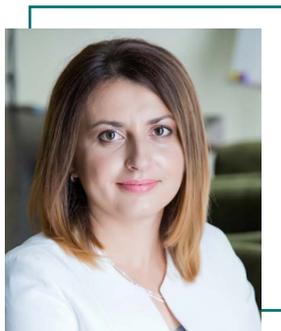


TIME LIMITS FOR COMMENCING ARBITRATION



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Missing most deadlines in our society can be forgiven or excused. For example, being late for work might get you a warning from your boss, but it typically won't cost you a job. However, in arbitration being late in submitting a claim might cost you the whole case.

Indeed, the arbitration must be commenced within a specified time failing which the right to go to arbitration, or indeed the claim itself, will be barred.

Time limits operate as instrument preventing a person from instituting a claim after a substantially long period of time. If a cause of action were to be permitted to go ahead after substantial delay it could have a problematic effect on the collection of evidence and the administration of the arbitration proceedings as it relates to the availability of witnesses and documents. In that way limitation periods seek to balance the interests of all parties and the effective administration of the case.

When claimant deals with commencement of arbitration, he needs to ask himself these four questions:

- what is the length of the limitation period?
- when does it start to run?
- when the arbitration is commenced?
- what will happen after limitation period expires?

What is the length of the limitation period?

Every legal claim will be subject to a limitation period, imposed either by the governing law or by the applicable contract terms.

Although limitation periods are common to all legal systems, they differ in length from six months to up to 15, 20 or even 30 years.

There could be also limitation periods set by international conventions applicable in a specific matter. For instance, the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods (as amended in 1980) ("UN Limitation Convention") provides uniform rules but is restricted to the international sale of goods. Another example is the one-year time bar under Article III Rule 6 of the Hague-Visby Rules.¹

It is also necessary to bear in mind that different time frames apply to different types of claims. Usually claims concerning the defects in goods have shorter time limits than the general ones.

Most of institutional rules do not specify the limitation period for the commencement of arbitration. Generally no time limits are specified under LCIA Rules, ICC Rules, LMAA Terms.

¹ *A set of international rules for the international carriage of goods by sea.*

However, time limits are usually introduced in commodities arbitration:

- GAFTA Arbitration Rules No. 125 (1 year)
- FOSFA Rules of Arbitration and Appeal (120 days; quality claim-90 days)
- RSA Rules and Regulations (quality claim - 7 days)

Often, commodities arbitration rules will require the claims, if commenced, to be renewed after a period of one year by giving a written notice to the other party. It may also be the case that such renewal is permitted a limited number of times, for example, GAFTA allows the claim to be renewed for 6 years, while FOSFA now permits one annual renewal only.

Therefore, it is strikingly important to be aware of and to actively monitor applicable time limits.

When does the clock start running?

Knowing the length of the limitation period is, of course, of little value unless you also know when that period starts to run.

For example, under the English law the six-year limitation period for a claim for breach of contract begins to run when the breach of contract occurs regardless of whether any damage is suffered at that point and regardless of whether the innocent party knows there has been a breach of contract.

However, under the Ukrainian law the starting point is the date when claimant became or could have become aware of the breach.

Meanwhile, international conventions specify their rules on the starting date for the calculation of time limits. Similarly, GAFTA, FOSFA and RSA Rules elaborated starting dates suitable for the commodities contracts.

When arbitration is commenced?

National law of different countries and almost every set of institutional rules include a provision regarding the commencement of the arbitration.

Under the Ukrainian law “On the International Commercial Arbitration” the arbitration is considered commenced on the day of receipt of the request of arbitration by the respondent. Under the Arbitration Act 1996 the general rule is that arbitration is commenced upon the appointment of an arbitrator.

There are a lot of formalities inherent to the arbitral process, which are very important to remember to make the request for arbitration effectively served.

It would be wrong to underestimate the importance of getting the notice or request for arbitration right. If you don’t, claim may become time-barred because an ineffective arbitration notice will not stop time running for the purposes of statutory or contractual time limits.

Usually the following requirements are established for arbitration notice:

- The written form of the request for arbitration;
- Effective service according to the parties’ agreement or the governing law;
- The notice should identify the contract in relation to which your claim, or the dispute, arises;
- The notice should state the identity of the respondent;
- The best practice is also to state which claims you wish to refer to arbitration.

The notice of arbitration needs careful drafting, as it is likely to have a bearing on the scope of the tribunal’s jurisdiction. If you draft the notice too broadly, you may fail to satisfy the requirement that the disputes to be referred to arbitration must be specified. On the other hand, if you draft it too narrowly, you may lose the opportunity of introducing other claims at a later date because these will fall outside the scope of the jurisdiction of the tribunal.

What will happen after limitation period expires?

Time limits to commence arbitration are strict and if a claim is brought outside the limitation period it will likely be dismissed, unless there is a reasonable excuse for the delay in bringing the claim. The Tribunal will consider the issue of time limits if it is raised by the respondent as the defence.

If you have this reasonable excuse, there could be still a chance that your claim would be admitted for consideration. For example, some institutional rules allow arbitrators to exercise their discretion in extending the time limits.

Another option available to claimants is to address the court with the application to extend the time limits for the commencement of an arbitration according to the law of the seat of arbitration. It is possible to seek an extension of time limits for commencement of arbitration in certain very limited circumstances.

For example, section 12 of the Arbitration Act 1996 deals with the court's power to extend time for the commencement of arbitration proceedings. The court may order an extension only if satisfied:

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one of the parties makes it unjust to hold the other party to the strict terms of the provision in question.

It is also necessary to bear in mind that courts cannot extend time limits stated in the Limitation Acts, but only the contractual time limits.

The following factors may be of importance for the arbitrators when exercising their discretion to admit late claim:

The length of delay. Clearly, the longer the delay, the more reluctant the court will be to allow the application. This is relevant to the justice criterion. The amount at stake. Similarly, the value of your claim has also impact whether is it just to make the extension.

Whether the delay was due to the fault of the applicant or the circumstances beyond his control. Therefore, it is relevant if the claimants have due justifications for the delay.

If the delay was due to the fault of the applicant and the extent of that fault. It is noteworthy that mistake of claimants' lawyers often will not be the ground for the extension.

The conduct of the other party. For example, it is unjust to hold the party to the strict time limits if the other party attempted to negotiate the dispute making an impression that the time limits do not

apply. However, it is important to remember that under the general rule, the parties' negotiations do not suspend the time limits for the commencement of arbitration.

A lesson to be learned from A v B [2017]

In the case of *A v B* [2017] EWHC 3417 (Comm), the English High Court set aside the arbitral award rendered under LCIA Rules upholding its own jurisdiction on the basis of the ineffective request for the arbitration.

The dispute between A and B arose under two contracts for the sale of consignments of crude oil. The Contracts were governed by the English law and provided for arbitration under the LCIA Rules 2014, seated in London.

B commenced arbitration in September 2016 in a single Request for Arbitration under both contracts accompanied by payment of a single registration fee.

On 24 May 2017, A challenged the jurisdiction of the tribunal contesting the validity of B's Request for Arbitration on the grounds that it referred to single arbitration the claims under different Contracts. A served its Statement of Defence on 2 June 2017 without prejudice to its jurisdictional challenge.

On 7 July 2017, the LCIA tribunal made a partial award on jurisdiction and dismissed A's jurisdictional challenge on the basis that it was brought too late. Subsequently A challenged the partial arbitration award on jurisdiction pursuant to section 67 of the Arbitration Act 1996 in an English court.

The English court had to consider two key questions:

Was the Request for Arbitration effective?

Answering the first question, the court concluded that LCIA Rules do not allow several arbitrations to be commenced under a single Request for Arbitration. The LCIA Rules allow consolidation of arbitration proceedings only upon the parties' consent.

The Request for Arbitration concerned one single amount claimed, one registration fee was paid and it referred throughout to ‘the arbitration’. Accordingly, the judge concluded that in the context of the LCIA Rules, a reasonable person in the position of the recipient would have understood the request as starting a single arbitration.

The request for arbitration served under both contracts was ineffective as LCIA Rules do not permit a party to commence multiple arbitrations and consolidate the proceedings without the consent of all parties.

Did A raise its jurisdiction objection in time?

Article 23.3 LCIA Rules provides that jurisdictional objections must be made as soon as possible

but not later than the time for serving Statement of Defence.

The judge concluded that A had not lost the right to challenge the tribunal’s jurisdiction, as it objected not later than the time for its statement of defence.

At the end of the day, B’s claim was dismissed based on the drawbacks of the Request for Arbitration.

Conclusions

Imagine the balloons, the champagne, the party hats, when the defendant finds out that you tossed away your claim by being late or submitted with fatal errors. The claimant in the arbitration must make sure that it uses the proper document and procedure to start the arbitration. If it does not, then arbitration will be commenced incorrectly and the limitation period may expire in the meantime.



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