Kluwer Arbitration Blog

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

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

Part One of this blog post discussed how uncertainty can arise in determining the Limitations laws that apply in international commercial arbitration proceedings. Part Two will now discuss some potential solutions.

One Solution

The United Kingdom modified the traditional common law approach with the enactment of the *Foreign Limitation Periods Act 1984* (UK), which reduced uncertainty by legislation. The Act provides, with limited exceptions, that any law relating to the limitation of claims shall be treated, for the purposes of cases in which effect is given to foreign law, or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure. Similar legislation has been introduced in Singapore. States that have not done so may wish to consider adopting the same.

In a practical sense, the importance of adopting any such measures may in part hinge on the extent to which a State interacts with other jurisdictions that might be nominated by parties as the governing law or seat of arbitration, and whether these jurisdictions take different positions on the applicability of Limitation laws.

An alternative may be for institutional rules to provide clarity by in effect mandating outcomes such as those provided for under the Foreign Limitation Periods Acts. However, while technically this would amount to the parties agreeing to that course as part of agreeing to those rules, it might be seen as an unwelcome encroachment on party autonomy.

Where an answer is not provided through legislative intervention, the approach an arbitral tribunal should adopt is less clear.

Approach in Courts vs Arbitral Tribunals

While considerations of certainty and simplicity in the application of laws are important in both court litigation and arbitral proceedings, the problem of ‘forum shopping’ (i.e., a party attempting to obtain advantages by choosing to initiate proceedings in a particular forum) is of less concern in international arbitration proceedings, where there is no *lex fori*, only the *lex arbitri*. The *lex arbitri* is usually agreed by the parties at a time well prior to the relevant dispute arising, and in the absence of such agreement is determined by the tribunal or institution. The 'forum' is thus not determined by the unilateral actions of the claimant.

It has been said (in the context of a national court applying choice of law rules) that:

> '*Once [State X's] choice of law rules direct attention to the law of a foreign jurisdiction, basic considerations of justice require that, as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in [State X's] forum*'.

This arguably provides some support for the proposition that the rights and obligations of the parties as determined by arbitration should be the same whether the procedural machinery by which their dispute is prosecuted is that of the *lex causae* or the *lex arbitri*. However, parties often choose a different *lex arbitri* to avoid real or perceived problems in the procedural regimes of the *lex causae*. Again, that choice is made by both parties and not by one party unilaterally deciding to initiate proceedings in a particular jurisdiction, e.g., to gain an advantage that would not accrue to it at the *lex causae*.

In contrast to national courts, an arbitral tribunal's powers and the rules it applies are derived from the agreement of the parties, which may mandate the use of the laws of particular States or other rules or principles for particular purposes.

As regards the law applicable to the substance of the dispute, this is reflected in the Model Law and its enactments in most national arbitration laws. Article 28(1) of the Model Law requires the arbitral tribunal to decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

If the parties have chosen the applicable governing law and the tribunal is required to apply it, there appears to be little room for a discretion. Of course, there may still be questions over what exactly has been chosen, but that is a question of interpreting what the parties have agreed, rather than the tribunal being given a discretion to choose for itself.

A similar position can be taken as regards 'procedural issues' that arguably go beyond just how the proceedings are conducted (such as Limitation laws). A procedural rule or law of the *lex arbitri* chosen by the parties does not necessarily import a discretion as to whether to apply other laws of the *lex arbitri* that are classified as procedural. This is arguably so, despite the wide discretion given to tribunals to '*conduct the arbitration in such manner as it considers appropriate*' pursuant to Article 17(1) of the Model Law.

How Applicable Limitation Laws Might be Determined with More Certainty

In the author's view, a potential way to reduce the uncertainty involved is to focus on what the parties have agreed and the proper interpretation of the arbitration agreement.

If the only agreement is as to the seat (as opposed to any specific choice of Limitation laws), the question still remains as to which laws of the seat the parties have agreed are applicable. If that is not clear, rather than concluding that the tribunal has a discretion to decide, the tribunal should consider the particular 'procedural' law of the *lex arbitri* and seek to determine whether the parties' choice of the *lex arbitri* (and any procedural rules) and the *lex causae* when viewed together warrant a conclusion that they have agreed to that law being applicable.

In light of the above, the question of what Limitation laws ought to be applied by international commercial arbitral tribunals can be approached by focussing on what the parties have agreed and interpreting their agreement to arbitrate, without seeking to apply choice of law principles the way national courts may do.

The arbitration agreement would be interpreted by the law applying to that agreement. In this case it is assumed the law of the arbitration agreement includes contractual interpretation principles similar to those recognised by the common law. For example, in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract. Further, unless a contrary intention is indicated in the contract, a tribunal is entitled to approach the task of giving a commercial contract an interpretation on the assumption that the parties intended to produce a commercial result.

In doing so it might be possible to avoid a formulaic or rigid application of the substance versus procedure distinction (including the right/remedy distinction) and the potentially incongruous results of doing so already discussed in Part One.

Revisiting the Hypothetical

Revisiting the hypothetical discussed in Part One, one could then ask whether by agreeing to a seat of arbitration, a reasonable businessperson would have understood that to mean the parties were choosing the Limitation laws of the seat as applicable to the dispute, particularly having regard to what the parties had also chosen as the *lex causae*.

The context of the arbitration agreement in this case includes the underlying contractual relationship in connection with which the dispute has arisen. The purpose of the arbitration agreement is to have the disputes encompassed by it determined in a manner that accords with the parties' agreements, including as to seat and as to governing law. Further, the objective of choosing an arbitral process is for that process to facilitate the application of the applicable substantive law to the facts to resolve the dispute. These interrelated elements call for an approach that achieves coherency and a harmonious operation between both the choice of law clause governing the law of the contract and the choice of seat (as providing the arbitral procedure).

It seems sensible to conclude that a reasonable businessperson would not have intended for two Limitation laws to apply (particularly if each covered the same ground). It also seems sensible to conclude that a reasonable businessperson would not have intended for no Limitation laws to apply (unless they expressly say so). Both these results arguably produce an uncommercial result that makes commercial nonsense or at least produces commercial inconvenience. Further, it seems sensible to conclude that a reasonable businessperson would expect Limitation laws to be substantive in nature given the potentially significant impact they may have on a party's rights and obligations.

Similarly, when interpreting the parties' choice of law clause in their contract, it seems sensible to conclude (although it will of course depend on the precise terminology used) that a reasonable businessperson would have understood such a choice to encompass at least all laws affecting the existence, extent or enforceability of the rights or duties of the parties, including Limitation laws, given the potentially significant impact they may have on a parties' rights and obligations.

In those circumstances, it might be relatively easy to conclude that a reasonable businessperson would understand the reference to the seat as not including the Limitation laws of the seat as part of the *lex arbitri*, as the parties had already chosen the applicable Limitation laws as part of choosing the *lex causae*. Further, if the parties wanted to choose a particular seat to avoid the consequences of unwanted Limitation laws of the *lex causae* being applied, they could easily provide for this in the text of their arbitration agreement.

Where a governing law is chosen that does not have any Limitation laws (for example, the United Nations Convention on Contracts for the International Sales of Goods), the lack of a choice of applicable Limitation law based on the governing law would point to the parties objectively intending to have the Limitation laws of the *lex arbitri* apply, whether or not they are classified by the laws of the seat as substantive or procedural.

Such an approach may avoid the potentially unexpected and somewhat incongruous possible results discussed in items (i), (ii) and (iv) of Part One and provide more certainty to parties that better aligns with their expectations.

This entry was posted on Saturday, October 7th, 2023 at 8:50 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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