Kluwer Arbitration Blog

Flash, Flash! Hundred Yard Dash: Limitation Defence in the Russian Arbitration Practice

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Not long time ago the Supreme Court of Canada upheld a refusal to grant an enforcement of an US$950,000 award, rendered on 6 September 2002 and issued in favor of the Russian oil company *Yugraneft* at the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry ("ICAC"). The enforcement application was filed on 27 June 2006 and, thus, seen as time-barred under the two-year limitation period in section 3 of the Alberta Limitations Act.

One will not find a special Russian limitation act, such as the Alberta Limitations Act or the Hong Kong Limitation Ordinance 2011. Like in any other civil law country, most substantive limitation-related provisions are concentrated in the civil code, whereas procedural law governs time limits for enforcement. Some of them were extensively reviewed within the last three years.

Several issues are addressed in this post: the duration of the limitation period, driving factors for commencing an ICAC arbitration, the interruption and suspension of the limitation period, especially by use of statutory negotiation, and time limits for the enforcement of awards.

What is the duration of the limitation period?

Claimants must file claims within a statutorily prescribed period of time, generally amounting to three years. The period would run from the date on which a claimant knows or ought reasonably to know the facts giving rise to the cause of action and the identity of respondent.

Shorter time limits apply to contesting transactions and in some areas, including corporate, insurance, transportation or service disputes. Also, a ten-year long-stop period should be considered.

Russian law does not allow the extensions of limitation periods by a court where the claimant is a legal person. Also, the parties may not agree on their prolongation or decrease them, or validly include a time-bar clause in an arbitration agreement.

When does the arbitration proceedings commence?

Two steps have to be taken to commence proceedings before the ICAC and suspend the running of a limitation statute: (i) the delivery of a statement of claim and (ii) the payment of registration fee.

Arbitration in Russia usually, just as litigation, is initiated by filing a full-framed statement of claim. Notices (ICDR, HKIAC, SIAC) or requests (SCC, ICC, LCIA) for arbitration are alternatively used abroad to commence arbitration, and they have rarely been used in Russia to date.

No wonder that the "request for arbitration", mentioned as a primary method for commencing arbitration proceedings in Article 21 of the UNCITRAL Model Law 1980 ("MAL"), was considered by domestic practitioners as a foreign feature. Instead, the new Article 21 of the Russian International Arbitration Act, in force as of 1 September 2016, uses a "statement of claim delivered to a respondent" as a starting point for arbitration.

Again, this rule applies unless otherwise agreed by the parties, including their reference to institutional rules, which forms an integral part of the arbitration agreement. In the end, while some foreign rules allow combining the formal request for arbitration and the statement of claim (Art. 16 of the 2013 HKIAC Rules), the distinction between them is actually leveled out.

Some claimants might prefer to file a detailed statement of claim at a later stage as a last resort in not particularly strong cases. Some use this tactic to give as little time as possible to the respondent to prepare its case.

In setting out a detailed statement of case, the parties and the tribunal will be in position to make informed decisions at a very early stage in the proceedings regarding the procedural measures and case management techniques that are appropriate for the case, as advised in the ICC Commission Report Controlling Time and Costs in Arbitration.

Most Russian institutional rules provide that arbitration commences when the secretariat of an arbitral institution – and not the respondent – receives the statement of claim. Thus, a respondent has a disadvantage compared to the MAL pattern since it additionally loses the time allotted for redirecting the claim from the secretariat to it. Direct service to the respondent is mostly used in *ad hoc* arbitrations.

Payment of a registration fee

To commence an ICAC arbitration, the claimant should further pay a registration fee for a statement of claim (at present of USD 1,000), which should not be deemed filed unless the registration fee is paid.

Both conditions – the delivery of a statement of claim and the payment of the registration fee – should be met before the dispute is considered commenced in terms of suspending the limitation running (*ICAC Awards of 15.11.2006 No.30/2006, of 23.06.2006 No.146/2006, and of 13.11.1995 No.231/1989*). The payment of arbitration (arbitrators' and institutional) fee, which is paid in full amount and in advance by the claimant, is irrelevant from a standpoint of a limitation period.

When will the limitation period be suspended or interrupted?

Since 1 September 2013 the filing of a statement of claim suspends the running of the limitation period, until an award is issued. By substituting a more classical *interruption* approach, this rule follows the same modern principle, adopted in international treaties (Art.14 of the 1974 New York Convention on the Limitation Period in the International Sale of Goods, signed by the USSR, but not valid for Russia), soft law acts (Art.10.6 of the UNIDROIT Principles of International Commercial Contracts 2010), and other national laws (§204(1)11 of the German BGB).

At this point in time, only the acknowledgement and partial payments of a debt will interrupt and restart the limitation period. Furthermore, the feature of a 2015 novel rule is that the acknowledgement of a debt not only before, but also upon its expiry would renew the limitation period. Thus, signing the minutes of a meeting by a debtor, and acknowledging the debt some years after the expiration date might to his surprise revive the corresponding claim.

Sue promptly when you are out of time

The use of ADR methods envisaged or prescribed by a federal act, i.e. mediation or statutory negotiation, would suspend running of the limitation period. The use of other ADR forms, backed solely on the parties' agreement, e.g., dispute review boards, would not have the same effect.

Starting from June 2016, a statutory default negotiation for commercial disputes is introduced. Only if the negotiation fails within 30 days after the notice has been sent to the respondent, the claimant may request arbitration or resort to a commercial court. The obvious goal of this reform is to reduce a number of court cases and arbitrations. Some disputes, such as corporate, insolvency, or arbitral awards annulment proceedings, are exempt from the statutory negotiation duty.

Insofar, by entering into settlement negotiations shortly before the limitation expiry, it is worth remembering that the limitation period is renewed after the expiration of the 30 days statutory "cooling off" period. Optional negotiation for a period exceeding 30 days might deter the claimant from issuing proceedings in time and, thus, compromise his claim, irrespective of whether it is well justified or not.

Alternatively, the use of non-binding mediation in a multi-tiered clause suspends running of a statute of limitations for 180 days of mediation proceedings.

Time limits for the enforcement of awards

After the *Yugraneft* decision, due attention should be given when dealing with time limits for the commencement of proceedings for the enforcement of an arbitral award.

An application for permission to enforce a foreign judgment or a foreign arbitral award may be filed within three years after the judgment or the award became binding. Meanwhile, a time period for the issuance of permission to enforce a foreign award will be decreased from three to one month, starting from 2017.

A similar three-year time limit should apply to the issuance of an execution writ for a Russian international arbitration award, such as the ICAC award (*Decision of Commercial Court of Moscow District of 12.08.2015 No. A40-212386/14-52-1703*).

Limitation periods for partial awards start running separately. In the IP dispute Philips, two partial judgements were rendered by an Antwerp court resulting from pirated copying. The enforcement court in Russia rejected to grant the enforcement of the first foreign partial judgement due to expiration of the limitation period (*Decision of Commercial Court of Moscow District of 05.11.2013 No. A40-59094/13-141-446*). The same principle should apply to final arbitral awards resolving only part of a dispute. The claimant should not take a risk by waiting until all the partial awards are issued.

In summary, when commencing the arbitration proceedings, one of the first questions to ask is whether it is admissible. A tribunal often considers a limitation period at its outset, before putting the parties to the trouble and expense of preparing the case on the merits. This careful preliminary review by a party's counsel would allow arbitrators to concentrate their attention on the claim, especially vis-a-vis a dilatory respondent. Similarly, all the efforts invested into a successful award might fall short of expectations if the claimant exceeds time limits at an enforcement stage.

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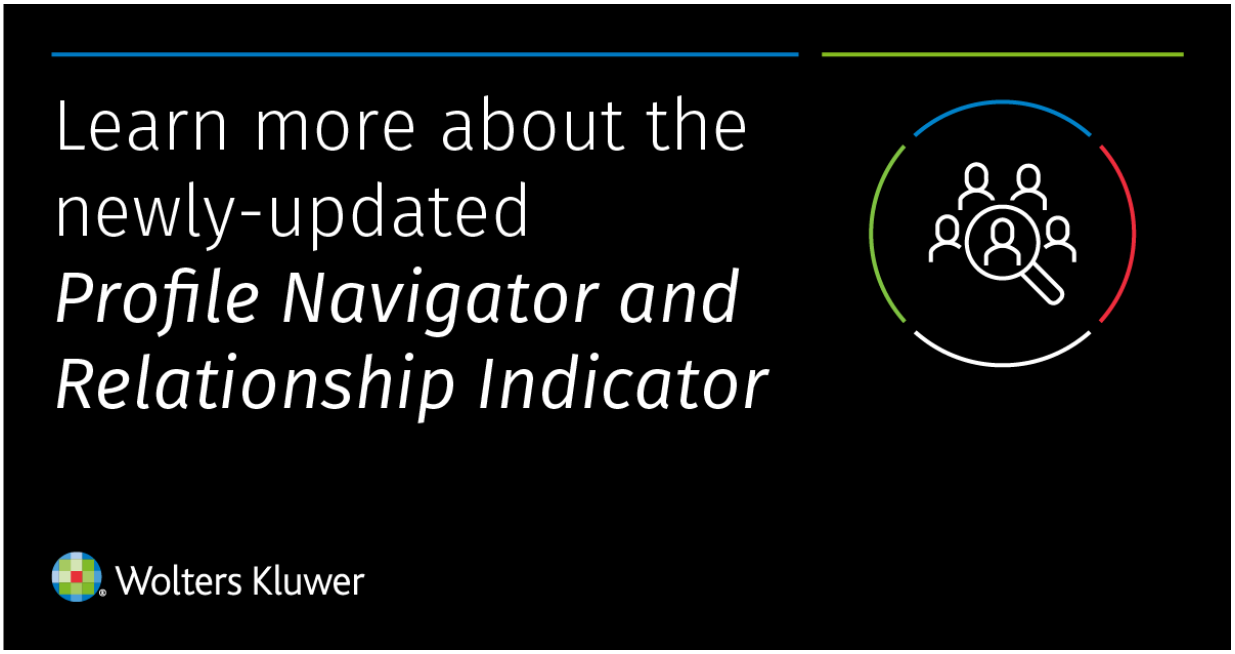

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