Kluwer Arbitration Blog

Applicable Laws for Limitation Periods: Blurring Substantive and Procedural Lines in International Commercial Arbitration? (Part One)

Brian Millar (Francis Burt Chambers) · Saturday, October 7th, 2023

This two-part blog post discusses applicable limitation laws, *i.e.*, legislation purporting to limit the time period within which claims in international commercial arbitration proceedings must be commenced (**Limitation laws**). It raises questions regarding how arbitral tribunals ought to decide whether to apply such Limitation laws and whether attempts to classify them as matters of 'substance' or 'procedure' are likely to cause uncertainty. Part One addresses the potential for uncertainty in application, and Part Two will suggest some solutions.

Overview

Statutes of limitation apply in international arbitral proceedings, just as they do in national courts and other tribunals. In some jurisdictions, such as England & Wales, Singapore and Hong Kong, there is express legislation to this effect. When parties choose a law they mean to choose the substantive law governing the merits of their dispute. This is said to accord with the likely intentions of commercial parties, particularly where the parties' chosen law is different from that of the arbitral seat. The applicable substantive law governing the merits of the dispute (often referred to as the *lex causae*) is usually determined by the choice of law clause in the contract.

In the context of international commercial arbitration proceedings, the choice of the seat of the arbitration will, along with any rules or other agreement between the parties, provide the 'procedural law' of the arbitration (often referred to as the *lex arbitri*).

The Limitation laws of the *lex arbitri* and the *lex causae* may differ not only in terms of their respective periods of limitation but also in the nature of their limitation provisions. For example, issues such as when a limitation period commences and whether there is discretionary power to extend the period, will depend on which Limitation law the arbitral tribunal applies.

Hypothetical Problem

The following relatively simple hypothetical scenario is provided:

(a) Party A from State A enters into a contract with Party B from State B;

(b) The contact contains a 'governing law' clause providing that the contract will be governed by the law of State A (*lex causae / lex contractus*);

(c) The parties have agreed to arbitration. The arbitration agreement stipulates State C as the seat of the arbitration (*lex arbitri*);

(d) State A, State B and State C all have Limitation laws, which prescribe various, and in some cases differing, time periods for the commencement of proceedings.

The question is which Limitation law(s) should the tribunal apply in the proceedings commenced by Party A against Party B alleging breach of contract?

The deceptively simple answer might be to adopt choice of law concepts similar to those used by domestic courts, i.e., that the *lex fori* provides the procedural law and *lex causae* the substantive law. Whilst there is no *lex fori* for international arbitration proceedings, the *lex arbitri* is recognised as providing the procedural law. Therefore, if Limitation laws are classified as procedural by the *lex arbitri* then the tribunal would apply them. If Limitation laws are classified by the *lex causae* as substantive the tribunal would apply them.

However, applying such a process might yield two sets of Limitation laws to apply or none, both of which seem to be a strange result and not one that the parties are likely to have intended. This is because some States classify Limitation laws as substantive and some procedural. As a general proposition, civil law jurisdictions consider Limitation laws as being substantive rather than procedural law. However, in some common law jurisdictions such as Hong Kong, India and Malaysia, Limitation laws are treated as matters of procedural law where the law is interpreted as barring the remedy as opposed to extinguishing the right. Australia and Canada have moved away from that interpretation and treat such Limitation laws as substantive.

Consequences of Error in Applying Limitation Law

At least in States that have adopted the UNCITRAL Model Law (**Model Law**), if a tribunal applies the wrong Limitation law, that error is not likely to be one that would render an award liable to be set aside or not enforced, except in rare circumstances. That said, it is not unlikely that arguments will be raised to such effect and still impinge on the timely and cost-effective resolution of the parties' dispute, particularly in jurisdictions where the arbitral jurisprudence is relatively unadvanced.

For example, it may be argued that Articles 34 and/or 36 of the Model Law apply in such circumstances because: (a) the arbitral procedure was not in accordance with the agreement of the parties (under Art 34(2)(a)(iv)); (b) the award is in conflict with the public policy of the State (under Art 34(2)(b)(ii)); or perhaps (c) that a party was unable to present its case (under Art 34(2)(a)(ii)). These arguments may arise particularly where the law of the seat considers Limitation laws to be matters of procedure and/or where the length of the limitation periods under the Limitation laws of the seat and the *lex causae* diverge greatly and lead to issues of procedural unfairness and/or public policy concerns.

In any event, whether or not awards can be successfully challenged, there is merit in awards reflecting the reasonable expectations of parties. Potential uncertainty for parties arises if it is unclear what Limitation law is applicable and may be applied by the tribunal. Further uncertainty arises if several Limitation laws (or none) may be applied.

As a general comment, it seems to the author that commercial businesspeople would find it strange that two Limitation laws from different jurisdictions could both apply to the proceedings, *a fortiori* that no Limitation laws could apply where both jurisdictions had such Limitation laws. Although there is room for debate, it is also arguable that businesspeople would find it strange that a Limitation law from the jurisdiction of the seat would apply rather than a Limitation law from the jurisdiction of the governing law of the contract chosen by the parties. One would imagine that if asked, commercial businesspeople would characterise Limitation laws as substantive in effect (and not matters of procedure) given the significant impact their application may have on the enforceability of their rights.

Applying the Hypothetical to Different Situations

If we were to adopt a procedural / substantive analysis to the hypothetical scenario set out above, and without legislative intervention, some of the following results arguably follow:

> (i) If the statutes of limitation of State A and State C are both procedural, the tribunal applies those of State C and: (a) the claim will fail if it is brought after the period of limitation of State C has expired (although that of State A may have not yet expired); (b) the claim will proceed if the period of limitation of State C has not yet expired (although that of State A may have expired).
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> (ii) If the statute of limitation of State A is substantive and State C is procedural, the tribunal applies both those of State A and State C and: (a) the claim will fail if it is brought after the period of limitation of State A has expired (although that of State C may have not yet expired); (b) the claim will fail if it is brought after the period of limitation of State C has expired (although that of State A may have not yet expired), in other words, the claim will only proceed if the period of limitations of both State A and State C have not yet expired.
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> (iii) If the statutes of limitation of State A and State C are both substantive, the tribunal applies those of State A and: (a) the claim will fail if it is brought after the period of limitation of State A has expired (although that of State C may have not yet expired); (b) the claim will proceed if the period of limitation of State A has not yet expired (although that of State C may have expired).
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> (iv) If the statute of limitation of State A is procedural and State C is substantive, the tribunal applies neither those of State A nor State C and the claim will proceed even if it is brought after the periods of limitation of State A and/or State C have expired.

In the author's view the results in (ii) and (iv) above are most unlikely to have been intended by parties to international commercial transactions. As noted above it is also arguable that the result in (i) above would have been intended by the parties.

Having initially raised these issues in Part One, Part Two will discuss some potential solutions to

the uncertainty that may arise.

This entry was posted on Saturday, October 7th, 2023 at 8:38 am and is filed under Applicable Law, Governing Law, Lex Arbitri, lex contractus, Lex Fori, Limitation period, Place of arbitration, Procedure, Seat of the arbitration, Substantive Law
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