

Blakes Bulletin

Litigation & Dispute Resolution

International Commercial Arbitration: Supreme Court of Canada Enforces Domestic Limitation Period on Application to Enforce Foreign Arbitration Award

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A primary advantage of international commercial arbitration as a means of resolving commercial disputes is the relative ease of enforcement in the many states that have adopted either or both of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the Convention) and the *UNCITRAL Model Law on International Commercial Arbitration* (the Model Law). In particular, international commercial arbitration is favoured because, in many instances, enforcement of awards is thought to be easier and less costly than the enforcement of foreign judgments. Both the Convention and the Model Law have been adopted in all Canadian provinces. Nevertheless, the foregoing assumptions may have to be re-assessed in the Canadian context by the Supreme Court of Canada decision in *Yugraneft Corporation v. Rexx Management Corporation*, released May 20, 2010.

The facts of the case are straightforward. Yugraneft was the successful claimant (receiving an award of C\$952,614.43) in arbitral proceedings against Rexx before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. Almost three years after obtaining its award, Yugraneft applied in Alberta, under Alberta's *Arbitration Act* for recognition and enforcement of the award. Rexx resisted recognition and enforcement on the basis that the applicable limitation period under Alberta's *Limitations Act* was two years. Rexx was successful in first instance, before the Alberta Court of Appeal, and has now succeeded before the Supreme Court of Canada (the Court).

Yugraneft's position throughout was that a foreign arbitral award should be treated as a domestic court judgment; hence the limitation period under the *Limitations Act* would be 10 years as opposed to two. Alternatively, the award should have been treated as a foreign court judgment, with the same result.

Finally, Yugraneft argued that the *Limitations Act* was ambiguous as to which limitation period would apply, and therefore the longer prescription period shall apply.

In its analysis, Justice Rothstein, for the unanimous court, acknowledged that the Convention and Model Law both limit the potential for court intervention in arbitration and provide very limited grounds for resisting recognition and enforcement of arbitral award. At the same time, while both are silent as to the possible application of time limitations, the Convention provides for recognition and enforcement "in accordance with the rules of procedure" in the state where the award is relied upon.

This was taken to mean that domestic law can permit the application of time limits and will apply to characterize limitation legislation because:

- (i) the Convention, as a treaty, has to be construed in its context and in light of its object and purpose and in a manner that takes into account the fact that it was intended to interact with a variety of legal traditions, including the common-law treatment of limitation provisions as procedural as opposed to substantive law (in civil law states, on the other hand, limitation provisions are treated as substantive law);
- (ii) the practice of over 53 states that have adopted the Convention and Model Law (both civil and common-law jurisdictions) have or would likely subject recognition and enforcement to some form of time limitation; and
- (iii) legal scholars have accepted that the Convention permits the application of local time limitations.

Accordingly, the Convention permitted the application of the time limitations in this case and equally permitted the characterization of Alberta's limitation legislation as a matter of procedure that could apply to provide a further ground for a court's refusal to recognize and enforce a foreign arbitral award. In coming to this conclusion, the Court ruled that it was not relevant that, for purposes of conflicts of law, limitation provisions are viewed as matters of substantive law, and that the Convention, properly read, did not constrain Alberta from imposing a limitation period shorter in time than the longest similar limitation period in Canada.

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Having disposed of arguments based upon the terms of the Convention, the Court next grappled with whether and how the *Limitations Act*, properly construed, applied to the Award. In this context, the Court first noted the intended comprehensive nature of the statute, which applies a single two-year limitation period to all proceedings brought in Alberta to obtain any “remedial order”, which is defined as a court judgment or order “requiring a defendant to comply with a duty or to pay damages for the violation of a right”, even where that right is grounded in foreign law. In making this finding, the Court noted that the *Limitations Act* was enacted after adoption of the Model Law and that it was not necessary for the legislature to expressly provide that the statute would apply to international arbitration awards.

The Court then had to determine whether an order recognizing and enforcing an arbitration award was a remedial order based on a “judgment or order for the payment of money” (in which case a 10-year limitation period would apply), a general remedial order (to which a two-year period would apply), or an order subject to no limitation period at all.

The Court held, for the following reasons, that an international commercial arbitration award is not a judgment or court order because:

- (i) it is not defined as such in relevant legislation (as distinct, for example, to British Columbia’s *Limitation Act*);
- (ii) it is not part of a state’s judicial system;
- (iii) it owes its existence to the will of the parties; and
- (iv) it requires a court application to enforce and hence is not directly enforceable. The Court also rejected Yugraneft’s argument that the *Limitations Act* was ambiguous as to which of the two limitation periods applied.

The final part of the Court’s analysis was devoted to whether Yugraneft’s application was actually time-barred. Under the *Limitations Act*, Yugraneft was required to commence its application within two years from the date that it first knew:

- (i) that the “injury” had occurred;
- (ii) that the injury was attributable to Rexx’s conduct; and

(iii) that the injury warranted the commencement of the application.

For this purpose, “injury” was “non-performance of the obligation”; which the Court said was non-payment of the arbitration award.

When did that non-performance first occur? The Court ruled that that was not necessarily the date of the award, as Yugraneft had three months under the Model Law to move in the court of the arbitral seat to have the award set aside under the limited grounds set out in the Model Law or under domestic legislation of the arbitral seat. It was only when the remedy was finally determined (after this period had passed) that the award could be properly described as binding. On that date, the obligation to pay would crystallize and non-payment would be apparent to Yugraneft.

That, however, would not necessarily determine the proper start date of the limitation period, given that the discoverability principle explicit in the *Limitations Act* required that Yugraneft must have determined (or in the circumstances should have determined) that an application in Alberta was warranted. The Court wrote on this issue:

An arbitral creditor cannot be presumed to know the location of all of the arbitral debtor’s assets. If the arbitral creditor does not know, and would have no reason to know, that the arbitral debtor has assets in a particular jurisdiction, it cannot be expected to know that recognition and enforcement proceedings are warranted in that jurisdiction. Thus, in my view, recognition and enforcement proceedings would only be warranted in Alberta once an arbitral creditor has learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.

Unfortunately for Yugraneft, Rexx was based in Alberta and the Court accepted that it ought to have known immediately that Rexx had Alberta assets.

The Court’s decision in *Yugraneft* was long-awaited by Canada’s arbitration practitioners. The case was closely followed as it was pursued through the Alberta courts and several arbitration institutions – including the London Court of International Arbitration – were given status as interveners. Application of this decision in other Canadian provinces will depend upon the provisions of provincial limitations statutes, as well as any applicable sections of provincial arbitration statutes.

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At this time, the case will have to be drawn to the attention of arbitral creditors who believe that they may have exigible assets to pursue in Canada, and it may be expected that some efforts will be made to have legislation changed to reflect and respond to the exigencies of international arbitration.

TWO KEY LESSONS FROM THIS CASE (GENERAL AND PARTICULAR TO ALBERTA)

1. Parties to an arbitration agreement should be very particular in identifying the choice of law applicable and whether it is procedural and substantive, and how they wish that law to be applied; and
2. Whether in the arbitration context, or in litigation in the courts, the time limits in the *Alberta Limitations Act* cannot, on public policy grounds, be altered by agreement by the parties to a contract.

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