted to only when there is a question "concerning matters governed by this Convention" which is not expressly settled by the Convention.

55 Schwenzer & Manner, *supra* note 4, at 293, 302.

56 Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICT. UNIV. WELLINGTON L. REV. 781, 788 (2005).

57 *See, e.g.,* Case No. 7110 of 1995, First Partial Award, 10 ICC Bull. No. 2, 1999 (ICC Int'l Ct. Arb).

58 FILIP DE LY, *supra* note 48, at 3.

59 BORN, *supra* note 3, at 3727.

60 Yugraneft, *supra* note 9, ¶ 34.

Convention, even though the limitation statute itself treats limitation as an issue of substance?[61]

That being said, the other concerns which led to the classification of limitation as substantive (regarding the artificial distinction between rights and remedies, and the expectations of the parties) do appear to be a factor in international arbitration as well. In fact, the distinction between right and remedy is even more artificial in international arbitration than in litigation before State courts. A party to an arbitration agreement has a contractual right to arbitrate the dispute, and to seek a remedy before an arbitral tribunal.[62] Therefore, even a limitation provision which merely bars the remedy of arbitration, directly affects the party's contractual rights.

Thus, within international arbitration, there may be certain reasons to classify limitation as substantive, but such a classification does not necessarily relieve arbitrators who could still be required to undertake a time-consuming and complicated conflict of laws analysis. Further, the interplay of such a 'substantive' classification with Article III of the New York Convention is still uncertain.

IV. The Prescription

How then can States reduce the burden on arbitrators, if a substantive classification of limitation issues does not do the job, and a procedural classification is undesirable? Several alternative reform solutions have been considered and rejected in the past, mostly within the context of court litigation. For instance, the Law Reform Commission of New South Wales at one point wanted to treat the limitation law of New South Wales as both substantive and procedural, so that foreign courts would apply that law in a substantive capacity in matters before them, and local courts could similarly apply the same law in a procedural capacity.[63] The American Law Institute rejected the substantive mode of classification and sought to provide, in some cases, for the application of that law of limitation with which the issue of limitation had the most significant connection. However, the default rule was still the application of the forum's laws.[64] Another solution has been to enact 'borrowing' statutes, where the shorter limitation period always applies, whether contained in the forum's law or in the applicable law.[65]

None of these solutions propose anything helpful. The proposals of the Law Reform Commission of New South Wales and of the American Law Institute reveal a strong forum bias and would not really help an international arbitral tribunal, which arguably has no 'forum'.[66] Moreover, in one way or another, they depend on a procedural classification of limitation periods. Further, applying the shortest possible limitation period in all cases does not seem to be an appropriate manner to handle an issue which can be of paramount importance to the parties. 'Borrowing' statutes have been criticised as claiming "*no virtue beyond administrative convenience*".[67] In any case, these borrowing statutes would be of no avail to an international arbitral tribunal,

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61 Alexander Sevan Bedrosyan, *The Limitations of Tradition: How Modern Choice of Law Doctrine Can Help Courts Resolve Conflicts Within the New York Convention and The Federal Arbitration Act,* 164 UNIV. PENN. L. REV. 207, 222 (2015); BORN, *supra* note 3, at 3726.

62 Daniel Huser, *supra* note 41.

63 NEW SOUTH WALES LAW REFORM COMMISSION, FIRST REPORT ON THE LIMITATION OF ACTIONS ¶ 321 (1967).

64 Restatement (Second) of Conflict of Laws § 142 (Am. L. Inst. 1971).

65 Schwenzer & Manner, *supra* note 4, at 293, 297; E. SCOLES & E HAY, CONFLICT OF LAWS 3.11 (2d ed. 1992).

66 Klaus-Peter Berger, *supra* note 26, at 306.

67 MCDOUGAL II ET AL., *supra* note 8, at 437.

which has no forum, and which may be applying a law similar to the CISG, which has no provisions on limitation.

It is submitted that the best way to handle issues of limitation in international arbitration is to eschew the traditional model of classification and leave the determination of the relevant limitation regime to the discretion of the arbitrators. Such discretion can be granted at the national level by inserting specific provisions to this effect in national arbitration legislations. At a transnational level, such a change could be encouraged by inserting a provision to this effect in the UNCITRAL Model Law.

In the exercise of such discretion to determine the applicable limitation regime, the arbitrators can be required to take into consideration all relevant factors, including the subjective intentions of the parties and considerations of fairness. In most cases, the exercise of such discretion may well lead to the application of the limitation regime of the law of the contract. However, allowing discretion to the arbitrators will also take care of those situations in which the law of the contract does not provide adequate answers (for instance, if the CISG is the law of the contract, as indicated above), or fair answers. Accounting for the parties' subjective intentions will also promote predictability and certainty in international arbitration.

Further, incorporating fairness and justice in the application of limitation laws is not a novel concept. The limitation statutes of some countries specifically allow the adjudicator to take into consideration whether the application of a specific rule of limitation would be against public policy or would cause undue hardship to either party.[68] This power should be granted to all arbitrators, irrespective of whether the applicable substantive law allows them the power or not. This can be done by granting discretion to the arbitrators to choose the appropriate limitation law.

This solution has the benefit of simplicity and is hardly controversial. After all, arbitrators are usually granted the discretion to determine tremendously impactful aspects of the arbitral process, including the seat of the arbitration and the law applicable to the merits of the dispute (when there is no prior agreement between the parties).[69] Further, any abuse of discretion can be taken care of at the setting aside or enforcement stage. It has been stated above that applying a 'foreign' limitation period does not by itself threaten the enforceability of the award. However, it is clear that if an arbitrator abuses his discretion and refuses to apply a limitation period, or applies an irrational or arbitrary limitation period, the award could be set aside or refused enforcement on grounds of public policy.

Marginally similar suggestions to grant arbitrators such discretion have been made in the past, where it was argued that limitation should be classified as an aspect of the arbitral procedure, regulated by Article 19 of the UNCITRAL Model Law, and thereby subject to arbitrator discretion in the absence of an agreement between the parties.[70] There are two problems with

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68 Foreign Limitation Periods Act 1984, § 2 (Eng.); Foreign Limitation Periods Act 2012, § 4 (Sing.).

69 *See, e.g.,* The Arbitration and Conciliation Act, No. 26 of 1996, §§ 20, 28 (India), which permits the tribunal to determine, respectively, the seat of the arbitration and the law applicable to the merits of the dispute, in the absence of party consensus.

70 Benjamin Hayward, *supra* note 25, at 430.

this argument. First, the argument rests on the substance - procedure distinction which, as mentioned above, is exceedingly artificial in the context of limitation periods in international arbitration. More importantly, allowing limitation periods to be regulated under Article 19 of the UNCITRAL Model Law (or a similar provision) subjects the applicability of limitation periods entirely to party autonomy. Given that parties may decide the arbitral procedure under Article 19, they may theoretically waive the applicability of any limitation period. The problem with waivers is that some courts have recognized some forms of waiver of limitation periods as unenforceable.[71] Arbitrators may once again be in a quandary. Should they allow the waiver and risk the award being unenforceable, or should they ignore party autonomy and risk the award being unenforceable?

For these reasons, amending existing legislation, to grant arbitrators discretion to decide the applicable limitation regime, is the better option.

V. Conclusion

Despite their ubiquitous presence across jurisdictions, limitation periods remain a source of confusion for adjudicators in international disputes. Apart from the fact that limitation regimes vary vastly across borders, the principal source of this confusion is the fact that there is little consensus on whether limitation statutes are to be classified as substantive or procedural.

States have, in order to put to rest this confusion, attempted to move towards a substantive classification of limitation periods. These attempts have gained traction over the years, and for good reason. A substantive classification of limitation periods discourages forum shopping, and is likely in line with the expectations of the parties to the contract. In any case, procedural classifications rested on exceedingly artificial distinctions between statutes that barred the remedy and statutes that extinguished the right.

The merits of a substantive classification (and the demerits of a procedural classification) notwithstanding, the traditional model of classification of limitation periods does little good in the context of international commercial arbitration. As described above, arbitrators may have to resort to a complicated conflict of laws analysis even under a substantive classification. Further, the interplay between such a substantive classification and the New York Convention is unclear. Therefore, a dogmatic insistence on following the model of classification is likely to perpetuate the confusion that prevailed in the field.

A simpler (and better) solution is to allow arbitrators to exercise discretion in choosing the appropriate limitation regime. As long as well-defined parameters are stipulated for the exercise of such discretion, this solution will promote predictability and efficiency in international arbitration. This, in the author's opinion, should be the prescription (to the problem of limitation periods in international commercial arbitration).

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[71] *See, e.g.*, Hirtler v. Hirtler, 566 P.2d 1231, 1232 (Utah Sup. Ct. 1977) (where the Court held that a waiver of the statute of limitation would be contrary to public policy); Born & Raviv, *supra* note 16, at 404. The reason for non-enforceability of such waivers was explained thus, "Although the Statute of Limitations is generally viewed as a personal defense to afford protection to defendants against defending stale claims, it also expresses a societal interest or public policy of giving repose to human affairs": *see* John J. Kassner & Co. v. New York, 46 N.Y.2d 544, 550 (New York, App. Ct. 1979).