Contractual Time Limits to Commence Arbitration

Yasin Alperen KARAŞAHIN*

Arbitration and multi-tier dispute resolution clauses may contain a time limit to commence arbitration. The expiry of such a time limit could have different legal results. First, it could make the arbitration clause ineffective. Second, it could extinguish the claim or prevent its enforcement through legal proceedings. In the latter case, the contract provision about the time limit would have to be examined with regard to its compliance with mandatory provisions of the law applicable to limitation periods. Even the determination of the law applicable to limitation periods causes considerable difficulty. It is another difficult issue to determine which provisions of the law applicable to limitation periods are mandatory and, if so, whether the contract provision complies with the limits of the law. Once it is established that the contract provision is valid, the acts necessary to prevent the expiry of the time limit would have to be examined.

Keywords: limitation period, preclusion period, extinctive prescription, time bar, commencement of arbitration, mandatory rule, jurisdiction, applicable law, interpretation, validity.

1. INTRODUCTION

Arbitration and multi-tier dispute resolution clauses may include time limits within which the parties have to commence arbitration proceedings.[1] An example of such a time limit can be found in the following clause: 'All disputes arising out of or

* Dr iur. (Lucerne), Assistant Professor of Civil Law at Koç University, Istanbul. I would like to express my thanks to Hüseyin Bahadır Çolak, LL.M. (LSE), Research Assistant for Civil Law at Koç University, for his assistance with the collection of sources and final controls of the article. Email: yakarasahin@ku.edu.tr.

1 Richard H. Kreindler & Timothy J. Kautz, *Agreed Deadlines and the Setting Aside of Arbitral Awards*, 15 ASA Bull. 576 (1997); Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes,* para. 18.01, at 529 (Oxford U. Press 2005); Julia-Maria Oppermann, *Internationale Handelsschiedsgerichtsbarkeit und Verjährung* [*International Commercial Arbitration and Extinctive Prescription*] 18, 44 (Peter Lang 2009); Gary B. Born, *International Commercial Arbitration* 917, 2220 (2d ed., Wolters Kluwer 2014). *See also* Julian D. M. Lew, Loukas A. Mistelis & Stephan M. Kröll, *Comparative International Commercial Arbitration,* para 20-10, at 507, paras 20-13 to 20-22, at 508–511 (Wolters Kluwer 2005); Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Commercial Arbitration,* para. 4.05, at 231 (6th ed., Oxford U. Press 2015). Multi-tier dispute resolution clauses may also contain so-called cooling-off periods which require the parties to wait a certain period of time after the end of an alternative dispute resolution procedure before the commencement of litigation or arbitration proceedings. For explanations about such clauses, *see* Born, *supra* n. 1, at 279; Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives,* para. 1240, at 306 (3d ed., Nomos & Schulthess 2016). This article will not deal with such periods.

Karaşahin, Yasin Alperen. 'Contractual Time Limits to Commence Arbitration'. *Journal of International Arbitration* 37, no. 2 (2020): 209–256.
© 2020 Kluwer Law International BV, The Netherlands

relating to this Agreement may be submitted to arbitration under [the ICC Rules] within 12 months of the date on which such dispute arises'.[2]

The interpretation of the relevant contract provision could cause severe problems in case a dispute arises. For example, it will probably be a matter of dispute whether or when the time limit has begun to run, if the contract uses criteria such as the breakdown of negotiations.[3] This article aims to focus on another, probably less expected, but practically important issue: the validity of the contractual provision of a time limit. Since party autonomy has relatively few limits in international commercial arbitration, it might surprise some to read that the validity of such contractual provisions can be a source of severe problems.

Contractual time limits to commence arbitration may constitute a limitation or a preclusion period. In order to be able to explain and examine the rules relevant for this article, some comparative remarks on limitation and preclusion periods are necessary. These comparative remarks will show the presence of mandatory rules that limit contractual modification of limitation periods. Since the limits set to party autonomy in this regard differ to a considerable extent in national legal systems and model laws, it is paramount to determine the law applicable to limitation in order to examine the validity of a contractual limitation or preclusion period.

These explanations will lay the foundation necessary to examine the validity of contractual time limits to commence arbitration proceedings. In each case, the relevant contractual provision has to be interpreted in order to determine its content and validity. It is not possible to deal with all possible contractual provisions. However, it is possible to delineate the main types of contract provisions and establish some guidelines to interpret them and examine their validity.

If the contractual time limit to commence arbitration is valid, it will be important to determine the acts that are necessary to prevent its expiry. Finally, if such a time limit has expired, it has to be explained what kind of a decision the arbitral tribunal should render and what the extent of control is which state courts can exercise over the decision of the arbitral tribunal.

2. LIMITATION PERIODS

In this article, the term 'limitation period' will be used to express the time limit to assert a claim in legal proceedings, such as litigation or arbitration. Failure to

---

2 Example in Born, *supra* n. 1, at 917, 1512.
3 Cf. Lew et al., *supra* n. 1, para 20-17, at 509.

commence legal proceedings within this period of time will limit the claimant's ability to enforce the claim in legal proceedings thereafter.

Most – if not all[4] – modern legal systems have rules that set a time limit to commence legal proceedings.[5] However, there is substantial difference about the terminology used to describe the relevant legal institution,[6] its legal nature and effects, as well as specific rules about these time limits. This article will focus on the rules about contractual modifications of limitation periods and the effect of the commencement of legal proceedings on limitation periods.

2.1 Terminology

2.1[a] *Limitation Periods*

In common law systems, the relevant legal institution is called 'limitation of actions' or 'statute of limitations'.[7] In civil law systems, the functionally equivalent institution is usually described in English as 'extinctive prescription'[8] or 'liberative

---

[4] Heinz-Peter Mansel, *Prescription*, in *Encyclopedia of Private International Law* 1368 (Jürgen Basedow, Gisela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds, Edward Elgar 2017): 'The notion of prescription is known in all legal systems'.

[5] Blackaby et al., *supra* n. 1, para. 4.05, at 231. Cf. Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law,* para. 51.01, at 789 (Oxford U. Press 2012).

[6] *See generally* Daniel Huser, *The Appropriate Prescription Regime for International Sales Contracts in International Commercial Arbitration* 3 (Basel 2014) [hereinafter Huser, *The Appropriate Prescription Regime*]. The author proposed the use of the term 'liberating time limits' (*ibid*., at 50). However, in a later publication, he used the term 'limitation period'. Daniel Huser, *Determining the Relevant Limitation Period for International Sales Contracts Before International Arbitral Tribunals*, 33 ASA Bull. 825, passim (2015) [hereinafter Huser, *Determining the Relevant Limitation Period*].

[7] Michael Joachim Bonell, *Chapter 31: Limitation Periods*, in *Towards a European Civil Code* 715, 719 (Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak & C. Edgar du Perron eds, 4th ed., Wolters Kluwer 2011); Huser, *The Appropriate Prescription Regime, supra* n. 6, at 46.

[8] Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* 69 (Cambridge U. Press 2002); Bonell, *supra* n. 7, at 719; Mansel, *supra* n. 4, at 1368. In the codes of most civil law countries, a derivative of the Latin term '*praescriptio*' is used. *See* e.g. Art. 2219 C. civ. (Code civil des français) [French Civil Code]: '*prescription extinctive*'; Art. 127 OR/CO/CO (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, Fünfter Teil: Obligationenrecht/Loi fédérale complétant le Code civil suisse, Livre cinquième: Droit des obligations/Legge federale di complemento del Codice civile svizzero, Libro quinto: Diritto delle obbligazioni) [Swiss Code of Obligations]: '*prescription*' (French version), '*prescrizione*' (Italian version); Art. 2935 c.c. (Codice Civile Italiano) [Italian Civil Code]: '*prescrizione*'; Art. 1961 C.C. (Còdigo Civil) [Spanish Civil Code]: '*prescripción de las acciones*'. The term used in German is '*Verjährung*'; *see* § 194 BGB (Bürgerliches Gesetzbuch) [German Civil Code]; Art. 127 OR/CO/CO (German version); § 1451 ABGB (Allgemeines bürgerliches Gesetzbuch) [Austrian Civil Code]. In civil law systems, 'extinctive prescription' is distinguished from 'acquisitive prescription' which denotes the acquisition of a property right by the lapse of time (Zimmermann, *supra* n. 8, at 69; Huser, *The Appropriate Prescription Regime, supra* n. 6, at 46). For the terminology *see* e.g. Art. 2258 C. civ.: '*prescription acquisitive*'; Arts 661 et seq. ZGB/CC/CC (Schweizerisches Zivilgesetzbuch/Code civile Suisse/Codice civile svizzero) [Swiss Civil Code]: '*prescription acquisitive*' (French version), '*prescrizione acquisitiva*' (Italian version); Art. 1940 C.C.: '*prescripción del dominio y demás derechos reales*'. The term used in German is '*Ersitzung*'; *see* §§ 900 and 937 et seq. BGB; Arts 661 et seq. ZGB/CC/CO (German version); § 1452 ABGB.

prescription'.[9] In this article the term 'limitation periods' will be used to describe the relevant time limits.[10] The legal institution will be referred to as 'limitation regime' or only 'limitation'.[11]

2.1[b] *Suspension and Renewal*

All legal systems provide for different mechanisms to postpone the expiry of the limitation period.

In civil law systems, there are two mechanisms used for this purpose. The first one is described as 'suspension' of the limitation period.[12] When a cause of suspension exists, the limitation period temporarily does not run. After the cause of suspension ceases to exist, the limitation period continues to run.[13] The second mechanism is usually described as 'interruption' of the limitation period.[14] However, the term 'renewal' is suggested in the doctrine since it describes the legal result better.[15] When a cause of 'interruption' or 'renewal' is present, a completely new limitation period begins to run. The period of time accrued prior to the cause of interruption or renewal becomes completely irrelevant.[16]

---

[9] The term 'liberative prescription' is actually more appropriate since prescription does not cause the claim to extinguish in most civil countries, as it will be explained below. In this regard *see* Zimmermann, *supra* n. 8, at 75. For French law *see* Philippe Malaurie, Laurent Aynès & Philippe Stoffel-Munck, *Droit des obligations* [*Law of Obligations*], para. 1200, at 703 (9th ed., LGDJ 2017). Due to historical reasons, the term 'extinctive prescription' is still used often.

[10] 'Limitation periods' is the term used in the U.N. Convention on the Limitation Period in the International Sale of Goods ('U.N. Limitation Convention') (1974) and in UNIDROIT Principles of International Commercial Contracts (PICC) (2016), Ch. 10.

[11] It is stated that the term 'prescription' is used in some common law systems to describe a different legal institution than 'limitation of actions'. In these legal systems 'prescription' refers to a legal institution that is comparable to 'acquisitive prescription' in civil law systems (Zimmermann, *supra* n. 8, at 70; Bonell, *supra* n. 7, at 719–720). Any terminological confusion will be avoided by the use of the term 'limitation' instead of 'prescription'.

[12] *See* e.g. Arts 2233 et seq. C. civ.: '*suspension*'; Art. 134 OR/CO/CO: '*suspension*' (French version), '*sospensione*' (Italian version); Arts 2941–2942 c.c. ('*sospensione*'). *See also* Art. 10.5 PICC (2016): 'suspension'. The terms used in German are '*Hemmung*' (§§ 203 et seq. BGB; §§ 1494 et seq. ABGB) and '*Stillstand*' (Art. 134 OR/CO/CO [German version]).

[13] Zimmermann, *supra* n. 8, at 124; Innhwa Kwon & Krzysztof Nowak, *Prescription Trap? Continuation of Freezing the Legal Prescription in International Arbitration – in Korean, Austrian, German and Swiss Context*, 35 ASA Bull. 84, 87 (2017).

[14] *See* e.g. Arts 2240 et seq. C. civ.: '*interruption*'; Art. 135 OR/CO/CO: '*interruption*' (French version), '*interruzione*' (Italian version); Art. 2943 c.c.: '*interruzione*'. The term used in German is '*Unterbrechung*'; *see* §§ 208 et seq. BGB (prior to the revision of 2002), § 1497 ABGB, Art. 135 OR/CO/CO (German version).

[15] Zimmermann, *supra* n. 8, at 124–125; Bonell, *supra* n. 7, at 725; Schwenzer et al., *supra* n. 5, para. 51.39, at 798. Arts 14:401–14:402 of Principles of European Contract Law (PECL) also use the term 'renewal'. The term used in § 212 BGB (after the revision of 2002) is 'recommencement' ('*Neubeginn*').

[16] Zimmermann, *supra* n. 8, at 124; Schwenzer et al., *supra* n. 5, para. 51.38, at 798; Kwon & Nowak, *supra* n. 13, at 87.

In common law systems, the terminology used to describe equivalent mechanisms seems to differ more than in civil law systems. The UK Law Commission refers to them collectively as 'factors postponing the running of time'.[17] In US common law jurisdictions, the phrases 'tolling the statute of limitations' or 'tolling the limitation period' are often used.[18]

In this article, the terms 'suspension' and 'renewal' will be used, since they describe the legal effect in both common law and civil law systems quite accurately.

2.1[c] *Time-Bar*

As it will be explained below, the legal result of the expiry of the limitation period can be quite different from one legal system to another. In this article, the claim will be said to be 'time-barred' after the expiry of the limitation period.

2.2 Procedural or substantive nature and legal effect of limitation

2.2[a] *Common Law Systems*

In common law systems, limitation is considered to be an institution of procedural law.[19] It is usually stated that the expiry of limitation periods only bars the remedy, but not the right.[20] '[T]he right continues to exist even though it cannot be enforced by action',[21] provided that the respondent pleads the expiry of the limitation period.[22]

Unlike in civil law systems, the limitation period is only relevant until the commencement of legal proceedings. If legal proceedings are commenced within

---

17 Law Commission, *Limitation of Actions,* para. 8.1, at 141 (Consultation Paper No. 151, 1998).

18 It is stated that the term 'tolling' has a variety of different meanings which can cause misunderstandings. *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 n. 1 (1949–1950) [hereinafter *Developments in the Law*].

19 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, 296 (2007); Oppermann, *supra* n. 1, at 14; Bonell, *supra* n. 7, at 719; Andrew Burrows, *Chapter 28: Limitation of Actions*, in *Chitty on Contracts,* paras 28–126, at 2013 to 2014 (31st ed., Sweet & Maxwell 2012); Schwenzer et al., *supra* n. 5, para. 51.08, at 790; Pascal Hachem, *Verjährungs- und Verwirkungsfristen bei CISG-Verträgen* [*Limitation and Preclusion Periods in CISG-Contracts*], 17 Internationales Handelsrecht 1, 12 (2017); Mansel, *supra* n. 4, at 1369–1370; Thien Le Nguyen Gia, *Time Limit to File Petition for the Recognition and Enforcement of Foreign Arbitral Award: A Comparative Perspective*, 35 ASA Bull. 95, 97 (2017).

20 *Developments in the Law, supra* n. 18, at 1186; Law Commission, *supra* n. 17, para. 9.1, at 161; *Ibid., Limitation of Actions, Item 2 of the Seventh Programme of Law Reform: Limitation of Actions,* para. 2.93, at 33 (Law Commission No. 270, 2001); Zimmermann, *supra* n. 8, at 70; Burrows, *supra* n. 19, paras 28–126, at 2013 to 2014.

21 Burrows, *supra* n. 19, paras 28–126, at 2013 to 2014.

22 *Developments in the Law, supra* n. 18, at 1198–1199; Burrows, *supra* n. 19, paras 28–107, at 2004. *See also* Oppermann, *supra* n. 1, at 14–16.

the limitation period, the issue of limitation becomes in principle irrelevant. In English law, '[t]ime ceases to run against a claimant when he or she commences proceedings'.[23] In the common law jurisdictions of the United States, it is accepted that the limitation period continues to run even after the commencement of legal proceedings.[24] The fact that the limitation period still runs is, however, not important since the action was commenced within the time limit. Unlike in civil law systems, the limitation period is not applicable to a claim that has been upheld in an award. There may be special time limits for execution of awards. However, the original limitation period is not relevant in this regard.

2.2[b] *Civil Law Systems*

The limitation regime is accepted to be a part of substantive law in civil law systems.[25] In these systems, the expiry of the limitation period has an effect on the rights of the parties.[26] However, this effect may be different from one legal system to another. The expiry of the limitation period could theoretically cause the right to extinguish[27] ('strong effect').[28] Nevertheless, in most civil law systems the expiry of the limitation period only gives the debtor a right to refuse performance[29] ('weak effect').[30] In the latter case, the right of the creditor is still present and can be performed by the debtor. However, the debtor cannot be legally forced to perform if he or she pleads the expiry of the limitation period and thereby exercises his or her right to refuse performance.

In civil law systems, the limitation period affects the right or the claim, and not the action. The commencement of legal proceedings suspends or renews the limitation period, but does not make it cease to run. After the end of legal proceedings, the limitation period continues to run and could still prevent the execution of an award.[31]

---

[23] Law Commission, *supra* n. 20, para. 2.94, at 34. This is also the legal result accepted in Arts 13–15 of the U.N. Limitation Convention.

[24] Hans Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born*, 23 Am. J. Comp. L. 337, 342 (1975).

[25] Schwenzer & Manner, *supra* n. 19, at 296; Oppermann, *supra* n. 1, at 27; Schwenzer et al., *supra* n. 5, para. 51.06, at 790; Gary B. Born & Adam Raviv, *Arbitration and the Rule of Law: Lessons from Limitation Periods*, 27 Am. Rev. Int'l Arb. 373, 386 (2016); Hachem, *supra* n. 19, at 12; Mansel, *supra* n. 4, at 1370; Le Nguyen Gia, *supra* n. 19, at 97. It is stated that the People's Republic of China constitutes an exception within civil law systems (Le Nguyen Gia, *supra* n. 19, at 97).

[26] Bonell, *supra* n. 7, at 719.

[27] Schwenzer et al., *supra* n. 5, para. 51.07, at 790.

[28] In such a case, the difference between limitation and preclusion periods would diminish.

[29] Schwenzer et al., *supra* n. 5, para. 51.07, at 790; Mansel, *supra* n. 4, at 1368.

[30] The expressions 'strong effect' and 'weak effect' can be found in Zimmermann, *supra* n. 8, at 72; Bonell, *supra* n. 7, at 727.

[31] For Austrian law *see* § 1497 ABGB; Gabriel Kogler, *Die Zulässigkeit von Verjährungsvereinbarungen* [*Permissibility of Limitation Agreements*] (Pts. 1 & 2), 137 Juristische Blätter 351, 137 Juristische Blätter 429, 429–430 (2015). For French law *see* Art. 2242 C. civ. For German law *see* § 204 para. 2 BGB. For Swiss law *see* Art. 135 and Art. 137, para. 2 OR/CO/CO.

2.3 Contractual modification of the limitation regime

Both in common law and in civil law systems, most, if not all, aspects of limitation are regulated by statutes.[32] For the purposes of this article, it is important to determine to what extent the parties can contractually modify[33] statutory limitation rules. National legal systems and model laws have substantially different rules about the extent and limits of party autonomy in the law of limitation.[34] Common law systems tend to leave more freedom to the parties than civil law systems.[35] Modern model laws tend to leave the parties a relatively large freedom for contractual modification.

2.3[a] *Common Law Systems*

2.3[a][i] Law of England and Wales

The Limitation Act 1980 does not contain any provision about contractual modifications.[36] It is, however, accepted that '[t]he limitation period may be excluded by agreement, express or implied'.[37] Furthermore, an agreement not to plead the expiry of the limitation period is effective.[38] Such an agreement has a similar effect to the exclusion of limitation.[39]

It is accepted that the parties can shorten the limitation period. Such agreements can, however, be regarded as exemption clauses and therefore be subject to the restrictions applicable to exemption clauses.[40] When the Unfair Contract Terms Act 1977 is applicable, clauses that shorten the limitation period would

---

[32] In common law systems 'limitation of actions' is therefore statute law, not part of common law. *See* Daniel Girsberger, *Verjährung und Verwirkung im internationalen Obligationenrecht* [*Limitation and Preclusion in International Law of Obligations*] 28 (Schulthess 1989); Oppermann, *supra* n. 1, at 14.

[33] It could be stated that parties to a contract cannot 'modify' statutory rules, but merely deviate from them in their contract. While the mentioned statement is not incorrect, the term 'modification' is widely used to describe contractual stipulations that deviate from statutory rules. Even Roman lawyers considered it self-evident that private persons could not change the law by agreement in the sense that it would cease to exist or have a different content. Max Kaser, *'Ius publicum' und 'ius privatum'*, 103 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 1, 78 (1986).

[34] Zimmermann, *supra* n. 8, at 162–163; Schwenzer & Manner, *supra* n. 19, at 298; Schwenzer et al., *supra* n. 5, para. 51.16, at 793; Reinhard Zimmermann, *Die Verjährung: von den Principles of European Contract Law bis zum Entwurf eines Gemeinsamen Europäischen Kaufrechts* [*Extinctive Prescription: From the Principles of European Contract Law to the Draft of a Common European Sales Law*], 24 Eur. Rev. Priv. L. 687, 721 (2016); Hachem, *supra* n. 19, at 10.

[35] Schwenzer et al., *supra* n. 5, para. 51.18, at 793.

[36] Law Commission, *supra* n. 20, para. 3.170, at 95; Oppermann, *supra* n. 1, at 16.

[37] Law Commission, *supra* n. 20, para. 2.96, at 34. *See also* Hachem, *supra* n. 19, at 10.

[38] Law Commission, *supra* n. 17, para. 9.7, at 163; Burrows, *supra* n. 19, paras 28–108, at 2004 to 2005.

[39] It should be noted that the exact effect of such an agreement is still not clear. Law Commission, *supra* n. 17, para. 9.7, at 163; Burrows, *supra* n. 19, paras 28–108, at 2004 to 2005.

[40] Burrows, *supra* n. 19, paras 28–113, at 2007.

also have to comply with the provisions of this Act.[41] Apart from these cases, there seems to be no general restriction on agreements that shorten limitation periods.[42] It is reported for English law that '[t]he courts will enforce a time bar clause even if the time period is very short, such as three days'.[43]

However, English law contains a mandatory rule[44] that limits the freedom of the parties to provide short limitation or preclusion periods for commencement of arbitration proceedings. Section 12 of the Arbitration Act 1996 allows the parties to apply to court for the extension of such periods, if they are contained in an agreement that refers future disputes to arbitration.[45] The court can grant an extension under strict conditions, namely:

> if satisfied – (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.[46]

2.3[a][ii] Laws of the United States

In common law jurisdictions of the United States, the freedom of the parties to modify the rules on limitation are not as extensive as in English law.[47] Indeed, 'U.S. courts have frequently held that, because limitations periods serve vital public and private ends, parties may not contract around them'.[48]

Case Law Applicable in State Courts

The issue of contractual modification of limitation periods is in general regulated by case law, which can differ from one State to another.

An extension of the limitation period in the contract that establishes the legal relationship between the parties (i.e. original contract) is accepted to be valid only in some jurisdictions.[49] In other jurisdictions, it is accepted that the parties cannot lengthen the limitation period or otherwise render limitation more difficult in the

---

41 *Ibid*.; Hachem, *supra* n. 19, at 10.
42 Cf. Burrows, *supra* n. 19, paras 28–112, at 2006 to 2007.
43 Tweeddale & Tweeddale, *supra* n. 1, para. 18.03, at 530.
44 *Ibid*., para. 18.19, at 536.
45 *Ibid*., para. 18.21, at 536.
46 Arbitration Act 1996, s. 12(3).
47 With regard to the Uniform Commercial Code, *see* Hachem, *supra* n. 19, at 11.
48 Born & Raviv, *supra* n. 25, at 403.
49 *Developments in the Law, supra* n. 18, at 1182. Cf. Nancy Hylden, Student Author, *Contract – A Rose By Another Name: No Tolling of An Arbitration Agreement Limitation Period But Unreasonableness Achieves the Same End in Rose Revocable Trust v. Eppich*, 29 Wm. Mitchell L. Rev. 635, 641 (2002–2003).

original contract.[50] However, after the conclusion of the original contract, the parties can contractually postpone the expiry of the limitation period,[51] which can, inter alia, be the result of so-called 'tolling agreements'. At this point, it is also possible for the debtor to declare a 'waiver' of limitation or promise not to plead limitation – at least for a limited period.[52]

In common law jurisdictions of the United States, the parties can contractually shorten the limitation period. However, such agreements are accepted to be unenforceable if the contractual limitation period is unreasonably short.[53] It is stated that the creditor must have an opportunity to commence legal proceedings in order for the contractual limitation period not to be unreasonable.[54]

Case Law Applicable in Arbitration

In several common law jurisdictions of the United States, the parties have an unrestricted freedom to regulate the issue of limitation if they have concluded an arbitration agreement. The courts in these jurisdictions have held that statutes of limitations are not applicable in arbitration, since arbitration does not constitute an action in law.[55] Therefore, the conclusion of an arbitration agreement has the (most probably unexpected) effect that limitation is excluded for all claims that fall within the scope of the arbitration agreement. In such a case, a time bar will only be present if the parties stipulate a time limit in the contract. It can therefore be argued that the parties have an unlimited freedom to regulate such a time limit.[56]

---

50 *Developments in the Law, supra* n. 18, at 1181. For Delaware law, *see* Melissa DiVincenzo, *Repose v. Freedom – Delaware's Prohibition on Extending the Statute of Limitations by Contract: What Practitioners Should Know*, 12 Del. L. Rev. 29, 40–42 (2010).

51 *Developments in the Law, supra* n. 18, at 1181. *See also* Born & Raviv, *supra* n. 25, at 403, who state that 'a pre-dispute agreement to waive statute of limitations is unenforceable' in a 'substantial majority of U.S. jurisdictions'.

52 *Developments in the Law, supra* n. 18, at 1223–1224; *Effectiveness of Promises Not to Plead the Statute of Limitations in Contract Cases*, 30 Colum. L. Rev. 383 (1930). It is reported that Delaware courts do not require the 'waiver' to be limited in time. DiVincenzo, *supra* n. 50, at 32–33.

53 *Developments in the Law, supra* n. 18, at 1181; Hylden, *supra* n. 49, at 641. It is reported that Minnesota courts had previously applied the reasonableness test only to contractual limitation periods challenged in litigation, not in arbitration. However, Minnesota Supreme Court applied this test to a limitation period in an arbitration agreement in *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601 (Minn. 2002). Hylden, *supra* n. 49, at 649.

54 Hylden, *supra* n. 49, at 642.

55 State courts in California, Connecticut, Minnesota, Maine, North Carolina, and Washington, as well as some federal courts have accepted this position. Born & Raviv, *supra* n. 25, at 375–381. In Washington, the State legislature later adopted an amendment to the State arbitration law to provide explicitly that statute of limitations is applicable in arbitration. *Ibid.*, at 381. It should be noted that there are also US State courts which accept that the statute of limitations is applicable to arbitration as well as litigation. Born & Raviv, *supra* n. 25, at 381–383.

56 It could be argued that the arbitration agreement has to be invalid due to the violation of the rule not to exclude statute of limitations. *Ibid.*, at 403. Such an argument would lead to the untenable conclusion that arbitration agreements are invalid if the law applicable to limitation is the law of a US jurisdiction that does not apply statute of limitations in arbitration proceedings. *See Ibid.*, at 403–404. This untenable result is considered by Born and Raviv as – another – reason to apply statute of

Special Provisions of Uniform Commercial Code

The limitation period for claims arising from sales contracts is specifically regulated in U.C.C. § 2–725. Paragraph 1 of this provision stipulates that the limitation period is four years. It furthermore provides that in the original sales contract, the parties can shorten this period to one year; but not lengthen it. The question whether the parties can contractually postpone the expiry of the limitation period after the conclusion of the original sales contract (i.e. the validity of the so-called 'tolling agreements')[57] seems to be subject to the relevant case law of the States. The fact that U.C.C. § 2–725 paragraph 1 only regulates whether the parties can modify the four-year limitation period in 'the original agreement' supports the view that later agreements do not fall within the scope of this provision.

2.3[b] *Civil Law Systems*

2.3[b][i] General Remarks

In civil law systems, the limits set to contractual modifications of the limitation regime tend to be stricter than in common law systems.[58]

Agreements that lengthen limitation periods or otherwise render limitation more difficult (e.g. agreements that postpone the commencement of limitation periods or provide for additional causes of suspension or renewal) have traditionally been – to a large extent – prohibited by statute or considered to be invalid by courts and legal doctrine.[59] This is still the position in some civil law systems.

---

limitations in arbitration and abandon the case law to the contrary. *Ibid.*, at 406. In my opinion, if US courts continue to hold that statute of limitations is not applicable in arbitration, it should not be accepted that arbitration agreements are invalid as a result of this case law. As mentioned above, it should be accepted that the arbitration agreement is valid and limitation is excluded by law. This opinion seems to lead to a less untenable result. It is at least possible for the parties to an arbitration agreement to include a contractual limitation period. This opinion also seems to be in conformity with US laws. 'State law in each of the jurisdictions that has refused to apply limitations periods in arbitration … mandates the validity and enforceability of arbitration agreements'. *Ibid.*, at 406.

57 For the validity of tolling agreements, *see* DiVincenzo, *supra* n. 50, at 38, 45; Born & Raviv, *supra* n. 25, at 403 n. 181.

58 Cf. Schwenzer et al., *supra* n. 5, para. 51.18, at 793.

59 § 225 BGB in its previous version (i.e. prior to 2002) specifically forbade all agreements that rendered limitation more difficult. Helmut Grothe, *§ 202*, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* [*Munich Commentary to German Civil Code*] vol. 1, para. 1 (8th ed., C. H. Beck 2018). § 1502 ABGB prohibits agreements that lengthen the limitation period. Based on this provision, Austrian doctrine accepts that all other agreements which render limitation more difficult are invalid. Michael Bydlinski, *§ 1502*, in *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* [*Commentary to Austrian Civil Code*] vol. 2, para. 1 (Peter Rummel ed., 3d ed., Manz 2002); Peter Vollmaier, *§ 1502 ABGB*, in *ABGB §§ 1451 bis 1502* [*Austrian Civil Code §§ 1451 to 1502*], para. 20, at 66–67 (Attila Fenyves, Ferdinand Kerschner & Andreas Vonkilch eds, 3d ed., Verlag Österreich 2012); Peter Mader & Sonja Janisch, *§ 1502*, in *ABGB Praxiskommentar* [*Austrian Civil Code Practice Commentary*] vol. 6, para. 4, at 1590 (Michael Schwimann & Georg Kodek eds, 4th ed., LexisNexis 2016). Art. 2220 C. civ. in its previous version (i.e. prior to 2008) prohibited the renunciation of prescription in advance. For a long time,

However, in the last decades, there has been a trend to give the parties more freedom to regulate limitation. This trend could be observed in the Principles of European Contract Law (PECL) which has influenced other model laws, as well as German and French legislators. Furthermore, the mentioned trend can also be observed in the case law and legal doctrine of several civil law systems.[60]

Agreements that shorten limitation periods have been considered valid in several civil law systems, even before any revisions.[61] However, in some civil law systems, even such modifications have been prohibited by legislators.[62]

The broadest restriction of the freedom of contract can be found in Italian law which expressly prohibits any contractual modifications of the limitation regime.[63]

2.3[b][ii] Exclusion of Limitation

In civil law systems, the parties cannot exclude limitation when the statute provides for a limitation period. This result can be derived from the fact that the freedom of the parties to lengthen the limitation period is limited by a maximum period or excluded completely.

French courts and legal doctrine derived from this provision that all agreements which render limitation more difficult were impermissible. Anne-Marie Sohm-Bourgeois, *Prescription civile* [*Civil Law Prescription*], in *Répertoire du droit civil,* para. 600 (Dalloz 30 Apr. 1985); for further references, *see* Yasin Alperen Karaşahin, *Parteiautonomie im Verjährungsrecht: Inhalt und Grenzen* [Party Autonomy in the Law of Extinctive Prescription: Content and Limits], para. 256, at 74–75 (Schulthess 2017). *See also* Art. 129 OR/CO/CO and Art. 2936 c.c.

60 For a detailed explanation of this trend, *see* Karaşahin, *supra* n. 59, paras 242 et seq., at 69 et seq.

61 *See* e.g. § 225 BGB (prior to the revision of 2002) and § 202 BGB (as revised in 2002). For German law prior to the revision of 2002, *see* Reinhard Zimmermann, *Die Verjährung* [Extinctive Prescription], 24 Juristische Schulung 409, 422 (1984); Helmut Grothe, *§ 225*, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* [*Munich Commentary to German Civil Code*] vol 1, para. 6 (2d ed., C. H. Beck 2001); Frank Peters, *§ 225*, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 1: Allgemeiner Teil,* §§ 164–240*: Allgemeiner Teil* 5 [*J. von Staudinger's Commentary to German Civil Code with Introductory Act and Secondary Acts, Book 1: General Part,* §§ 164–240*: General Part 5*], para. 14 (de Gruyter 2001). For German law after the revision of 2002, *see* Grothe, *supra* n. 59, para. 6; Frank Peters & Florian Jacoby, § 202, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 1: Allgemeiner Teil,* §§ 164–240*: Allgemeiner Teil 5* [*J. von Staudinger's Commentary to German Civil Code with Introductory Act and Secondary Acts, Book 1: General Part,* §§ 164–240*: General Part 5*], para. 14 (de Gruyter 2014). For Austrian law, *see* Vollmaier, *supra* n. 59, para. 1, at 553, para. 17, at 563–564; Kogler, *supra* n. 31, at 351–352. For French law prior to the revision of 2008, *see* Sohm-Bourgeois, *supra* n. 59, para. 597; further references in Karaşahin, *supra* n. 59, para. 258, at 75–76. For French law after the revision of 2008, *see* Art. 2254, para. 1 C. civ.; Malaurie et al., *supra* n. 9, para. 1226, at 714. For comparative remarks, *see* Zimmermann, *supra* n. 8, at 166–167.

62 *See* Art. 129 OR/CO/CO, which prohibits to shorten the general limitation period of ten years. It is accepted in Swiss case law and doctrine that shorter special limitation periods can be further shortened by agreement unless there is a provision to the contrary. This result seems to be – and actually is – contradictory. However, this contradiction is caused and supported by legislative decisions. Karaşahin, *supra* n. 59, paras 401–403, at 121–122.

63 Article 2934 c.c.

2.3[b][iii] Modification of the Length of Limitation Periods

In most civil law systems, the issue whether the parties can contractually modify the length of limitation periods is usually regulated in the provisions of the relevant codes.[64] It is therefore relatively easy to determine the legal situation in this regard.

Agreements that Lengthen the Limitation Period

Traditionally, agreements that lengthen limitation periods were considered invalid in many civil law systems. In revisions of the relevant provisions of Civil Codes, a trend can be observed to allow parties to lengthen limitation periods up to a certain limit.[65] When present, such upper limits should be calculated from the statutory commencement of the limitation period.

Agreements that Shorten the Limitation Period

In most civil law systems, agreements that shorten limitation periods are accepted to be valid. Important exceptions are Italian law and Swiss law with regard to the general limitation period of ten years.

In civil law systems that allow the parties to shorten the limitation periods, this freedom is not limitless. Some civil law systems set a lower limit to contractual modification of limitation periods. For example, in French law, the parties cannot shorten the limitation period to less than one year.[66] When present, such lower limits should be calculated from the statutory commencement of the limitation period.

In civil law systems that allow the parties to contractually shorten the limitation period without a statutory lower limit, one restriction is accepted in case law and legal doctrine: the parties cannot shorten the limitation period to a degree that would render it inequitably difficult for the creditor to pursue his or her claim. Although different formulae are used in national legal orders,[67] the essence of the restriction seems to be similar to each other and comparable with the criterion of reasonableness used in the common law jurisdictions of the United States.

---

64 *See* e.g. § 202 BGB; § 1502 ABGB; Art. 2254, para. 1 C. civ.; Art. 129 OR/CO/CO; Art. 2936 c.c. There are, however, some codes that do not include an express provision in this regard.

65 *See* e.g. § 202, para. 2 BGB; Art. 2254, para. 1 C. civ.

66 *See* Art. 2254, para. 1 C. civ. It is notable that French law did not contain such a restriction prior to the revision of 2008. Therefore, prior to 2008, the parties could shorten the limitation period to less than one year. The revision of 2008, which was based on the idea to broaden the freedom of contract, had therefore the effect to restrict the freedom of contract in this regard.

67 For Swiss law, *see* Karaşahin, *supra* n. 59, para. 404, at 122. For German law, *see* Grothe, *supra* n. 59, para. 9, who states that the general principle of good faith and fair dealing (*Treu und Glauben*) constitutes a limit; Peters & Jacoby, *supra* n. 61, para. 14, who state that the creditor should have a fair chance to enforce its claim. For Austrian law, *see* Vollmaier, *supra* n. 59, para. 17. For French law prior to the revision of 2008, *see* Sohm-Bourgeois, *supra* n. 59, para. 597.

2.3[b][iv] Modification of the Commencement of Limitation Periods

Civil Codes usually do not contain express provisions on whether the parties can modify the moment in which the limitation period begins to run. Modification of the commencement of limitation periods is closely connected with the issue whether the parties can shorten or lengthen limitation periods. Modification of the time of commencement would lead to similar results as the modification of the limitation period. Therefore, the parties should only be able to modify the time of the commencement of a limitation period to the extent they can contractually change the length of the limitation period.[68] However, it should always be verified that this method of argumentation is compatible with the applicable rules of law.[69]

2.3[b][v] Modification of the Causes of Suspension and Renewal

The modification of the causes of suspension and renewal is another issue that is usually not expressly regulated in Civil Codes.[70] In my opinion, it would be misleading to assume that there is a link between the modification of limitation periods and the modification of the causes of suspension and renewal.

First, it is possible that a legal order prohibits modifications of limitation periods, but allows the modification of the causes of suspension and renewal. Prior to the revision of 2008, this result was accepted in France by case law. French courts and legal doctrine considered it impermissible to contractually lengthen the limitation period.[71] The French Court of Cassation ruled, however, that the parties could agree on additional causes of renewal despite the fact that they could not agree on a longer limitation period.[72] In Swiss legal doctrine, there are authors who have a similar opinion with regard to Swiss law.[73]

Secondly, it is also possible that national legal orders allow the parties to modify the limitation period, but not the causes of suspension or renewal. After the revision of 2008, the French Civil Code expressly allows the parties to shorten limitation periods to one year.[74] It also provides that the parties can create new causes of suspension and renewal.[75] It is argued in the French

---

68 For Swiss law, *see* Karaşahin, *supra* n. 59, para. 416, at 125.

69 Hachem states that this question is answered differently in legal systems. Pascal Hachem, *The CISG and Statute of Limitations*, in *35 Years CISG and Beyond* 151, 154 (Ingeborg Schwenzer ed., Eleven International Publishing 2015).

70 As examples to the contrary, *see* § 202 BGB; Art. 2254, para. 2 C. civ.

71 Sohm-Bourgeois, *supra* n. 59, para. 600. For further references, *see* Karaşahin, *supra* n. 59, para. 256, at 74–75.

72 *Civ. 1ère*, 25 June 2002, No. 00-14590, www.legifrance.gouv.fr (accessed 20 Aug. 2018).

73 For this opinion and its criticism, *see* Karaşahin, *supra* n. 59, para. 442, at 135–136.

74 Article 2254, para. 1 C. civ.

75 *Ibid.* para. 2 C. civ.

doctrine that this provision prohibits *e contrario* the exclusion of statutory causes of suspension and renewal.[76] In Austrian and German laws, the parties can in principle contractually shorten the limitation period. However, it is argued by some authors that the parties cannot exclude the application of certain causes of suspension.[77]

In conclusion, it can be stated that the freedom to modify the limitation period does not necessarily entail the freedom to modify the causes of suspension or renewal. In order to determine the extent and limits of freedom of contract in this regard, national legal systems have to be examined separately.

2.3[c] *Model Laws*

2.3[c][i] General Remarks About Limitation in Model Laws

In the last two decades, several model laws have been published based on comparative law scholarship. In the area of contract law, PECL and UNIDROIT Principles of International Commercial Contracts (PICC)[78] can be mentioned as the two most influential of these model laws. Both of these model laws contain provisions about limitation.

Whether the provisions of these model laws about limitation are closer to civil law or common law can be debated. After the expiry of the limitation period, the claim is not extinguished and the debtor has a defence that enables him or her to refuse performance.[79] In my opinion, this legal result is compatible with the approach of civil law systems that accept the weak effect of limitation. However, at least one author argues based on the same provision that PICC is closer to the procedural approach accepted in common law systems.[80]

2.3[c][ii] Modification of the Limitation Regime

With regard to the modification of the rules on limitation, PECL and PICC have taken a middle position between English law and civil law systems that

---

[76] Philippe Malaurie, *La réforme de la prescription civile* [*The Reform of Civil Law Prescription*], 2009 La semaine juridique: edition générale 15, 18 (8 Apr. 2009); Laurent Leveneur, *Le nouvel Article 2254 du code civil* [*The New Article 2254 of the Civil Code*], in *Liber Amicorum Christian Larroumet* 282, 288 (Sarah Bros & Blandine Mallet-Bricout eds, Economica 2010); Malaurie et al., *supra* n. 9, para. 1226, at 714. It is, however, stated that the contrary is also argued in French doctrine (Leveneur, *supra* n. 76, at 288).

[77] For Austrian law, *see* Vollmaier, *supra* n. 59, para. 21, at 567. For German law, *see* Peters & Jacoby, *supra* n. 61, para. 13.

[78] The last version of PICC was published in 2016. All references in this article are to PICC 2016.

[79] Article 14:501 PECL; Art. 10.9 PICC.

[80] Benjamin Hayward, *New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations*, 26 J. Int'l Arb. 405, 419–420 (2009).

set strict limitations on the freedom of contract in this regard. According to these model laws, the parties can modify the limitation periods within certain lower and upper limits.[81] With regard to contractual time limits to commence arbitration, which would in many cases be relatively short, it is important to note that the lower limits in these model laws can cause an issue of validity.

Article 14:601 paragraph 1 of PECL expressly stipulates that the parties can modify all requirements of limitation. The modification of the length of limitation periods is only one such modification. The parties are also free to modify the commencement of limitation periods or the causes of suspension or renewal.[82] However, the lower and upper limits set out in Article 14:601 paragraph 2 constitute a limit to the effects of such modifications.[83]

Article 10.3 of PICC (2016) regulates only modifications of the length of limitation periods. It is, however, argued by at least one author that the parties can modify other requirements of limitation.[84]

2.4 Effect of the commencement of arbitration proceedings on limitation periods

2.4[a] *In General*

The commencement of legal proceedings prevents the expiry of limitation periods, although the mechanism used to achieve this result differs.[85] In English law[86] and the U.N. Convention on the Limitation Period in International Sale of Goods (hereinafter 'U.N. Limitation Convention'),[87] limitation periods cease to run when legal proceedings commence.[88] In civil law systems, the commencement of legal proceedings has traditionally been accepted as a cause of interruption

---

81 Article 14:601 PECL; Art. 10.3 PICC.

82 Karaşahin, *supra* n. 59, para. 290, at 84.

83 For the application of these limits to agreements that postpone the expiry of the limitation period or create new causes of suspension or renewal, *see* Karaşahin, *supra* n. 59, para. 291, at 84.

84 Robert Wintgen, *Article 10.3*, in *Commentary on the UNIDROIT Principles on International Commercial Contracts (PICC),* para. 6, at 1064 (Stefan Vogenauer & Jan Kleinheisterkamp eds, Oxford U. Press 2009).

85 Girsberger, *supra* n. 32, at 97; Anita F. Hill, *A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2-725 of the Uniform Commercial Code*, 25 Tex. Int'l L.J. 1, 19–20 (1990); Lew et al., *supra* n. 1, para. 20-9, 507; Oppermann, *supra* n. 1, at 24. However, it is stated that U.C.C. implies the continuation of the limitation period even after the commencement of legal proceedings (Hill, *supra* n. 85, at 20 n. 105).

86 Law Commission, *supra* n. 20, para. 2.94, at 34; Zimmermann, *supra* n. 8, at 117–118; Oppermann, *supra* n. 1, at 24, 234–235.

87 U.N. Limitation Convention, Art. 13; Oppermann, *supra* n. 1, at 235–236.

88 This result follows naturally from the concept of limitations of actions. *See Principles of European Contract Law: Part III* 180 (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds, Kluwer 2003).

(renewal). Thus, a new limitation period starts to run, although the moment in which the new limitation period begins to run differs.[89] The commencement of legal proceedings can also be regulated as a cause of suspension.[90] In such a case, the limitation period stops with the commencement of proceedings and continues to run after the conclusion of the proceedings.[91]

National legal systems usually concentrate on the commencement of litigation proceedings before state courts. However, the commencement of arbitration proceedings is also accepted as an act that prevents the expiry of the limitation period,[92] which is expressly provided for in several national legal systems.[93]

2.4[b] *Requirements for Suspension or Renewal by Legal Proceedings*

The law applicable to limitation determines the acts necessary to suspend or renew limitation periods through the commencement of legal proceedings.[94]

In order to determine the acts necessary to suspend or renew the limitation period, national legal systems can – and in many cases do[95] – refer to the rules of procedural law about the commencement of legal proceedings.[96] In such cases, limitation periods are suspended or renewed at the moment in which legal proceedings are deemed to have commenced according to the rules of procedural law. With regard to arbitration proceedings, it should be noted that national arbitration laws may allow the parties to determine the requirements and the

---

89 Zimmermann, *supra* n. 8, at 119; Oppermann, *supra* n. 1, at 24, 232; Kwon & Nowak, *supra* n. 13, at 88. For a list of European legal systems that provide for the interruption of limitation periods in case of legal proceedings, *see Principles of European Contract Law: Part III, supra* n. 88, at 182.

90 § 204 BGB; Arts 10.5 and 10.6 PICC; Art. 14:302 PECL.

91 Zimmermann, *supra* n. 8, at 121–124; Oppermann, *supra* n. 1, at 24, 230; Kwon & Nowak, *supra* n. 13, at 87–88.

92 Zimmermann, *supra* n. 8, at 124; Schwenzer & Manner, *supra* n. 19, at 298; Lew et al., *supra* n. 1, para. 20-9, 507; Oppermann, *supra* n. 1, at 24–25; Girsberger & Voser, *supra* n. 1, para. 861, at 209–210; Kwon & Nowak, *supra* n. 13, at 86–87.

93 § 204 para. 1 subpara. 11 BGB; Art. 135 OR/CO/CO. It is stated that the commencement of arbitration proceedings is accepted as a cause of interruption in Austrian and Korean laws despite the fact that the relevant codes do not expressly contain a provision to that effect. Kwon & Nowak, *supra* n. 13, at 89.

94 Oppermann, *supra* n. 1, at 95. However, Foreign Limitation Periods Act 1984, s. 1(3) contains an exception to this rule. It provides that '[t]he law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter'. It is stated that this provision is criticized in the doctrine. *Ibid*., at 94.

95 *Ibid.,* at 100–115, 145.

96 *Ibid.,* at 27, 99; Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration,* paras 16–152, at 353 (3d ed., Wolters Kluwer 2015). After the revision of 2002, this is the legal situation in German law. Oppermann, *supra* n. 1, at 102–107; Helmut Grothe, *§ 204*, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* [*Munich Commentary to German Civil Code*] vol 1, para. 27 (9th ed., C. H. Beck 2018).

moment of commencement of arbitration proceedings.[97] Such an agreement of the parties determines the moment of commencement both for purposes of procedural issues and limitation. Section 14(1) of the Arbitration Act 1996 (England and Wales) expresses this legal result: 'The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts'.

National legal systems can also determine the acts necessary to deem legal proceedings commenced for the purposes of suspension or renewal of limitation periods autonomously, i.e. independent from the rules of procedural law.[98] Swiss law constitutes an example for such a legal system.[99] In these legal systems, it is possible that the limitation period is suspended or renewed before or after the moment determined by the rules of procedural law as the moment of commencement. Two examples will be given here from Swiss law.

In order to have the limitation period renewed, Swiss law requires the individualization of the claim in the document that initiates legal proceedings.[100] The necessary level of individualization may, however, not be present in the notice of arbitration. Indeed, some national arbitration laws or institutional arbitration rules establish few requirements for notices of arbitration.[101] In such a case, the notice of arbitration may be sufficient to commence arbitration proceedings for procedural purposes, however not cause the renewal of the limitation period.[102]

---

97 Lew et al., *supra* n. 1, paras 20–25, 512; Oppermann, *supra* n. 1, at 100–101, 163.

98 Oppermann, *supra* n. 1, at 27, 99, 145–146. Cf. Berger, *supra* n. 96, paras 16–151, at 352–353. This possibility seems to be overlooked in the literature on international commercial arbitration. It is usually stated without reservations that the commencement of arbitral proceedings in the sense of arbitration laws and rules prevents the expiry of the limitation period. *See* e.g. Lew et al., *supra* n. 1, para. 20-2, 505, para 20–24, 512; Blackaby et al., *supra* n. 1, para. 4.10, at 232.

99 Oppermann, *supra* n. 1, at 115, who mentions Austrian law as another example. For detailed explanations on Austrian law *see ibid.*, at 130–133.

100 Stephen V. Berti, *Artikel 135* [*Article 135*], in *Kommentar zum Schweizerischen Zivilgesetzbuch: Obligationenrecht, Teilband V1h: Das Erlöschen der Obligationen, Lieferung II: Art. 127-142 OR* [*Commentary to Swiss Civil Code: Code of Obligations, Vol. V1h: Extinction of Obligations, Part II: Art. 127–142 of Swiss Code of Obligations*], para. 63, at 153, para. 101, at 169, para. 140, at 176–177, paras 143–144, at 177 (3d ed., Schulthess 2002); Oppermann, *supra* n. 1, at 118–119; Christof Bergamin, *Die Unterbrechung der Verjährung durch Klage* [*Interruption of Prescription by Action*], paras 142–157, at 84–93 (Schulthess 2016).

101 For an example *see* Tweeddale & Tweeddale, *supra* n. 1, para. 17.21, at 521 ('The words " … we hereby give you formal notice of our commencement of arbitration against you under the … above charterparty which requires the appointment of a sole arbitrator" have been held to be sufficient to commence the arbitration') and *ibid.*, para. 17.22, at 521 ('It is common practice for an arbitration notice to set out the relationship between the parties and the nature of the dispute that has arisen. However, depending on the parties' agreement, a document simply requiring the dispute to be referred to arbitration will suffice'.). *See also* Lew et al., *supra* n. 1, paras 20–36, at 516; Oppermann, *supra* n. 1, at 169–170.

102 For Swiss law, *see* Oppermann, *supra* n. 1, at 119; Bergamin, *supra* n. 100, para. 384, at 217–218; Girsberger & Voser, *supra* n. 1, para. 886, at 215–216. For a general remark about this risk, *see* Oppermann, *supra* n. 1, at 252.

In Swiss law, it is sufficient to dispatch the documents necessary to commence legal proceedings within the limitation period in order to renew it. It is not necessary that these documents reach the court within the limitation period.[103] On the other hand, national arbitration laws and institutional arbitration rules may deem arbitration proceedings commenced at the moment that the necessary document reach the arbitration institute or the respondent.[104] In such a case, the limitation period can be renewed at a moment before arbitration proceedings are deemed to have commenced for procedural purposes.

If the law applicable to limitation determines the moment of suspension or renewal independent from the rules of procedural law and the contract stipulates a moment of commencement that deviates from the relevant rule of the law applicable to limitation, it has to be examined whether the provision of limitation law is mandatory.[105] If the relevant rule is mandatory, the limitation period will be suspended or renewed at the moment determined by the statute, regardless of any provision about the commencement of arbitration proceedings in the contract or arbitration rules incorporated in the contract by reference.

3. PRECLUSION PERIODS

3.1 Concept and terminology

In most civil law systems, a distinction is made between limitation and preclusion periods.[106] The legal regime applicable to preclusion periods (also called cut-off periods)[107] differs from the limitation regime in three important aspects. First, the expiry of preclusion periods causes the claim to extinguish.[108] Second, in most legal systems, the expiry of a preclusion period is taken into account by the court *ex officio*, i.e. without the need to be plead as a defense.[109] Third, the causes that

---

[103] Berti, *supra* n. 100, para. 69, at 154; Oppermann, *supra* n. 1, at 119–127; Bergamin, *supra* n. 100, para. 109, at 64–65, para. 386, at 218–219.

[104] UNCITRAL Model Law on International Commercial Arbitration, Art. 21; UNCITRAL Arbitration Rules, Art. 3, para. 2; ICC Rules of Arbitration (2017), Art. 4, para. 2; LCIA Arbitration Rules (2014), Art. 1, para. 1.4; Swiss Rules of Arbitration, Art. 3, para. 2.

[105] For Swiss law, *see* Bergamin, *supra* n. 100, para. 386, at 218–219. For a general remark about this issue, *see* Oppermann, *supra* n. 1, at 137, who criticizes the application of mandatory limitation rules to prevent agreements about the commencement of arbitration proceedings. For this critique, *see* Oppermann, *supra* n. 1, at 137–138.

[106] The terminology used to describe preclusion periods varies, even in the same language. In German, different terms are used in different jurisdictions: '*Ausschlußfrist*' in Germany, '*Verwirkungsfrist*' in Switzerland, '*Präklusivfrist*' or '*Verfallfrist*' in Austria. In French, the terms '*délai de péremption*' or '*délai prefix*' are used. A uniform terminology is therefore not present. *See* Girsberger, *supra* n. 32, at 30.

[107] Girsberger & Voser, *supra* n. 1, para. 861, at 209–210.

[108] Girsberger, *supra* n. 32, at 29, 31; Mansel, *supra* n. 4, at 1369.

[109] Girsberger, *supra* n. 32, at 31, 41.

suspend or renew limitation periods do not – at least directly – have an effect on preclusion periods.[110]

Common law systems also have time limits with similar characteristics, which are classified as institutions of substantive law.[111] The 'substantive time limits'[112] or 'substantive limitation periods'[113] of some common law jurisdictions are comparable to the preclusion periods of civil law systems. A common term to express preclusion periods has not been established in common law systems.[114]

3.2 Acts necessary to prevent the expiry of preclusion periods

In order to avoid the expiry of a preclusion period the creditor has to perform an act within that period. The acts to be performed in order to avoid the expiry of preclusion periods can be diverse. For the purposes of this article, a distinction has to be made between preclusion periods that require the commencement of legal proceedings and those that require the performance of other acts.

3.2[a] *Commencement of Legal Proceedings*

The act to be performed can consist of the commencement of legal proceedings. In such cases, the preclusion period overlaps, to some extent, with the limitation period,[115] since the performance of one and the same act prevents the expiry of both periods. It is therefore important to examine whether such preclusion periods violate mandatory limitation rules.[116] If the parties agree on a preclusion period for the commencement of legal proceedings[117] that is shorter than the applicable limitation period, the creditor has in effect less time to commence legal proceedings. When the law applicable to limitation does not allow the parties to shorten the limitation period, such a contractual preclusion period will therefore be invalid.

---

110 *Ibid.*, at 31; Oppermann, *supra* n. 1, at 19; Bonell, *supra* n. 7, at 721.
111 Girsberger, *supra* n. 32, at 30.
112 *Developments in the Law, supra* n. 18, at 1187–1188.
113 Hayward, *supra* n. 80, at 418.
114 Girsberger, *supra* n. 32, at 30; Mansel, *supra* n. 4, at 1369.
115 Karaşahin, *supra* n. 59, para. 516, at 152.
116 For French law, *see* Malaurie et al., *supra* n. 9, para. 1223, at 713. For Swiss law, *see* Karaşahin, *supra* n. 59, para. 516, at 152.
117 For a decision of the French Court of Cassation about the possibility of such agreements in French law, *see Com.*, 26 Jan. 2016, No. 14-23285, www.legifrance.gouv.fr (accessed 20 Aug. 2018).

3.2[b] *Other Acts*

The contract can require the performance of an act other than the commencement of legal proceedings, such as the dispatch of a notice, within a specific period. In such cases, the preclusion period does not overlap with the limitation period. Mandatory rules of the law applicable to limitation cannot be violated by preclusion periods of this type.[118] This view is confirmed by Article 10.1 paragraph 2 of PICC, which reads as follows: 'This Chapter does not govern the time within which one party is required under the Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings'.

A notice requirement can be found in Fédération Internationale des Ingénieurs Conseils (FIDIC) (International Federation of Consulting Engineers) Conditions of Contract for Construction (hereinafter 'FIDIC Red Book'). Its sub-clause 20.4 paragraph 1 provides that all disputes between the parties have to be referred to the Dispute Adjudication Board (DAB). After the notification of the decision of the DAB or failure of DAB to render a decision within the specified period, a party that wishes to commence arbitration has to give a notice of dissatisfaction within twenty-eight days. This requirement is regulated in sub-clause 20.4 paragraphs 5 and 6, which read as follows:

> If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.
>
> In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute[119] unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

---

[118] Karaşahin, *supra* n. 59, para. 516, at 152. For PICC, *see* Wintgen, *supra* n. 84, para. 9, at 1065.

[119] As expressly stipulated in the provision, the legal result of the expiry of the twenty-eight-day time limit is the inability to commence arbitration proceedings. It is accepted that the expiry of this time limit bars litigation proceedings before state courts as well. Lew et al., *supra* n. 1, para. 20-14, at 508. It is not clear whether the claim of a party extinguishes as a result of the expiry of this period. It can therefore be questioned whether this time limit constitutes a preclusion period in the sense explained above. For the purposes of this article, this classification is not important since the mandatory rules on limitation are not applicable in either case.

For the reasons explained above, the mandatory rules of the law applicable to limitation are not relevant for this contractual time limit.[120]

4. LAW APPLICABLE TO LIMITATION PERIODS

As explained above, the provisions of the law applicable to limitation may have an important effect on the validity of contractual time limits to commence arbitration. Since the substantive rules of national legal systems differ to an important extent in this regard, it is essential to determine the law applicable to limitation.[121]

4.1 In general

4.1[a] *Problem of Classification and Its Effect on the Applicable Law*

In private international law, limitation causes a classical problem of classification and choice of law.[122] In civil law systems, the law applicable to limitation is accepted to be *lex causae* since limitation is considered as an institution of substantive law.[123] On the other hand, in common law systems, the law applicable to limitation was traditionally accepted to be *lex fori* since limitation is (still) considered to be an institution of procedural law in these systems.[124] It should be noted, however, that the relevant choice of law rules of common law systems have begun to change in the last decades. An important example is the Foreign Limitation Periods Act 1984. Pursuant to section 1(1) of this Act:

---

120 It is stated that clause 20 of the various new versions of FIDIC Rules is based on clause 67 of the previous version of FIDIC Red Book. Lew et al., *supra* n. 1, para. 20-14, at 508. With regard to clause 67 of the previous version of FIDIC Red Book, it was debated whether it was sufficient for the creditor to give a notice of the intent to arbitrate (similar to clause 20 of the new versions of FIDIC Rules) or necessary to commence arbitration within the time limit. For this debate and the different opinions, *see French Contractor v. Ministry of Irrigation of African Country X*, Second Interim Award, ICC Case No. 5277, 1987 (1988) 13 Y.B. Com. Arb. 80, 85–86 [hereinafter *French Contractor v. Ministry of Irrigation*]. If the latter opinion was to be accepted (as in *French Contractor v. Libyan Employer*, Partial Award, ICC Case No. 3790, 20 Jan. 1983 (1986) 11 Y.B. Com. Arb. 119), the time limit had to be compatible with mandatory rules of the law applicable to limitation. *See French Contractor v. Ministry of Irrigation, ibid.,* at 88: 'the effect of the strict interpretation would be to make … a drastic reduction in the period of limitation'.

121 Cf. Hachem, *supra* n. 19, at 9.

122 Mansel, *supra* n. 4, at 1375. *See also* Hachem, *supra* n. 19, at 12–13.

123 Mansel, *supra* n. 4, at 1370. *See also* Girsberger, *supra* n. 32, at 46; Schwenzer & Manner, *supra* n. 19, at 296; Schwenzer et al., *supra* n. 5, paras 51.04, 51.06, at 790; Hachem, *supra* n. 69, at 155; Huser, *Determining the Relevant Limitation Period*, *supra* n. 6, at 826–827.

124 Mansel, *supra* n. 4, at 1372. *See also* Girsberger, *supra* n. 32, at 50 (for English law prior to the enactment of Foreign Limitation Periods Act); Schwenzer & Manner, *supra* n. 19, at 296; Schwenzer et al., *supra* n. 5, paras 51.04, 51.08, at 790; Hachem, *supra* n. 69, at 155; Huser, *Determining the Relevant Limitation Period*, *supra* n. 6, at 826–827.

> where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by such court) to be taken into account in the determination of any matter (a) the law of that other country relating to limitation shall apply in respect of that matter for the purpose of the action or proceedings; and (b) … the law of England and Wales relating to limitation shall not apply.

In other words, the classification as an institution of procedural law will no longer affect the choice of law. However, the traditional approach can still be applicable in other common law jurisdictions. Therefore, in common law jurisdictions, generalizations should be especially avoided and choice of law rules of each jurisdiction should be examined separately.

When a contract provides for modification of the rules about limitation, the issue whether such a contract provision is invalid due to possible violation of a mandatory rule should be decided solely by the law applicable to limitation.[125] If the modification is made after the conclusion of the original contract with a second separate contract, the law applicable to the second contract may be different from the law applicable to the original contract. In such a case, the general conditions for the validity of the second contract will be determined by the law applicable to this contract. However, whether this second contract can modify the limitation of a claim created by the original contract should be decided by the law applicable to the limitation of that claim, which would be the law applicable to the original contract in civil law systems.[126]

4.1[b] *Contractual Choice of Law*

In modern legal systems, it is accepted that the parties are free to determine the law applicable to a contract with a foreign element by agreement. In legal systems which accept that *lex causae* is applicable to limitation, the contractual choice of law will determine the law applicable to limitation. There is, however, the risk that the contractually chosen law will not be applied to limitation in legal systems which accept that *lex fori* is applicable to limitation.[127]

The fact that many legal systems have mandatory provisions about limitation does not prevent the effectiveness of a choice of law clause.[128] As will be explained

---

[125] Girsberger, *supra* n. 32, at 78.

[126] Cf. *ibid.,* at 79.

[127] Hachem, *supra* n. 69, at 155–156. For the view that the chosen law should be applicable to limitation regardless of whether limitation is classified as substantive or procedural, *see* Schwenzer & Manner, *supra* n. 19, at 303–304. The authors admit that there may be problems if *lex loci arbitri* follows the procedural classification. However, they argue that '[i]t would be arbitrary to classify the question of limitation according to *lex loci arbitri*' and that '[t]he arbitral situs cannot prevail over the parties' choice of law' (Schwenzer & Manner, *supra* n. 19, at 304).

[128] Girsberger, *supra* n. 32, at 118.

below, the rules on limitation are only internal mandatory rules, not international mandatory rules that remain applicable despite the choice of another law.

Many legal systems allow a partial or split choice of law by the parties (*dépeçage*), although the limits set on such a partial choice of law may still be an issue of debate.[129] It is accepted that a partial choice of law with regard to limitation is possible.[130] Due to the inner connection between the rules on limitation (e.g. rules on the commencement, length, and suspension of limitation periods), a division of the rules on limitation and the choice of several laws applicable to different aspects of limitation is in principle not possible.[131]

An explicit partial choice of law with regard to limitation is likely to be very rare. An issue that may be more relevant in practice is whether a contractual provision that is invalid due to the violation of a mandatory rule of the law otherwise applicable to limitation can be upheld as an implicit partial choice of a different law with regard to limitation. In my opinion, such a reinterpretation of the contractual provision is only possible if there are considerable indications of a common intent to make a partial choice of law.[132] The mere fact that a specific contractual provision would be valid according to one of the potentially applicable laws is not in itself sufficient to accept a partial choice of law.[133] In any case, the specifics of every case must be examined individually in order to make a determination in this regard.

4.2 In international commercial arbitration

When the dispute is to be resolved through international commercial arbitration, some special features with regard to choice of law exist.

4.2[a] *Lack of Lex Fori*

The choice of law problem with regard to limitation expands by another aspect due to the lack of *lex fori*.[134] In international commercial arbitration *lex arbitri*

---

[129] Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* para. 1436, at 794–795 (Kluwer Law International 1999).

[130] Girsberger, *supra* n. 32, at 120–121. But *see* Vollmaier, *supra* n. 59, para. 14, at 561, who states that the limitation period of Austrian law cannot be lengthened indirectly by a partial choice of law and cites a decision of the Austrian Supreme Court.

[131] Girsberger, *supra* n. 32, at 121. However, the author accepts that the parties can choose a different law with regard to the causes that renew limitation or cease it to run (*ibid.,* at 121–122).

[132] Cf. *ibid.*, at 123.

[133] Cf. Huser, *The Appropriate Prescription Regime, supra* n. 6, at 167.

[134] With regard to the lack of *lex fori* in international arbitration, cf. Blackaby et al., *supra* n. 1, para. 3.213, at 222–223.

performs some functions of *lex fori*. However, there is a considerable difference between the functions of *lex fori* in state court litigations and the functions of *lex arbitri* in international commercial arbitration.[135] This determination supports the view that *lex causae* should be applicable to limitation in international commercial arbitration.[136] However, if the seat of arbitration is in a common law country, it is still conceivable that the arbitral tribunal applies the law of the seat of arbitration to limitation.[137] In such a case, a conflict could arise between the law applicable to the merits and the law of the seat of arbitration.[138]

4.2[b] *Applicability of Non-State Rules of Law*

Most arbitration laws allow the choice of 'rules of law' that do not constitute the law of a state as the law applicable to the merits. It is therefore possible in international commercial arbitration to apply instruments such as PECL and PICC to the merits of the case.[139] In the area of limitation, such instruments may contain provisions that are very different from state laws.

4.3 Importance of the law applicable to limitation for contractual time limits to commence arbitration

It may be argued that the determination of the law applicable to limitation periods will in most cases not make a practical difference when the contract provides for a time limit to commence arbitration proceedings, since the key issue would be the interpretation of the relevant contract provision. While this consideration may be accurate for most issues in contractual disputes, it is not the case with regard to contractual time limits. Mandatory rules of the law applicable to limitation – if present – would determine whether the contract provision about the time limit to commence arbitration is valid.[140] The determination of such rules of law can therefore have a decisive effect on the outcome of the dispute.

---

135 For the functions of *lex arbitri* and its suitability as the law applicable to limitation, *see* Huser, *The Appropriate Prescription Regime, supra* n. 6, at 79–92; Huser, *Determining the Relevant Limitation Period*, *supra* n. 6, at 835–838.

136 Schwenzer & Manner, *supra* n. 19, at 304; Oppermann, *supra* n. 1, at 58–60; Huser, *The Appropriate Prescription Regime, supra* n. 6, at 97–98; Hachem, *supra* n. 69, at 155. *See also* Hachem, *supra* n. 19, at 13.

137 *See* e.g. *Licensor Oy v. Licensee Pty.*, Award, 1984, 2 J. Int'l Arb. 75 (1985); Huser, *Determining the Relevant Limitation Period*, *supra* n. 6, at 832, who cites ICC Case No. 12586. Cf. Blackaby et al., *supra* n. 1, para. 4.07, at 231.

138 *See Note – Award of 1984*, 2 J. Int'l Arb. 77 (1985).

139 Schwenzer & Manner, *supra* n. 19, at 301; Oppermann, *supra* n. 1, at 71–72.

140 With regard to contractual limitation periods in CISG contracts, *see* Hachem, *supra* n. 69, at 153; Schwenzer & Manner, *supra* n. 19, at 9.

4.3[a] *Concept of Mandatory Rules in International Commercial Arbitration*

With regard to mandatory rules, a clarification of terminology is necessary. First, mandatory rules (also called immutable rules) describe provisions of the applicable law that prevail over agreements to the contrary and thereby limit the parties' freedom of contract. In this article, the term 'mandatory rules' is used in this sense. In domestic contracts, the parties cannot avoid the application of such rules. In contracts with a foreign element, on the other hand, the parties can exclude the application of the mandatory rules of a specific domestic law by the choice of another domestic law or rules of law.[141] This type of rules can be referred to as internal (domestic) mandatory rules.[142]

There are, however, rules of domestic laws that remain applicable despite the choice of another law. In order to avoid confusion, this second type of rules can be called international mandatory rules.[143] In the private international law literature, this type of rules is usually meant when the term 'mandatory rule' is used.[144] These rules are usually of a public law nature.[145] They pursue primarily a public interest and do not aim to balance the interests of the parties.[146] Such rules intervene in the contract between the parties in order to fulfil general interests of the public or the state. Typical examples are exchange regulations, import and export regulations, and antitrust laws.[147]

As explained above, national legal orders can contain internal mandatory rules about limitation. These rules do not constitute international mandatory rules.[148] Although it is widely accepted that the law of limitation serves, to some extent, public interests, its primary aim is nevertheless the protection of the interests of the

---

141 Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* [*Private International Law*] 654 (9th ed., C. H. Beck 2004).

142 Nathalie Voser, *Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 Am. Rev. Int'l Arb. 319, 321 (1996).

143 *Ibid*. For this term, *see also* Gaillard & Savage, *supra* n. 129, para. 1515, at 847. These rules are called '*Eingriffsnormen*' in German and '*lois d'application immediate*' or '*lois de police*' in French (for the latter, *see* Gaillard & Savage, *supra* n. 129, para. 1515, at 847). In these languages, a risk of confusion is not present since other terms are used to refer to internal mandatory rules. However, a terminological differentiation is necessary in English to avoid confusion.

144 George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 Am. Rev. Int'l Arb. 1 (2007).

145 Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Commercial Arbitration*, 14 J. Int'l Arb. 23, 23–24 (1997).

146 Voser, *supra* n. 142, at 356.

147 *Ibid.,* at 325; Oppermann, *supra* n. 1, at 90.

148 Oppermann, *supra* n. 1, at 90; Bonell, *supra* n. 7, at 730. *See also* Girsberger, *supra* n. 32, at 118. The author mentions the presence of some time limits of the *lex fori* that may be of international mandatory character and therefore remain applicable despite a choice of law clause. However, the example given by the author does not have any connection to limitation periods. It concerns the acquisition of land by foreigners.

parties.[149] It should be left to the applicable rules of law to establish the necessary balance between the interests of the parties.[150] Since the law of limitation does not contain international mandatory rules, the parties can exclude the application of the limitation law of a specific state by the choice of another national law or rule of law.[151]

4.3[b] *Applicability of Internal Mandatory Rules*

Internal mandatory rules determine the validity of contractual provisions. In litigation before state courts, there would be no debate about the effect of mandatory rules. In my opinion, the same should be true in international commercial arbitration.[152] There are, however, some authors whose explanations about contractual limitation periods could be understood to the contrary.[153]

---

[149] For Swiss law, *see* Karaşahin, *supra* n. 59, para. 35, at 8–9.

[150] Cf. Voser, *supra* n. 142, at 325, who argues that the rules enacted for the protection of the weaker party (such as consumers, employees and tenants) do not constitute international mandatory rules.

[151] Girsberger, *supra* n. 32, at 118.

[152] Cf. Lew et al., *supra* n. 1, paras 17–27, at 420.

[153] The explanations of the mentioned authors are open to interpretation. Therefore, their explanations will be given verbatim. Schwenzer & Manner, *supra* n. 19, at 300–301: 'Within the boundaries of freedom of contract, it is, first and foremost, up to the parties to specifically agree upon a limitation period in their contract. This is in line with the overriding principle of party autonomy recognized in most international arbitration laws and rules … If the contract provides for a true limitation period, … the question arises of whether such a clause is valid or not. Article 4(a) of the CISG provides that questions of "validity of the contract or of any of its provisions" are to be decided by the applicable domestic law, which, in a select few cases, may be the Limitation Convention. In any case, resorting to the substantive provisions of the otherwise applicable national law, however, would ignore the fact stated above, namely that many legal systems in common law countries still adhere to the procedural classification of limitation periods. Yet, an independent national approach seems to be preferable, and boundaries for an international public policy have to be found on a comparative basis. Hence, as long as the stipulated limitation period is consistent with what is generally provided for under national substantive or procedural law, and what is now set out in international instruments, there can be no doubt that such a clause is valid, notwithstanding a specific national regulation for the contrary'. Bonell, *supra* n. 7, at 730: 'The only mandatory rules the arbitral tribunals may take into account, also in view of their task of rendering to the largest possible extent a decision capable of enforcement, are those which claim to be applicable irrespective of the law otherwise governing the contracts ("*loi d'application necessaire*"). Yet none of the national limitation rules should fall under this notion'. Huser, *The Appropriate Prescription Regime, supra* n. 6, at 166–167: 'the parties agree – by stipulating a specific choice of law clause or by leaving the decision on the applicable law on the merits to the arbitrators – that the chosen and selected legal framework decides on any dispute arising out or relating to the contract, including any dispute encompassing the validity of the provisions of the contract itself, wherefore the mandatory provisions of this reference legal framework must be respected and prevail over the principle of party autonomy. Although the parties to arbitration enjoy the freedom to contract out provisions of the *lex causae* – encompassing also mandatory rules of said legal framework … this exclusion cannot be assumed by the mere fact that a contractual clause is contradictory to the provisions laid down in the *lex causae*. Rather, the suspension of particular rules of a specific *lex causae* should be either made by an explicit statement or by availing the freedom to resorting to another, additional law on the merits to decide on certain questions'.

A possible cause for such an opinion might be a provision that is present in several national arbitration laws and institutional arbitration rules.[154] This provision can be found in Article 28 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ('Model Law'), which reads as follows:

> (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. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
> (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.
> (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
> (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

As it can be seen, the last paragraph of this article provides that 'the arbitral tribunal shall decide in accordance with the terms of the contract'. The fact that this provision comes in the last paragraph after all methods of choice of law and states that it is applicable '[i]n all cases' could lead to the interpretation that the terms of the contract are to be applied regardless of the rules of law applicable to the merits of the case. Nevertheless, such an interpretation cannot be supported by the legislative history of the provision.

The initial draft of the Model Law contained a similar provision. The Working Group discussed this provision of the draft and decided not to retain it. The reason for this decision can be found in the report of the Working Group: 'The prevailing view … was not to retain this provision in view of the many questions and concerns it raised. For example, the reference to the terms of the contract could be misleading where such terms were in conflict with mandatory provisions of law'.[155] This explanation makes it clear that the mandatory rules of

---

[154] *See* e.g. Schwenzer & Manner, *supra* n. 19, at 300, n. 58, where the authors cite the equivalent provision in several institutional arbitration rules, UNCITRAL Arbitration Rules and UNCITRAL Model Law on International Commercial Arbitration.

[155] United Nations Commission on International Trade Law, *Report of the Working Group on International Practices on the Work of Its Sixth Session (Vienna 29 Aug. – 9 Sept. 1983)*, para. 99, at 22 (A/CN.9/245, 22 Sept. 1983). *See also* United Nations Commission on International Trade Law, *Analytical Commentary of Draft Text of a Model Law on International Commercial Arbitration*, para. 11, at 63 (A/CN.9/264, 25 Mar. 1985): 'As regards the reference to the terms of the contract, it was stated … that such reference could be misleading where the terms of the contracts were in conflict with mandatory provisions of law'.

the law applicable to the merits would prevail over any contractual provisions. A provision that could be understood otherwise was desired to be avoided.

However, the Commission decided to insert the provision back into the Model Law.[156] The relevant opinions expressed by the representatives in the Commission clarify the reason for the insertion of the provision:

> Mr HOELLERING (United States of America) proposed the insertion of a new paragraph (3) to provide that the arbitral tribunal should decide in accordance with the terms of the contract and take account of the usages of the trade applicable to the transaction, in line with article 33(3) of the UNCITRAL Arbitration Rules.[157]
> Mr AYLING (United Kingdom) said it was essential to introduce the rule proposed by the United States representative, which was similar to the one in the UNCITRAL Arbitration Rules, since the pre-eminent obligation of the arbitral tribunal was to determine the matter in dispute by applying the terms of the contract. His delegation therefore strongly supported the United States proposal.[158]

This legislative history reveals the fact that it was never the intention of the drafters to have the arbitrator apply contract terms that violated mandatory rules of the applicable law. The relevant provision was only meant to express a duty of the arbitrator that was in any case present, namely, the duty to decide the dispute based on the terms of the contract, when present and valid. In many cases, the application of contract terms will indeed be sufficient to resolve the dispute.[159] However, this does not mean that the contractual relationship exists in a legal vacuum. The interpretation and validity of the contract is still subject to a system of law.[160] If a contract provision violates a mandatory rule of the applicable law, the mandatory norm prevails and the contract provision is invalid.[161]

5. INTERPRETATION AND VALIDITY OF CONTRACTUAL TIME LIMITS TO COMMENCE ARBITRATION

Theoretically, the first step of the examination related to a contractual time limit to commence arbitration would be the interpretation of the relevant contract provi-

---

156 *327th Meeting, 17.06.1985*, 16 Y.B. United Nations Comm'n Int' Trade L. 488 (1985).
157 *Ibid*.
158 *Ibid*.
159 *See* Blackaby et al., *supra* n. 1, para. 3.92, at 185.
160 Gaillard & Savage, *supra* n. 129, para. 1439, at 797–799; Blackaby et al., *supra* n. 1, para. 3.93, at 185.
161 Aron Broches, *Commentary on the UNCITRAL Model Law (1990)*, in *ICCA International Handbook on Commercial Arbitration* 142 (Jan Paulsson & Lise Bosman eds, Kluwer Law International 1990); Gaillard & Savage, *supra* n. 129, para. 1439, at 797–799.

sion. It would then be determined whether the provision is invalid due to the violation of a mandatory rule. Interpretation of contract provisions and determination of their validity are, however, not completely independent from each other. At least in some legal systems, the issue of validity can have an effect on interpretation. When a contract (or a clause thereof) is open to be interpreted in two ways and one interpretation would make the contract (or the clause) invalid, the other interpretation should be preferred. However, like all rules of contract interpretation, this rule can only be applied when a common intent of the parties cannot be determined otherwise.

5.1 Time limit to the arbitration clause or to the claim

With regard to contractual time limits to commence arbitration, the first issue of interpretation is to determine whether the parties intended to limit the effectiveness of the arbitration clause or the existence or enforcement of the claim with a certain period of time.[162]

5.1[a] *Time Limit to the Effectiveness of the Arbitration Clause*

Expiry of the time limit could make the arbitration agreement ineffective. In such a case, if the parties do not commence arbitration proceedings within the contractual time limit, the arbitration agreement will lose its effect so that the parties cannot resort to arbitration any longer. The expiry of such a time limit would, however, have no effect on the claim. Therefore, the parties could resort to litigation before state courts.[163]

Contractual time limits to the effectiveness of the arbitration clause do not cause a special issue of validity. In line with the principle of party autonomy prevalent in international commercial arbitration, the stipulation of such a time limit will be valid.

5.1[b] *Time Limit to the Existence or Enforcement of the Claim*

The contractual time limit to commence arbitration may also be intended as a limit to the existence or enforcement of the claim. In the first case, the expiry of the time limit would extinguish the claim. Such a time limit would be classified as a

---

[162] For the need of interpretation in this regard, *see* Oppermann, *supra* n. 1, at 45.

[163] Lew et al., *supra* n. 1, para. 20-15, at 508 to 509; Tweeddale & Tweeddale, *supra* n. 1, para. 18.02, at 529–530, para. 18.08, at 532. *See also* Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland,* para. 623, at 217 (3d ed., Stämpli, Hart, C. H. Beck & Manz 2015).

preclusion period. In the second case, the claim would still exist, but could not be legally enforced after the expiry of the time limit if the respondent makes a plea to this effect. Such a time limit would constitute a limitation period. In either case, the arbitral tribunal would have to render an award in favour of the respondent.[164] It would not be possible for the claimant to assert the claim in litigation proceedings before state courts.

Due to the presence of mandatory rules on limitation periods, contractual time limits to the existence or enforcement of the claim must be carefully examined with regard to their validity. Before an in-depth examination of contractual time limits to the existence or enforcement of the claim, some guidelines of interpretation will be explained in order to enable the determination whether a contractual time limit affects the arbitration clause or the claim.

5.1[c] *Guidelines for Interpretation*

In some cases, the formulation of the contract provision may be clear enough to determine the intent of the parties. For example, this is the case when the parties stipulate that the claim will be waived if arbitration proceedings are not commenced within the contractual time limit.[165] However, in many cases, the parties will only stipulate the time limit and not explicitly determine the legal results of its expiry. In my opinion, a contractual time limit to commence arbitration should be interpreted as a limit to the existence or enforcement of the claim instead of a limit to the effectiveness of the arbitration agreement unless a clear intent to the contrary can be discerned.[166]

In arbitration or multi-tier dispute resolution clauses, time limits to commence arbitration proceedings serve to provide clarity about the presence of a dispute.[167] This aim can only be reached if the parties cannot commence any legal proceedings after the expiry of the time limit. However, a time limit to the effectiveness of the arbitration agreement would not have this result, since the parties could litigate the dispute in state courts after the expiry of the time limit.

---

[164] Lew et al., *supra* n. 1, para. 20-11, at 507–508.

[165] For such a clause, *see Bell Canada v. The Plan Group* et al., [2009] ONCA 549, http://canlii.ca/t/24brq (accessed 20 Aug. 2018), para. 2: 'Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim'. In this decision, Blair, J.A. stated that 'the parties create what is in effect a limitation period for the bringing of claims which is tied to the filing of a notice of arbitration' (*ibid*., para. 50). Based on the classification in this article, the time limit would be characterized as a preclusion period, rather than a limitation period. However, it is clear that the contract provides a time limit to the existence or enforcement of the claim, not a time limit to the effectiveness of the arbitration clause.

[166] Cf. K. K. Cheung, *Time Limits for Commencing Arbitration in Construction Contracts*, 5 Asian Dis. Rev. 53, 54 (2003); Born, *supra* n. 1, at 941–942.

[167] Cf. Lew et al., *supra* n. 1, para. 20-10, at 507.

The fact that the parties have agreed on an arbitration clause is a clear indication of their common intent to avoid litigation in state courts to the extent possible. A time limit to the effectiveness of the arbitration agreement would violate this clear intent without a discernible interest of the parties. Time limits to the effectiveness of arbitration agreement could be useful, if the aim of the parties is to prevent an excessive limitation of their access to courts. However, in such cases, it would be more appropriate for the parties to set a time limit, within which the arbitral tribunal should render an award.[168] If the arbitral tribunal cannot render an award within the stipulated time limit, the arbitration agreement would become ineffective and the parties could resort to litigation before state courts. A time limit to commence arbitration would not serve a similar purpose.

If the expiry of the time limit ends the effectiveness of the arbitration agreement and therefore the jurisdiction of the arbitral tribunal, the decision of the tribunal about compliance with the time limit (hence its own jurisdiction) will be subject to full review by state courts.[169] In such a case, the state court would have to decide on the facts related to the time limit. When the parties stipulate an arbitration clause, their common intent is to have the arbitral tribunal decide on issues of fact. It would therefore be more in conformity with the intent of the parties to classify the time limit as a limit to the existence or enforcement of the claim, since the decision of the arbitral tribunal on this issue would not be subject to full review by state courts.

A time limit to the existence or enforcement of a claim has harsh results since its expiry deprives the creditor – at least in effect – of his or her right. It could be argued that an interpretation which preserves a claim should be given preference over one that bars a claim in case of doubt. In my opinion, this argument cannot be supported with regard to contractual time limits to commence arbitration. Such rules of interpretation should only be used as a last resort when all circumstances of the case have been evaluated and it still cannot be decided whether one or the other interpretation would conform more to the common intent of the parties. However, the reasons explained above reveal the common interests and typical intent of the parties.

5.2 Interpretation and validity of contractual time limits to the claim

5.2[a] *Classification of the Contractual Time Limit as a Limitation or Preclusion Period*

Once it has been established that the parties' intent was to set a time limit to the claim (and not to the effectiveness of the arbitration clause), it has to be examined

---

[168] For such time limits cf. Born, *supra* n. 1, at 2238–2239; Blackaby et al., *supra* n. 1, paras 9.162 et seq., at 555–557.

[169] *See infra* text to nn. 190–198.

whether this time limit constitutes a limitation or preclusion period. At this phase of interpretation, two differences between limitation and preclusion periods will be relevant.

The first difference concerns the running of the relevant period. Limitation periods can be suspended and renewed when certain causes are present, whereas preclusion periods will – in principle – not be suspended or renewed. Therefore, preclusion periods constitute a more certain and clear time limit to claims, as expressed by the term 'cut-off period'. Due to lack of suspension and renewal, preclusion periods would be more in conformity with the need to ensure clarity about the presence of a dispute after the lapse of a certain period of time. Therefore, the common interest of the parties in such clarity would in most (but not necessarily all) cases lead to the result that the time limit constitutes a preclusion period.

The second difference relates to the legal result of the expiry of the relevant period. In the majority of legal systems, the expiry of limitation periods does not extinguish the claim. It provides the debtor with a defense (procedural defense in common law systems and right to refuse performance in most civil law systems) that has to be plead by the debtor in order to be effective. Furthermore, if the claim is performed despite the expiry of the limitation period, the debtor does not have a claim of restitution. On the other hand, the expiry of a preclusion period extinguishes the claim, both in common law and civil law systems. The classification of a contractual time limit as a preclusion period would have the result that a plea by the debtor would not be necessary and payment by the debtor after the expiry of the time limit could in principle be claimed back. In some cases, the parties could have an interest to avoid these legal results. Nevertheless, such an interest would in most cases be outweighed by the interest of the parties to ensure clarity about the presence of a dispute. If a choice has to be made between a limitation and a preclusion period, the common interest of the parties would typically lead to an interpretation in favour of a preclusion period.

In civil law systems, where the distinction between limitation and preclusion periods is quite categorical, there can be a tendency to classify the contractual time limit as either a limitation or a preclusion period and apply the rules about limitation or preclusion periods in their entirety to the contractual time limit. It can therefore be expected that a contractual time limit to commence arbitration will be interpreted as a preclusion period based on the mentioned considerations. However, it is possible that the common intent of the parties requires a more nuanced solution. The interpretation could, for example, lead to the result that the time limit cannot be suspended or renewed, but has the legal results of a limitation period after expiry. In such a case, the need to promote clarity would be met by the exclusion of suspension and renewal, but the expiry of the time limit would

not affect the parties if the debtor does not raise a plea to this effect or performs the claim.

In my opinion, the decisive factor for the classification of a contractual time limit as a limitation or a preclusion period should be the effect of its expiry. In the example above, the time limit could be classified as a limitation period which cannot be suspended or renewed. Such an agreement could therefore be construed as a modification of the rules on suspension and renewal of limitation periods, in addition to a possible modification of the length of the limitation period.

5.2[b] *Contractual Limitation Periods*

If the contractual time limit is accepted as a limitation period, the question arises whether the relevant agreement only modifies the statutory limitation period or creates a second limitation period that runs parallel to the statutory limitation period.

Interpretation in favour of the modification of the statutory limitation period should be preferred if the intention of the parties is to have the contractual time limit determine the issue of limitation irrespective of the statutory period. On the other hand, interpretation in favour of a second limitation period is appropriate if the parties intend to keep the statutory limitation period as an upper limit that cannot be exceeded, but could be cut short by the contractual time limit. Indeed, when the parties stipulate a contractual limitation period in addition to the statutory limitation period, both periods would run independently of each other. If the statutory limitation period expires first, the claim would be time barred irrespective of the fact that the contractual limitation period has not expired. If, on the other hand, the contractual limitation period expires first, the claim would be time barred before the expiry of the statutory limitation period.

5.2[b][i] Contractual Modification of the Statutory Limitation Period

Once it is established that the common intent of the parties is to modify the statutory limitation period, the rules about limitation periods will be applicable unless the parties agree to exclude or modify some or all of them. In most cases, the agreement will be limited to the stipulation of the length and commencement of the limitation period. The provisions on the suspension and renewal of limitation periods will therefore remain applicable.

In order to determine whether the modification of the length and commencement of the limitation period is valid, it must first be examined whether the law applicable to limitation allows modifications of the limitation regime at all.

Modification Not Allowed

In legal systems that do not allow any modifications, such as Swiss law with regard to the general limitation period of ten years and Italian law in general, the contract provision will be invalid.

Modification Allowed Within Certain Limits

In some civil law systems and model laws, such as French law and PICC, the parties are allowed to modify the limitation period between certain lower and upper limits. These lower and upper time limits should be calculated from the moment of commencement determined by the statute or model law. The stipulation about the limitation period can only be deemed valid, if the expiry of the limitation period as modified by the contract falls within the lower and upper limits imposed by the law. In this regard, the contractual modification of the length and commencement of the limitation period should be considered together.

Compliance with lower limits: If the law provides for a lower limit, the legislative aim is to ensure that the creditor has at least a certain period of time in order to assert the claim in legal proceedings. The modification of the limitation period should therefore not shorten this period of time. If the contractually modified limitation period expires after the minimum period of time provided by the statute, the lower limit to the modification of limitation periods would not be violated. The fact that the contractually modified limitation period is shorter than the statutory limitation period cannot, in my opinion, be decisive if the contract also modifies the commencement of the limitation period. For example, a contractual limitation period of one month that shall commence after the end of a mediation or adjudication procedure could expire later than a one-year limitation period that commences after the claim is due. This would depend on when the mediation or adjudication procedure ends.

Compliance with upper limits: If the contractually modified limitation period runs longer than the upper limit imposed by the law, the contractual stipulation will be invalid. The fact that the contractual period is shorter than the statutory upper limit does not necessarily entail that the contractual stipulation is valid if the contract modifies the commencement of the limitation period as well. In such a case, the contractual commencement and length of the period must be considered together, as explained above. If the contractually modified limitation period will expire after the upper limit calculated from the statutory commencement, the relevant contract provision will be invalid.

Compliance with mandatory rules about suspension and renewal: It has been assumed until now that the parties only modified the length and the commencement of the limitation period. As mentioned before, it is possible that the parties excluded some or all causes of suspension or renewal or created a new cause of suspension or

renewal. Whether such a modification is allowed can differ substantially from one legal system to another. As a general remark, it can only be stated that the limits to modifications of the length of limitation periods (i.e. the lower and upper limits) do not necessarily provide the necessary rules to determine the validity of modifications of the causes of suspension or renewal.[170]

5.2[b][ii] Contractual Limitation Period Independent from the Statutory Limitation Period

In General

As explained before, if the parties stipulate a second limitation period, the contractual and statutory limitation periods run independently of each other. An issue of validity arises only if the contractual limitation period expires before the statutory limitation period and has thereby the effect to cut the latter short. In such a case, it must be examined whether the contractual limitation period violates any lower limit imposed on modifications of limitation periods. Even though the agreement does not actually shorten the statutory limitation period, it would still violate such a mandatory provision of the statute if the contractual limitation period expires before the lowest possible limitation period calculated from the moment of statutory commencement.

Suspension and Renewal of the Contractual Limitation Period

In civil law systems, once a contractual time limit is classified as a limitation period, the provisions on suspension and renewal of limitation periods would be deemed applicable to this time limit, unless the common intent of the parties is to exclude some or all of them. In common law systems, the application of the rules on suspension and renewal to contractual limitation periods does not seem to be so evident. A possible reason for this difference could be the fact that limitation and preclusion periods are not as clearly and categorically distinguished in common law systems as in civil law systems. In common law systems, it could be accepted as an issue of contract interpretation whether the statutory rules on suspension and renewal will be applicable to the time limit.

If the common intent of the parties is to exclude some or all causes of suspension or renewal, the validity of such a stipulation can be determined based on the explanations below on contractual preclusion periods which cannot be suspended or renewed.

---

[170] *See supra* text to nn. 70–77.

5.2[c] *Contractual Preclusion Periods*

When the parties stipulate a contractual preclusion period for the commencement of arbitration proceedings, it has to be determined by interpretation whether the contractual preclusion period shall run concurrent to the statutory limitation period or replace it. The determination in this regard could have a considerable effect on the validity of the agreement.

5.2[c][i] Contractual Preclusion Period Concurrent to the Statutory Limitation Period

When the contractual preclusion period and statutory limitation period run parallel to each other, the expiry of the preclusion period prior to the expiry of the limitation period would have an effect on the latter. Since the expiry of the preclusion period extinguishes the claim, the limitation period for that claim would cease to run. In effect, the time that the creditor has to commence legal proceedings would thereby be cut short. It must, therefore, be examined whether the contractual preclusion period leads to a result which mandatory provisions about limitation periods aim to prevent.[171]

First, it must be examined whether the limitation period can be shortened. If the statutory limitation period cannot be shortened below a minimum limit, the stipulation of a preclusion period that expires prior to the minimum limitation period will be invalid.[172] Whether the contractual preclusion period expires before the statutory minimum limit for limitation periods should be determined having regard to the commencement as well as the length of the preclusion period. In this regard, the explanations above about the stipulation of a second limitation period can be consulted.

Second, it must be examined whether the preclusion period cuts off the effects of a cause of suspension or renewal that cannot be excluded by contract. For this purpose, it should be assumed that the length of the limitation period is modified to the length of the contractual preclusion period. If a cause of suspension or renewal that cannot be excluded by contract becomes present before the end of this period of time, the fictitious limitation period would not expire. The contractual preclusion period would, however, cut off the effects of such a cause of suspension or renewal. In such a case, the contract provision which stipulates the preclusion period must be invalid.[173]

---

171 For Swiss law, *see* Karaşahin, *supra* n. 59, para. 515, at 151.
172 For Swiss law, *see ibid.,* para. 518, at 152.
173 For Swiss law, *see ibid.,* para. 525, at 154.

It should be noted here that the mentioned examination has to be made even if the contractual preclusion period is longer than the statutory limitation period.[174] The latter can be suspended and renewed which can eventually provide the creditor a longer time to commence legal proceedings than the former:

5.2[d] Contractual Preclusion Period in Lieu of the Statutory Limitation Period

In Civil Law Systems

In civil law systems, an agreement to replace the limitation period with a contractual preclusion period would be invalid. In these legal systems, the limitation period relates to the claim. It continues to run until the claim is performed or otherwise extinguished. Even the commencement of legal proceedings does not exclude limitation, but merely suspends or renews the limitation period. After the end of legal proceedings, the suspended or renewed limitation period continues to run. The replacement of the limitation period with a contractual preclusion period to commence arbitration proceedings would – if valid – exclude limitation altogether after legal proceedings. In such a case, the creditor would only have to commence arbitration proceedings within the contractual preclusion period. There would, however, be no other time limit, i.e. neither a limitation period nor a preclusion period, after the commencement of arbitration proceedings. Such an exclusion of limitation is invalid.[175]

In order to uphold the agreement and respect the common intent of the parties as far as possible, the contractual preclusion period should be interpreted in civil law systems as a period additional to the statutory limitation period, unless the intent to the contrary can be established. This does not, however, mean that contractual preclusion periods will definitely be valid if they run concurrently to the statutory limitation period.

In Common Law Systems

In general: In common law systems, the limitation period is only relevant for the commencement of legal proceedings. Once legal proceedings have been commenced and an award on the merits is rendered, the limitation period becomes irrelevant. There can be time limits for the enforcement or execution of awards. However, these time limits are separate from the limitation period. Due to these reasons, in common law systems, the parties should be able to replace the statutory limitation period with a contractual preclusion period provided that the latter does not violate any mandatory rules about the modification of limitation periods.

---

[174] For Swiss law, *see ibid.,* para. 522, at 153.
[175] For Swiss law, *see ibid.,* para. 514, at 151.

US law: It has been explained above that several US courts do not apply limitation periods at all, if the parties refer the dispute to arbitration. In those jurisdictions, there should be no limits to the agreement of a contractual preclusion period. Since a limitation period does not exist for the commencement of arbitration proceedings, the stipulation of a preclusion period cannot violate any rules about limitation.

6. COMMENCEMENT OF ARBITRATION PROCEEDINGS WITHIN THE CONTRACTUAL TIME LIMIT

When the parties stipulate a time limit in their contract, the acts that are necessary to prevent the expiry of the time limit will primarily be determined by the provisions of the contract. This statement is also applicable to contractual time limits to commence arbitration,[176] subject to any limitations imposed by mandatory rules of the law applicable to limitation.

6.1 Issue of contract interpretation

Although it might be advisable,[177] it will probably be rare that the contract contains explicit provisions about the acts necessary to prevent the expiry of such time limits. In order to determine which acts have to be performed within the contractual time limit so that arbitration proceedings are commenced and the expiry of the time limit is prevented, the interpretation and, if necessary, supplementation[178] of the contract therefore plays an important role. It should be noted at the outset that the result of interpretation depends on the circumstances of each case. This article will only outline some guidelines for interpretation.

---

[176] Lew et al., *supra* n. 1, paras 20–26, at 512.

[177] In ad hoc arbitration, the proceedings would in many cases be commenced when the request for arbitration is received by the respondent (UNCITRAL Model Law on International Commercial Arbitration, Art. 21; UNCITRAL Arbitration Rules, Art. 3 para. 2). In such a case, the claimant would face the risk to serve the request for arbitration on the respondent in due time. A contractual provision that diminishes this risk could be advisable. Oppermann, *supra* n. 1, at 153. It should be noted that the UNCITRAL Arbitration Rules diminish this risk with fictions of receipt (Art. 2 para 2–5). In institutional arbitration, the arbitration rules usually provide that arbitration proceedings are commenced when the request for arbitration is received by the arbitration institution. Oppermann, *supra* n. 1, at 163. Such provisions prevent the risk associated with the receipt by the respondent.

[178] In some legal systems, the supplementation of the contract is considered to be different from contract interpretation. In other legal systems, supplementation is accepted as a type of interpretation. With regard to the relation of contract interpretation to supplementation of the contract in order to fill in gaps, cf. Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 404–408 (Tony Weir trans., 3d ed., Oxford U. Press 1998).

6.1[a] *Interpretation Based on the Applicable Procedural Rules*

National Arbitration Acts usually allow the parties to determine the requirements for the commencement of arbitration proceedings by agreement[179] and contain default provisions in this regard that are (by definition) applicable absent any agreement of the parties.[180] Article 21 of the UNCITRAL Model Law on International Commercial Arbitration provides that, '[u]nless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent'. Arbitration rules that are often incorporated by the parties into the contract also have provisions about this issue. For example, pursuant to article 3 paragraph 2 of the UNCITRAL Arbitration Rules, '[a]rbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent'. International Chamber of Commerce (ICC) Arbitration Rules (2017) provide in article 2 paragraph 4 that '[t]he date on which the Request [for Arbitration] is received by the Secretariat [of the International Court of Arbitration of ICC] shall, for all purposes, be deemed to be the date of the commencement of the arbitration'. Unless the circumstances of the case require otherwise, it would usually be reasonable to argue that the contractual time limit will be complied with if commencement of arbitration proceedings as determined by the applicable arbitration law or arbitration rules occurs within the time limit.[181] For example, if the contract contains a sixty-day time limit to commence arbitration and makes reference to ICC Arbitration Rules (2017), the request for arbitration that contains all the information in article 4 paragraph 3 and the documents in article 4 paragraph 4 would have to be received by the Secretariat within that sixty-day limit. It would not, however, be necessary that the respondent is notified of the request for arbitration within that time limit.[182]

It should be noted that an interpretation based on the provisions of the national Arbitration Act or incorporated arbitration rules is not necessarily appropriate in all cases. It must be examined whether these provisions are compatible with the contractual time limit. For that, it must be possible for the claimant to commence arbitration proceedings within the contractual time limit. This could

---

[179] Lew et al., *supra* n. 1, paras 20–25, at 512; Blackaby et al., *supra* n. 1, para. 4.08, at 232; Girsberger & Voser, *supra* n. 1, para. 863, at 210.

[180] *See* Lew et al., *supra* n. 1, paras 20–28, at 513.

[181] Blackaby et al., *supra* n. 1, para. 4.10, at 232. In ICC Arbitration Rules, the expression 'for all purposes' has been used with the intent to clarify that this moment is relevant in order to determine whether the expiry of the limitation period is prevented (Oppermann, *supra* n. 1, at 164). It should be noted, however, that mandatory provisions of the law applicable to limitation may prevent the validity of such a provision.

[182] Oppermann, *supra* n. 1, at 164. Cf. Berger, *supra* n. 96, paras 16–153, at 353–354 with regard to German Arbitration Institute (DIS) Arbitration Rules.

not be the case if the provision of the Arbitration Act or rules accepts that arbitration proceedings are deemed to have commenced at a relatively late stage and the contractual time limit is relatively short. Article 19 of the Brazilian Arbitration Act[183] served (especially prior to 2015)[184] as a good example in this regard. It (still) provides that an arbitral procedure is commenced when the appointment is accepted by the sole arbitrator or by all of the arbitrators. Since the respondent can postpone this moment for a considerable period of time, it cannot be expected that the claimant accomplishes commencement of arbitration in the sense of this provision within a short contractual time limit, such as sixty days after the failure of negotiations.

6.1[b] *Interpretation Based on the Provisions About Limitation Periods*

If an interpretation based on the provisions of the national Arbitration Law or incorporated arbitration rules is not appropriate to the circumstances of the case or not compatible with the contractual time limit, the provisions of the law applicable to limitation can be used as an instrument of contract interpretation or supplementation, with appropriate adaptations where necessary. As mentioned before, the commencement of legal proceedings suspends or renews limitation periods. The law of limitation determines the acts necessary to have the limitation period suspended or renewed as a result of the commencement of legal proceedings. The provisions of Swiss and German laws can be used as an example.

In Swiss law, the limitation period is renewed (interrupted) at the moment in which the claimant dispatches the statement of claim addressed to the court. It is therefore sufficient that the claimant dispatches the statement of claim at the last day of the limitation period. The respondent carries the risk that the statement of claim is delayed or lost in the post as well as the risk that it is notified to him or her late. If this rule is applied to the contractual time limit to commence arbitration, it would be sufficient that the claimant dispatches the notice of arbitration to the respondent (in ad hoc arbitrations) or to the arbitration institute (in institutional arbitration) at the last day of the time limit.

In German law, the limitation period is suspended at the moment in which the statement of claim is filed with the court, provided that the statement of claim is notified to the respondent in due time.[185] If this rule is applied to contractual time limits to commence arbitration in institutional arbitration, the request for

---

[183] Law No. 9.307 of 23 Sept. 1996.

[184] In 2015, the Brazilian Arbitration Act has been amended (Law No. 13.129 of 26 May 2015). Art. 19 now includes a para. 2 which provides that limitation is deemed to be interrupted retroactively at the date of the request of arbitration.

[185] Grothe, *supra* n. 96, para. 27.

arbitration would have to reach the arbitration institute within the contractual time limit and be notified by the arbitration institute to the respondent in due time. In ad hoc arbitrations, on the other hand, an adaptation of the rule would be necessary for its application to the contractual time limit. In such cases, it could be argued that the request for arbitration would have to reach the respondent within the contractual time limit in order to prevent its expiry. Unlike in Swiss law, it would, however, not be sufficient that the request for arbitration is dispatched on the last day of the time limit, if it reaches the respondent after the expiry of the time limit.

6.2 Effect of mandatory rules

As explained above, the law applicable to limitation could have mandatory rules about the requirements of suspension or renewal of limitation periods by the commencement of legal proceedings.[186] The presence of mandatory rules in this regard could be relevant both when the contract modifies the statutory limitation period[187] and when it creates a second (limitation or preclusion) period that runs parallel to the statutory limitation period. In the first case, a violation of the mandatory rule would make the contract provision – at least partially – invalid.[188] In the second case, if the acts performed by the claimant to commence arbitration do not fulfil the requirements in the statute, the statutory limitation period could expire and bar the claim, even if the mentioned acts are sufficient to prevent the expiry of the contractual period.

As it has been explained above, the law of limitation often refers to the rules of procedural law, which allow the parties to determine the requirements and moment of commencement of arbitration proceedings. In such cases, it will not be necessary to examine the compliance of the contract with any mandatory provisions, since the agreement would not make any modifications to the rule of

---

[186] For this risk in international commercial arbitration, *see* Born, *supra* n. 1, at 2670.

[187] Cf. Blackaby et al., *supra* n. 1, para. 4.10, at 232.

[188] This risk is (in my opinion) present if Swiss law is applicable, since the provision about the causes of interruption is deemed mandatory in an *obiter dictum* of Swiss Federal Tribunal (BGE 132 III 226, para. 3.3.1). *See also* Berti, *supra* n. 100, para. 4, at 141, para. 180, at 185; Karaşahin, *supra* n. 59, paras 425–446, at 127–137. However, Oppermann, *supra* n. 1, at 128–129, argues that an agreement about the commencement of arbitration proceedings does not constitute a modification of substantive law and therefore does not violate any mandatory provision of Swiss law. In my opinion, such an argument is only acceptable if the law applicable to limitation refers to the rules of procedural law with regard to commencement of arbitration proceedings and the rules of procedure allow agreements in this regard. The mentioned risk can also be present if Austrian law is applicable to limitation. It should be noted that the legal situation in this regard remains unclear in Austrian law. *Ibid.*, at 133, 136.

the law applicable to limitation.[189] The limitation period would still be suspended or renewed at the moment determined by the rules of procedural law.

7. DECISION OF THE ARBITRAL TRIBUNAL IN CASE OF EXPIRY OF THE TIME LIMIT

In case of expiry of the contractual time limit to commence arbitration, the decision that should be rendered by the arbitral tribunal depends on whether the time limit relates to the arbitration clause or to the claim. The extent of review that can be exercised by state courts also differs in both cases.

7.1 Time limit to the effectiveness of the arbitration clause

7.1[a] *In General*

The expiry of a contractual time limit to the effectiveness of the arbitration clause would render the arbitration clause inoperative.[190] As a result, national courts would no longer have to refer the dispute to arbitration.[191] If arbitration proceedings are commenced after the expiry of such a time limit, the arbitral tribunal should render a judgment of inadmissibility due to lack of its jurisdiction.[192] The decision of the arbitral tribunal about the lack or presence of its jurisdiction is subject to full review by state courts in an action to set aside.[193] If the arbitral tribunal renders an award on the merits despite the fact that the arbitration agreement became ineffective due to the expiry of the contractual time limit, the award could therefore be set aside.

---

189 Cf. *Ibid*., at 137. Thus, any lower or upper limits to the modification of limitation periods would (in my opinion) not be applicable. For a different opinion with regard to German law, *see ibid*., at 106–107. The author states that the upper limit of thirty years would not be violated by the mentioned agreements, since any deviations from the statute would be relatively minor. Thus, the author seems to assume that the upper limit is actually applicable in such cases.

190 Dorothée Schramm, Elliott Geisinger & Philippe Pinsolle, *Article II,* in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 37, 105–106 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds, Wolters Kluwer 2010); Born, *supra* n. 1, at 847; Blackaby et al., *supra* n. 1, para. 2.202, at 138. Cf. Lew et al., *supra* n. 1, paras 14–45, at 343: 'The term "inoperative" refers to arbitration agreements which have not been invalid from the beginning but have since lost effect'.

191 Convention on the Recognition and Enforcement of Arbitral Awards (New York 1958), Art. II, para. 3; UNCITRAL Model Law on International Commercial Arbitration, Art. 8, para. 1.

192 In the United States, it is debated whether compliance with or expiry of such a contractual time limit (i.e. a time limit to the jurisdiction of the arbitrator) is to be decided by the arbitrator or by a state court. Lawrence W. Newman & Charles M. Davidson, *Arbitrability of Timeliness Defenses: Who Decides?,* 14 J. Int'l Arb. 137 (1997).

193 Lew et al., *supra* n. 1, paras 14–28, at 337–338.

The Swiss Federal Tribunal has set aside an arbitral award under such circumstances in *Transporten Handelsmaatschappij 'Vekoma' v. Maran Coal Corporation*.[194] In this case, the arbitration clause required the commencement of arbitration proceedings within thirty days 'after it was agreed that the difference or dispute cannot be resolved by negotiation'.[195] The result of the expiry of the thirty-day period was not expressed in the clause. The arbitral tribunal held that the time limit related to the effectiveness of the arbitration clause and did not have any effect on the claim.[196] It was therefore possible for the parties to file the claim before state courts after the expiry of the time limit. This interpretation was not contested by the parties and later accepted by the Swiss Federal Tribunal.[197] It was only disputed when the thirty-day period began to run and whether this time limit had expired when the claimant commenced arbitration proceedings. Contrary to the arbitral tribunal, the Swiss Federal Tribunal held that the time limit had expired prior to the commencement of arbitration and set aside the arbitral award due to the arbitral tribunal's lack of jurisdiction.[198]

7.1[b] *In the Laws of the United States*

In order to be able to understand the relevant US case law and literature, it should be noted at the outset that the term 'arbitrability' is used in US law in a wide sense that encompasses all issues of the jurisdiction of arbitral tribunals.[199] Therefore, the effects of contractual time limits to arbitration agreements are considered as an issue of arbitrability.

In US case law, it is not settled whether the arbitral tribunal is competent to decide on the expiry of contractual time limits to arbitrability. Some courts have decided that the arbitral tribunal is competent to decide this issue, whereas others have held that this issue is for courts to decide in the first instance.[200] It is notable

---

194 For the text of the decision in German *see Transporten Handelsmaatschappij 'Vekoma' v. Maran Coal Corporation*, Bundesgericht, I. Zivilabteilung, Not Indicated, 17 Aug. 1995, 15 ASA Bull. 673 (1996) [hereinafter *Transporten Handelsmaatschappij 'Vekoma'*]. For an explanation of this case in English, *see* Paul D. Friedland, *The Swiss Supreme Court Sets Aside an ICC Award*, 13 J. Int'l Arb. 111 (1996); Kreindler & Kautz, *supra* n. 1, at 594–595.

195 *Transporten Handelsmaatschappij 'Vekoma', supra* n. 194, at 674.

196 *Ibid*., at 675.

197 *Ibid*., at 676.

198 *Ibid*., at 677 et seq. It is criticized that the Swiss Federal Tribunal substituted its judgment for that of the arbitral tribunal with regard to factual findings about the case (especially about when negotiations have failed in the present case) even though it did not hear witness testimony related to it, unlike the arbitral tribunal. Friedland, *supra* n. 194, at 114–115.

199 Lew et al., *supra* n. 1, para. 9-4, at 188. *See also* Edward R. Leachy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, 17 J. Int'l Arb. 19, 20 (2000).

200 Newman & Davidson, *supra* n. 192, at 141 et seq.; William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 137 et seq. (1997); Alan Scott Rau, *The Arbitrability Question Itself*, 10 Am. Rev. Int'l Arb. 287, 331 (1999).

that courts have based their decisions in both directions on the US Supreme Court decision *First Options of Chicago Inc. v. Kaplan*.[201]

In *First Options of Chicago Inc. v. Kaplan*, the US Supreme Court had to decide whether the decision of an arbitral tribunal about arbitrability (i.e. the arbitral tribunal's jurisdiction) was subject to full or limited review by state courts. The Court held that the parties could agree that a dispute about arbitrability shall be resolved by arbitration before the same tribunal. It has decided that '[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is "[c]lear and unmistakabl[e]" evidence that they did so'.[202] In case, however, the parties have indeed agreed to arbitrate disputes about arbitrability, courts would not have the power to exercise full review of the arbitral tribunal's decision in this regard.[203] As it should be clear from the previous explanations, *First Options of Chicago Inc. v. Kaplan* does not deal with the question whether the arbitral tribunal is competent to decide on arbitrability. It implicitly assumes that the arbitral tribunal can decide on this issue and deals with the scope of review by state courts. US courts, which use this decision as a precedent to conclude that the arbitral tribunal is competent to decide on contractual time limits to arbitrability, actually give the arbitral tribunal not only 'first word on the matter of time bars, but also the last'.[204] Indeed, if *First Options of Chicago Inc. v. Kaplan* is applied, the decision of the arbitral tribunal will not be subject to full review by state courts.

7.2 Time limit to the existence or enforcement of the claim

The expiry of a contractual preclusion period extinguishes the claim. In such a case, the arbitral tribunal should reject the claim with an award on the merits of the case. As it has been explained earlier, the legal effects of the expiry of limitation periods differ in common law and civil law traditions. The decision of the arbitral tribunal could therefore be different. In the common law tradition, the arbitral tribunal would have to reject the claim on procedural grounds. In the civil law

---

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

202 *Ibid*., at 944.

203 *Ibid*., at 943: 'Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, … so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate … That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances … If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide the question just as it would decide any other question that the parties did not submit to arbitration, namely, independently'.

204 Park, *supra* n. 200, at 139.

tradition, on the other hand, the arbitral tribunal would render an award on the merits. In either case, the decision of the arbitral tribunal to reject the claim due to the expiry of the contractual preclusion or limitation period would be subject to limited review by state courts – unlike when the contractual time limit makes the arbitration clause ineffective.

A ground for challenge that could be relevant to limitation and preclusion periods is the violation of public policy. At the outset, it should be noted that the difference in the length of limitation periods should in principle not be accepted as a ground for the violation of public policy.[205] The violation of public policy could only be considered when the law applicable to limitation provides for no limitation period at all or for a limitation period that is extremely long or short.[206] Even in such cases, it should be examined carefully whether the law applicable to limitation balances the length of the limitation period through other mechanisms.[207] For example, the provision of a rather short limitation period could be balanced by extensive causes of suspension.

Contractual time limits to commence arbitration which constitute a limitation or preclusion period can be relatively short.[208] The violation of public policy could come into consideration if the contractual time limit is so short as to make it virtually impossible for the claimant to assert his or her claim.[209] It should, however, be noted that most national laws provide for a mechanism to prevent such inequitable results. Some national laws set lower limits to contractual limitation and preclusion periods. Others accept that the relevant contract provision is invalid or unenforceable if the application of the contractual time limit is inequitable or unreasonable in the specific case. The application of national laws would therefore in many cases prevent the enforcement of contractual time limits that could create a possible violation of public policy. Even if the law applicable to limitation does not provide for a mechanism to control such contract terms, it would still be difficult to argue that public policy is violated by the application of the contractual time limit. Unlike statutory limitation or preclusion periods,

---

[205] BGE 72 II 405, 415; Parties not indicated, Tribunal fédérale, Not indicated, 13 Mar. 1992, 10 ASA Bull. 365 (1992) [hereinafter *Parties not indicated*]; Girsberger, *supra* n. 32, at 86; Oppermann, *supra* n. 1, at 84; Mansel, *supra* n. 4, at 1379.

[206] Schwenzer & Manner, *supra* n. 19, at 299; Oppermann, *supra* n. 1, at 84; Huser, *The Appropriate Prescription Regime, supra* n. 6, at 170–171. The rule of Swiss law which provides that claims based on a certificate of insolvency are not subject to any limitation period was found by the German Imperial Court to violate public policy. For an excerpt from this decision *see* Girsberger, *supra* n. 32, at 85 n. 325. For the criticism of this decision, *see* Girsberger, *supra* n. 32, at 87–88. In another case, the Swiss Federal Tribunal accepted that a preclusion period of thirty days that commenced upon the delivery of sold goods and could be suspended or renewed violated public policy (BGE 72 II 405, 416–418). For an evaluation of this decision, *see* Girsberger, *supra* n. 32, at 89.

[207] Cf. Girsberger, *supra* n. 32, at 87.

[208] Cf. Blackaby et al., *supra* n. 1, para. 4.06, at 231.

[209] Cf. Tweeddale & Tweeddale, *supra* n. 1, paras 8–15, at 262; Oppermann, *supra* n. 1, at 88.

contractual time limits are founded on the agreement of the parties. As long as this agreement is valid, the principle of party autonomy would require its enforcement. Thus, it can even be argued that public policy would be violated if the arbitral tribunal did not give effect to the contractual time limit despite the fact that it is valid.[210]

In my opinion, the stipulation of an extraordinarily short time limit is in itself not sufficient to assume a violation of public policy. There must also be exceptional circumstances which create a substantial risk of abuse of party autonomy.

8. FINAL REMARKS

When the parties stipulate a time limit to commence arbitration, they may aim to ensure legal certainty about their legal situation, especially with regard to the presence of disputes. As explained in this article, the stipulation of a time limit to commence arbitration in the arbitration or dispute resolution clause could, however, have counterproductive results and cause more uncertainty by being the source of complex disputes.

In many cases, it would be a source of disputes when the contractual time limit begins to run and how its expiry can be prevented by the creditor. If it is concluded that the time limit has expired in a specific case, the legal results of its expiry have to be determined. On the one hand, the expiry of the time limit could make the arbitration agreement ineffective and revive the jurisdiction of state courts. On the other hand, the time limit could constitute a limitation or preclusion period which limits the enforceability or the existence of the claim.

If the contractual time limit constitutes a limitation or preclusion period, its validity must be examined, particularly due to the presence of mandatory limitation rules in some legal systems. This examination would first require to determine the law applicable to limitation which is the source of a classical problem of conflict of laws. Since national legal orders have very different rules on the extent and limits of party autonomy with regard to limitation, the determination of the law applicable to limitation could have an important practical effect on the validity of the relevant clause. Once the law applicable to limitation is ascertained, it would then have to be examined which provisions of this law are mandatory. This is an issue that is very controversial in several national legal orders.

Inconsistent with its aim to serve legal certainty, limitation causes complex problems in several legal orders. It is also a source of problems in private international law. Unlike in most other areas of contract law, these problems cannot be

---

[210] Huser, *The Appropriate Prescription Regime, supra* n. 6, at 177. The Swiss Federal Tribunal accepts that the principle of *pacta sunt servanda* is part of public policy (*Parties not indicated, supra* n. 205, at 366).

prevented completely by contractual provisions.[211] On the contrary, the validity of such contractual provisions is another cause of severe problems. If the parties stipulate a time limit to commence arbitration in their arbitration or dispute resolution clause, they could find themselves at the centre of several problems.[212] Being aware of these problems could prove useful both when the contract is drafted and when a dispute has arisen.

[211] Cf. Oppermann, *supra* n. 1, at 43.

[212] However, Schwenzer and Manner consider the 'case of the parties … stipulating a certain limitation period in their contract' 'more or less uncontroversial'. Schwenzer & Manner, *supra* n. 19, at 307. This remark could be based on their view that the validity of contractual limitation periods is determined solely based on a criterion of international public policy that is found on a comparative basis, regardless of the specific provisions of the law applicable to limitation. For the relevant excerpt from their article, *see supra* n. 153. It has previously been explained that this view will not be accepted in this article.