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New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations

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Parties to international sale of goods transactions often exercise their rights to choose a governing law and refer disputes to arbitration. Where their choice is incomplete, as is the case where the Contracts for the International Sale of Goods (CISG) is chosen, complex conflict of laws problems can arise, including disputes over the governing limitation period. While such disputes are traditionally resolved using conflict of laws methodologies, this article argues a superior solution can be achieved through procedural law. Through a simple discretion, arbitral tribunals may apply the limitation period from either the International Institute for the Unification of Private Law (UNIDROIT) Principles 2004 or the UN Limitation Period Convention. Such an approach makes determination of the governing limitation period a simpler process, allowing parties to focus their attention on what they are really concerned with—the merits.

I. INTRODUCTION

The growing importance of arbitration in regulating international commercial relationships is well documented,[1] as are its potential advantages.[2] Arbitration can be more time and cost efficient than litigation,[3] helps ensure confidentiality,[4] and simplifies enforcement in foreign jurisdictions through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[5] Further, arbitration's inherent flexibility has meant "an arbitration clause is almost a 'must' in all contracts of international trade and commerce."[6]

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[1] *See generally* Edward Leahy & Carlos Bianchi, *The Changing Face of International Arbitration*, 17 J. INT'L ARB. 19 No. 4, 2000; MICHAEL PRYLES, JEFF WAINCYMER & MARTIN DAVIES, INTERNATIONAL TRADE LAW: COMMENTARY AND MATERIALS 572, para. 12.05 (2d ed. 2004); Margaret Wang, *Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?*, 16 ARB. INT'L 189, 189–93 (2000); *see also* J. Gillis Wetter, *The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years*, 11 ARB. INT'L 117, 123–24 (1995) (discussing the lack, in 1995, of reliable statistical evidence to support this widely held belief); *but cf.* Pricewaterhouse-Coopers, *International Arbitration: Corporate Attitudes and Practices 2008* (2008), (providing current statistical evidence of the preference for International arbitration as a dispute resolution mechanism) *available at* <www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf>.

[2] *See generally* Klaus Peter Berger, *Understanding International Commercial Arbitration, in* UNDERSTANDING TRANSNATIONAL COMMERCIAL ARBITRATION 7–8 (Center for Transnational Law ed., 2000).

[3] Wang, *supra* note 1, at 192.

[4] *See generally* Leahy & Bianchi, *supra* note 1, at 36–42; Leon Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L 1 (2002).

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 19, 1958, 330 U.N.T.S. 38 (*entered into force* June 7, 1959) [hereinafter "New York Convention"]; *see generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 706–08 (2d ed. 2001).

[6] JOHN MO, INTERNATIONAL COMMERCIAL LAW 663, para. 11.10 (3d ed. 2003); *see also* Berger, *supra* note 2, at 6.

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[7] grants parties considerable freedom to choose a governing law.[8] International instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG)[9] are an obvious choice, especially where neutrality is desired.[10] Difficulties arise, however, where a choice is "incomplete." Indeed, the CISG "seldom suppl[ies] sufficiently defined standards to resolve all the legal issues which may arise."[11] It instead adopts an "eclectic model" of regulation, presupposing supplementation by other sources of law.[12] Conflict of laws rules are typically used to identify the domestic law governing matters outside the CISG's scope.[13] Put simply, conflict of laws problems are not avoided where a chosen law is incomplete.[14]

While conflict of laws questions often "sound academic," they are in fact "questions of crucial practical significance" as their resolution can "directly determine the outcome of a case."[15] The practical importance of such questions is illustrated by the following example:

> Carter Co. (incorporated in Tollana) sells industrial machinery to Daniel Co. (incorporated in Oralla), under a contract submitting any disputes to arbitration in Atlantis (a Model Law jurisdiction)[16] and adopting the CISG as its governing law.[17] Daniel Co. alleges non-conformity, and after three years of unsuccessful negotiations submits the matter to arbitration. Carter Co. defends by arguing the governing limitation period has expired. Tollana's limitation period runs for two years and has now clearly expired, while Oralla's four-year period has one whole year left to run. Successfully arguing Tollana's period applies will completely absolve Carter Co. from liability. Conversely, if Oralla's period applies, Carter Co. must defend its liability on the merits.[18]

The purpose of this article is to analyze how the governing limitation period may be determined in this context. Section II examines the CISG's parameters to demonstrate limitation periods are outside the Convention's scope. Section III analyzes the conflict of

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[7] U.N. Doc. A/40/17, Annex I, adopted by the United Nations. Commission on International Trade Law on June 21, 1985 [hereinafter "Model Law"].

[8] Model Law, art. 28.

[9] United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 1489 U.N.T.S. 3 (*entered into force* Jan. 1, 1988) [hereinafter "CISG"].

[10] *See, e.g.*, B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 187, 189 (1988).

[11] W. Laurence Craig, William W. Park & Jan Paulsson, International Chamber of Commerce Arbitration 319, para. 17.01 (3d ed. 2000); *see also* Herbert Bernstein & Joseph Lookofsky, Understanding the CISG in Europe 22–23 (2d ed. 2003); Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 Am. J. Comp. L. 403, 404 (1991).

[12] Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J.L. & Com. 1, 3 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/De%20Ly.pdf>; *see also* Bruno Zeller, *Four Corners: The Methodology for Interpretation and Application of the U.N. Convention on Contracts for the International Sale of Goods* para. 2.8a (Pace Law School Working Paper, 2003), *available at* <http://eprints.vu.edu.au/88/1/4corners.html>.

[13] Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 Yale J. Int'l L. 1, 14 (1993); Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 Victoria U. Wellington L. Rev. 781, 788 (2005).

[14] Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kroll, Comparative International Commercial Arbitration 424 n. 50 (2003).

[15] Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. Int'l Arb. 39, 49 (No. 2, 1997).

[16] This article's analysis proceeds on the assumption that the *lex arbitri* is the same as the *lex loci arbitri*; *see generally* William W Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21, 23 (1983).

[17] Given Model Law, art. 28(1), permits parties to choose "rules of law," it is permissible for these hypothetical arbitrants to adopt the CISG in the "abstract" rather than as part of a domestic legal order; *see generally* Georgios Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 Revue Hellenique de Droit International 191, para. IBiii (1999), *available at* <www.cisg.law.pace.edu/cisg/biblio/petrochilos.html>.

[18] Adapted from Institute of International Commercial Law, 13th Moot Problem (2005), *available at* <www.cisg.law.pace.edu/cisg/moot/moot13.pdf>; *see also* J.A.C. Thomas, Private International Law 161 (1955).

laws methodologies traditionally applied to resolve such disputes. Section IV discusses an alternative and (it is submitted) superior approach based on procedural law, focusing on the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2004[19] and the United Nations Convention on the Limitation Period in the International Sale of Goods.[20] Section V considers the practical implications of this analysis by reference to the above example. This article concludes by considering the implications of its analysis for the arbitration of contractual disputes otherwise governed by the CISG.

II. Parameters and Scope of the CISG

> The Convention on Contracts for the International Sale of Goods (CISG) is not a monolithic system; from the outset it envisaged coexistence with other sources of law.[21]
>
> The CISG does not attempt to provide rules for every legal issue that can arise in an international sales transaction … The Convention's ambitions, understandably, are far more modest.[22]

Where the Model Law applies, primacy is given to party choice in determining a contract's governing law.[23] If that choice deals with all matters in dispute, there is no conflict of laws to resolve. A careful analysis of the CISG's scope is therefore required, to determine whether limitation periods fall within its regulatory regime.

No provision of the CISG expressly purports to regulate limitation periods. The two-year notice provision in CISG, Article 39(2) does serve a similar function,[24] and has been described by some commentators as a "limitation period."[25] This matter is, however, clearly distinct from the limitation of actions.[26] Nevertheless, the CISG's silence on limitation periods is not conclusive of the matter.[27]

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[19] International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2d ed. 2004) [hereinafter "UNIDROIT Principles 2004"].

[20] United Nations Convention on the Limitation Period in the International Sale of Goods, *opened for signature* June 12, 1974, 1511 U.N.T.S. 99 (*entered into force*, as amended by 1980 Protocol, August 1, 1988) [hereinafter "U.N. Limitation Period Convention"].

[21] De Ly, *supra* note 12, at 1.

[22] Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 187, 198 (1998).

[23] Model Law, art. 28(1).

[24] On the analogous provisions under the UNIDROIT Principles 2004, *see generally* UNIDROIT Principles 2004, *supra* note 19, at 313 (art. 10.1 Comment para. 2); Peter Schlechtriem, *Limitation Periods* (Revised Draft No. L–Doc. 68) 2, para. 2 (2001), *available at* <www.unidroit.org/english/documents/2001/study50/s-50-068-e.pdf>.

[25] *See, e.g.*, Mo, *supra* note 6, at 122, para. 2.136.

[26] Bernstein & Lookofsky, *supra* note 11, at 96; Fritz Enderlein & Dietrich Maskow, International Sales Law 161 (1992); Daniel Girsberger, *The Time Limits of Article 39 CISG*, 25 J.L. & Com 241, 248 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Girsberger.pdf>; John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 276, para. 254.2a & 286, para. 261.1E (3d ed. 1999); Sonja Kruisinga, *What Do Consumer and Commercial Sales Law have in Common? A Comparison of the EC Directive on Consumer Sales Law and the U.N. Convention on Contracts for the International Sale of Goods*, 9 Eur. Rev. Priv. L. 177, 185 (2001); Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods, in* International Encyclopedia of Laws: Contracts 109 (J. Herbots ed., 2000); Ingeborg Schwenzer, *Article 39, in* Commentary on the UN Convention on the International Sale of Goods (CISG) 318, para. 28 (Peter Schlechtriem ed., 2d ed. 1998); Ingeborg Schwenzer & Simon Manner, *The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 Arb. Int'l 293, 294 (2007); Kazuaki Sono, *Article 39, in* Commentary on the International Sales Law 306–07, para. 1.9 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

[27] Michael Joachim Bonell, *Article 7, in* Commentary on the International Sales Law 75 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Stefan Kroll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J.L. & Com. 39, 41 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Kroll.pdf>.

The CISG distinguishes "internal" from "external" gaps.[28] Internal gaps are *within* the Convention's scope, but not expressly settled, in which case CISG, Article 7(2) requires reference to the Convention's general principles before domestic law.[29] External gaps are *outside* the Convention's scope altogether, in which case CISG, Article 7(2) has no application[30] and recourse is automatically had to private international law.[31]

Delineating the Convention's boundaries is a task fulfilled by CISG, Article 4.[32] As the Convention's "table of contents"[33] that Article sets out the CISG's scope as follows:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
> (b) the effect which the contract may have on the property in the goods sold.

The CISG's scope is thus "*restricted* to the formation of the contract and the rights and duties of the buyer and seller"[34]—an "emphatic statement" directing the reader "to look elsewhere for solutions to other questions."[35] The words "[i]n particular" emphasize that contractual validity and property are not the *only* matters excluded from the Convention's scope.[36] The preliminary question for our hypothetical arbitrants, therefore, is whether CISG, Article 4 encompasses the subject of limitation periods. If the limitation of actions is insufficiently related to the matters set out in CISG, Article 4, the matter is implicitly excluded.[37]

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[28] *See, e.g.*, MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE 51, para. 2.21 (1999); John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* para. 4.3.a (2000), *available at* <www.cisg.law.pace.edu/cisg/biblio/felemegas.html>; Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*, 7 VINDOBONA J. INT'L COM. L. & ARB. 63, 80–81 (2003); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, UNIFORM L. REV. 683, 696–97 (2000–2004); Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q. REV. 201, 210 (1989).

[29] Ferrari, *supra* note 28, at 80–81.

[30] Bonell, *supra* note 27, at 75–76; Lookofsky, *supra* note 11, at 407.

[31] Peter Schlechtriem, *Article 4, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 65, para. 6 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d English ed. 2005); Schlechtriem, *supra* note 13, at 788.

[32] Peter Schlechtriem, *Article 7, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 95–96, para. 8 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d English ed. 2005); *see also* Bonell, *supra* note 27, at 75; Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 89 (2005) *available at* <www.uncitral.org/pdf/english/CISG25/Lookofsky.pdf>.

[33] Anna Kazimierska, *The Remedy of Avoidance Under the Vienna Convention on the International Sale of Goods, in* PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 157 (1999–2000).

[34] UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods* para. 11, *available at* <www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (visited January 20, 2009) (emphasis added); *see also* Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 252 (1996); Bruno Zeller, *Is the Sale of Goods (Vienna Convention) Act the Perfect Tool to Manage Cross Border Legal Risks Faced by Australian Firms?*, 6 MURDOCH U. ELECTRONIC J.L. para. 69 (1999), *available at* <www.murdoch.edu.au/elaw/issues/v6n3/zeller63.html>.

[35] Warren Khoo, *Article 4, in* COMMENTARY ON THE INTERNATIONAL SALES LAW 46, para. 3.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

[36] *Id.* at 45, para. 2.4; Schlechtriem, *Article 4*, *supra* note 31, at 70, para. 19.

[37] Bridge, *supra* note 28, at 51, para. 2.21.

The vast weight of authority treats limitation periods as *outside* CISG, Article 4 and thus *outside* the Convention's scope.[38] This seems to be the plain result of CISG, Article 4, even on the "liberal and flexible" interpretation required by CISG, Article 7(1).[39] Applying an ordinary meaning to "formation of the contract,"[40] it is self-evident that limitation periods are not included. Formation refers to "the technical process of concluding a contract,"[41] an issue unrelated to the limitation of actions. Notwithstanding the lack of a "universally accepted" definition of "rights and obligations,"[42] this also cannot extend to limitation periods. Whilst the passage of time might affect the enforcement of rights, limitation periods are not rights or obligations in themselves.

Further support for this view can be derived from CISG, Article 7(1), requiring consideration of the Convention's "international character" in its interpretation. Limitation periods in the international sale of goods are regulated by the separate (and pre-existing) UN Limitation Period Convention,[43] with which the CISG was always intended to coexist.[44] Matters pertaining to the CISG's legislative history play an "important role" in the Convention's interpretation,[45] thus this intended coexistence strengthens the conclusion reached above.

While Professor Schlechtriem suggests this view is accepted with "unanimity,"[46] a relatively recent Paris Court of Appeal decision[47] puts forward the alternative viewpoint. With respect, this decision should be treated with caution. The court suggested limitation periods are governed by the CISG but not expressly settled in it, for the purpose of invoking French private international law under CISG, Article 7(2).[48] This reasoning is flawed. As indicated above, CISG, Article 7(2)'s importance lies in its instruction to consider the Convention's general principles *before* domestic law: it permits a tribunal to stay "within" the Convention[49] (having recourse to domestic law only as a "last resort").[50] It is *not* an "enabling" provision which "permits" recourse to private international law.

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[38] *See, e.g.*, PETER SCHLECHTRIEM, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 72 (1986); Schlechtriem, *Article 4*, *supra* note 31, at 71, para. 21; Schwenzer, *supra* note 26, at 318, para. 28; Ulrich Huber, *Article 45, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 372, para. 62 (Peter Schlechtriem ed., 2d ed. 1998); HONNOLD, *supra* note 26, at 276, para. 254.2a; Kazimierska, *supra* note 33, at 130; Zeller, *supra* note 12, para. 2.8a.

[39] Bonell, *supra* note 27, at 73.

[40] Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* January 27, 1980) [hereinafter "Vienna Convention"].

[41] Kroll, *supra* note 27, at 42.

[42] *Id.* at 47.

[43] U.N. Limitation Period Convention, art. 1(1); *see also* Schwenzer & Manner, *supra* note 26, at 302.

[44] De Ly, *supra* note 12, at 3–4.

[45] Alexander Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75, 78 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Komarov.pdf>.

[46] Schlechtriem, *Article 4*, *supra* note 31, at 71, para. 21.

[47] Traction Levage S.A. v. Drako Drahtseilerei Gustav Kocks GmbH, Cour d'appel Paris, November 6, 2001, *available at* <http://cisgw3.law.pace.edu/cases/011106f1.html>.

[48] Claude Witz & Timo Niebsch, *Abstract No. 482, in* CASE LAW ON UNCITRAL TEXTS (UNCITRAL ed., 2001), *available at* <http://cisgw3.law.pace.edu/cases/011106f1.html>; UNILEX, *Case Abstract* (2001), *available at* <www.unilex.info/case.cfm?pid=1&do=case&id=772&step=Abstract>.

[49] Lookofsky, *supra* note 32, at 88.

[50] Bonell, *supra* note 27, at 83.

Where a decision-maker is confronted by "external" gaps, it is the confines of CISG, Article 4 that necessitates reference to private international law.[51] Given the Paris Court of Appeal did not apply any general principles underpinning the CISG, its conclusion would have been the same had it treated limitation periods as outside the Convention's scope. This court's view should not be preferred—it appears to reflect the (unfortunate) general tendency of courts in failing to properly distinguish between CISG, Articles 4 and 7(2).[52]

Returning to our hypothetical arbitrants, Carter Co. and Daniel Co.'s choice of law has not avoided conflict of laws problems. Despite expressly adopting the CISG, the parties are in dispute over a matter completely external to the Convention's scope. It is thus necessary to determine what other law governs this limitation period issue.

III. Conflict of Laws

> "Conflict of laws": [T]hat part of the law … which deals with cases having a foreign element … The questions that arise in conflict of laws cases are of two main types: first, has the … court jurisdiction to determine this case? And secondly, if so, what law should it apply?[53]

A. The orthodox view

As indicated above, disputes over the governing limitation period in international commercial arbitration are traditionally resolved through conflict of laws methodologies.[54] In the case of our hypothetical arbitrants, this follows from the application of Model Law, Article 28(2):

> (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

B. Some orthodox solutions

Under Model Law, Article 28(2), tribunals are required to apply conflict of laws rules. However, no guidance is given as to *which* rules should be applied. Unlike the judiciary, arbitrators "are not instruments of a state's judicial process" and are thus not required to apply the arbitral seat's national conflict rules.[55] Rather, tribunals enjoy

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[51] Schlechtriem, *Article 4*, *supra* note 31, at 65, para. 6; Schlechtriem, *supra* note 13, at 788.

[52] *See generally* Kroll, *supra* note 27, at 40–41.

[53] Dicey, Morris, and Collins on the Conflict of Laws 3, paras. 1-001–4, 1–003 (Lawrence Collins ed., 14th ed. 2006).

[54] *See, e.g.*, ICC Case No. 6149/1990 (Interim Award), 20 Y.B. Com. Arb. 41, para. 54 (1995); *see also* Schwenzer & Manner, *supra* note 26, at 305.

[55] Okezie Chukwumerije, Choice of Law in International Commercial Arbitration 214 (1994).

considerable flexibility[56] and are "free to apply any conflict rule" deemed "applicable"[57]—possibly even rules suggested in scholarly writings.[58]

One option available to tribunals is to apply national conflict of laws rules. Though not required to, a tribunal might still apply the arbitral seat's private international law,[59] or perhaps the conflict rules of either party's state. Where the conflict rules of states converge in result, a tribunal may alternatively adopt a "cumulative" approach and apply the indicated law on the basis of that cumulative result.[60]

Another option open is to fashion an individual conflict of laws rule appropriate to the particular case, by "finding common or widely-accepted principles in the main systems of private international law."[61] A tribunal may draw on previous arbitral awards (notwithstanding a lack of strict precedential value) and international conventions (even if not in force or adopted by either party's state) as reflecting "a certain consensus" on this matter.[62]

The closest connection test is a commonly applied individual rule. This rule was described by Blessing as the "central concept in private international law,"[63] and Nygh suggests it is supported with "near unanimity."[64] It finds expression in both the Convention on the Law Applicable to Contractual Obligations[65] and Convention on the Law Applicable to CISG,[66] as well as being widely applied in the common law world.[67] Under this approach, tribunals must analyze "various elements in each contractual instrument with a view to establishing as governing law the law of that country with which the contract has its closest connection."[68] Specific factors relied upon to demonstrate this connection may include:

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[56] Fouchard, Gaillard, Goldman on International Commercial Arbitration 871, para. 1546, 875, para. 1550 (Emmanuel Gaillard & John Savage eds., 1999); A.F.M. Maniruzzaman, *Conflict of Laws Issues in International Arbitration: Practice and Trends*, 9 Arb. Int'l 371, 373 (1993).

[57] Blessing, *supra* note 15, at 54.

[58] Lew, Mistelis & Kroll, *supra* note 14, at 431.

[59] Fouchard, Gaillard, Goldman, *supra* note 56, at 867, para. 1541, 869, para. 1543; *see, e.g.*, ICC Case No. 5460/1987, 13 Y.B. Com. Arb. 104, paras. 1–3 (1988).

[60] Fouchard, Gaillard, Goldman, *supra* note 56, at 872, para. 1547; *see, e.g.*, ICC Case No. 5314/1988 (Interim Award), 20 Y.B. Com. Arb. 35, paras. 4, 12–13 (1995); ICC Case No. 7319/1992 (Partial Award), 24a Y.B. Com. Arb. 141, paras. 14–17 (1999); *see also* Stockholm Chamber of Commerce Interim Award, July 17, 1992, 22 Y.B. Com. Arb. 197, paras. 17–18 (1997).

[61] Fouchard, Gaillard, Goldman, *supra* note 56, at 873, para. 1548.

[62] *Id.* at 874, para. 1549.

[63] Blessing, *supra* note 15, at 54.

[64] Peter Nygh, *Choice of Forum and Law in International Commercial Arbitration*, Forum Internationale 1, 21 (No. 24, 1997).

[65] Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 19 I.L.M. 1492 (*entered into force* April 1, 1991) [hereinafter "Rome Convention"]; *see generally* Rome Convention, art. 4.

[66] Convention on the Law Applicable to Contracts for the International Sale of Goods, concluded December 22, 1986 (not yet in force) [hereinafter "Hague Convention"]; *see generally* Hague Convention, art. 8.

[67] *See, e.g.*, Bonython v. Commonwealth of Australia, [1951] A.C. 201, 219 (Lord Simonds); Peter North, Private International Law Problems in Common Law Jurisdictions 104 (1993); Reid Mortensen, Private International Law in Australia 389, para. 15.6 (2006); P.E. Nygh & Martin Davies, Conflict of Laws in Australia 367, para. 19.7 (7th ed. 2002); Michael Tilbury, Gary Davis, & Brian Opeskin, Conflict of Laws in Australia 754 (2002); J.G. Castel, Canadian Conflict of Laws 549–50, para. 424 (3d ed. 1994).

[68] J. Gillis Wetter, *Choice of Law in International Arbitration Proceedings in Sweden*, 2 Arb. Int'l 294, 300 (1986).

- the place in which contractual negotiations occurred;[69]
- the place in which the parties' contract was formed,[70] though its precise determination[71] and relevance[72] may be open to dispute;
- the place in which performance of the contract occurred[73] (including the places of delivery[74] and payment[75]), though some have likewise questioned the relevance of this factor;[76] and
- the place of residence of both parties to the contract.[77]

What tribunals cannot do, under Model Law, Article 28(2), is apply the so-called *voir directe*—a "direct choice" of governing law. Unlike some modern arbitration rules,[78] Model Law, Article 28(2) specifically requires use of conflict of laws rules. The significant autonomy granted to arbitral tribunals does not mean they can determine the governing law without recourse to any rules at all.[79] In any event, a direct choice must always be

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[69] *See, e.g.*, ICC Case No. 5314/1988 (Interim Award), 20 Y.B. COM. ARB. 35, 37, para. 6 (1995).

[70] *See, e.g., id.*; *see*, especially, CASTEL, *supra* note 67, at 561, para. 430 (suggesting this factor may be highly important where it is also the place of performance).

[71] *See, e.g.*, CISG, art. 23, which provides a contract is concluded "when" an acceptance becomes effective, while this provision's indication of the *place* of contracting was accepted in argument in Roder Zelt-Und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. & Eustace, (1995) 57 F.C.R. 216, 223, para. 21; this is not necessarily the clear consequence of CISG, art. 23's text.

[72] *See, e.g.*, Amin Rasheed Shipping Corp. v. Kuwait Insurance Corp. (The Al Wahab), [1984] A.C. 50, 62 (Lord Diplock); Blessing, *supra* note 15, at 53; Francis Gabor, *Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods*, 7 NORTHWESTERN J. INT'L L. & BUS. 696, 710 (1986); MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 421 (1945) (all suggesting this factor lacks significance as being often a matter of pure chance).

[73] *See, e.g.*, ICC Case No. 5314/1988 (Interim Award), 20 Y.B. COM. ARB. 35, 37, para. 6 (1995); ICC Case No. 5460/1987, 13 Y.B. COM. ARB. 104, 106, para. 1 (1988); Re United Railways of the Havana & Regla Warehouses Ltd., [1960] 2 All E.R. 332, 350 (Lord Radcliffe); ABLA MAYSS, CONFLICT OF LAWS 71 (1994).

[74] *See, e.g.*, Shanghai Foreign Trade Corp. v. Sigma Metallurgical Co. Pty. Ltd., 22 Y.B. COM. ARB. 609, 611, para. 4 (1997) (Bainton, J.); as to determining the place of delivery, *see generally* CISG, art. 31; INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1999); Ronald Brand, *CISG Article 31: When Substantive Law Rules Affect Jurisdictional Results*, 25 J.L. & COM. 181 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Brand.pdf>; ENDERLEIN & MASKOW, *supra* note 26, at 129–33; Ole Lando, *Article 31, in* COMMENTARY ON THE INTERNATIONAL SALES LAW 249–56 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

[75] *See, e.g.*, ICC Case No. 6560/1990 (Interim Award), 17 Y.B. COM. ARB. 226, 229, para. 11 (1992); as to determining the place for payment, *see generally* CISG, art. 57; ENDERLEIN & MASKOW, *supra* note 26, at 214–21; Henry Deeb Gabriel, *The Buyer's Performance Under the CISG: Articles 53–60 Trends in the Decisions*, 25 J.L. & COM. 273, 277–80 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Gabriel.pdf>; Dietrich Maskow, *Article 57, in* COMMENTARY ON THE INTERNATIONAL SALES LAW 412–19 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); MO, *supra* note 6, at 130, paras. 2.157–2.159; Claude Witz, *The Place of Performance of the Obligation to Pay the Price: Article 57 CISG*, 25 J.L. & COM. 325 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Witz.pdf>.

[76] *See, e.g.*, Amin Rasheed Shipping Corp. v. Kuwait Insurance Corp. (The Al Wahab), [1984] A.C. 50, 62 (Lord Diplock) (suggesting importance of the place of performance varies with the nature of the contract); Hong-Lin Yu, *Choice of Law for Arbitrators: Two Steps or Three*, 4 INT'L ARB. L. REV. 152, 160 (2001) (indicating this factor's importance might diminish where performance occurs across several states).

[77] Courts and tribunals generally presume the closest connection lies with the seller's state, since the seller is assumed to carry out a sales contract's "characteristic performance", *see, e.g.*, ICC Case No. 1455/1967, 3 Y.B. COM. ARB. 215, 216 (1978); ICC Case No. 4237/1984, 10 Y.B. COM. ARB. 52, 55 (1985) (Loek Malmberg); ICC Case No. 5713/1989, 15 Y.B. COM. ARB. 70, 71, para. 3 (1990); *see also* ICC Case No. 6149/1990 (Interim Award), 20 Y.B. COM. ARB. 41, 53–55 (1995), where the closest connection test, proceeding from this presumption, was used to reinforce a conclusion otherwise reached by the cumulative approach; *see* Rome Convention, art. 4(2); Hague Convention, art. 8(1).

[78] *See, e.g.*, International Chamber of Commerce Arbitration Rules, art. 17(1), *adopted* January 1, 1998: "[i]n the absence of any such [party] agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate"; *see generally* YVES DERAINS & ERIC A SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 233–42 (2d ed. 2005); *see also* Schwenzer & Manner, *supra* note 26, at 306–07.

[79] Yu, *supra* note 76, at 152.

influenced by some reasoning, amounting in reality to a de facto conflict rule that should (in the interests of transparency) be made explicit.[80]

C. Defects in the orthodox approach

Vast amounts of literature describe and explain these conflict of laws methodologies. Nevertheless, several limitations make their practical application somewhat problematic.

At a general level, Model Law, Article 28(2) requires a tribunal to choose between competing conflict of laws approaches, creating a second overarching "level" in the process. Uncertainty arises as a consequence of this broad discretion. Selection of the conflict rule should consider (normatively) what the most appropriate rule might be.[81] Selection should also be guided by the need to be objectively fair, subjectively reasonable, and in conformity with "international standards."[82] Such "fuzzy" criteria are likely to provide little practical assistance. As suggested by Gaillard and Savage, "it is hard to see how a choice of law rule, which is abstract by nature, could be 'appropriate' for a particular case."[83] This deficiency is well illustrated if we assume (in our hypothetical dispute) that the cumulative approach favours Tollana's two year limitation period, while the closest connection clearly lies with Oralla (and its four-year stipulation).

Each individual conflict of laws approach also presents specific difficulties. Application of the arbitral seat's conflict rules is often criticized for falsely equating arbitrators to judges.[84] The cumulative approach only works where converging outcomes can be demonstrated[85]—never a certainty, given conflict of laws rules "differ from one country to another in the same way as other rules of private law."[86] The closest connection test is premised on the vague principle that tribunals should ascertain "what just and reasonable persons ought to have intended if they had thought about the matter at the time the contract was made,"[87] notwithstanding that the conflict of laws question *only arises* because the actual parties *did not turn their minds to the governing law*. Further, the outcome of a closest connection analysis can be very uncertain.[88] A dearth of academic literature and case law both supports and critiques the relevance of many connecting factors, and the

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[80] Beda Wortmann, *Choice of Law by Arbitrators: the Applicable Conflict of Laws System*, 14 Arb. Int'l 97, 101 (1998).

[81] Fouchard, Gaillard, Goldman, *supra* note 56, at 875, para. 1550.

[82] Blessing, *supra* note 15, at 53.

[83] Fouchard, Gaillard, Goldman, *supra* note 56, at 875, para. 1550.

[84] *See, e.g., id.* at 867, para. 1541; Chukwumerije, *supra* note 55, at 126–27; Craig, Park & Paulsson, *supra* note 11, at 322, para. 17.01.

[85] Chukwumerije, *supra* note 55, at 129; Wortmann, *supra* note 80, at 110.

[86] Peter Stone, The Conflict of Laws 2 (1995).

[87] Mayss, *supra* note 73, at 71; given this principle, some commentators suggest it is difficult to practically separate application of the closest connection test from the conceptually distinct task of determining an implied choice; *see, e.g.*, Mo, *supra* note 6, at 668–69, paras. 11.24–11.25.

[88] Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* Lex Mercatoria and Arbitration 174 (Thomas E. Carbonneau ed., 1998).

strength of factors required to displace the general presumption favouring a seller's law is far from clear.[89]

As noted by Born, conflict of laws rules seek to provide parties with a measure of certainty as to the law governing their relationship.[90] However, as has been demonstrated, this is typically not the case. The deficiencies inherent in the traditional conflict of laws methodologies leave their application open to critique.

IV. Rules of Procedure

> "Procedure": The judicial rules or manner for carrying on a civil lawsuit or criminal prosecution.[91]
>
> "Procedural law": The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.[92]

A. Reviewing some underlying assumptions

Applying conflict of laws methodologies to determine the governing limitation period rests on a hitherto unexpressed assumption: that the governing limitation period is a matter of substantive (rather than procedural) law. History tells us this need not be the case.

Suggesting that a matter so closely connected with enforcing rights and obligations need not be a matter of substantive law may at first blush seem strange. However, as noted by Chukwumerije, "[t]his distinction between substance and procedure is widely recognized as a cardinal element of international commercial arbitration."[93]

The grounds for setting aside[94] and refusing recognition or enforcement[95] of an arbitral award do not include the misapplication of substantive law. Further, a tribunal's misapplication of substantive law does not justify appellate review in court.[96] These two respects in which arbitration differs from litigation lead Levin to suggest that "in adjudication, law rules; in arbitration this is not necessarily so."[97] Levin goes on to "conjecture that a great many arbitrants and even their attorneys *erroneously* believe that arbitration is

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[89] *See, e.g.*, Dicey, Morris & Collins, *supra* note 53, at 1588, para. 32–127, endorsed in Bank of Baroda v. Vysya Bank Ltd., [1994] 2 Lloyd's Rep. 87, 93 (Mance, J.) (emphasizing relevance of the place of performance); *cf.* Ennstone Building Products Ltd. v. Stranger Ltd., [2002] 1 W.L.R. 3059, 3069–70 (Keene, L.J.) (requiring a clear connection shown on the evidence); VII ZR 408/97, Bundesgerichtshof, Germany, February 25, 1999, where a different place of performance (construction site) was insufficient to displace the presumption.

[90] Born, *supra* note 5, at 531.

[91] Black's Law Dictionary 1241 (Bryan Garner ed., 8th ed. 2004).

[92] *Id.*

[93] Chukwumerije, *supra* note 55, at 78.

[94] Model Law, art. 34.

[95] Model Law, art. 36; New York Convention, art. V.

[96] *See, e.g.*, Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907 (1996) (Green, D.J.), *cited in* Born, *supra* note 5, at 769–74; Ole Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 Tulane J. Int'l & Comp. L. 129, 139 (1995).

[97] Murray Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105, 106–12 (1997); *see generally* Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law: The 2000 Freshfields Lecture*, 17 Arb. Int'l 235 (2001).

to be resolved in accordance with principles of substantive law."[98] Limitation periods in international commercial arbitration are a matter particularly apt for this kind of analysis.

Common law jurisdictions[99] have historically differentiated limitation periods as being matters of either substantive or procedural law. Some commentaries make the generalization that common law states treat limitation periods as procedural, while other states classify them as substantive.[100] It has also been suggested that purported distinctions between substantive and procedural limitation periods lack "unifying principle."[101] However, the true test of characterization (as recognized in the common law) is a simple matter of effect. Limitation periods either extinguish a right itself, or bar the obtaining of a remedy (leaving the right "still in existence").[102] The Australian High Court explained the distinction as follows:

> For the purposes of applying conflict of law rules, English courts have long adopted the distinction that a true statute of limitation, which does no more than cut off resort to the courts for enforcement of a claim, is a procedural law, while a statute which extinguishes a civil liability and destroys a cause of action is a substantive law.[103]

If the legitimacy of this distinction was accepted, application of conflict of laws methodologies in our hypothetical dispute would become unnecessary. Since limitation periods are the only matter in dispute not governed by the CISG, applying a limitation period sourced from *procedural law* ensures all matters in dispute can be fully resolved.

B. Legitimacy of the distinction

Ascertaining the governing law is a task to be "examined and handled very carefully."[104] Given the common law grounding of this distinction, and the criticisms of artificiality it has attracted, a tribunal should naturally be satisfied of the distinction's legitimacy before proceeding on the basis advocated.

1. *Application of Common Law Concepts in International Commercial Arbitration*

As noted by Thomas, "[t]he tendency to classify questions as matters of procedure is a marked feature of *English law*."[105] The desirability of embracing a common law conception of limitation periods, in the context of international commercial arbitration (especially one applying international instruments such as the CISG) requires close scrutiny.

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[98] Levin, *supra* note 97, at 107 (emphasis added).
[99] Including English, Scottish, U.S., and Australian courts; *see generally* McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd., (1991) 174 C.L.R. 1, 41 (Brennan, Dawson, Toohey, & McHugh, JJ.).
[100] *See, e.g.*, Enderlein & Maskow, *supra* note 26, at 400; J.G. Collier, Conflict of Laws 63 (3d ed. 2001).
[101] John Pfeiffer Pty. Ltd. v. Rogerson, (2000) 203 C.L.R. 503, 542–43, para. 97 (Gleeson, C.J., Gaudron, McHugh, Gummow, & Hayne, JJ.).
[102] Thomas, *supra* note 18, at 160–61.
[103] McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd., (1991) 174 C.L.R. 1, 41 (Brennan, Dawson, Toohey, & McHugh, JJ.).
[104] Blessing, *supra* note 15, at 49.
[105] Thomas, *supra* note 18, at 159–60 (emphasis added).

The CISG is an instrument which "provides a uniform text of law for international sales of goods."[106] It must therefore be applied in a fashion unaffected by the peculiarities of national legal systems.[107] This is reflected in CISG, Article 7(1), which requires regard to be had to the CISG's international character and the need to promote uniformity in its application when interpreting the Convention. As observed by the UNCITRAL Secretariat:

> This Convention for the unification of the law governing the international sale of goods will better fulfil its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade.[108]

However, it must be kept in mind that limitation periods are a subject completely outside the CISG's scope. Applying a common law conception of substance and procedure in this context is not necessarily antithetical to a uniform application of the CISG. As noted by De Ly, "Article 7 of the CISG applies to matters governed by the CISG and does not cover issues expressly excluded."[109]

Further support for differentiating substantive and procedural limitation periods in arbitrations applying the CISG rests on the very rationale for separating substance from procedure. In the words of Mason, C.J., of the Australian High Court:

> For the purposes of private international law, an appropriate criterion may be formulated by reference to the principal reason why it is necessary to draw a distinction between matters of substance and procedure. This reason, as has been seen, is associated with the efficiency of litigation. That efficiency is achieved by the adoption and application of the rules of practice and procedure and by the judges' practical familiarity with those rules.[110]

Notwithstanding its long common law history,[111] distinguishing substantive from procedural limitation periods can bring substantial efficiency gains to the conduct of international commercial arbitration (a matter explored *infra*). In an era where the high costs of arbitration are eroding one of its claimed advantages over litigation,[112] this is a matter of substantial importance. Further, the process for adopting procedural limitation periods (also explored below) resonates strongly with the goals of the CISG itself: overcoming the "serious obstacles" to international trade posed by highly divergent national sales laws.[113]

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[106] UNCITRAL Secretariat, *supra* note 34, para. 1.
[107] Komarov, *supra* note 45, at 77.
[108] UNCITRAL Secretariat, *supra* note 34, para. 13.
[109] De Ly, *supra* note 12, at 7.
[110] McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd., (1991) 174 C.L.R. 1, 26.
[111] *See generally* John Pfeiffer Pty. Ltd. v. Rogerson, (2000) 203 C.L.R. 503, 542–43, para. 97 (Gleeson, C.J., Gaudron, McHugh, Gummow, & Hayne. JJ.).
[112] Wang, *supra* note 1, at 196.
[113] Komarov, *supra* note 45, at 75; *see also* Bell, *supra* note 34, at 240; Troy Keily, *Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods*, Nordic J. Com. L. 2 (2003), *available at* <www.njcl.fi/1_2003/art.3.pdf>.

A related problem arises through the necessity to differentiate substance from procedure by reference to the standards of a particular legal system. Substance and procedure "should never be considered in the abstract"[114] (as Thomas puts it), characterization is a process "which *itself will be decided by the lex fori*."[115] This poses an interesting problem in arbitration. As "[i]t is now almost universally accepted that disputes involving parties and arbitrators from different countries cannot be constrained by the same rules as govern courts,"[116] current arbitral practice conceives tribunals as having no *lex fori*.[117]

On one view, seeking to distinguish substance from procedure without having determined a governing law is putting the cart before the horse. However, it is not strictly true that there is *no system* against which the distinction can be drawn. As Dr. Karrer notes, the question of characterizing substance and procedure in arbitration is one "for the *lex arbitri* to decide."[118] While a tribunal has no discretion on the characterization question, the Model Law (like most arbitration laws) is "silent" on the issue.[119]

Dr. Karrer's extensive experience in international commercial arbitration leads him to suggest tribunals should define procedure narrowly, treating as substantive that which "influences the outcome of the case directly."[120] However, it is submitted that limitation periods are a subject for which an exception can be justifiably made. As discussed immediately *infra*, distinguishing substantive from procedural limitation periods has real functional purposes. It is also consistent with the determination of arbitral procedure in incremental steps. Both factors are standards which Dr. Karrer suggests should guide the characterization process.[121]

2. *Practical Significance of the Common Law's Characterization*

Given that the distinction's common law foundations should not themselves preclude recognition in international commercial arbitration, it is necessary to consider the distinction itself in more detail. At first blush, the distinction may seem more apparent than real given that "all limitation provisions can affect whether a plaintiff recovers."[122] It may also seem difficult in principle "to understand why a rule of law which denies a right of action should be construed as procedural."[123]

However, as Cook suggests, assessing whether the distinction between substance and procedure is "illusory and artificial" cannot occur in the abstract; rather, it must be

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[114] A.H. Robertson, Characterization in the Conflict of Laws 122 (1940).
[115] Thomas, *supra* note 18, at 159 (emphasis added).
[116] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 Arb. Int'l 19, 20 (2001).
[117] Berger, *supra* note 2, at 18; Maniruzzaman, *supra* note 56, at 383–84; F.A. Mann, *Lex Facit Arbitrum*, 2 Arb. Int'l 241, 245 (1986).
[118] Pierre A. Karrer, *Freedom of an Arbitral Tribunal to Conduct Proceedings*, 10 ICC Bull. 14, 15, para. 4 (1999).
[119] *Id.* at 15–16, para. 4.
[120] *Id.* at 16, para. 4.
[121] *Id.* at 16, para. 4, 18, para. 7.4, 19, para. 10.
[122] John Pfeiffer Pty. Ltd. v. Rogerson, (2000) 203 C.L.R. 503, 543, para. 98 (Gleeson, C.J., Gaudron, McHugh, Gummow, & Hayne, JJ.); *see also* Schlechtriem, *supra* note 24, at 5, para. 4b.
[123] John Falconbridge, Essays on the Conflict of Laws 308 (2d ed. 1954).

considered with reference to "the purpose in hand."[124] In the judicial context, differing private international law rules for applying substance and procedure are one "forensic purpose" for which the difference has relevance.[125] Practical matters impacted upon in international commercial arbitration include:

- locating an arbitral tribunal's authority to apply the law: authority to apply substantive law is sourced to Model Law, Article 28 while authority to apply procedure (a matter discussed *infra*) is sourced to Model Law, Article 19;
- the ability to validly perform contractual obligations: since substantive limitation periods extinguish rights, they leave no obligations left to perform. By contrast, expiry of a procedural limitation period does not prevent the voluntary satisfaction of obligations[126] "as happens among honourable merchants."[127] Where voluntary satisfaction occurs, valid performance is effected and no claim in restitution is available to recover sums paid;[128]
- legal incidents to an expired claim: set-off has no application where substantive limitation periods expire, since no claims remain in existence; by contrast, the continued existence of obligations after a procedural period's expiry necessarily permits set-off to be raised;[129]
- the manner in which limitation periods operate: since substantive limitation periods affect the very existence of a right, the onus rests on a claimant to "affirmatively prove compliance."[130] Given procedural limitation periods merely bar remedies, courts and tribunals will not raise the matter of their own motion and will require respondents to specifically plead the defense.[131]

Whilst the distinction between substantive and procedural limitation periods can be "a difficult one,"[132] this distinction does have very real and practical consequences. This distinction is one which merits recognition in international commercial arbitration.

C. Problem of characterization

Having properly delineated substantive and procedural limitation periods, and accepted the distinction's fitness for international commercial arbitration, it is now necessary to

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[124] Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws 158 (1949).

[125] McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd. (1991) 174 C.L.R. 1, 40 (Brennan, Dawson, Toohey, & McHugh, JJ.).

[126] Stephen Colbran et al., Civil Procedure: Commentary and Materials 186, para. 4.4.1 (3d ed. 2005).

[127] Schlechtriem, *supra* note 24, at 16, para. 1.

[128] UNIDROIT Principles 2004, *supra* note 19, at 333 (art. 10.11 Comment para. 1); *see also* Peter Schlechtriem, *Limitation of Actions by Prescription*, 10, para. 3a (Position Paper No. L–Doc. 58, 1999), *available at* <www.unidroit.org/english/publications/proceedings/1999/study/50/s-50-58-e.pdf>.

[129] Schlechtriem, *supra* note 24, at 16, para. 2.

[130] Peta Spender, *Civil Procedure, in* Oxford Companion to the High Court of Australia 105 (Tony Blackshield et al. eds., 2001).

[131] Andrew McGee, *A Critical Analysis of the English Law of Limitation Periods*, 9 Civil J.Q. 366, 373 (1990); G.H. Newsom, Limitation of Actions 11–12 (2d ed. 1943).

[132] McGee, *supra* note 131, at 373.

identify procedural limitation periods of potential application. Limitation periods may not be dealt with by the CISG, but they have not gone untouched by other international instruments. On the contrary, they have attracted "much interest" at the international level.[133] The following analysis considers the limitation periods in the UNIDROIT Principles 2004 and U.N. Limitation Period Convention, both of which display the characteristics of procedural law.

1. *Characterizing the UNIDROIT Principles 2004*

The UNIDROIT Principles were first published in 1994,[134] and in their original form contained no provisions regulating the limitation of actions. A new Chapter 10, contained in the revised UNIDROIT Principles 2004, addresses this omission.[135] UNIDROIT Principles 2004, Article 10.2 establishes a two-tiered limitation period. Claimants are given three years to initiate proceedings commencing on the day after the day they know or ought to know the facts as a result of which their right can be exercised.[136] As an outer boundary, claimants are also required to initiate proceedings within ten years of their cause of action accruing.[137]

Drafting of the new limitation period provisions was undertaken in cognizance of the distinction between substantive and procedural limitation periods. As noted by Professor Schlechtriem early in Chapter 10's development, "[t]he rather technical distinction between full extinction … and the lesser effect of creating a defense … must also be considered by the working group."[138]

Pursuant to UNIDROIT Principles 2004, Article 10.9(1), the limitation period's expiry "does not extinguish the right."[139] On the contrary, UNIDROIT Principles 2004, Article 10.9(3) confirms that a stale right "may still be relied on as a defense."[140] The UNIDROIT Principles 2004 limitation period merely bars a right's enforcement.[141] This matter was the result of a quite deliberate choice in drafting,[142] is reflected in adoption of the phrase "limitation of rights" (as opposed to "prescription"),[143] and was modelled on the similarly constructed U.N. Limitation Period Convention (discussed *infra*).[144] Further,

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[133] Schlechtriem, *supra* note 128, at 1, para. 1.

[134] International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (1994).

[135] *See, e.g.*, Michael Joachim 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*, Uniform L. Rev. 5, para. II.1 (2004).

[136] UNIDROIT Principles 2004, art. 10.2(1); *see also* Schwenzer & Manner, *supra* note 26, at 295.

[137] *Id*.

[138] Schlechtriem, *supra* note 128, at 4, para. 6.

[139] *See also* UNIDROIT Principles 2004, *supra* note 19, at 312 (art. 10.1 Comment para. 1).

[140] *Id*. at 332 (art. 10.9 Comment para. 3).

[141] *Id*. at 331 (art. 10.9 Comment para. 1).

[142] Peter Schlechtriem, *Limitation of Rights* 9 [a] (UNIDROIT Study L-WP 2, 2000), *available at* <www.unidroit.org/english/documents/2000/study50/s-50-wp02-e.pdf>; Schlechtriem, *supra* note 24, at 15, para. 1.

[143] Schlechtriem, *supra* note 24, at 2, para. 1.

[144] Schlechtriem, *supra* note 142, at 9 [a].

UNIDROIT Principles 2004, Articles 10.10 and 10.11 permit a limited form of set-off[145] and prohibit claims in restitution respectively. This focus on barring remedies, rather than affecting the existence of rights, is highly suggestive of a procedural law characterization.

Pursuant to UNIDROIT Principles 2004, Article 10.9(2), a respondent wishing to take advantage of an expired limitation period must raise that matter as a defense.[146] Placing the onus on a respondent to prove the limitation period's expiry further supports the view that the period set out in the UNIDROIT Principles 2004 goes to the remedy, not the right, and is best characterized as a matter of procedural law.

2. *Characterizing the U.N. Limitation Period Convention*

U.N. Limitation Period Convention, Article 8, establishes a four-year limitation period. As a general rule, this period runs from the date on which a claimant's cause of action accrues.[147] Specific definitions of "accrual" are given[148] where claims involve breach of contract,[149] breach of a continuing undertaking,[150] and termination for anticipatory breach.[151]

Unlike the UNIDROIT Principles 2004, the U.N. Limitation Period Convention does not explicitly state that its limitation period does not extinguish a cause of action. However, the Convention implicitly recognizes this effect. U.N. Limitation Period Convention, Article 1(1), explains that the Convention determines when a claim "can *no longer be exercised* by reason of the expiration of a period of time."[152] U.N. Limitation Period Convention, Article 25, goes on to confirm that "no claim shall be *recognized or enforced* in any legal proceedings commenced after the expiration of the limitation period"[153] and that time-barred claims may still be asserted as a set-off or defense.[154] Both provisions presuppose the Convention's limitation period will prevent the obtaining of a remedy, but not affect the right per se, as does the stipulation in U.N. Limitation Period Convention, Article 26, that the period's expiry does not entitle a debtor to restitution.[155]

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[145] The Principles treat set-off as "the self-enforcement of a right" and thus do not allow set-off where expiry of the limitation period has already been invoked; *see generally* UNIDROIT Principles 2004, *supra* note 19, at 332–33 (art. 10.10 Comment).

[146] *See also* UNIDROIT Principles 2004, *supra* note 19, at 312 (art. 10.1 Comment para. 1), 331 (art. 10.9 Comment para. 2).

[147] U.N. Limitation Period Convention, art. 9(1).

[148] Hans Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born*, 23 AM. J. COMP. L. 337, 341 (1975).

[149] *See generally* U.N. Limitation Period Convention, art. 10.

[150] *Id*. art. 11.

[151] *Id*. art. 12.

[152] Emphasis added. *See also* UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the Convention on the Limitation Period in the International Sale of Goods and the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods* para. 20, *available at* <www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf> (visited January 20, 2009).

[153] U.N. Limitation Period Convention, art. 25(1) (emphasis added).

[154] U.N. Limitation Period Convention, art. 25(2); *see also* UNCITRAL Secretariat, *supra* note 152, para. 21.

[155] Smit, *supra* note 148, at 349.

Like the UNIDROIT Principles 2004, the Convention's limitation period must be invoked by a respondent as a defence.[156] Pursuant to U.N. Limitation Period Convention, Article 24, the limitation period's expiry "shall be taken into consideration in any legal proceedings *only if invoked by a party* to such proceedings."[157] While public policy concerns over this matter[158] led to provision for state declarations that this rule not apply,[159] no state at the time of writing has made such a declaration.[160] Put another way, no state adopting the Convention has done so in a way permitting the limitation period to be applied other than in a defensive capacity.

As was the case with the UNIDROIT Principles 2004, these characteristics of the U.N. Limitation Period Convention are highly suggestive of a procedural law characterization.[161]

D. Source of a tribunal's authority

As Enderlein and Maskow point out, distinguishing substantive from procedural limitation periods is crucial in private international law as "[t]his difference has an effect on the determination of the law applicable to limitation."[162] Having established that both the UNIDROIT Principles 2004 and UN Limitation Period Convention contain periods of a procedural character, it is necessary to consider the mechanism by which those periods might be applied to supplement the CISG.

Such mechanisms are well-settled in the litigation context. As Thomas explains, "[o]ne of the earliest rules of private international law to emerge—and one which has steadily retained universal support—is that matters of procedure are governed by the *lex fori*."[163] The rationale for such a rule was succinctly explained by Tenterden, C.J. in the English High Court:

> A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantages which the law of this country may confer.[164]

No such principle can be applied in the context of international commercial arbitration,[165] given arbitral tribunals lack any *lex fori*.[166] Differential treatment of substance

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[156] Though "nothing in the Convention prevented a national court from suggesting to a party that the defense of limitation appeared to be available," *id*. at 348.

[157] Emphasis added. *See also* UNCITRAL Secretariat, *supra* note 152, para. 20.

[158] *Id*.

[159] U.N. Limitation Period Convention, art. 36.

[160] UNCITRAL Secretariat, *supra* note 152, para. 20.

[161] Though constituting part of the U.N. Limitation Period Convention's context, it is submitted that the heading to Part I ("substantive provisions") should not affect this interpretation; *cf.* Vienna Convention art. 31(1), (2).

[162] Enderlein & Maskow, *supra* note 26, at 400.

[163] Thomas, *supra* note 18, at 159; *see also* Dicey, Morris & Collins, *supra* note 53, at 177, para. 7–002; Adrian Briggs, The Conflict of Laws 33–36 (2002); J.G. Collier, Conflict of Laws 60 (3d ed. 2001).

[164] De La Vega v. Vianna, (1830) 1 B. & Ad. 284, *cited in* W. Hibbert, International Private Law 148 (1918).

[165] For an award where this principle was (erroneously, according to modern thinking) applied, *see* ICC Case No. 5460/1987, 13 Y.B. Com. Arb. 104, para. 4 (1988) (Paul Sieghart).

[166] Berger, *supra* note 2, at 18; Maniruzzaman, *supra* note 56, at 383–84; Mann, *supra* note 117, at 245.

and procedure is nevertheless preserved. Model Law, Article 28, discussed in section III *supra*, provides the mechanism to apply substantive law. By contrast, a tribunal's authority to apply procedural law is sourced to Model Law, Article 19, in a manner very different to the conflict of laws methodology prescribed by Model Law, Article 28(2):

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

At first blush, the capacity of Model Law, Article 19 to support the broad application of "procedural law" might be questioned. Is not the Model Law, as the relevant *lex arbitri*, a sufficient procedural law?

While this may seem intuitive, it is not strictly correct to describe any *lex arbitri* as a purely procedural law.[167] Further, *lex arbitri* typically "deal with general propositions, such as the need to treat each party equally, rather than with detailed rules of procedure."[168] Quite simply, "there is a great difference between the general provisions of the law governing the arbitration (the *lex arbitri*) and the detailed procedural rules that will need to be adopted, or adapted, for the fair and efficient conduct of the proceedings."[169] Model Law, Article 19, permits a tribunal to "simultaneously use appropriate rules from different legal systems."[170] Of course, due respect must be given to any choice of procedure by the parties, since Model Law, Article 19(1), requires that "party autonomy reigns supreme."[171] However where a matter of procedure is not settled by the Model Law or any party choice, it is entirely permissible for a tribunal to determine the governing procedure for that issue under Model Law, Article 19(2).[172]

A further issue arises from the manner in which Model Law, Article 19(2), is expressed. Model Law, Article 19(2), seems to merely contemplate a tribunal "conduct[ing] the arbitration." Surely this refers to the physical conduct of arbitral proceedings; time allocations for oral argument, the order in which submissions progress, and the like?

Despite the confusing way in which Model Law, Article 19(2), is phrased, this provision may legitimately be treated as encompassing procedural law in general. Turning

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[167] Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 102, para. 2–19 (4th ed. 2004).
[168] *Id.* at 97, para. 2–12.
[169] *Id.* at 97, para. 2–13.
[170] Isaak Dore, The UNCITRAL Framework for Arbitration in Contemporary Perspective 115 (1993).
[171] Karrer, *supra* note 118, at 14, para. 1.1; *see also* UNCITRAL Secretariat, *First Secretariat Note: Possible Features of a Model Law* para. 73 (1981), *cited in* Howard Holtzmann & Joseph Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary 572 (1989).
[172] Holtzmann & Neuhaus, *supra* note 171, at 565; Karrer, *supra* note 118, at 15, para. 1.3.

first to the legislative context,[173] Model Law, Article 19(1), makes *explicit* reference to procedure. Further, party agreement under Model Law, Article 19(1), can extend to a choice of national procedural law,[174] even though as a practical matter "[t]he wisdom of this approach must be questioned."[175] Turning next to Model Law, Article 19(2) itself, reference is made to the rules of evidence,[176] a matter typically regarded as one of procedural law.[177] Further, Dore has suggested Model Law, Article 19(2), could support the application of rules of joinder[178]—again a matter of procedural law.[179]

However, the clearest explanation of Model Law, Article 19's reach is contained in the Model Law's Explanatory Note. According to the UNCITRAL Secretariat:

> The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving *any procedural questions not regulated in the arbitration agreement or the Model Law*.[180]

As Model Law, Article 19, has been described as the "Magna Carta of Arbitral Procedure"[181] and one of "the most important provision[s] of the model law,"[182] it is clear that Model Law, Article 19(2), should be interpreted broadly. The discretion afforded to tribunals through Model Law, Article 19(2), was always intended to be "considerable," "[e]xcept where the parties have laid down detailed and stringent rules of procedure."[183] Indeed, one of the purposes underlying the discretion is to permit flexible response to the contingencies of international arbitral cases free from the constraints of domestic law.[184] In all the circumstances, Model Law, Article 19(2), is quite capable of supporting the broad reading advocated here.

It is important to appreciate this approach does not contradict the principle entrenched in Model Law, Article 28(3), that an arbitration must be conducted according

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[173] Vienna Convention, art. 31(1).

[174] Aron Broches, Commentary on the UNCITRAL Model Law on International Commercial Arbitration 97–98, para. 7 (1990); UNCITRAL Secretariat, *Seventh Secretariat Note: Analytical Commentary on Draft Text* para. 2 (1985), *cited in* Holtzmann & Neuhaus, *supra* note 171, at 583; *see also* Naviera Amazonia Peruana S.A. v. Compania internacional de Seguros de Peru, [1988] 1 Lloyd's Rep. 116, 120 (Kerr, L.J.), *cited in* Redfern & Hunter, *supra* note 167, at 104, para. 2–21.

[175] Karrer, *supra* note 118, at 18, para. 7.4; *see also* Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions 187–88, para. 5–023 (2d ed. 2005); Redfern & Hunter, *supra* note 167, at 103, para. 2–20; Naviera Amazonia Peruana S.A. v. Compania Internacional de Seguros de Peru, [1988] 1 Lloyd's Rep. 116, 120 (Kerr, L.J.), *cited in* Redfern & Hunter, *supra* note 167, at 104, para. 2–21.

[176] UNCITRAL Working Group, *Fourth Working Group Report* para. 75 (1983), *cited in* Holtzmann & Neuhaus, *supra* note 171, at 577–78.

[177] *See generally* Dicey, Morris & Collins, *supra* note 53, at 183, para. 7–015, 190, para. 7–031.

[178] Dore, *supra* note 170, at 164.

[179] *See generally* Colbran et al., *supra* note 126, at 337–38, paras. 8.3.1–8.3.2.

[180] UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration* para. 31, *available at* <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> (visited January 20, 2009) (emphasis added).

[181] Holtzmann & Neuhaus, *supra* note 171, at 564; UNCITRAL Secretariat, *supra* note 174, para. 1, *cited in* Holtzmann & Neuhaus, *supra* note 171, at 582–83.

[182] *Id.*

[183] UNCITRAL Secretariat, *supra* note 174, para. 5, *cited in* Holtzmann & Neuhaus, *supra* note 171, at 584.

[184] Broches, *supra* note 174, at 101, para. 20; Dore, *supra* note 170, at 114; UNCITRAL Secretariat, *supra* note 174, para. 1, *cited in* Holtzmann & Neuhaus, *supra* note 171, at 582–83.

to law. The Model Law's application is triggered by choice of a Model Law jurisdiction as the arbitral seat,[185] and it is Model Law, Article 19(2) itself, which confers the relevant discretion.[186] It may be that in a practical sense "the *lex arbitri* will govern with a very free rein, but it *will govern nonetheless*."[187]

E. Exercise of the discretion

Although Model Law, Article 19(2), permits tribunals to adopt procedural limitation periods, and both the UNIDROIT Principles 2004 and U.N. Limitation Period Convention provide periods of potential application, our analysis is not yet complete. The power conferred by Model Law, Article 19(2), is *discretionary*. In order to convince an arbitral tribunal to adopt either period, the relevant party would need to show, first, that there is a basis for the exercise of discretion at all, and secondly, that there are strong reasons justifying adoption of the particular period advocated.

1. *Justifying the Exercise of Discretion*

Before attempting to justify application of either the UNIDROIT Principles 2004 or U.N. Limitation Period Convention, it is necessary to ask a question fundamental to the hypothetical dispute under consideration: Why apply a limitation period at all? This question is especially pertinent in cases where, as in our hypothetical dispute, the parties have made a choice of law sufficient to govern all other matters in dispute.

It is commonly observed that "contracts are incapable of existing in a legal vacuum."[188] As discussed in section II *supra*, the CISG is by its very nature incomplete. The "eclectic model" of regulation underpinning the Convention demonstrates that its drafters always intended supplementation by other bodies of law for those matters outside its scope.[189] As Professor Schlechtriem has observed, "[a]ll matters not covered by the formula of Article 4 … are meant to be excluded from the Convention and have to be dealt with in applying domestic law as determined by the conflict of laws rules."[190]

The need for limitation periods in international sales transactions is a matter of mere pragmatism. Limitation periods seek to promote basic entitlements to "legal certainty and clarity."[191] By precluding claims after a certain period of time, limitation periods balance the interests of claimants in having "a fair and sufficient opportunity" to obtain a remedy

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[185] Model Law, art. 1(2); Dore, *supra* note 170, at 115.

[186] Dore, *supra* note 170, at 114–15; Karrer, *supra* note 118, at 26, para. 18.3.2.2; *see generally* Pryles, Waincymer & Davies, *supra* note 1, at 635, para. 12.70.

[187] Redfern & Hunter, *supra* note 167, at 98, para. 2–13 (emphasis added).

[188] *See, e.g.*, Amin Rasheed Shipping Corp. v. Kuwait Insurance Corp. (The Al Wahab), [1984] A.C. 50, 65 (Lord Diplock); *see also* Goode, *supra* note 116, at 29.

[189] De Ly, *supra* note 12, at 1; *see also* Zeller, *supra* note 12, at para. 2.8a.

[190] Schlechtriem, *supra* note 13, at 788.

[191] N.H. Andrews, *Reform of Limitation of Actions: The Quest for Sound Policy*, 57 Cambridge L.J. 589, 591 (1998).

and the interests of respondents in protection "against stale claims."[192] The limitation of actions has even been described by Andrews as "the gateway to justice."[193]

Dr. Karrer, discussing the application of arbitral procedure, has noted "there should not be too many surprises, just enough to make it exciting."[194] Regardless of domicile, it would be highly unusual for any party to be "surprised" by the application of a limitation period to contractual claims. The UNIDROIT Principles 2004 note that "[a]ll legal systems recognize the influence of passage of time on rights."[195] It was similarly observed during the U.N. Limitation Period Convention's drafting that "most legal systems limited or prescribed a claim from being asserted after the lapse of a specified period of time."[196] The limitation of actions has a long legal history,[197] and the subject's international attention through the UNIDROIT Principles 2004 and U.N. Limitation Period Convention demonstrates an international consensus on its integral place in commerce.

2. *Justifying Adoption of the UNIDROIT Principles 2004*

The UNIDROIT Principles 2004 do not form part of domestic law and do not constitute an international treaty.[198] They therefore cannot govern an international sale of goods contract by their own force.[199] Rather, their application arises only by virtue of their "persuasive value,"[200] reflecting an "aspiration to impose themselves by virtue of their usefulness and sophistication."[201] A number of factors support exercise of the Model Law, Article 19(2) discretion in favour of the limitation period in Chapter 10 of the UNIDROIT Principles 2004.

a. *International character of the principles*

The UNIDROIT Principles 2004 represent a restatement of widely-accepted principles of international contract law,[202] primarily directed to international commercial

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[192] *Id.* at 593; *see also* Schlechtriem, *supra* note 128, at 1, paras. 1, 1b.
[193] Andrews, *supra* note 191, at 590.
[194] Karrer, *supra* note 118, at 23, para. 13.4.2.
[195] UNIDROIT Principles 2004, *supra* note 19, at 312 (art. 10.1 Comment para. 1); *see also* Schlechtriem, *supra* note 24, at 1, para. 1.
[196] UNCITRAL Secretariat, *supra* note 152, para. 2.
[197] *See, e.g.*, JOHN MASON LIGHTWOOD, THE TIME LIMIT ON ACTIONS 1 (1909); KATHRYN REES & MERCIA CHAPMAN, LIMITATION OF ACTIONS HANDBOOK: VICTORIA para. 20.10 (1997).
[198] Alejandro M Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 TULANE J. INT'L & COMP. L. 93, 95, 127 (1995).
[199] Franco Ferrari, *Defining the Sphere of Application of the 1994 UNIDROIT Principles of International Commercial Contracts*, 69 TULANE L. REV. 1225, 1228 (1995); Herbert Kronke, *The U.N. Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 452 (2005), *available at* <www.uncitral.org/pdf/english/CISG25/Kronke.pdf>.
[200] Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TULANE L. REV. 1121, 1122 (1995); Bonell, *supra* note 135, para. I.
[201] Garro, *supra* note 198, at 96.
[202] Bonell, *supra* note 200, at 1129–30; Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?*, UNIFORM L. REV. 26, 30 (1996); ICC Case No. 7375/1996 (Preliminary Award), *cited in* Blessing, *supra* note 15, at 47; ICC Case No. 9797/2000, ASA BULL. 514, 519 (2000); for analysis of the separate issue of whether the Principles embody common business practices, *see generally* Richard Hill, *A Businessman's View of the UNIDROIT Principles*, 13 J. INT'L ARB. 163 (No. 2, 1996).

contracts.[203] Their legal solutions are "better-suited than national laws to handle international issues"[204] and it has even been suggested that the Principles "represent the most appropriate solution to satisfy the needs brought about by … the always increasing intercommunication among persons belonging to different states."[205] Application of the UNIDROIT Principles 2004 ensures "none has the advantage of having the case pleaded or decided by his own law and nobody has the handicap of seeing it governed by a foreign law."[206]

The Principles are drafted neutrally[207] and seek to avoid identification with any particular type of legal system.[208] Indeed, the *travaux préparatoires* relating to Chapter 10 of the UNIDROIT Principles 2004 demonstrate this was a key consideration during drafting. By way of example, the Working Group paid careful attention to the implications of terminology such as "limitation" and "prescription" (given their association with common and civil law states respectively).[209]

Applying the UNIDROIT Principles 2004 allows a tribunal to render an award consistent with the international character of a dispute.

b. *Consistency with the purpose of the principles*

The Preamble to the UNIDROIT Principles 2004 identifies several purposes they are intended to serve. Among them is an intention to "supplement international uniform law instruments."[210] This purpose reflects the often unsatisfactory result where non-unified domestic law plays a supplementary role.[211] Indeed, the role of Chapter 10's limitation period provisions in "gap-filling" was specifically contemplated during their drafting.[212] The "gaps" with which this Preamble limb is concerned are "external" (rather than "internal") gaps.[213] This Preamble limb is therefore apt to describe situations where the CISG does not regulate a particular matter in dispute.[214]

Further, application of the UNIDROIT Principles 2004 is particularly apposite in supplementing the CISG. This should not be surprising, given the Principles were "inspired

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[203] UNIDROIT Principles 2004, *supra* note 19, at 2 (Preamble Comment); Garro, *supra* note 198, at 102; Gonzalo Parra-Aranguren, *Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts*, 69 TULANE L. REV. 1239, 1245 (1995).

[204] Garro, *supra* note 198, at 126.

[205] Parra-Aranguren, *supra* note 203, at 1252.

[206] Lando, *supra* note 96, at 140.

[207] Hans van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 ARB. INT'L 373, 374 (1995).

[208] Samuel Kofi Date-Bah, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa*, UNIFORM L. REV. 269 (2004).

[209] Peter Schlechtriem, *Limitation of Actions by Prescription* 4 [f] (UNIDROIT Study L-Doc. 64, 1999), *available at* <www.unidroit.org/english/publications/proceedings/1999/study/50/s-50-64-e.pdf>.

[210] UNIDROIT Principles 2004, *supra* note 19, at 1 (Preamble para. 5).

[211] UNIDROIT Principles 2004, *supra* note 19, at 5 (Preamble Comment para. 5); Bonell, *supra* note 200, at 1124, 1142.

[212] Schlechtriem, *supra* note 128, at 1, para. 1c.

[213] Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TULANE L. REV. 1149, 1152 (1995).

[214] Garro, *supra* note 198, at 105.

by the Vienna Sales Convention."[215] Despite being "two utterly diverse individuals," the CISG and UNIDROIT Principles 2004 are "a perfect match."[216] It is submitted that the following observations of Kronke have particular resonance in the limitation of actions context:

> What we see looking at the two instruments … are neither competitors nor apples and pears. What we see is actually, and even more, potentially, a fruitful coexistence and, if legislatures, parties to a contract or dispute, and tribunals and courts so wish or agree, a source for critical scrutiny, "improvement" or refinement of the solutions provided for in the [CISG] … [T]he UNIDROIT Contract Principles are, obviously, complementary in that they address a wide range of topics of general contract law which neither the CISG nor any other existing or future convention devoted to a specific type of transaction would ever venture to touch upon.[217]

Applying the UNIDROIT Principles 2004 is therefore consistent with their very purpose.

c. *International consensus on the period's duration*

Domestic limitation periods are subject to great disparity in length,[218] ranging from some six months to thirty years worldwide.[219] Chapter 10 of the UNIDROIT Principles 2004 reflects an international average of sorts. As noted by Bonell, the three-year limitation period "has only recently become prevalent at domestic level."[220] While this does differ from the four-year period established under the U.N. Limitation Period Convention,[221] it coincides with the period contemporaneously considered for inclusion in the Principles of European Contract Law[222] and the period recommended after the U.K. Law Commission's 1998 review of limitation periods.[223] Drafting of the UNIDROIT Principles 2004 in fact proceeded from the body of comparative law research underpinning the U.N. Limitation Period Convention.[224]

Applying the UNIDROIT Principles 2004 permits consistency (to the extent possible) with international norms.

d. *International consensus on the period's commencement*

A limitation period's expiry is not solely determined by its length. The time after which enforcement of rights is precluded is also affected by the factual circumstances

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[215] Lando, *supra* note 96, at 143; *see also* Bonell, *supra* note 200, at 1129–30.
[216] Kronke, *supra* note 199, at 452.
[217] *Id.* at 458–59.
[218] Schwenzer & Manner, *supra* note 26, at 297; UNIDROIT Principles 2004, *supra* note 19, at 314 (art. 10.2 Comment para. 1); UNCITRAL Secretariat, *supra* note 152, para. 2.
[219] UNIDROIT Principles 2004, *supra* note 19, at 314 (art. 10.2 Comment para. 1); Schlechtriem, *supra* note 24, at 4, para. 1; Kazuaki Sono, *The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility* para. IA (2003), *available at* <www.cisg.law.pace.edu/cisg/biblio/sono3.html>.
[220] Bonell, *supra* note 135, para. II.2.g.
[221] UNIDROIT Principles 2004, *supra* note 19, at 315 (art. 10.2 Comment para. 3).
[222] Schlechtriem, *supra* note 24, at 4, para. 1.
[223] Andrews, *supra* note 191, at 591.
[224] Schlechtriem, *supra* note 128, at 2–3, para. 3b.

triggering commencement.[225] Limitation periods tend to reflect one of two "rival" models: the "accrual" test (where commencement occurs upon accrual of a cause of action) and the "discoverability" test (where commencement occurs when a claimant knows or should have known facts forming the basis of their claim).[226] The UNIDROIT Principles 2004 adopt a discoverability standard.[227]

The discoverability test does raise practical problems. For example, it can be factually difficult to determine exactly what a claimant must know for the period to commence, or what degree of knowledge would have been reasonable.[228] However, from a claimant perspective, the discoverability test is fair and equitable.[229] The Principles' discoverability test "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."[230] Further, as Bonell notes, the discoverability test "recently has become more common" in domestic legal systems.[231]

Applying the UNIDROIT Principles 2004 again permits consistency with international norms. It also facilitates rendering awards consistent with principles of equity and fairness.

e. *Comprehensive character of the principles*

Chapter 10 of the UNIDROIT Principles 2004 comprehensively regulates limitation periods. Its provisions address "all the principal components of any limitation regime, that is, the length of limitation periods, when they begin to run, whether and under which circumstances they may be suspended or begin to run afresh, and whether they may be shortened or extended by parties' agreement."[232]

Applying the UNIDROIT Principles 2004 permits disposal of a limitation period dispute within a complete and self-contained framework.

f. *Compatibility with international commercial arbitration*

The UNIDROIT Principles 2004, as a whole, are "especially designed for application by international arbitrators."[233] Given this fact, application of the Principles can "increase the efficiency of international arbitration."[234] The tendency for arbitrators (more so than state courts) to be "in touch with the international business community" suggests

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[225] UNIDROIT Principles 2004, *supra* note 19, at 315 (art. 10.2 Comment para. 2).
[226] Andrews, *supra* note 191, at 598.
[227] UNIDROIT Principles 2004, *supra* note 19, art. 10.2(1).
[228] Andrews, *supra* note 191, at 599; *see, e.g.*, UNIDROIT Principles 2004, *supra* note 19, at 316–17 (art. 10.2 Comment para. 6).
[229] Andrews, *supra* note 191, at 599.
[230] UNIDROIT Principles 2004, *supra* note 19, at 315 (art. 10.2 Comment para. 4).
[231] Bonell, *UNIDROIT Principles 2004*, *supra* note 135, para. II.2.g.
[232] *Id*.
[233] Garro, *supra* note 198, at 108.
[234] *Id*. at 95.

arbitrators are a "natural authority" for applying the Principles.[235] Indeed, an increasing number of arbitral decisions are applying the Principles of their own motion.[236]

Chapter 10's limitation period provisions expressly accommodate international commercial arbitration. Pursuant to UNIDROIT Principles 2004, Article 10.6, the initiation of arbitral proceedings suspends a running limitation period in the same manner as the initiation of judicial proceedings.[237] Such accommodation was treated as a matter of importance from the very outset of drafting.[238]

Further, the UNIDROIT Principles 2004's nature as "autonomous" standards makes them inherently compatible with international commercial arbitration. As Dr. Karrer has noted (citing privilege in aid of settlement as an example), it is permissible and often desirable to apply autonomous standards under Model Law, Article 19(2).[239]

Applying the UNIDROIT Principles 2004 allows tribunals to take advantage of a regulatory regime friendly to arbitration.

g. *Conclusion: the UNIDROIT principles 2004 are suitable for application*

Notwithstanding a lack of binding force, these factors offer strong persuasive reasons for adopting the UNIDROIT Principles 2004 limitation period in an arbitration otherwise applying the CISG.

3. *Justifying Adoption of the U.N. Limitation Period Convention*

Notwithstanding this conclusion, adopting the UNIDROIT Principles 2004 is not the only manner in which an arbitral tribunal could exercise its Model Law, Article 19(2) discretion. A number of factors also support its exercise in favour of the U.N. Limitation Period Convention.

a. *International character of the convention*

Like the UNIDROIT Principles 2004, the U.N. Limitation Period Convention possesses an international character. However, its international character differs in a very important respect. As a convention, it has a degree of actual "legal" status through being "in force" in many states. As at January 20, 2009, the Convention has been adopted by twenty states, and eight more in its pre-CISG unamended form.[240]

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[235] Van Houtte, *supra* note 207, at 383.

[236] Michael Joachim Bonell, *A Global Arbitration Decided on the Basis of the UNIDROIT Principles: In Re Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, 17 Arb. Int'l 249, 250 (2001).

[237] *See generally* UNIDROIT Principles 2004, *supra* note 19, at 326–27 (art. 10.6 Comment para. 1).

[238] Schlechtriem, *supra* note 128, at 8–9, para. 2b.

[239] Karrer, *supra* note 118, at 25, para. 18.2.

[240] UNCITRAL, Status: 1974—Convention on the Limitation Period in the International Sale of Goods (2008), *available at* <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html>.

Applying the U.N. Limitation Period Convention therefore permits a tribunal to render an award consistent with a dispute's international character.

b. *Consistency with the CISG*

Application of the U.N. Limitation Period Convention is particularly apt where the CISG otherwise applies. The U.N. Limitation Period Convention is the CISG's "sister convention,"[241] with a 1980 Protocol harmonizing the two Conventions' texts.[242] Both have consistent prerequisites for their application.[243] Both require their international character, and the need to promote uniformity, to influence their interpretation.[244] Though the CISG's adoption has been broader, many states party to the CISG are also party to the U.N. Limitation Period Convention.[245] The two instruments were very much intended to operate together.

The U.N. Limitation Period Convention therefore integrates well with any party choice of the CISG as a governing law.

c. *International consensus on the period's duration*

While the Convention's four-year period differs from the three-year period now argued by Bonell to be prevalent domestically,[246] it still represents a consensus on the period appropriate for international sales contracts. The period established was considered by the Convention's drafters to be "a justifiable compromise"[247] between highly divergent national systems; one which accomplished the policy aims of limitation periods but also provided adequate time to seek relief.[248] Indeed, the U.N. Limitation Period Convention's four-year period formed the model for the original UNIDROIT Principles 2004 proposal.[249]

Applying the U.N. Limitation Period Convention permits consistency (to the extent possible) with international norms.

d. *Precise and certain approach to the period's commencement*

Unlike the UNIDROIT Principles 2004, the U.N. Limitation Period Convention adopts an accrual (rather than discoverability) test for commencement.[250] While such a

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[241] Sono, *supra* note 219, para. IA.
[242] Enderlein & Maskow, *supra* note 26, at 394; UNCITRAL Secretariat, *supra* note 152, para. 3.
[243] Schlechtriem, *supra* note 38, at 114.
[244] CISG, art. 7(1); U.N. Limitation Period Convention, art. 7.
[245] Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn*, 28 Int'l Lawyer 1071, 1079 (1994).
[246] Bonell, *supra* note 135, para. II.2.g.
[247] Enderlein & Maskow, *supra* note 26, at 411.
[248] UNCITRAL Secretariat, *supra* note 152, para. 11.
[249] Schlechtriem, *supra* note 128, at 5–6, para. 2; Schlechtriem, *supra* note 209, at 1, para. a.
[250] U.N. Limitation Period Convention, art. 9(1); *cf.* UNIDROIT Principles 2004, *supra* note 19, art. 10.2(1).

test is less capable of meeting the demands of equity, it has several advantages. By focusing on the date a cause of action arises, the accrual test is more precise.[251] Further, in the context of contractual claims, the accrual test ensures a limitation period runs from the time of the events that cause a claimant's loss.[252] For these reasons, Andrews describes accrual as "the superior legal tool";[253] and interestingly, accrual formed the basis of the original UNIDROIT Principles 2004 proposal.[254]

Applying the U.N. Limitation Period Convention allows a tribunal to render an award based on legal principles recognized as both certain and sound.

e. *Comprehensive character of the convention*

Like Chapter 10 of the UNIDROIT Principles 2004, the U.N. Limitation Period Convention regulates the limitation of actions in "comprehensive detail."[255] Through its forty-six Articles, the U.N. Limitation Period Convention completely displaces the disparate time periods, concepts, and rules contained in domestic regimes.[256] In their place are substituted "uniform rules"[257] that are "reasonable"[258] and "self-contained,"[259] representing a "very credible effort to deal with a difficult subject matter."[260]

Applying the U.N. Limitation Period Convention permits disposal of a limitation period dispute within a complete and self-contained framework.

f. *Compatibility with international commercial arbitration*

Like the UNIDROIT Principles 2004, the U.N. Limitation Period Convention has particular strengths in international commercial arbitration. Arbitral proceedings are specifically accommodated[261] through the Convention's definition of "legal proceedings,"[262] provisions regulating the limitation period's termination,[263] and provisions relating to its modification.[264] These accommodations have led Sono to describe the Convention as "friendly to arbitration" and an instrument giving "full credit to arbitration as an important means to settle disputes."[265]

Applying the U.N. Limitation Period Convention allows tribunals to take advantage of a regulatory regime friendly to arbitration.

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[251] Andrews, *supra* note 191, at 600.
[252] *Id.*
[253] *Id.*
[254] Schlechtriem, *supra* note 128, at 6, para. 3.
[255] Smit, *supra* note 148, at 338.
[256] Winship, *supra* note 245, at 1072.
[257] *Id.* at 1081; Smit, *supra* note 148, at 338.
[258] Smit, *supra* note 148, at 338.
[259] Sono, *supra* note 219, para. IA.
[260] Smit, *supra* note 148, at 355.
[261] UNCITRAL Secretariat, *supra* note 152, para. 13.
[262] U.N. Limitation Period Convention, art. 1(3)(e).
[263] *Id.* art. 14.
[264] *Id.* art. 22(3); *see also* Smit, *supra* note 148, at 346–47.
[265] Sono, *supra* note 219, para. IVD.

g. *Conclusion: the U.N. Limitation Period Convention is suitable for application*

Unlike the UNIDROIT Principles 2004, the U.N. Limitation Period Convention does envisage application by its own binding force.[266] However, these factors offer a strong persuasive basis for exercising the Model Law, Article 19(2) discretion in favour of the Convention even where it would not otherwise apply.

F. Advantages over the orthodox approach

Use of a tribunal's Model Law, Article 19(2) discretion to resolve disputes over the governing limitation period is not a mere theoretical exercise. As Blessing notes, conflict of laws problems are often issues "of crucial practical significance."[267] The alternative approach to resolving limitation period disputes advocated in this article has a number of strengths, and offers some very tangible advantages.

1. *Policy Factors Supporting the Advocated Approach*

Exercise of the Model Law, Article 19(2) discretion as advocated has a solid foundation in policy. Securing international order in private relationships, in a world where states claim equal status, underpins enforcement of orthodox conflict of laws rules.[268] At their most basic level, conflict rules seek "to provide parties with a measure of certainty about the substantive law governing their conduct."[269] As discussed in section III *supra*, the achievement of this goal in practice must be questioned.

Though involving significant discretion, the procedural methodology advocated here should not produce a result any more uncertain than that flowing from the haphazard conflict of laws process. Consistency in the application of international commercial law should in fact be improved if tribunals target internationally well-known instruments such as the UNIDROIT Principles 2004[270] or the U.N. Limitation Period Convention through Model Law, Article 19(2).

2. *Effective Complementation of the Governing Substantive Law*

Exercising the Model Law, Article 19(2) discretion sits comfortably with the application of substantive law under Model Law, Article 28. At first blush, Model Law, Article 19(2)'s instruction that procedure is determined "subject to" the Model Law might suggest Model Law, Article 28 (and therefore substantive law) should take precedence. This is not the case.

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[266] U.N. Limitation Period Convention, art. 3(1).
[267] Blessing, *supra* note 15, at 49.
[268] Stone, *supra* note 86, at 4.
[269] Born, *supra* note 5, at 531.
[270] *See, e.g.*, Garro, *supra* note 198, at 106.

The phrase "subject to the provisions of this Law" in Model Law, Article 19(2) refers only to the Model Law's "mandatory" provisions.[271] Mandatory provisions "are laws that purport to apply irrespective of a contract's proper law or the procedural regime selected by the parties."[272] Choice of law provisions in arbitral acts and rules, such as Model Law, Article 28, do not constitute mandatory rules.[273]

But more fundamentally, procedure determined under Model Law, Article 19, should in fact be given precedence. In the case of conflict, the *lex specialis* of Model Law, Article 19(2), was always intended to prevail over the more general rules in Model Law, Article 28.[274] As indicated by UNCITRAL's Commission Report, "the objective of paragraph (2) was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute."[275]

Holtzmann and Neuhaus illustrate this proposition by considering the rules of evidence, a matter treated by Italian law as substantive.[276] This directly puts in issue the relationship between these two provisions:[277]

> During the Commission's deliberations on Article 19, it was pointed out that that Article might be thought to conflict with Article 28, which allows the parties, or, failing that, the arbitral tribunal, to choose the substantive law that will govern the dispute. Under some legal systems, the admissibility, relevance, materiality, and weight of evidence are considered questions of substantive law. Suppose, for example, that the substantive law of Italy is to govern the resolution of the merits of a dispute, either as a matter of party choice or tribunal determination. Suppose also that under Italian law certain rules limiting the admissibility of testimony of parties are considered substantive. Would the arbitral tribunal be bound to follow those rules or could it decide the admissibility of such testimony under different rules it chose pursuant to Article 19(2)? The Commission determined that the discretion accorded to the arbitrators by Article 19(2) … *should not be affected by the choice of law applicable to the substance of the dispute under Article 28*.[278]

Thus, even where Model Law, Article 28(2), would lead an arbitral tribunal to a substantive limitation period, Model Law, Article 19(2), may be used in preference to adopt either the UNIDROIT Principles 2004 or U.N. Limitation Period Convention.

3. *Practicality in Conducting Arbitral Proceedings*

Exercising the Model Law, Article 19(2) discretion facilitates a more practical resolution of disputes over the governing limitation period. Fundamentally, it allows a tribunal

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[271] Peter Binder, International Commercial Arbitration in UNCITRAL Model Law Jurisdictions 126, para. 5–017, 130, para. 5–026 (2000).

[272] Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 Melbourne J. Int'l L. 205, 206 (2005); *see also* Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. Int'l Arb. 23 (No. 4, 1997); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l 274, 275 (1986).

[273] Blessing, *supra* note 15, at 50.

[274] Broches, *supra* note 174, at 99, para. 13, 100, para. 18.

[275] UNCITRAL, *Commission Report* para. 174 (1984), *cited in* Holtzmann & Neuhaus, *supra* note 171, at 590.

[276] UNCITRAL Secretariat, *Sixth Secretariat Note: Analytical Compilation of Government Comments* para. 4 (1985), *cited in* Holtzmann & Neuhaus, *supra* note 171, at 580.

[277] UNCITRAL, *supra* note 275, para. 173, *cited in* Holtzmann & Neuhaus, *supra* note 171, at 590.

[278] Holtzmann & Neuhaus, *supra* note 171, at 567 (emphasis added).

to avoid the technical, complex, and uncertain conflict of laws process, a process which is "inefficient and inadequate in the face of enormous volumes of trade."[279] As noted by Baptista, "[o]ne need only testify to the quantity of time and effort spent in the solution of conflicts of law problems and to the inadequacy of many decisions in order to perceive the extent to which international traders find themselves treading a minefield."[280] In cases like our hypothetical dispute, where limitation periods are the only matter in dispute not governed by the parties chosen law, further reference to Model Law, Article 28 is rendered otiose.

4. *Consistency with the New York Convention*

Over and above fighting out the arbitration itself, the recognition and enforcement of awards is of paramount practical importance to arbitrants. The approach advocated does not jeopardize recognition and enforcement of arbitral awards under the New York Convention.

Pursuant to New York Convention, Article V(1)(d), recognition and enforcement may be refused if "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." No basis exists for invoking this ground in the type of dispute considered. No inconsistency lies with any choice of arbitral rules, since such rules do not regulate limitation periods. Further, no inconsistency lies with the Model Law itself, as application of procedural law occurs pursuant to the power contained in Model Law, Article 19(2).

Pursuant to New York Convention, Article V(2)(b), recognition and enforcement may also be refused if it "would be contrary to the public policy of that country" where recognition and enforcement is sought. Similarly, no basis exists for invoking this ground. While limitation periods are typically considered a matter of domestic public policy,[281] such "domestic" public policy must be differentiated from the public policy with which New York Convention, Article V(2)(b), is concerned. New York Convention, Article V(2)(b), is concerned with the "international" (rather than "domestic") dimension of a state's public policy,[282] reflecting the generally restrictive interpretation given to the Convention's grounds for refusing recognition and enforcement.[283] Limitation periods are not the kind of public policy issue coming within the purview of this provision.

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[279] Luiz Olavo Baptista, *The UNIDROIT Principles for International Commercial Law Project: Aspects of International Private Law*, 69 TULANE L. REV. 1209, 1212 (1995).
[280] *Id.* at 1211.
[281] *See, e.g.*, Cholmondeley v. Clinton, (1820) 2 Jac. & W. 140 (Plummer, M.R.), *cited in* LIGHTWOOD, *supra* note 197, at 2.
[282] REDFERN & HUNTER, *supra* note 167, at 544, para. 10–53.
[283] *Id.* at 528–29, para. 10–34.

V. The Problem Revisited

> Unless one says goodbye to what one loves, and unless one travels to completely new territories, one can expect merely a long wearing away of oneself and an eventual extinction.[284]

To illustrate the implications of this article's analysis we return to our hypothetical arbitrants, Carter Co. and Daniel Co., in dispute over the governing limitation period. As has been demonstrated, the avenues through which their dispute can be resolved are not as confined as the traditional conflict of laws methodologies that immediately spring to mind. Further, such avenues are not necessarily the most ideal manner in which their dispute can be resolved.

Rather than adopting a conflict of laws methodology, Carter Co. and Daniel Co.'s tribunal may resolve their limitation period dispute by reference to Model Law, Article 19(2). Through that discretion, their tribunal may apply the limitation period from either the UNIDROIT Principles 2004 or the U.N. Limitation Period Convention, depending on which justifications it finds most compelling in the circumstances of the case. This approach does no violence to the parties' choice of law, the CISG, and in fact either instrument complements the CISG's provisions well. By exercising its procedural discretion in this manner, Carter Co. and Daniel Co.'s tribunal ensures all matters in dispute have a governing law. Any further reference to Model Law, Article 28(2) would be rendered unnecessary.

VI. Conclusion

Some 110 years ago, the First Edition of Dicey's seminal *Conflict of Laws* text endorsed the application of multiple governing laws to a single international sales contract:

> A contract is made in one country, and is to be performed, as regards the obligations of one of the parties, wholly in that country, and as regards the obligation of the other wholly in another country, as where A agrees to deliver goods to X in Liverpool, and X agrees to pay for them in New York. The contract may be treated as two contracts, the one to be performed by A in England and the other by X in New York. It is, then, reasonable at any rate to assume (though the presumption is by no means conclusive) that on the one hand the delivery, etc., of the goods (i.e., the performance of A's share of the contract) is governed by the law of England, and on the other hand the payment for the goods, i.e., the performance of X's part of the contract, is governed by the law of New York.[285]

Where parties to an international sale of goods contract choose the CISG as a governing law, and submit contractual disputes to arbitration, any dispute over the governing limitation period may be resolved by applying either the UNIDROIT Principles 2004 or U.N. Limitation Period Convention. In essence, this proposition is not greatly different from that advanced by Dicey so long ago.

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[284] Jean Dubuffet, *quoted in* New International Dictionary of Quotations 63 (Margaret Miner & Hugh Rawson eds., 3d ed. 2000).

[285] A.V. Dicey, Conflict of Laws 572–73 (1896).

Dicey's original work suggested "procedure" can and should be given a wide scope for the purposes of private international law.[286] A far more moderate view tends to prevail today.[287] The Fourteenth Edition's editors suggest modern times call for a different approach:

> Dicey wrote that English lawyers gave "the widest possible extension to the meaning of the term procedure." As a matter of history, this is true; and a court may, even today, be tempted to extend the meaning of "procedure" in order to evade an unsatisfactory choice of law rule. But in general the attitude expressed by Dicey has fallen into disfavour precisely because it tends to frustrate the purposes of choice of law rules.[288]

With the greatest respect to the very learned authors of this seminal text, this view can be challenged in the international commercial arbitration context. Rather than being frustrated, the core purpose of conflict of laws rules—providing parties with some certainty over the governing law[289]—is in fact furthered. Taking a liberal approach to procedure when parties dispute the governing limitation period allows an arbitral tribunal to apply well-known international instruments, and in this way, improves certainty and consistency in international commercial law.

[286] *Id.* at 712.
[287] *See, e.g.*, Karrer, *supra* note 118, at 16, para. 4.
[288] Dicey, Morris & Collins, *supra* note 53, at 177, para. 7–003.
[289] Born, *supra* note 5, at 531.