ARBITRATION: International Commercial – Domestic – Investment

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In an era where the resolution of disputes is increasingly moving away from traditional court systems towards alternative methods, the comprehensive collective work in Greek with Professor Charalampos (Haris) P. Pamboukis as editor emerges as both a timely and seminal contribution to the field of arbitration, both nationally within Greece and on an international scale. This book review seeks to delve into the multifaceted contributions of the book, examining its scope, its pioneering contributors, its evolution within Greek law, and its broader implications for dispute resolution globally.

The book begins by exploring the flourishing landscape of arbitration across various domains such as commercial, investment, construction, maritime, and energy disputes, alongside other alternative dispute resolution (ADR) methods. The interest in these mechanisms reflects a societal shift towards less adversarial, more cosmopolitan forms of dispute resolution, aimed at alleviating the burdens on state judiciary systems characterized by procedural rigidity and often excessive delays. The prologue set the stage by discussing the significant legislative and jurisprudential developments in domestic and international arbitration within Greece, highlighting the transformative impact of laws passed from 1999 through to the latest reforms in 2023. Such legislative milestones not only signify Greece’s evolving arbitration framework but also illustrate the

dynamic interplay between law, scholarly research, and practical application in shaping effective dispute resolution practices. Furthermore, the book weaves through the theoretical underpinnings and the practical aspects of arbitration agreements, the composition of arbitral tribunals, and the procedural norms governing arbitration proceedings, offering a holistic view of the arbitration landscape.

Central to the book's discourse is the collaborative effort of esteemed scholars, academics, and practitioners who contribute their insights across various themes. This collective approach not only enriches the book's content with a diversity of perspectives but also underscores the collaborative spirit within the arbitration community. The inclusion of introductory developments on increasingly significant areas such as investment arbitration and mediation, alongside a critical overview of international arbitration consent and the arbitral process, reflects a comprehensive and forward-looking examination of the field.

The book does not shy away from discussing the inherent challenges within arbitration and the diverse methodological approaches adopted by different contributors. However, these aspects are presented as enriching the scientific pluralism and intellectual rigor of the work rather than detracting from its cohesion.

In addition to its substantive chapters, the book is augmented with appendices that include key legislative and regulatory texts relevant to arbitration and mediation. This practical inclusion underlines the book's aim to serve as a useful tool for both practitioners and scholars.

In conclusion, this collective work stands as a testament to the evolving and vibrant field of arbitration within Greece and its broader implications on the international stage. It encapsulates the intellectual legacy, the legislative advancements, and the practical insights of a diverse group of contributors, offering a comprehensive resource for understanding and navigating the complexities of arbitration. As such, it represents an invaluable contribution to the legal scholarship and practice of arbitration, both within Greece and beyond, fostering a deeper appreciation for alternative dispute resolution mechanisms in the pursuit of justice and societal harmony.

CCTL Cross-Border Legal Issues Dialogue Seminar Series – 'Parallel Proceedings between International Commercial Litigation and Arbitration' by Dr. Guangjian Tu (Recording Released)

Parallel proceedings in international commercial litigation between the courts of different countries have long been discussed and explored, for which the Brussels I Regulation in the EU provides a good model for solution although it is still a problem at the global level and an obstacle for the Hague Jurisdiction Project.

However, it seems that so far no enough attention has been paid to the problem of parallel proceedings between international commercial litigation and arbitration. Theoretically, parties' consent to arbitration will exclude the jurisdiction of states' courts by virtue of the rules set out in Article 2 of the New York Convention altogether. But the Convention fails to successfully eradicate parallel proceedings between arbitral tribunals and state courts, owing to its inherent defects. When a conflict arises between international commercial arbitration and litigation proceedings, a rational balance must be struck between the judiciary and the arbitral tribunal with a reasonable division of competence between the two bodies. Different from parallel proceedings between two courts of different countries where usually both have jurisdiction and the question is only who should decide first, the jurisdiction of a national court and that of an arbitral tribunal excludes each other; similar to them, the problems with the former will also happen to the latter. Shall one always give "priority" to the arbitral tribunal to decide i.e. the issue of validity of the arbitration agreement for the purpose of

respecting the doctrine of competence/competence? Can a simple lis pendens rule like that under the Brussels I Regulation work i.e. a national court or arbitral tribunal whoever is seized earlier shall decide when the issue of the validity of arbitration agreement is raised as a preliminary question in the national court? This presentation will try to explore an ideal model for the solution to this problem.

The recording can be found here.

A note on "The BBC Nile" in the High Court of Australia – foreign arbitration agreement and choice of law clause and Article 3(8) of the Amended Hague Rules in Australia

By Poomintr Sooksripaisarnkit

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Introduction

On 14th February 2024, the High Court of Australia handed down its judgment in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4. The case has ramifications on whether a foreign arbitration clause (in this case, the London arbitration clause) would be null and void under the scheme of the *Carriage of Goods by Sea Act 1991* (Cth) which makes effective an amended version of the International Convention on the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924 (the "Hague

Rules"). The argument focused on the potential effect of Article 3(8) of the Amended Hague Rules, which, like the original version, provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligent, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in *these Rules*, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability".

BRIEF FACTS OF THE CASE

The case involved a carriage of head-hardened steel rails from Port of Whyalla in South Australia to the Port of Mackay in Queensland. When the goods arrived at the Port of Mackay, it was discovered that goods were in damaged conditions to the extent that they could not be used, and they had to be sold for scrap. A bill of lading issued by the carrier, BBC, containing the following clauses:

"**3. Liability under the Contract**

- Unless otherwise provided herein, the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. In respect of shipments to which there are no such enactments compulsorily applicable, the terms of Articles I-VIII inclusive of said Convention shall apply…."

4. **Law and Jurisdiction**

Except as provided elsewhere herein, any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms. The arbitration Tribunal is to consist of three arbitrators, one arbitrator to be appointed by each party and the two so appointed to appoint a third arbitrator. English law is to apply".

The carrier, BBC, commenced arbitration in London according to Clause 4 of the bill of lading. Carmichael, on the other hand, commenced proceeding before the Federal Court of Australia to claim damages. Carmichael sought an anti-suit injunction to restrain the arbitration proceeding. BBC, on the other hand, sought a stay of the Australian proceeding.

ARGUMENTS IN THE HIGH COURT OF AUSTRALIA

Carmichael contended that Clause 4 should be null and void because of Article 3(8) of the Amended Hague Rules. First, there is a risk that London arbitrators will follow the position of the English law in *Jindal Iron and Steel Co Ltd and Others v Islamic Solidarity Shipping Co. Jordan Inc* (*The "Jordan II"*) [2004] UKHL 49 and found the carrier's duty to properly stow and care for the cargo under Article 3(2) of the Hague Rules to be a delegable duty, as opposed to an inclination of the court in Australia, as shown in the New South Wales Court of Appeal decision in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371. Secondly, there is a risk that the London arbitrators would construe Clause 3 as incorporating Article I-III of the Hague Rules, instead of the Amended Hague Rules of Australia. This would result in reducing the package limitation defence. Thirdly, there would be more expenses and burdens on the part of Carmichael to have to pursue its claim against BBC in London.

REASONING OF THE HIGH COURT OF AUSTRALIA

Whether Article 3(8) is applicable, the High Court of Australia found as a matter of principle that the court must consider all circumstances (being past, present, or future) whether a contractual clause relieves or lessen the carrier's liability. The standard of proof to be applied in considering such circumstances is the civil standard of the balance of probability. The court drew support from section 7(2) and section 7(5) of the *International Arbitration Act 1974* (Cth), as the parties relied on this piece of legislation in seeking an anti-suit injunction or a stay of the proceeding. In section 7(2), the language is that the court "shall" stay the proceedings if a matter is capable of settlement by arbitration. In section 7(5), again, there is a word "shall" in that the court shall not stay the proceedings under subsection (2) if the court finds the arbitration agreement to be null and void. As the High Court of Australia emphasised in paragraph 25 of its judgment: "For an Australian court to 'find' an arbitration agreement null and void … it must be able to do so as a matter of law based on agreed, admitted, or proved fact".

Such proof is on the balance of probabilities pursuant to the *Evidence Act 1995* (Cth). Moreover, the Amended Hague Rules in Australia ultimately has the nature of an international convention. The interpretation of which must be done within the framework of the Vienna Convention on the Law of Treaties 1969 which requires that relevant rules of international law must be considered. The burden of proof which international tribunals usually adopt is that of "preponderance of evidence", which is no less stringent than that of the balance of probabilities. This supports what the High Court of Australia found in paragraph 32 of its judgment that "references to a clause 'relieving' a carrier from liability or 'lessening such liability' are to be understood as referring to facts able to be found in accordance with the requisite degree of confidence…" Also, the High Court of Australia found the overall purpose of the Hague Rules is to provide a set of rules which are certain and predictable. Any attempt to apply Article 3(8) to the circumstances or facts which are not agreed or admitted or proved would run against the overall objective of the Hague Rules.

A reference was also made to an undertaking made by BBC before the Full Court of the Federal Court of Australia that it would admit in the arbitration in London that the Amended Hague Rules would be applicable to the dispute and BBC did consent to the Full Court of the Federal Court of Australia to make declaration to the same effect. It was argued by Carmichael that the undertaking and the subsequent declaration should not be considered because they came after BBC had commenced the arbitration pursuant to Clause 4. However, the High Court of Australia, emphasised in paragraph 59 that the agreed or admitted or proved facts *at the time the court is deciding whether to engage Article 3(8)* are what the courts consider. The effect of the undertaking and the declaration are that it should be amounted to the choice of law chosen by the parties within the meaning of section 46(1)(a) of the Arbitration Act 1996 and should effectively supersede the choice of the English law in Clause 4 of the bills of lading.

All the risks pointed out by Carmichael are unreal. First, the indication of the New South Wales Court of Appeal in the *Nikolay Malakhov* case in respect of Article 3(2) of the Hague Rules was not conclusive as it was *obiter* only. There is no clear legal position on this in Australia. Secondly, the language of Clause 3 is that Article I-VIII are to be applied if there are "no such enactments". But the country of shipment in this case (namely Australia) enacts the Hague-Rules. Moreover, there is no ground for any concern in light of the undertaking and the declaration.

Lastly, Article 3(8) of the Amended Hague Rules concerns with the carrier's liability. It is not about the costs or burdens in the enforcement process. Hence, the Australian proceeding is to be stayed.

COMMENT

As the High Court of Australia emphasised, whether Article 3(8) of the Amended Hague Rules is to be engaged depending upon facts or circumstances at the time the court is deciding the question. This case was pretty much confined to its facts, as could be seen from the earlier undertaking and the declaration which the High Court of Australia heavily relied upon. Nevertheless, the door is not fully closed. There is a possibility that the foreign arbitration and the choice of law clause can be found to be null and void pursuant to Article 3(8) if the facts or circumstances are established on the balance of probabilities that the tribunals will apply the foreign law which has the effect of relieving or lessening the carrier's liabilities.

New Book Releases: "Private International Law and Competition Litigation in a Global Context" & "Third Party Funding in International Arbitration"

Two books on international litigation and arbitration have recently been published that might be of interest to the CoL Community and PIL research.

The first book by **Mihail Danov** (University of Exeter) is the latest contribution to Hart's renowned "Studies in Private International Law" series (Volume 37) and examines the challenging interaction of "**Private International Law and Competition Litigation in a Global Context**". The blurb reads as follows:

> *This important book analyses the private international law issues regarding private antitrust damages claims which arise out of transnational competition law infringements. It identifies those problems that need to be considered by injured parties, defendants, judges and policy-makers when dealing with cross-border private antitrust damages claims in a global context. It considers the post Brexit landscape and the implications in cross border private proceedings before the English courts and suggests how the legal landscape should be developed. It also sets out how private international law techniques could play an increasingly important role in private antitrust enforcement.*

For all interested *conflict of laws.net* readers, Hart Publishing is kindly offering a **discount price of £76.** If you order online at **www.bloomsbury.com,** just use the **code GLR AQ7 to get 20% off!**

In the second treatise, **Mohamed F. Sweify** (Hinshaw & Culbertson LLP) takes an in-depth look at the increasingly important issue of "**Third Party Funding in International Arbitration**". Edward Elgar Publishing provides the following content description:

> *The author of Third Party Funding in International Arbitration challenges the structural inconsistencies of the current practices of arbitration funding by arguing that third party funding should be a forum of justice, rather than a forum of profit.*
>
> *By looking at the premise, rather than the implication, the author presents the arcane areas of intersection between access to justice, as a foundational theory for third party funding, and the arbitration funding practice that lacks a unifying framework. The author introduces a new methodology with an alternative way of structuring third party funding to solve a set of practical problems generated by the risk of claim control by the funder.*
>
> *This book will be of interest to third party funders, arbitrators, lawyers, arbitral institutions, academics, and law students.*

Virtual Workshop (in English) on October 10: Diego Fernández Arroyo on "Transnational Commercial Arbitration as Private

International Law Feature”

On Tuesday, October 10, 2023, the Hamburg Max Planck Institute will host its 37th monthly virtual workshop Current Research in Private International Law at **11:00-12:30** (CEST). **Diego P. Fernández Arroyo** (Sciences Po Law School) will speak, **in English**, about

Transnational Commercial Arbitration as Private International Law Feature

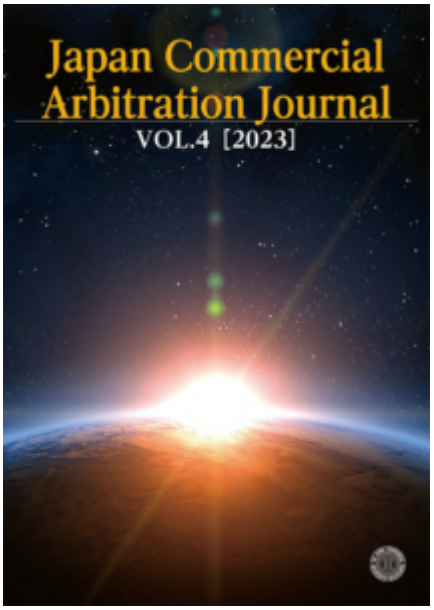
A significant part of private international law (PrIL) disputes is nowadays solved by means of arbitration. At the same time, the range of arbitrable issues has been growing up for decades. Consequently, arbitration is no longer ignored by PrIL scholars, who, nevertheless, hesitate about how to deal with it. Many of them are only attracted by the fact that arbitral tribunals are often confronted to ordinary problems of determining the law applicable to a particular issue. Through the lens of this classical-PrIL approach, they identify sometimes conflict-of-law rules in arbitration instruments. Without denying any interest to this option, we will try to provide a more comprehensive view, starting by revising the very respective notion of arbitration and PrIL as well as their interaction, and concluding to challenge the excessive role played by the seat of the arbitration.

The presentation will be followed by open discussion. All are welcome. More information and sign-up here.

If you want to be invited to these events in the future, please write to veranstaltungen@mpipriv.de.

New Volume of the Japan Commercial Arbitration Journal

The Japan Commercial Arbitration Association (JCAA), one of the oldest international arbitration institutions in the world, founded in 1950, has started to publish its annual journal on commercial arbitration – "Japan Commercial Arbitration Journal" – entirely in English. The Journal's Volume 4, which has been published recently, features the following articles:



Miriam Rose Ivan L. Pereira

Combining Interactive Arbitration with Mediation: A Hybrid Solution under the Interactive Arbitration Rules

Masaru Suzuki, Shinya Sakuragi

The Use of Technology in the International Commercial Arbitration and the Consideration of Rulemaking

Kazuhisa Fujita

Current Status of International Arbitration from the Perspective of Corporate Law and Japan as the Place of Arbitration

Dai Yokomizo

International Commercial Arbitration and Public Interests: Focusing on the Treatment of Overriding Mandatory Rules

Yuji Yasunaga

Extending the Application of an Arbitration Agreement Involving a Corporation to Include its Representative

Kazuhiro Kobayashi

Scope, Amount and Sharing of Arbitration Expenses and Court Costs in Japan

Leon Ryan, Shunsuke Domon

Disputes in India ? Lessons from Mittal v Westbridge

Junya Naito, Motomu Wake

Potential for a New Arb-Med in Japan

Yoshihiro (Yoshi) Takatori

Arbitrator Training and Assessment ? How to Increase and Strengthen Resource of Arbitrators and ADR Practitioners

Shuji Yanase

On Dual Conciliation by Two Conciliators

Takeshi Ueda

Discussions and Challenges in Promoting Online Dispute Resolution

Shinji Kusakabe

Civil Litigation after the Introduction of IT, as Suggested by Scheduled Proceedings in Commercial Arbitration

All volumes can also be freely consulted and downloaded here.

AMEDIP’s upcoming webinar: The Applicable Law to Investment Arbitration and the Future Guide of the Organization of American

States – 31 August 2023 (at 14:30 Mexico City time) (in Spanish)

The Mexican Academy of Private International and Comparative Law (AMEDIP) is holding a webinar on Thursday 31 August 2023 at 14:30 (Mexico City time – CST), 22:30 (CEST time). The topic of the webinar is the Applicable Law to Investment Arbitration and the Future Guide of the Organization of American States (OAS) and will be presented by Dr. José Antonio Moreno Rodríguez (in Spanish).

The details of the webinar are:

Link: https://us02web.zoom.us/j/89032691768?pwd=R3pJTnJsSEg5U0o3QmJqR3dwOWdIdz09

Meeting ID: 890 3269 1768

Password: AMEDIP

Participation is free of charge.

This event will also be streamed live: https://www.facebook.com/AmedipMX

Upcoming Event: International Symposium (hybrid format) on International Arbitration and Mediation in Japan

The Ministry of Justice of Japan (MOJ), Civil Affairs Bureau, in cooperation with the Japan Commercial Arbitration Association (JCAA) and supported by CIArb East Asia Branch, Japan Association of Arbitration (JAA), Japan International Dispute Resolution Center (JIDRC), is organizing an international symposium (hybrid format) on the "Future Prospects of International Arbitration and Mediation: How does the Judiciary Assist?".

This event could not have been more timely as the House of Councillors (the upper house of the Japanese Diet) unanimously passed and enacted into law on 21 April of this year the amendments to the Arbitration Act and the "Act for the Implementation of Settlement Agreements Resulting from Mediation" (the "Singapore Mediation Convention Implementation Act"). These enactments aim to promote international arbitration and mediation in Japan and to make Japan an

attractive hub for international dispute resolution in competition with other leading centers in the region.

Date, Venue & Formats:

July 7 (Fri.), 2023, 9am-12:30 pm (JST)

Hotel New Otani Tokyo?ONSITE / **Online**?

Language: English

English-Japanese consecutive interpretation available

Program (see link below):

Keynote Speeches

Panel Sessions

Registration: free

Sign up on the Official Website of the Forums

by 6pm, JUNE 26 (Mon.) for ONSITE participation,

by noon, JULY 3 (Mon.) for Online participation

Details of registration and the program can be found here.

Milan Arbitration Week – 2023

edition

From 22 to 27 May 2023, the 2023 edition of the Milan Arbitration Week will take place, online and in presence. It encompasses a series of events dedicated to domestic, international commercial and investment arbitration, with the participation of renowned Italian and foreign experts from academia and legal profession.

The Milan Arbitration Week is jointly organized by Università degli Studi di Milano and the European Court of Arbitration, in collaboration with DLA Piper-Milan, **Comitato Italiano dell'Arbitrato**, the Centre of Research DEuTraDiS and the Erasmus + Programme of the European Union.

In particular, this edition will focus on the recent Italian reform of arbitration law; the mechanism of the mandatory mediation; the status quo and future perspectives of surfing on pledges in international arbitration; the umbrella clauses; the recent developments of the relationships between EU Law and investment arbitration. In addition, the MiAW, always attentive to the relationship between university education and arbitration, will host a chat with the winners of the 30th edition of the Willem C. Vis International Commercial Arbitration Moot, as well as the Frankfurt Investment Pre-Moot (Conference and hearings), organized by DLA Piper, Milan.

All information (including how to register) can be found at this link.

Relevance of Indian Limitation Law vis-à-vis Foreign-seated International Arbitration With Indian Law As The Applicable Substantive Law

Written by Harshal Morwale, Counsel, Singularity Legal

Introduction

The precise determination of the laws that will govern different aspects of international arbitration is a crucial matter, given that there could be a substantial divergence between different laws, such as the law of the seat and the substantive law of the contract on the same issue. One such issue is limitation.

The determination of the law applicable to limitation is a complex exercise. The different characterization of limitation as a procedural or substantive issue adds more to the complexity. This issue could not be simpler in India. This post is prompted by a recent decision of the Delhi High Court ("DHC") in *Extramarks Education India v Shri Ram School* ("*Extramarks* case"), which although on domestic arbitration, makes various obiter observations on the nature of limitation and flexibility of parties to contract out of the same.

The aim of this post is to explore how would Indian substantive law of the contract impact limitation period and party autonomy, especially in the context of contracting out of limitation in a foreign-seated international arbitration. It will also look at the legality of limitation standstill agreements to defer the limitation period in the context of foreign-seated arbitration by examining prevailing legal principles together with relevant case laws and through the prism of the decision in the *Extramarks* case.

Classification of limitation in the context of foreign-seated

arbitrations – procedural or substantive?

The limitation in India is governed by the Limitation Act, 1963 ("Limitation Act").

The Supreme Court of India ("SC") and the Law Commission of India have characterised the law of limitation as a procedural law. That being stated, the SC has also proposed a more nuanced approach to classifying law of limitation noting that while limitation is *prima facie* a procedural law construct, its substantive law characteristics cannot be wholly discounted.

This distinction was affirmed by the DHC in the *NNR Global Logistics* case, which concerned the enforcement of a foreign award where the seat of arbitration was Kuala Lumpur and the applicable substantive law of the contract was Indian law. Under Indian law, the limitation for the type of cause of action at stake, in this case, was three years as opposed to Malaysian law, where the limitation was six years. The respondent argued that since Indian law is the substantive law governing the contract, and given that the Limitation Act could be substantive law, Indian limitation law would apply. The DHC rejected this contention and held that the law of limitation is procedural, and the issues of limitation would be governed by procedural/curial law governing the arbitration, i.e., the *lex arbitri*. However, the DHC's reasoning is suspect insofar as it makes the link between limitation law and procedural law uncritically, discounting the impact or connection of limitation with the remedy, and the substantive law implications therewith.

While the premise that since the arbitral procedure is governed by the *lex arbitri* and since limitation is generally a procedural law subject, the *lex arbitri* must govern the limitation might appear fairly straight forward, there exists a degree of tentativeness as to the characterisation of limitation in the context of international arbitration. The recent DHC decision in the *Extramarks* case makes some interesting observations which could have a deep impact on the mentioned premise.

In the *Extramarks* case, the issue at stake was the limitation period for filing an application before the High Court for the appointment of the arbitrator, for a purported India-seated domestic arbitration. The DHC held that conceptually, limitation bars a legal remedy and not a legal right, the legal policy being to ensure that legal remedies are not available endlessly but only up-to a certain

point in time. The DHC further held that a party may concede a claim at any time; but cannot concede availability of a legal remedy beyond the prescribed period of limitation. In essence, according to the DHC, passing of limitation bars a remedy, which would generally mean that limitation is a procedural law subject. This distinction is in line with the traditional 'right is substantive and remedy is procedural' divide that exists in the common law. However, this position is not a settled one and remedy, could, arguably, be governed by the substantive law governing the contract.

Interestingly, the Singapore Court of Appeal in *BBA v. BAZ*, drew a distinction between procedural and substantive time bars in the context of international arbitration, noting that time bar of remedy is procedural in nature. Simultaneously, it was also observed that choice of seat does not automatically require application of the seat's limitation period and the applicable substantive law will have to be looked at. Consequently, the principle that limitation is a procedural law issue and subject to *lex arbitri* cannot be relied on reflexively.

If the position of the DHC in *NNR Global Logistics* case is contrasted with the position in *Extramarks* case, acknowledging the difficulties in making substantive and procedural classification vis-à-vis limitation in international arbitration, then the choice of Indian substantive law in a foreign-seated arbitration could potentially mean that the tribunal presiding over in a foreign-seated arbitration with Indian substantive applicable law could potentially be required to engage in the limitation period analysis from the perspective of the seat as well as the Limitation Act and might be confronted with conflicting limitation periods. However, there lacks judicial clarity as to how to resolve the conflict when there is repugnancy in limitation prescribed in the *lex arbitri* and the Limitation Act, which would more often be the case.

Notably, Schwenzer and Manner argue that choice of substantive law should prevail over choice of seat and *lex causae* must govern the question of limitation of actions, notwithstanding whether it is classified as substantive or procedural. Indeed, this is the prevalent position in the civil law jurisdictions. However, this argument, if accepted, will have certain repercussions on the party autonomy, especially from an Indian perspective in the context of standstill agreements, as explored below.

Suspending/Extending Limitation in Foreign-seated Arbitrations

A standstill agreement is a contract between the potential parties to a claim to either extend or suspend the limitation period for a fixed time or until a triggering event occurs without acknowledging the liability.

The legality of such agreements is not entirely clear under Indian law. For instance, Section 28 of the Limitation Act expressly bars agreements that limit the time within which a party may enforce its rights. However, the converse, i.e., the possible extension of limitation, is not discussed in the Limitation Act. According to Section 25(3) of the Indian Contract Act, the parties can enter into an agreement to enforce a time-barred debt as long as there is a written and signed promise to pay the debt, essentially acknowledge the debt/liability. However, as noted above a standstill agreement is not an admission or acknowledgement of liability and hence Section 25(3) would not applicable. It has also been noted that the legality of standstill agreements in India is sub-judice before the Madras High Court.

From an India-seated domestic arbitration perspective, in light of DHC's ruling in the *Extramarks* case, that a "party may concede a claim at any time; but cannot concede availability of a legal remedy beyond the prescribed period of limitation", it would mean that limitation standstill agreements would not be valid.

From a foreign-seated arbitration with Indian substantive applicable law perspective, relying on the *NNR Global Logistics* case, it may be argued that the seat's procedural law, including limitation law provisions, will apply and as long as limitation standstill agreements are permitted under the *lex arbitri*, there should not be an issue. However, given that merits of the claim would be anchored in Indian law, if limitation is viewed from a substantive law perspective, the impact of the *Extramarks* case ruling on the parties' ability to enter into standstill agreements in foreign seated arbitration with Indian substantive law appears precarious.

Essentially, the legality of standstill agreements in foreign seated arbitration with Indian substantive law faces a critical impediment explored above, i.e., the divide between substantive and procedural classification. One possible view could be that since the parties have already chosen the seat of the arbitration, all

procedural law issues will be governed by law of the seat, if, indeed, limitation is treated as a procedural issue. A second, contrary view may be that the legality of a standstill agreement would be tested on the touchstone of Indian law, since the choice of applicable substantive law of the contract is Indian law under which limitation cannot be conceded beyond the prescribed period by consent.

Given that the impact of Indian substantive law on the issue of limitation and standstill agreements is not entirely clear, in light of the *Extramarks* case, the tribunals might now be required to consider a relatively unique issue of limitation period alongside large number of other considerations in an international arbitration with Indian substantive applicable law.

Conclusion

In the process of exploring the impact of Indian substantive law of the contract on parties' freedom to contract out of limitation in a foreign-seated international arbitration, the tensions between procedural law and substantive law in foreign-seated arbitrations vis-à-vis limitation become apparent. The tensions are further compounded by the ruling in the *Extramarks* case that limitation bars remedy and that the parties cannot contract out of limitation. The exact impact of the *Extramarks* case on the parties to an international arbitration contemplating standstill agreements remains unclear and the connected issues in this context remain to be seen.

(The opinions of the author are personal and do not represent the opinion of the organisations he is affiliated with.)