

Article

BVI Limitation Periods for Foreign Law Claims

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Given the reputation of the BVI as a premium offshore jurisdiction, its corporate structures have long been popular with individuals from across the globe. That has, in turn, led to disputes before the BVI court with an international dimension. It is common for those disputes to involve claims that, under the BVI choice of law rules, are governed by the law of a foreign country. In those circumstances, a question that often arises is what limitation period or periods apply to those claims? Is the limitation period determined by the rules of the foreign country (the *lex causae*), or does the relevant BVI limitation period apply (on the basis that the BVI is *lex fori*)? Unfortunately, there does not appear, at present, to be a clear or straightforward answer to that question, as there do not appear to be any BVI or relevant offshore authorities that directly address the issue, and, as explained below, the English common law position has been replaced by statute and expressly departed from by the Courts in various well-known common law jurisdictions. Ultimately, our view is that the position adopted in those other jurisdictions (in particular Australia and Canada) ought now to be adopted in the BVI, but that would require the BVI Court to depart from a long line of old English authority, which is not something it is likely to do lightly.

The Position in England

Prior to the enactment of the Foreign Limitation Periods Act 1984 (“the 1984 Act”) and the implementation of the Rome I and II Regulations, the position in England was governed exclusively by the common law rules. Under those rules, an artificial distinction was drawn between two kinds of statute of limitation: (1) those which merely barred a remedy; and (2) those which extinguished a right. Statutes of the former kind were classified as “procedural”, and were said to bar merely the remedy; while the latter kind were classified as “substantive”, and were said to bar the right to bring the claim itself. If the foreign limitation period was regarded as “procedural” in nature, then the English limitation period would apply; but if the foreign limitation statute was classified as “substantive”, then that limitation period would be applied by the English court. In general, the English courts regarded foreign limitation statutes as procedural in nature, such that the English limitation period was treated as applying.

The common law rules were much criticised, even when they were in force in England and Wales. Among other things they were said to: (1) draw an unreal distinction between a “right” and a “remedy”; (2) potentially operate as a bar to a claim which would still be alive in the jurisdiction in which it arose, whilst also frustrating the aim of foreign limitation statutes by keeping otherwise stale claims alive; (4) encourage “forum shopping”; and (5) be neither simple nor convenient to apply.

In light of those criticisms, the Law Commission recommended that the old common law rules be swept aside by a new Act that would instead provide that as a general rule (subject to an exception based on public policy) the limitation period of the *lex causae* would apply, rather than the limitation period of the *lex fori*. That is precisely what happened by the enactment of the 1984 Act (although it is right to note that the 1984 Act did not purport to generally sweep away or alter the general classification and construction of procedural and substantive rights under English private international law).

The Position in Other Common Law Jurisdictions

Given the criticism of the English common law rules, it is perhaps not surprising that even without statutory intervention those rules have been modified and overruled by courts in other common law jurisdictions. For example, both the High Court of Australia and the Supreme Court of Canada have expressly rejected the old English common law rules and adopted a general rule in line with the 1984 Act i.e. they have determined that statutes of limitation are in fact substantive, rather than procedural in nature, with the result that the limitation periods of the *lex causae* are to be applied. Indeed, it appears that the Supreme Court of India has also very recently adopted the approach of the Australian and Canadian courts, and expressly rejected the old English common law rules.

The Current Position in the BVI

Despite the developments that have occurred elsewhere in relation to the rules, it is not, at present, clear what the position is in the BVI. In the absence of statutory intervention, there must at least be some uncertainty as to whether the BVI Court (and in particular the Court of Appeal) would follow the former English authorities, or whether it would instead follow the approach adopted by the Australian High Court and the Canadian Supreme Court. Although there does not appear to be any BVI authority that directly discusses and addresses this issue, in *Livingston Properties Inc et al v. JSC MCC Eurochem* BVIHMAP2016/0042-0046, the Court of Appeal did touch upon the subject of foreign limitation periods, albeit in the context of a forum application. Ultimately, the Court of Appeal was not required to decide the issue, as the defendants offered an undertaking not to take the limitation point if the action was pursued in Russia, but the Court appears to have proceeded on the basis that the Russian limitation period would not have applied had the matter proceeded in the BVI (which would have been the likely outcome had the English common law position applied). We understand that leave to appeal has been sought and granted in relation to the Court of Appeal's decision, so the issue may well be considered in more detail by the Privy Council in the near future.

Conclusion

At the present time it is not clear what the outcome would be if the issue raised at the outset of this article were taken and argued in full before the BVI Court. For all of the cogent reasons that ultimately led to introduction of the 1984 Act in England, there is real scope for arguing that the BVI Court should follow the approach adopted by the Australian High Court and the Canadian Supreme Court (among others), and apply the limitation period of the *lex causae*. However, given the BVI Court's longstanding preference to adopt English authority, it is possible that it could ultimately find that the old English common law rules still apply in the BVI. That would be unfortunate and, in our view, a retrograde step.

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