November 2024 | Special Edition: Vol. 22
MHM ASIAN
Legal Insights

Limitation period to sue in international contracts: A comparative look at Statutes of Limitation

Key Contacts

Kana Manabe
+65-6593-9762 (Singapore)
kana.manabe@mhm-global.com

Chong Chia Chi
+65-6593-9759 (Singapore)
chiachi.chong@mhm-global.com

Makoto Nishimura
+03-5293-4878 (Tokyo)
makoto.nishimura@mhm-global.com

Qiqing Goh
+65-6593-9761 (Singapore)
qiqing.goh@mhm-global.com

In the intricate web of international trade and commerce and cross-border disputes, understanding the legal time frames within which one can assert their rights is crucial. This is where the concept of the statute of limitations comes into play. In this publication, we consider the issue of ostensibly conflicting limitation periods that may arise in international contracts.

The essence of limitation periods

At its core, the limitation period is a legal mechanism that sets the maximum time after an event within which legal claims may be brought. When the clock runs out (or the limitation period ends), the claim becomes time-barred, meaning that it can no longer be brought before a court of law (or an arbitral tribunal, as the case may be). This protects parties from the stress of indefinite claims, and the difficulties associated with the deterioration of evidence over time.

Most countries have its own statute of limitation which sets out the limitation period for each type of cause of action. For instance, under Singapore and Malaysia law, the limitation period for commencing a claim for breach of contract is 6 years from the date of breach[1], whereas in India, the limitation period is 3 years from the date of breach[2]. Conversely, in Japan, the limitation period for contractual claims is the earlier of (i) 10 years from when it becomes possible to exercise the claimant's rights or (ii) 5 years from the day on which the claimant

[1] Limitation Act 1959 (Singapore), Section 6; Limitation Act 1953 (Malaysia), Section 6.
[2] Limitation Act 1963 (India), Article 55.

becomes aware or acknowledges that it can exercise such rights[3]. Unless otherwise stated in the relevant statute, these limitation periods are generally applicable to both arbitration and court proceedings.

How then, does one determine which statute of limitation applies in the context of international contracts, where the laws of different jurisdictions intersect? To give an example, in an international contract between a Japan manufacturer and its Indian distributor, the parties may choose Japanese law as the governing law of the contract and choose Singapore as the seat of arbitration.

In the event that the Indian party breaches the contract, the question of whether Singapore law (law of the seat of arbitration), Japanese law (governing law of the contract), or Indian law (home country of the distributor/defendant) should apply becomes critical, as it will affect whether the claim can even be commenced in the appropriate forum in the first place.

Differing approaches in civil law and common law jurisdictions

The traditional position in civil law countries (such as Japan and Vietnam) is that the relevant limitation period under the law governing the claim would apply. In contrast, in common law countries (such as Malaysia and India), the limitation period traditionally follows the law of the forum. Much of this boils down to whether limitation period is viewed as a procedural or substantive issue in the eyes of the *applicable* law. Where the issue is procedural in nature, the law of the forum court or seat of arbitration generally applies. Conversely, where the issue is regarded as substantive, the governing law of the contract will apply.

• *Japan and Civil Law Perspective*

Traditionally, civil law jurisdictions like Japan tended to regard limitation period laws as affecting the existence of the right to bring a claim. Consequently, this means that such issues would be treated as substantive in nature, and hence the limitation periods of the substantive law governing the claim would apply. To adopt our earlier example, this would mean that Japanese limitation periods would apply to the claim in question.

[3] Civil Code of Japan, Articles 166 (1)(i) and (ii).

• *Malaysia and India: the Common Law Approach*

Traditionally, in common law jurisdictions, limitation periods were regarded as a procedural, rather than substantive matter. Even today, certain jurisdictions like Malaysia and India continue to view limitation periods as merely barring the remedy i.e., a procedural matter.

For instance, the Malaysian Court of Appeal in ***Hindustan Oil Exploration Company Limited v Hardy Exploration & Production (India) Inc*** W-02(NCC)(A)-336-02/2022 recently held that determining limitation periods was a procedural rather than a substantive issue, and the proper law to be applied would therefore be the law of the seat of arbitration (which was Malaysian law).

In this case, the parties entered into a joint operating agreement ("JOA") governed by Indian law, with the seat of arbitration as Kuala Lumpur, Malaysia. The minority tribunal found that the counterparty's claims were barred by limitation under Indian law, which was the governing law of the JOA. On appeal, however, the Malaysian Court of Appeal reversed this decision and held that limitation periods were a procedural issue, and therefore the law of the seat, i.e., Malaysian law, should apply. As a result, the counterparty's claims were not time-barred, as the limitation period under Malaysian law was longer than that under Indian law.

Such is the current approach in India as well. In ***NNR Global Logistics Shanghai v Aargus Global Logistics Pvt Limited***[4], a key issue that confronted the Delhi High Court (DHC) was the applicable limitation period in respect of a foreign award that was to be enforced in India.

The dispute arose out of an agency agreement between the parties, which is governed by Indian law and contained an arbitration clause providing that disputes would be finally settled under the rules of conciliation and arbitration of the International Chambers of Commerce (ICC). Although parties did not initially agree on the place of arbitration, the ICC subsequently fixed the seat of arbitration at Kuala Lumpur in Malaysia. Subsequently, the Claimant sought to enforce the foreign award in India, where the Respondent was incorporated.

The DHC determined that, since the seat of arbitration was Malaysia, Malaysian law should rightfully governed the procedure and the law of limitation. As the claim was similarly not time-barred under Malaysian law, the foreign award was thus enforceable.

[4] CS(OS) No. 1738/2011, Judgment of the Delhi High Court, 4 October 2012 (https://indiankanoon.org/doc/95830156/)

• *The new position in common law jurisdictions: a unified approach?*

In the last two decades, however, apart from Malaysia and India, a number of major common law jurisdictions have unified their approach to align with the position in civil law jurisdictions, such that the issue of applicable limitation periods is one governed by the **substantive law** of the contract – namely: Canada[5] and Australia[6] (through decisions effected by its highest courts), the UK, and later Singapore as well, through the enactment of the Foreign Limitation Periods Act 2012 ("**FLPA**").

• *Singapore's approach to limitation periods*

The FLPA of Singapore is a pivotal piece of legislation when it comes to ascertaining limitation periods in the context of international contracts. It dictates that in any action or proceedings in Singapore court, when a foreign law is chosen to govern a contract, the limitation period of that foreign law will apply. The FLPA thus ensures that the parties' choice of law is respected and provides clarity to an otherwise potentially complex issue that can take months to litigate.

In particular, section 3 of the FLPA now provides that:

Application of foreign limitation law

3.—(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in Singapore the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be applied 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 purposes of the action or proceedings; and*

(b) the law of Singapore relating to limitation shall not so apply.

Consequently, even if parties in our hypothetical case have chosen the Singapore courts as the forum of dispute resolution, or selected Singapore as the seat of arbitration, Singapore's statute of limitation will not be applicable. Instead, the Singapore court or the arbitral tribunal will have to apply Japanese law (the governing law of the contract) to determine whether the cause of action initiated by the Japanese party against the Indian distributor is time barred.

---

[5] In *Tolofson v Jensen* [1994] 3 SCR 1022, the Supreme Court of Canada held that issues of limitation periods were substantive in nature, and a claim that was time-barred by the law governing the tort could not be pursued in the forum, even if the time had not expired by the limitation periods of the forum.
[6] Similarly, in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, the majority in the High Court of Australia considered the issue of limitation periods to be substantive in nature, as it was a matter that affected the "existence, extent or enforceability of the rights or duties of the parties to an action".

Practical Guidelines

For business professionals engaged in international contracts, understanding the statute of limitations is not just a legal technicality but a strategic necessity. The comparison between Singapore, Japan, Malaysia, and India highlights the diversity in legal approaches to this issue.

To avoid being caught off guard by a time-barred claim, you should consider the following practical guidelines:

- Carefully scrutinise the choice of laws in your contract and dispute resolution clause. Do not treat them as "midnight clauses" that are addressed only as an afterthought.
- Consider the possibility of aligning the governing law and the seat of arbitration, if possible and convenient. This may reduce the risk of conflicting or inconsistent laws applying to your contract and arbitration procedure, including the statute of limitations.

If you have a choice of different laws, consider the advantages and disadvantages of each law, including their approach to limitation periods.

- Be mindful of the events that trigger the start of the limitation period, such as the date of breach, the date of discovery, or the date of demand. Also, be aware of the circumstances that may extend or suspend the limitation period, such as fraud, concealment, or acknowledgment.
- Seek advice from qualified lawyers in the relevant jurisdictions, especially if you are unsure about the applicable law or the status of your claim.

Do not delay initiating or responding to a claim, as this may jeopardise your odds of success or lead to your claims being time-barred.

** Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.*