

‘The Claim is Time-Barred’: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration

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ABSTRACT

In an international commercial setting, in most cases parties to a sales contract add, albeit last minute, a choice of law and an arbitration clause. But they seldom, if at all, think of limitation periods that may bar their possible claims, and especially which law may be applied to this difficult and often crucial question. This fact burdens the arbitral tribunal with the difficult task of ascertaining the proper limitation regime for an international sales contract. This article examines the diversity of domestic rules in this field, compares them with international instruments regulating international sales of goods and limitation of actions, and analyses if and how arbitration rules give guidance to arbitrators in regard to the determination of the applicable and also, proper limitation regime for an international sales contract.

I. THE PROBLEM

IN AN international commercial setting, parties to a sales contract usually have certain expectations. They carefully draft the substantive provisions of their sales contracts governing the respective duties and rights, and in most cases, albeit last minute, they add both a choice of law and an arbitration clause. But despite the fact that all legal systems recognise the influence of the passage of time on rights,¹

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¹ See P. Schlechtriem, *Working Group for the Preparation of Principles of International Commercial Contracts*, Study L-Doc. 91 (UNIDROIT 2003), ch. 10, ‘Limitation Periods’, Art. 1, Comment 1.

the parties seldom think of limitation periods² that may bar their possible claims and especially which law may be applied to this difficult and often crucial question. This fact burdens the arbitral tribunal with the difficult task of ascertaining the proper limitation regime for an international sales contract.³

(a) *International Instruments Regulating Limitations of Actions*

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) represents a very successful attempt to unify sales law, not only shown by its ratification by 70 Contracting States⁴ and by the huge number of decisions on the CISG,⁵ but also by its influence on modern laws.⁶ Moreover, practitioners striving for certainty and predictability are becoming more and more aware of the advantages of explicitly choosing such uniform and neutral sets of rules.

However, the CISG does not address the issue of limitation of actions.⁷ Although Article 39(2) CISG sets forth an absolute time limit of two years for the buyer to give notice to the seller of any non-conformity of the goods, this does not constitute a limitation period and therefore, does not limit the buyer's right to commence arbitral proceedings.⁸

The 'Sister Convention'⁹ to the CISG, the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods (the 'Limitation Convention'), with its general limitation period of four years,¹⁰ was an important first step towards a comprehensive standardisation of limitation periods for

² In the following, the term 'limitation of actions' will be used as a synonym of the terms used in civil law countries, e.g. 'prescription' (France), 'prescrizione' (Italy), 'Verjährung' (Germany). On the terminology issue, see M. Bonell, 'Limitation Periods' in A. Hartkamp *et al.* (eds) *Towards a European Civil Code* (3rd edn, Nijmegen, 2004) pp. 517, 520; R. Zimmermann, 'Die Unidroit-Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive' in (2005) *ZEUP* 264 at p. 271.

³ This article does not address the situation where the parties authorise the arbitrator(s) to decide *ex aequo et bono* as amiable compositeur(s).

⁴ See www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

⁵ See the international web-based research databases, such as www.CISG-online.ch (University of Basel); <http://cisgw3.law.pace.edu> (Pace Law School) and www.uncitral.org/uncitral/en/case_law.html (CLOUT).

⁶ P. Schlechtriem, 'Introduction' in P. Schlechtriem and I. Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, Oxford, 2005): see e.g., the law of obligations in the Burgerlijk Wetboek of the Netherlands, the German Schuldrechtsreform ('Gesetz zur Modernisierung des Schuldrechts' of 26 November 2001) and the Scandinavian sales laws; cf. the influence of the CISG on the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

⁷ Oberlandesgericht Köln, Germany, 13 February 2006, CISG-online 1219; Hof van Beroep, Belgium, 17 May 2004, CISG-online 990; Rechtbank Middelburg, The Netherlands, 1 December 1999, UNILEX No. 408/98; Oberlandesgericht Hamm, Germany, 9 June 1995, CISG-online 146; P. Schlechtriem, *supra* n. 6 at Art. 4 para. 35.

⁸ Cf. B.K. Leisinger, 'Some Thoughts about Art. 39(2) CISG' in (2006) *IHR* 76 at p. 77; I. Schwenzer in P. Schlechtriem and I. Schwenzer, *supra* n. 6 at Art. 39 para. 28; ICC Case No. 7660 (1994), available at www.cisg.law.pace.edu/cases/947660i1.html; ICC Case No. 7565 (1994), available at www.unilex.info/case.cfm?pid=1&do=case&id=141&step=FullText; Handelsgericht des Kantons Bern, Switzerland, 30 October 2001, CISG-online 956.

⁹ H. Sono, 'The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility', I.A., available at <http://cisg.law.pace.edu/cisg/biblio/sono3.html>.

¹⁰ Limitation Convention, Art. 8.

international sales contracts.¹¹ Yet its amended version of 1980¹² was ratified by only 19 countries,¹³ and thus, its application is very rare.¹⁴

The second important step towards uniform rules on limitation periods are the UNIDROIT Principles of International Commercial Contracts 2004 (the 'UNIDROIT Principles'),¹⁵ which provide, in Article 10.2, for a general limitation period of three years¹⁶ and a maximum limitation period of ten years.¹⁷ Also, the Principles of European Contract Law (PECL), which are intended to be applied as general rules of contract within the Member States of the European Union,¹⁸ provide, in Article 14:201, for a general period of three years¹⁹ and, in Article 14:307, for a maximum period of ten years. Yet the UNIDROIT Principles and the PECL, which do not hold the same status as state law, face the problem of application, not only in state court proceedings, but also in ad hoc and institutional arbitral proceedings.²⁰ This is all the more true in cases where the parties did not explicitly opt for the UNIDROIT Principles or the PECL, and it is up to the arbitrators to choose the applicable limitation period.

(b) National Solutions: A Hopeless Huddle

If one is to place reliance on national laws concerning limitation of actions, the situation turns out to be wholly uncertain and unpredictable. The first problem concerns classification of limitation periods, be it procedural or substantive; the second is that domestic limitation periods differ significantly in length; and

¹¹ See K. Boele-Woelki, 'The Limitation of Actions in the International Sale of Goods', available at www.library.uu.nl/publarchief/jb/artikel/boele/full.pdf; Sono, *supra* n. 9; H. Smit, 'The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born', available at www.cisg.law.pace.edu/cisg/biblio/smit.html; American Bar Association, Section of International Law and Practice, Reports to the House of Delegates, Convention on the Limitation Period in the International Sale of Goods, available at www.cisg.law.pace.edu/cisg/biblio/nelson.html.

¹² In 1980, a Protocol to the 1974 Limitation Convention was concluded to adjust its scope of application to the respective provisions of the CISG.

¹³ See www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html, *inter alia* by the United States (1994), Argentina (1988), Mexico (1988) and Poland (1995).

¹⁴ M. Bonell, *supra* n. 2 at p. 517.

¹⁵ On the limitation regime of the UNIDROIT Principles, see R. Zimmermann, *supra* n. 2 at p. 269; S. Schilf, 'UNIDROIT-Principles 2004: Auf dem Weg zu einem Allgemeinen Teil des internationalen Einheitsprivatrechts' in (2004) *IHR* 236.

¹⁶ This period commences with actual or constructive knowledge, UNIDROIT Principles, Art. 10.2(1).

¹⁷ This maximum period begins on the day after the day on which the right can be exercised, UNIDROIT Principles, art. 10.2(2). The two-tier system adopts the policy that the obligee should not be barred before it has had a real possibility to pursue its right as a result of having actual or constructive knowledge of the right, see UNIDROIT Principles of International Commercial Contracts 2004, Comment 4 on Art. 10.2.

¹⁸ PECL, art. 1:101.

¹⁹ Pursuant to PECL, art. 14:203(1), the period commences on the date when the debtor has to effect performance or, in the case of a right to damages, on the date of the event giving rise to the claim.

²⁰ According to a recent study of PricewaterhouseCoopers LLP and Queen Mary University of London, School of International Arbitration (May 2006), over three-quarters of corporations opt for institutional arbitration due to its strong reputation for managing arbitration proceedings, see www.pwc.com/arbitrationstudy. On the application of the UNIDROIT Principles by international arbitral tribunals, see C.H. Brower and J.K. Sharpe, 'The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective' in (2004) 45 *Virginia J Int'l Law* 199.

thirdly; some limitation periods under national law may be mandatory or form part of the *ordre public* of the state in question.

(i) *Classification of limitation periods*

Concerning the classification of limitation periods, two major groups can be distinguished. Whereas under common law, limitation of actions is traditionally deemed to be a question of procedural law,²¹ civil law countries generally consider it as forming part of substantive law.²² Thus, at the outset, the issue of limitation periods is generally governed by the *lex fori* in common law countries and by the *lex causae*, and more precisely, the *lex contractus*, i.e. the law applicable to the international sales contract itself, in civil law countries. Hence, choosing between various potentially applicable statutes of limitations in international arbitration raises significant choice of law questions.²³

Yet the rigid position of common law countries in applying the *lex fori* approach, which may well encourage forum-shopping, has been considerably attenuated in recent years.²⁴

In England, beginning with the Foreign Limitation Periods Act 1984, the general principle has been adopted that the limitation rules of the *lex causae* are to be applied in actions in England.²⁵ The same principle applies to arbitrations whose seat is in England, according to section 13 of the Arbitration Act 1996.²⁶ Hence, the law of England relating to the statute of limitations is not to be applied unless the law of England is the *lex causae* or one of two *leges causarum* governing the matter.²⁷ The Contracts (Applicable Law) Act 1990, implementing the 1980 Rome Convention on the Law applicable to Contractual Obligations,²⁸

²¹ L. Collins *et al.*, *Dicey and Morris on the Conflict of Laws* (12th edn, London, 1993), vol. 1, p. 184; see also P. Hay, 'Die Qualifikation der Verjährung im US-amerikanischen Kollisionsrecht' in (1989) *IPRax* 197; R. Geimer, *Internationales Prozessrecht* (5th edn, Köln, 2005), para. 351; A. Danco, *Die Perspektiven der Anspruchsverjährung in Europa, eine rechtsvergleichende Untersuchung unter besonderer Berücksichtigung der Sachmängelgewährleistungsfristen im Kaufrecht* (Berlin, 2001), p. 65.

²² D. Girsberger, *Verjährung und Verwirkung im internationalen Obligationenrecht: Internationales Privat- und Einheitsrecht* (Zürich, 1989), p. 27; J. Basedow, 'Qualifikation, Vorfrage und Anpassung im Internationalen Zivilverfahrensrecht' in P. Schlosser (ed.), *Materielles Recht und Prozessrecht und die Auswirkungen der Unterscheidung im Recht der internationalen Zwangsvollstreckung*, (Bielefeld, 1992), pp. 131, 136. But see A. Danco, *supra* n. 21 at p. 61, criticising the substantive qualification in civil law countries and F. Peters and R. Zimmermann, 'Verjährungsfristen' in Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (Köln, 1981), vol. I, pp. 77, 318, stating that the issue of limitation in civil law countries is 'on the edge' of procedural law.

²³ G. Born, *International Commercial Arbitration* (2nd edn, Ardsley, New York, 2001), p. 539.

²⁴ On this development, see K. Boele-Woelki, *supra* n. 11 at p. 1; A. Danco, *supra* n. 21 at p. 65; D. Girsberger, *supra* n. 22 at p. 52.

²⁵ Foreign Limitation Periods Act 1984, s. 1(1). Cf. L. Collins *et al.*, *Dicey and Morris on the Conflict of Laws* (13th edn, London, 2000), vol. 1, p. 174.

²⁶ J. Hill, 'Some Private International Law Aspects of the Arbitration Act 1996' in (1997) 46 *ICLQ* 274 at p. 297.

²⁷ Cf. Foreign Limitation Periods Act 1984, s. 1(1) and s. 1(2). For similar developments in Scotland, South Africa, Canada and Australia, see D. Girsberger, *supra* n. 22 at p. 66.

²⁸ 80/934/EEC, [1980] OJ L266/1, 9 October 1980, available at www.rome-convention.org/instruments/i_conv_orig_en.htm.

follows the same approach by providing that the *lex contractus* shall also govern the limitation of actions.²⁹

In the United States, the 1982 Uniform Conflicts of Laws: Limitations Act now characterises statutes of limitations as forming part of substantive law.³⁰ However, so far only six states have adopted this uniform law.³¹ Section 142 of the Restatement (Second) on Conflict of Laws in its revised version of 1988,³² promulgated by the American Law Institute (ALI), rejected the substantive approach by providing that the statutes of limitation should be determined by the law of the state with the most significant relationship to the limitation issue, regardless of which state's substantive law controls. This provision still contains a forum bias by providing that, in general, the forum's shorter statute of limitations applies. If the forum's statute is longer than that of the *lex causae*, it will also apply unless there is no significant forum interest and the state having a more significant relationship to the parties and the issue in question would bar the claim.³³ At a domestic level, many states have now enacted so-called 'borrowing statutes', according to which the shorter limitation period applies in any case, be it the period of the *lex fori* or the *lex causae*.³⁴

(ii) *Length of limitation periods*

On a national level, limitation periods differ significantly in length: limitation periods for remedies for non-conformity of the goods, which is in practice the most important period, range from six months in Spain (Código civil, art. 1490³⁵), one year in Switzerland (Code of Obligations, art. 210(1)) and Italy (Codice civile, art. 1495(3)), two years in Germany (Bürgerliches Gesetzbuch, s. 438(1) no. 3) and France (Code civil, art. 1648(1)³⁶), three years in the Russian Federation (Civil Code of the Russian Federation, art. 196³⁷), four years in the

²⁹ Contracts (Applicable Law) Act 1990, Sch. 1, para. 10(1)(d). Cf. L. Collins *et al.*, *Dacey and Morris on the Conflict of Laws*, *supra* n. 25 at p. 176.

³⁰ See Uniform Conflict of Laws: Limitation Act, s. 2. On possible revisions of the Uniform Conflict of Laws: Limitation Act, see Study Committee Report, 23 June 2004, available at www.lawupenn.edu/bll/ulc/ulc_frame.htm.

³¹ Washington, Colorado, Oregon, North Dakota and Montana and Nebraska (in 2006).

³² Restatement (Second) on Conflicts of Law, s. 142, provides: 'Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general: (1) Unless the exceptional circumstances of the case make such result unreasonable, the forum will apply its own statute of limitations barring the claim. (2) The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no significant interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.'

³³ Cf. E. Scoles and P. Hay, *Conflict of Laws* (2nd edn, St. Paul, Min, 1992), para. 3.9.

³⁴ Cf. *ibid.* para. 3.11; P. Hay, *supra* n. 21 at pp. 197, 198.

³⁵ On the implementation of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees in Spain, see S. Navas Navarro, 'Umsetzung der EG-Verbrauchsgüterkaufrichtlinie in Spanien, Internationales Handelsrecht' in (2005) *IHR* 89.

³⁶ See art. 3 of Ordonnance no. 2005-136, 17 February 2005, published in JO no. 41, 18 février 2005, 2778, no. 26: the former '*bref délai*' was replaced by a limitation period of two years commencing with actual knowledge of the defect ('dans un délai de deux ans à compter de la découverte du vice').

³⁷ For an English translation, see W.E. Butler, *Civil Code of the Russian Federation* (Oxford, 2002).

United States (UCC, s. 2-725³⁸) and China (Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, art. 39), up to six years in England (Limitation Act 1980, s. 5).

The duration of the limitation period must be considered in conjunction with the moment at which the period begins to run and the events suspending or interrupting it.³⁹ In some legal systems, *e.g.* France (Code civil, art. 1648(1)⁴⁰), the limitation period for remedies for non-conformity of the goods only starts to run once the creditor becomes aware of the claim. Yet, in most legal systems, *e.g.* England (Limitation Act 1980, s.5), Germany (Bürgerliches Gesetzbuch, s. 438(2)), Italy (Codice civile, art. 1495(3)), Spain (Código civil, art. 1490), Switzerland (Code of Obligations, art. 210(1)) and the United States (UCC, s. 2-725), the beginning is determined objectively, predominantly at the time of handing over the goods. In any case, most, if not all laws usually consider the commencement of arbitration proceedings to be sufficient to stop the limitation period running.⁴¹

(iii) *Mandatory character and ordre public*

Whereas Article 10.3 of the UNIDROIT Principles allows the parties to modify the limitation periods within certain limits,⁴² Article 22 of the Limitation Convention generally does not recognise the possibility for the parties to modify the limitation period, although the debtor may, at least, extend the period by a declaration in writing to the creditor.

National laws, again, differ considerably on the question of whether the applicable period of limitation is deemed to be mandatory⁴³ or is subject to party autonomy, and thus may be altered by the parties' agreement.

Finally, both arbitral tribunals and national courts, when considering the recognition and enforcement of the award, may have to address the issue of

³⁸ Cf. the 2003 Draft Amendment to UCC, s. 2-725, according to which a five-year limitation period applies in certain circumstances ('but no longer than five years after the right of action accrued').

³⁹ P. Bernadini, 'Limitation Periods' in (2005) ICC International Court of Arbitration Bulletin Special Supplement, *UNIDROIT Principles: New Developments and Applications*, pp. 43, 44; F. Peters and R. Zimmermann, *supra* n. 22 at pp. 77, 267; Bonell, *supra* n. 2 at pp. 517, 522.

⁴⁰ Code civil, art. 1648(1) reads as follows: 'L'action résultant des vices rédhibitoires doit être intentée par l'acquéreur dans un délai de deux ans à compter de la découverte du vice'.

⁴¹ J. D. M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (The Hague/London/New York, 2003), paras 20-24.

⁴² UNIDROIT Principles, art. 10.3 provides: '(1) The parties may modify the limitation periods. (2) However they may not (a) shorten the general limitation period to less than one year; (b) shorten the maximum limitation period to less than four years; (c) extend the maximum limitation period to more than fifteen years.'

⁴³ P. Bernadini, *supra* n. 39 at pp. 43, 44 (referring *inter alia* to Italy (Codice civile, art. 2936), Russia and Switzerland (Code of Obligations, art. 129; *but see* Code of Obligations, art. 210(1), which allows parties to agree on an extension of the limitation period for remedies for non-conformity of the goods); cf. F. Peters and R. Zimmermann, *supra* n. 22 at pp. 77, 270. *See also* Bonell, *supra* n. 2 at p. 517: '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 contract ... Yet none of the national limitation rules should fall under this notion.'

whether the application of 'foreign law'⁴⁴ relating to limitation periods violates (international) public policy.⁴⁵ However, this may only be the case where the applicable national law does not provide for a limitation period at all,⁴⁶ or where its limitation period differs substantially from the comparative law standard of limitation periods set out above. Yet, the mere fact that the 'foreign' limitation period differs from the limitation period of the *lex fori*⁴⁷ does not, without more, contradict fundamental international standards.

II. LIMITATION REGIMES IN INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDINGS

The diversity of domestic rules in this field obviously creates unacceptable uncertainty in international trade. Against this background, arbitral tribunals are facing considerable problems in applying the proper limitation period.⁴⁸

In the following, it will be shown that arbitration rules give guidance to arbitrators in regard to the determination of the applicable limitation period for an international sales contract. In particular, how the different rules allow the arbitrators to make a carefully reasoned decision in this respect, which lives up to fair and reasonable expectations of the parties, will be examined.

Accordingly, we focus on the arbitration rules that are most widely used in international commercial arbitration,⁴⁹ namely the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules'),⁵⁰ the Arbitration Rules of the London Court of International Arbitration (the 'LCIA Rules');⁵¹ the International Dispute Resolution Procedures of the American Arbitration Association (the 'AAA/ICDR Rules');⁵² the Rules of the Arbitration Institute of

⁴⁴ Since international arbitral tribunals have no national forum, all national rules are 'foreign' to them, see J.D.M. Lew, L.A. Mistelis and S. Kröll, *supra* n. 41 at paras 17-27; G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' in (2005) 21(4) *Arb Int'l* 631 at p. 633: 'the very concept of foreign law is misplaced'.

⁴⁵ On this issue, in general, see E. Gaillard and J. Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague/Boston/London 1999), para. 1533; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-32; A. Redfern and M. Hunter *et al.*, *Law and Practice of International Commercial Arbitration* (4th edn, London, 2004), paras 9-33, 10-51; P.A. Karrer and A.C. Imhoff-Scheier, 'Ordre Public in Schiedssachen' in (1996) *IPRax* 282 at p. 284.

⁴⁶ A. Danco, *supra* n. 21 at p. 64; cf. ICC Case No. 4491 (1985), *Journal du Droit International* 112, 966 (also cited in G. Born, *supra* n. 23 at p. 535), where the arbitral tribunal applied the limitation regime of the *lex fori* (English Limitation Act 1980) due to the parties' choice of England as the place of arbitration and since the *lex causae* (Finnish law) allegedly did not contain any limitation rules.

⁴⁷ See ICC Case No. 5460 (1987), (1988) *Yearbook of Commercial Arbitration* 104 at p. 106, in which the sole arbitrator determined questions of limitation by the *lex fori*, which, in the present case, was the domestic law of England.

⁴⁸ On the difficult task of identifying and establishing the contents of the law chosen by the parties or the arbitrators, see G. Kaufmann-Kohler, *supra* n. 44 at p. 631.

⁴⁹ See the recent study of PricewaterhouseCoopers and Queen Mary University of London, School of International Arbitration (May 2006), available at www.pwc.com/arbitrationstudy.

⁵⁰ In force from 1 January 1998, ICC publication No. 808, available at www.iccarbitration.org.

⁵¹ Adopted to take effect for arbitrations commencing on or after 1 January 1998, available at www.lcia.org.

⁵² Amended and effective 1 May 2006, available at www.adr.org.

the Stockholm Chamber of Commerce (the 'SCC Rules');⁵³ the Swiss Rules of International Arbitration (the 'Swiss Rules');⁵⁴ the Rules of the China International Economic and Trade Arbitration Commission (the 'CIETAC Rules');⁵⁵ the UNCITRAL Arbitration Rules⁵⁶ and the Arbitration Rules of the German Institution of Arbitration (the 'DIS Rules').⁵⁷

(a) *Contractually Stipulated Limitation Periods*

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 recognised in most international arbitration laws and rules.⁵⁸ In a CISG contract, however, doubts could arise as to whether the stipulation of a certain period constitutes a limitation period or a mere time-bar provision altering the two-year period for giving notice under Article 39(2) of the CISG.⁵⁹

If the contract provides for a true limitation period, however, 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,⁶⁰ 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 countries⁶¹ 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

⁵³ Adopted by the Stockholm Chamber of Commerce and in force 1 April 1999, available at www.sccinstitute.com.

⁵⁴ As of 1 January 2006, available at www.swissarbitration.ch.

⁵⁵ Revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on 11 January 2005, effective as from 1 May 2005, available at www.sccietac.org/cietac/en/index.jsp.

⁵⁶ As of 1976, available at www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf; see e.g., the general arbitration clause for international arbitration recommended by the Hong Kong International Arbitration Centre (HKIAC): 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.'

⁵⁷ As of 1 July 1998, available at www.dis-arb.de.

⁵⁸ ICC Rules, art. 17(2); CIETAC Rules, art. 43; AAA/ICDR Rules, art. 28(2); DIS Rules, s. 23(4); Swiss Rules, art. 33(3); UNCITRAL Arbitration Rules, art. 33(3); see also UNCITRAL Model Law on International Commercial Arbitration (1985), art. 28(4); cf. N. Kulpa, *Das anwendbare (materielle) Recht in internationalen Handelschiedsgerichtsverfahren* (Frankfurt am Main, 2005), p. 70. See also CISG, art. 6, as well as UNIDROIT Principles, art. 1.5, according to which the parties may exclude the applicability of the respective set of rules or derogate from its provisions.

⁵⁹ See ICC Case No. 7565 (1994), available at <http://cisgw3.law.pace.edu/cases/947565i1.html> (with editorial remarks Kritzer); ICC Case No. 7660 (1994), available at <http://cisgw3.law.pace.edu/cases/947660i1.html> (with editorial remarks by A. Kritzer).

⁶⁰ See *supra* I.(a).

⁶¹ See *supra* I.(b)(i).

limitation period is consistent with what is generally provided for under national substantive or procedural laws, 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 providing for the contrary. However, the range for a limitation period for claims concerning non-conformity of the goods would have to respect the decision made under Article 39(2) of the CISG, according to which notice of non-conformity must be given, at the latest, within two years after delivery. Thus, this range could be set between a minimum period of two years and a maximum period of six to eight years.

(b) Respecting the Parties' Choice of Law

If the parties do not expressly stipulate a certain period of limitation, they may still opt for a choice of law in their contract, thereby implicitly referring to the limitation period regulated in the law chosen. Again, such a choice of law is universally acknowledged as an expression of party autonomy.

However, the question arises as to whether the parties may only elect a certain national law, or whether they are able to choose international Conventions not in force in the states concerned, such as the Limitation Convention, or even supranational rules of law, such as the *lex mercatoria*, the UNIDROIT Principles or general principles of law. As long as the applicable arbitration rules refer to 'rules of law',⁶² there can be no doubt at all that the parties are free to choose a national law as well.⁶³ Nowadays, almost all arbitration rules contain corresponding provisions.⁶⁴ But also under more traditional wording that only refers to 'law',⁶⁵ the result must be the same in light of the overall international development,⁶⁶ not confined to arbitration, but, more recently, extending to international procedures before state courts.⁶⁷

⁶² On the hierarchy between the institutional arbitration rules and the Arbitration Act prevailing at the seat of the arbitral tribunal, see M. Blessing, n. 66 at pp. 39, 49, according to whom the provisions in the Arbitration Acts relative to the determination of the applicable law are not of mandatory character, and thus, the arbitral tribunal has to take guidance from the institutional arbitration rules.

⁶³ M. Bonell, *supra* n. 2 at pp. 517, 529; W.L. Craig, W.W. Park and J. Paulsson, *International Chamber of Commerce Arbitration* (Dobbs Ferry, NY, 2000), p. 319; E. Gaillard and J. Savage, *supra* n. 45 at para. 1444; J.D.M. Lew, L.M. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-18; F.B. Weigand (ed.), *Practitioner's Handbook on International Arbitration* (München, 2002), Pt 5; UNCITRAL Model Law, art. 28 para. 5; O. Lando, 'The Law Applicable to the Merits of the Dispute' in (1986) 2(2) *Arb. Int'l* 104 at p. 106.

⁶⁴ ICC Rules, art. 17(1); LCIA Rules, art. 22.3; AAA/ICDR Rules, art. 28(1); SCC Rules, art. 24(1); Swiss Rules, art. 33(1); DIS Rules, s. 23.1.

⁶⁵ UNCITRAL Arbitration Rules, art. 33; Arbitration Rules of Chicago International Dispute Resolution Association, art. 32(1), available at www.cidra.org/rules.htm.

⁶⁶ M. Blessing, 'Choice of Substantive Law in International Arbitration' in (1997) 14(2) *J Substantive Law Int'l Arbitration* 39 at p. 56; F. Blase, 'Proposing a New Road Map for an Old Minefield: the Determination of the Rules Governing the Substance of the Dispute in International Commercial Arbitration' in (2003) 20(3) *J Int'l Arb.* 267 at p. 269; 'Wherever legal academia and the practice of international contracts thus applies the term "law", this should be replaced with the term "rules of law"'.
⁶⁷ Cf. art. 3(2) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ('Rome I'), COM(2005) 650 final (15 December 2005); on the Rome I Proposal, see P. Mankowski, 'Der Vorschlag für die Rom I-Verordnung' in (2006) *IPRax* 101.

(i) Explicit choice of uniform law on limitation

Thus, at first, parties to an international sales contract may explicitly opt for the application of the Limitation Convention, even if it is not directly applicable according to its Article 3(1).⁶⁸ The same holds true for a direct choice of the UNIDROIT Principles or the PECL that both provide for a limitation regime.⁶⁹ A reference to '*lex mercatoria*' or 'general principles of law' can nowadays be regarded as a choice of the UNIDROIT Principles,⁷⁰ whereas a reference to the 'law of the European Union' or the like can be conceived as a choice of the PECL.⁷¹

(ii) Implicit choice of uniform law on limitation

If the parties have not opted for a specific limitation regime, but have explicitly chosen the CISG to govern their contract, one might think that the limitation period could be defined via gap-filling under Article 7(2) of the CISG. However, there is no gap that can be filled, since the drafters of the CISG deliberately chose to refer questions of limitation to the sister convention, the Limitation Convention.⁷² Yet the question arises of whether uniform rules on limitation can be incorporated via Article 9(2) of the CISG, as well as under the applicable provisions of arbitration rules, according to which the arbitral tribunal shall take into account the usages of the trade applicable to the transaction.⁷³ This presupposes that these usages amount to an international trade usage, *i.e.* a rule of commerce which is regularly observed by those involved in a particular industry or marketplace at a global level.⁷⁴

This cannot be said for the Limitation Convention, having regard to its limited acceptance. For the same reasons, even an explicit choice of the CISG cannot be regarded as an implicit or tacit choice of the Limitation Convention.

⁶⁸ Limitation Convention, art. 3(1), provides: 'This Convention shall apply only (a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or (b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.'

⁶⁹ See *supra* I.(a).

⁷⁰ Preamble to the UNIDROIT Principles, para. 3; M. Bonell, *supra* n. 2 at pp. 517, 530; A. Redfern and M. Hunter *et al.*, *supra* n. 45 at paras 2-59, 2-65; F. La Spada, 'The Law Governing the Merits of the Dispute and Awards Ex Aequo et Bono' in G. Kaufmann-Kohler and B. Stucki (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague, 2004), pp. 115, 125; F. Vischer, 'Die kollisionsrechtliche Bedeutung der Wahl einer nichtstaatlichen Ordnung für den staatlichen Richter am Beispiel der Unidroit Principles of International Commercial Contracts' in I. Schwenzer and G. Hager (eds), *Festschrift für Peter Schlechtriem zum 70 Geburtstag* (Tübingen, 2003), pp. 445, 447; B. Handorn, *Das Sonderkollisionsrecht der deutschen internationalen Schiedsgerichtsbarkeit, Zur Bestimmung des anwendbaren materiellen Rechts gemäß § 1059 Abs. 1 und 2 Zivilprozessordnung* (Tübingen, 2005), p. 86.

⁷¹ PECL, art. 1:101; C. von Bar and R. Zimmermann, *Grundregeln des Europäischen Vertragsrechts* (München, 2002), Teile I und II XXVI; B. Handorn, *supra* n. 70 at p. 86.

⁷² See also, Oberster Gerichtshof, Austria, 24 October 1995, CISG-online 166; Oberlandesgericht Hamburg, Germany, 5 October 1998, CISG-online 473; K. Boele-Woelki, *supra* n. 11 at 2.2.

⁷³ ICC Rules, art. 17(2); AAA/ICDR Rules, art. 28(2); Swiss Rules, art. 33(3); UNCITRAL Arbitration Rules, art. 33(3); DIS Rules, s. 23.4. See also UNCITRAL Model Law on International Commercial Arbitration (1985), art. 28(4).

⁷⁴ M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, *supra* n. 6 at Art. 9 para. 11.

However, one should keep in mind that parties choosing a neutral substantive law and submitting the dispute to a neutral arbitration procedure at a neutral place will not generally expect to be confronted with a domestic law.⁷⁵ Thus, case law,⁷⁶ as well as scholarly writing,⁷⁷ increasingly recognise that the UNIDROIT Principles, as a whole, constitute 'excellent evidence'⁷⁸ of an internationally accepted solution to a problem and thus can be regarded as an international trade usage or, at least, as a restatement and rebuttable presumption of international trade usages.⁷⁹ Yet it cannot be ignored that the limitation provisions were only introduced into the UNIDROIT Principles in 2004. Thus, any 'trade usage' of limitation of actions might arguably have only come into existence after this year.

Whether the PECL can already be regarded as an international trade usage, at least in the European trade, or merely 'constitute an academic research ... and are a preliminary step to the drafting of a future European Code of Contracts'⁸⁰ is still an open question to be decided in the years to come.⁸¹

(iii) *Choice of national law and limitation*

If the parties have chosen a specific national law to govern their contract via a choice of law clause, the designated *lex causae* not only governs the true

⁷⁵ In other words, the absence of an express choice in favour of a domestic body of law is a significant choice in a negative way, see ICC Case No. 7110 (1995), available at www.unilex.info/case.cfm?pid=2&do=case&id=713&step=FullText; M. Blessing, 'Regulations in Arbitration Rules on Choice of Law' in A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings*, ICCA Congress Series No. 7 (The Hague, 1996), pp. 391, 396.

⁷⁶ International Arbitration Tribunal of the Chamber of Commerce of the Russian Federation, 5 June 1997, No. 229 (1996), available at <http://cisgw3.law.pace.edu/cases/970605r1.html> (abstract); ICC Case No. 9875 (1999), available at http://tldb.uni-koeln.de/php/pub_show_examples.php?page=pub_show_examples.php (abstract); ICC case No. 9479 (1999), (2001) 12(2) *ICC International Court of Arbitration Bulletin* 67; International Arbitration Tribunal of the Chamber of Commerce of the Russian Federation, No. 302 (1997), 27 July 1999, available at www.unilex.info/case.cfm?pid=2&do=case&id=671&step=Abstract (abstract); see also ICC Case No. 8769 (1996), CISG-online 775; Internationales Schiedsgericht der Bundeskammer gewerblichen Wirtschaft, Wien, 15 June 1994, No. SCH-4318, CISG-online 120.

⁷⁷ F. Marella, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts' in (2003) 36 *Vanderbilt Journal of Transnational Law* 1137; A.K. Schnyder and P. Grolimund, '"Opting in" oder "Opting out"?' Anwendung der UNIDROIT Principles of International Commercial Contracts in schiedsgerichtlichen Verfahren' in I. Schwenzer and G. Hager, *supra* n. 70 at pp. 395, 411.

⁷⁸ U. Magnus, 'Wesentliche Probleme des UN-Kaufrechts' in (1999) 642 *ZEUP* 642, available at www.20jahre.cisg-library.org/magnus6.html.

⁷⁹ On Incoterms, see US District Court, S.D. of Texas, Houston Division, 7 February 2006, CISG-online 1177: 'Because Incoterms is the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts, it is incorporated into the CISG through article 9(2)'. For an overview of ICC cases where the arbitrators applied the UNIDROIT Principles without reference to them in the contract, see E. Jolivet, 'The UNIDROIT Principles in ICC Arbitration' in ICC International Court of Arbitration Bulletin Special Supplement, *UNIDROIT Principles: New Developments and Applications* (2005), p. 66.

⁸⁰ ICC Case, 6 January 2003, available at www.unilex.info (abstract, UNILEX No. 12111).

⁸¹ Too critical in this respect, M. Bonell, 'UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law' in (2004-1) 5 *Uniform Law Review* 35; cf. R. Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods', at p. 201, available at www.cisg.law.pace.edu/cisg/biblio/koch.html.

substantive issues of the contract, but also the question of limitation, whether classified as substantive or procedural.⁸² This solution not only follows as a logical consequence in those legal systems that classify limitation periods as part of substantive law, but nowadays also holds water in those countries (including England) that have enacted the 1980 Rome Convention on the law applicable to contractual obligations.⁸³ This Convention expressly classifies the issue of limitation as a matter of substantive law,⁸⁴ and the same holds true for the intended Rome I Regulation, which is to succeed the 1980 Rome Convention in the near future.⁸⁵

However, problems may still subsist where the *lex loci arbitri* follows the procedural classification, while the *lex causae* classifies the issue of limitation as being substantive. Imagine the case where the parties designate English law, or any other national law of a Member State of the European Union, whereas New York is the seat of the arbitration; or the situation where the parties choose New York law, but the seat of arbitration is in Geneva, Switzerland.

It would be arbitrary to classify the question of limitation according to the *lex loci arbitri*. The arbitral situs cannot prevail over the parties' choice of law.⁸⁶ In many cases, the parties do not even choose the seat of the arbitration proceedings themselves, this depending on the rules of the chosen institution.⁸⁷ However, even if the parties explicitly choose a place where the arbitration is to be carried out, the reasons are usually that they choose the law of this particular country to govern the arbitration proceedings as the *lex arbitri* because it is favourable to arbitration or, as a compromise, 'neutral',⁸⁸ such as Swiss law. The place of arbitration provides no further connection to the dispute other than being the jurisdiction where the award is made, and whose courts are competent to supervise the arbitration, *e.g.*, to resolve any disputes with respect to appointment and/or challenge of the arbitrators, and to set aside the award.⁸⁹

To sum up, where the parties, by way of a choice of law clause, opt for a specific domestic law, this law governs the question of limitation of actions, notwithstanding how it is classified there. In this case, it might be questionable whether the limitation regime of the UNIDROIT Principles may still be applicable as an international trade usage, as provided for in most arbitration rules.⁹⁰ If it can be ascertained that the parties consciously chose the national law with its specific limitation period, then there is no basis on which to force uniform

⁸² P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn, Tübingen, 1989), para. 742.

⁸³ 80/934/EEC, [1980] OJ L266/1, 9 October 1980.

⁸⁴ Rome Convention 1980, Art. 10(1)(d).

⁸⁵ See Art. 11(1)(d) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ('Rome I'), COM(2005) 650 final (15 December 2005).

⁸⁶ But see ICC Case No. 4491 (1985), *supra* n. 46.

⁸⁷ *e.g.* ICC Rules, art. 14; LCIA Rules, art. 16; SCC Rules, art. 13(iii).

⁸⁸ O. Sandrock, 'Welches Kollisionsrecht hat ein Internationales Schiedsgericht anzuwenden?' in (1992) *RIW* 785 at p. 787; F. B. Weigand, *supra* n. 63 at Part 5; UNCITRAL Model Law, art. 28 para. 6.

⁸⁹ S. Greenberg, 'The Law Applicable to the Merits in International Arbitration' in (2004) 8 *Vindobona J* 315 at p. 317.

⁹⁰ See *supra* II(b)(ii). Cf. F. Vischer, n. 70 at pp. 445, 451; S. Schilf, *supra* n. 15 at pp. 236, 238.

law upon them. In this case, if the CISG governs the contract, the national limitation period still has to be interpreted in accordance with the two-year time limit for giving notice set forth in Article 39(2) of the CISG and may, in no case, be shorter than two years.⁹¹

(c) *The Arbitrators' Best Choice of Limitation Periods*

If the parties have not chosen a law to govern their contract, it is up to the arbitral tribunal to determine the applicable law.⁹² There are still several approaches underlying the respective arbitration rules.⁹³ Under the traditional conflict of laws approach, the tribunal designates a conflict of laws rule that then leads to the applicable domestic law. However, modern rules allow the tribunal to directly determine the applicable law (*voie directe*), either by applying a closest connection test or via its own wide discretion.

(i) *Traditional conflict of laws approach*

The most prominent example of the traditional conflict of laws approach can still be found in the UNCITRAL Arbitration Rules (1976), which provide in Article 33(1) sentence 2, that 'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. There have been numerous attempts to narrow the tribunal's discretion and to recommend appropriate conflict of laws rules to be chosen under this provision.⁹⁴

Today, two denationalised and flexible approaches prevail. First, the tribunal may apply general principles of conflict of laws,⁹⁵ which are common to the leading legal systems in the world and reflected in international conventions on conflict of laws rules,⁹⁶ or the closest connection test. In relation to sales contracts,

⁹¹ On this issue under Swiss law, see M.R. Will, 'Meine Großmutter in der Schweiz ...: Zum Konflikt von Verjährung und Rügefrist nach UN-Kaufrecht' in T. Rauscher and H.P. Mansell (eds), *Festschrift für Werner Lorenz zum 80 Geburtstag* (München, 2001), p. 623.

⁹² On this issue, in general, see M. Blessing, *supra* n. 66 at p. 39.

⁹³ On these approaches, see, in general, E. Gaillard and J. Savage, *supra* n. 45 at para. 1537; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-48; N. Kulpa, *supra* n. 58 at p. 162.

⁹⁴ It has been suggested that there is little practical difference between the conflict of laws approach and the direct choice approach because under the traditional conflict of laws approach, the arbitrator can still directly choose the law, see P. Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law' in (2001) 17(3) *Arb. Int'l* 235 at p. 239. *But see* B. Wortmann, 'Choice of Law by Arbitrators: the Applicable Conflict of Laws System' in (1998) 14(2) *Arb. Int'l* 97 at p. 100, stating with regard to the direct choice method that 'if arbitrators apply the national law of a country without any recourse to conflict of laws rules, they are always influenced by certain considerations having led them to exactly this particular system of law. These considerations are nothing more than the application of conflict of laws rules because the arbitrators will almost always look at factors, such as the "closest connection" of the contract, in order to determine the applicable law.'

⁹⁵ See ICC Case No. 6527, (1991) (1993) *Yearbook of Commercial Arbitration* 44 at p. 46; E. Gaillard and J. Savage, *supra* n. 45 at para. 1548; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-65; O. Chukwumerije, *Choice of Law in International Commercial Arbitration* (Wesport, CT, 1994), p. 129.

⁹⁶ ICC Case No. 6281 (1989), available at www.cisg.law.pace.edu/cases/896281i1.html; ICC Case No. 5713 (1989), available at www.cisg.law.pace.edu/cases/895713i1.html; B. Wortmann, *supra* n. 94 at pp. 97, 109; e.g. Hague Convention on the Law Applicable to International Sales of Goods, 15 June 1955; Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 22 December 1986; Rome Convention on the Law applicable to Contractual Obligations.

both approaches regularly lead to the application of the law of the seller, who effects the characteristic performance of the contract. Secondly, one may apply the choice of law systems of the countries having a relation to the dispute in question either by way of a 'cumulative approach'⁹⁷ or according to the '*trunc commun*' method.⁹⁸ If those national conflict of laws rules lead to the same substantive law, the interest of the states involved are protected to the utmost extent. Whether this equally applies to the interests of the parties, however, is questionable. Even if both conflict of laws rules lead to the application of the same law – that of the state where the seller has its place of business – this, in itself, does not mean that the applicable limitation regime of the seller's law is suitable for an international contract and that the outcome is foreseeable for a reasonable buyer in the given case. In any case, the limitation period must be in congruence with the general position taken by the CISG, as expressed in its Article 39(2), as well as with international trade usages, which are expressly safeguarded in arbitration rules. As already set out above,⁹⁹ the UNIDROIT Principles may well be regarded as a yardstick in this regard.

(ii) *Modern direct choice method*

Most modern institutional arbitration rules recognise what arbitrators do in practice¹⁰⁰ and entitle the arbitrators to ascertain the proper law of the contract directly, *i.e.* without any reference to conflict of laws rules. While the traditional choice of substantive law via conflict of law rules is often 'complicated'¹⁰¹ and 'creates a sometimes cumbersome extra step in the arbitral process',¹⁰² the direct approach allows an accelerated and cost-effective procedure.¹⁰³ Again, two approaches may be distinguished. Under the first, the arbitration rules themselves give the tribunal guidelines as to how to determine the applicable law, namely to choose the law or rules of law 'with which the dispute has the closest connection'¹⁰⁴ or 'with which the subject-matter of the proceedings is most closely connected'.¹⁰⁵ Under the second approach, the tribunal enjoys complete freedom in choosing the applicable law. Arbitration rules embracing this approach usually

⁹⁷ Cf. E. Gaillard and J. Savage, *supra* n. 45 at para. 1547; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-61; B. Wortmann, *supra* n. 94 at pp. 97, 108; A.F.M. Maniruzzaman, 'Conflict of Laws Issues in International Arbitration: Practice and Trends' in (1993) 9(4) *Arb. Int'l* 371 at p. 386.

⁹⁸ Cf. M. Rubino-Sammartano, 'Le trunk commun des lois nationales en présence' in (1987) *Revue de l'Arbitrage* 133; see also M. Blessing, *supra* n. 75 at pp. 391, 398; S. Greenberg, *supra* n. 94 at pp. 315, 327.

⁹⁹ See *supra* II(b)(ii).

¹⁰⁰ J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *supra* n. 41 at paras 17-72.

¹⁰¹ J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (New York, 1978), p. 371; ICC Case No. 4237, 17 February 1984, (1985) 10 *Yearbook of Commercial Arbitration* 52.

¹⁰² S. Baker and M. Davies, *The UNCITRAL Arbitration Rules in Practice* (Deventer, 1982), p. 181.

¹⁰³ J.D.M. Lew, *supra* n. 101 at p. 371; K. Lionnet and A. Lionnet, *Handbuch der Internationalen und Nationalen Schiedsgerichtsbarkeit* (3rd edn, Stuttgart, 2005), p. 78.

¹⁰⁴ Swiss Rules, art. 33(1).

¹⁰⁵ DIS Rules, s. 23.2.

empower the tribunal to apply the law or rules of law which it determines or considers to be 'appropriate'¹⁰⁶ or 'most appropriate'.¹⁰⁷

Both approaches may easily lead the tribunal to apply uniform rules regulating the question of limitation.¹⁰⁸ Under the closest connection approach, it can well be argued that the closest connection to an international sales contract that is governed by the CISG cannot be found in any domestic law provisions, but has to be sought on an international, if possible uniform level, leading to a foreseeable and fair result for the parties. The same holds true for the determination of the '(most) appropriate' law or rules of law. Again, as has been stated in connection with international trade usages,¹⁰⁹ it is almost impossible to apply the Limitation Convention, having regard to its limited acceptance even today, although it was explicitly designed to complement the CISG and, indeed, would be appropriate in the overwhelming majority of cases. However, the UNIDROIT Principles can fill this lacuna, provide a neutral and reasonable result and thus, guarantee a predictable, level playing field for the parties.

III. FINAL REMARKS

Although the CISG has considerably eased the arbitral tribunal's task of tackling the difficult problems that can potentially arise out of an international sales contract, crucial unresolved questions still remain when it comes to limitation of actions. This is all the more unsatisfactory because recourse to national law leads to unpredictable and sometimes harsh results, which can hardly be called appropriate in an international commercial setting.¹¹⁰

Beyond the more or less uncontroversial case of the parties themselves stipulating a certain limitation period in their contract, the UNIDROIT Principles 2004, with their implementation of a limitation regime, may yield a satisfying solution. The arbitral tribunal may choose this uniform set of rules not only if the parties designate it by an explicit choice of law, but also as an international trade usage in the sense of both Article 9(2) of the CISG and the applicable arbitration rules. Even a choice of national law by the parties does not necessarily exclude the application of uniform rules.

The application of the limitation regime of the UNIDROIT Principles 2004 is all the more warranted if the parties have not chosen the law to govern their contract, and it is left to the arbitral tribunal to determine the applicable law according to the arbitration rules in question. In this case, both the traditional conflict of laws approach and the direct choice method lead to a limitation regime that provides a foreseeable and reasonable solution for parties to an international sales contract, as set out in the UNIDROIT Principles 2004.

¹⁰⁶ ICC Rules, art. 17(1) sentence 2; AAA/ICDR Rules, art. 28(1) sentence 2; *see also* LCIA Rules, art. 22.3 sentence 2.

¹⁰⁷ SCC Rules, art. 24(1) sentence 2.

¹⁰⁸ M. Bonell, *supra* n. 2 at pp. 517, 529.

¹⁰⁹ *See supra* II.(b)(ii).

¹¹⁰ *See also* K. Boele-Woelki, *supra* n. 11 at p. 1.