

**“Time Is On My Side, Yes It Is (No It’s Not)”<sup>1</sup>:  
Are proceedings to enforce a foreign arbitral award subject to a limitation period?**

By Antonin I. Pribetic\*

The *New York Convention*<sup>2</sup> and the *Model Law*<sup>3</sup> each offer a process for recognition and enforcement of foreign arbitral awards which is generally more streamlined, less expensive and time-consuming than recommencing an action on the merits. However, the old cliché “timing is everything” is apt. There is still some degree of uncertainty under Canadian law as to whether a foreign arbitral award made under the *New York Convention* or *Model Law* is subject to a limitation period, and, if so, what that limitation period is.<sup>4</sup>

Under Ontario law, a foreign judgment is simply evidence of a contract debt and must be sued upon as an “action on the case.” The old limitation period for a “specialty” (i.e., a domestic judgment) was 20 years; however, the Ontario Court of Appeal held that a “foreign judgment” was not equivalent to a domestic judgment unless there was reciprocal enforcement legislation from the originating jurisdiction which granted judgment. The old limitation period in Ontario was six years, but was only triggered when the judgment debtor returned to Ontario.<sup>5</sup> This exception has limited application in circumstances where the debtor has no physical presence in Ontario, but simply has assets there. In any event, the new limitation period for most actions begun after Dec. 31, 2003 in Ontario is now two years – a relatively short time to sue. By contrast, in the U.S., the

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<sup>1</sup> From the popular song by The Rolling Stones “Time Is On My Side” written by Jerry Ragovoy (under the pseudonym Norman Meade)

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<sup>2</sup> UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, [the “New York Convention”] concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 art. V, s. 1.

<sup>3</sup> The UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (available online at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-english\\_revised%2006.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-english_revised%2006.pdf) .) [the “Model Law”]. The Model Law is incorporated in Ontario by the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (as am.) [the “ICAA”].

<sup>4</sup> THE [UNAMENDED] CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (New York, 1974) which has received accession from 18 countries, including the United States, generally imposes a four-year limitation period. Prof. Kazuaki Sono, in his article “The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility,” notes:

At present, there are eighteen Contracting States to the Convention as amended by the Protocol (Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Paraguay, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, Uganda, United States, Uruguay, and Zambia). On the other hand, the number of Contracting States to the original 1974 Limitation Convention is twenty-five, i.e., eighteen above plus seven. Out of the latter seven States, four (Dominican Republic, Ghana, Norway, and Yugoslavia) are those which ratified or acceded to the Limitation Convention before the Protocol was adopted (and have not yet ratified the Protocol); two States (Ukraine and Burundi) ratified only the original Convention in 1993 and 1998 respectively, and Bosnia and Herzegovina declared succession of the original Convention in 1994, on the theory that former Yugoslavia was a Contracting State to the 1974 Convention. [citations omitted] (available at <http://www.cisg.law.pace.edu/cisg/biblio/sono3.html>.)

See also UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Status of Conventions and Model Laws, art. 8. available at:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html).

<sup>5</sup> *Lax v. Lax* (2004) 70 O.R. (3d) 520 (Ont. C.A.). Cf. the recently proclaimed Saskatchewan *Enforcement of Foreign Judgments Act*, 2005 c.E-9.121 (effective April 19, 2006) which contains a 10 year limitation also found in some provincial reciprocal enforcement legislation: *British Columbia Court Order Enforcement Act*, R.S.B.C. 1996 Chap. 78, § 29 (1)(a) and (b); *Prince Edward Island Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, § 2(1)(a) and (b). For a more detailed analysis of limitation periods in this context, see Antonin I. Pribetic, “Thinking Globally, Acting Locally: Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada”, in *ANNUAL REVIEW OF CIVIL LITIGATION 2006*, The Honourable Justices T. Archibald & R. Echlin, eds., (Toronto: Thomson-Carswell, 2007) 144-199 at 178-181 and 189.

*Federal Arbitration Act* lays down a time limit of three years for the confirmation and enforcement of awards made under the *New York Convention*.<sup>6</sup>

This is further complicated by some drafting ambiguity in the *Limitations Act, 2002*,<sup>7</sup> which omits reference to the *ICAA* (incorporating the *Model Law*). Furthermore, the *New York Convention* is silent on limitation periods, which is a substantive issue to be determined by either the *lex arbitri* or the *lex fori* (at least in Canada and the U.S.). The following are relevant excerpts from the *Limitations Act, 2002* and the *Model Law* (as incorporated by the domestic enabling legislation):

*Limitations Act, 2002, S.O. 2002, c. 24, Sched. B*

No limitation period

16. (1) There is no limitation period in respect of,
- (a) a proceeding for a declaration if no consequential relief is sought;
  - (b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;
  - ...
  - (d) a proceeding to enforce an award in an arbitration to which the *Arbitration Act, 1991* applies;

*International Commercial Arbitration Act, R.S.O. 1990, c. I.9*

10. For the purposes of articles 35 and 36 of the *Model Law*, an arbitral award includes a commercial arbitral award made outside Canada, even if the arbitration to which it relates is not international as defined in article 1 (3) of the *Model Law*. R.S.O. 1990, c. I.9, s. 10.

Enforcement

11. (1) An arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court. R.S.O. 1990, c. I.9, s. 11 (1).

Idem

(2) An arbitral award recognized by the court binds the persons as between whom it was made and may be relied on by any of those persons in any legal proceeding. R.S.O. 1990, c. I.9, s. 11 (2).

There are two potentially conflicting outcomes. First, the new Act refers only to the domestic arbitration statute, namely, the *Arbitration Act, 1991*,<sup>8</sup> but fails to refer to the international domestic statute (the *ICAA*). However, one possible argument is that the interplay and combined effect of s. 16(b) of the *Limitations Act, 2002* and s. 11(1) of the *ICAA* means that, in Ontario, no limitation period applies to the enforcement of a foreign arbitral award.

Second, there is no guarantee that an Ontario judge will necessarily accept this novel point of law. In *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*,<sup>9</sup> the appellant company, which carried on business as a buyer, seller and supplier of grains, entered into a charter party agreement on January 17, 1978, with the respondent, as owner of the vessel *Grecian Isles*, for carriage of a cargo of grain from the port of Vancouver to the port of Bombay, India. The appeal concerned the Trial Division's directions for determination of certain points of law raised in the

<sup>6</sup> Alan Redfern and Martin Hunter (with Nigel Blackaby and Constantine Partasides), *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, (4<sup>th</sup> Ed.-Student Version) (London: Sweet & Maxwell, 2004), Chap. 9, at §9-46, p.508.

<sup>7</sup> *Limitations Act, 2002, S.O. 2002, c. 24, Sched. B* (as am.)

<sup>8</sup> *Arbitration Act, 1991, S.O. 1991, c. 17* (as am.)

<sup>9</sup> *Compania Maritima Villa Nova S.A. v. Northern Sales Co.* 137 N.R. 20, [1992] 1 F.C. 550 (F.C.A.) per Stone, J. (Heald and Mahoney JJ. concurring)

pleadings, including a constitutional question as to whether the *New York Convention*<sup>10</sup> was *ultra vires*, as well as whether the action to enforce the foreign arbitral award was statute-barred under *UK Limitation Act, 1980*. Stone, J. held Parliament did possess the power to adopt the Act as valid federal legislation for the recognition and enforcement in Canada of foreign arbitral awards having a federal character in a constitutional sense. With respect to the issue of limitation periods, Justice Stone agreed with the motions judge that limitations statutes are procedural in nature and the relevant provisions are those of the *lex fori*, concluding that Canadian law governs the matter of the limitation period applicable to an action in a Canadian court to enforce an award:

... *The foreign arbitral award, as I have already stated, gave rise to a fresh cause of action which may be asserted in the Trial Division. Even if the U.K. statute applied, it provides a limitation for bringing an action to enforce an award. But no such award can exist until after it is made. It is only then that it may be enforced in the courts.*

Counsel submits, in the alternative, that the matter of limitation is governed by the provisions of ss. 39(2) of the *Federal Court Act*, which reads:

ss. 39(2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

In my view, the "cause of action arose" on the date of the award, May 24, 1985, at the earliest. *The action in the Trial Division was instituted well within the six years limitation period prescribed by the subsection.* [emphasis added]<sup>11</sup>

Admittedly, *Compania Maritima Villa Nova S.A. v. Northern Sales Co.* is a federal court decision and has limited applicability for cases within provincial superior court jurisdiction, particularly in light of s. 23 of the *Limitations Act, 2002*, which represents a sea change for the applicability of conflict of laws rules *vis-à-vis* Ontario limitations law, and reads:

For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is *substantive law*. 2002, c. 24, Sched. B, s. 23.<sup>12</sup> [emphasis added]

Nevertheless, one should not blithely assume that just because Ontario limitations law is no longer procedural, no limitation period applies to the recognition and enforcement of a foreign arbitral award. In a recent Alberta case,<sup>13</sup> the applicant, Yugraneft Corp., applied for an order recognizing and enforcing an international arbitration award. The court rejected Yugraneft's contention that there was no applicable limitation period for foreign arbitration awards based upon the definition of a "remedial order" in s.1(i)(i) of the *Alberta Limitations Act*.<sup>14</sup> Chrumka, J. noted that since there were no comparable guidelines within the Model Law and the *ICAA* with respect to limitation periods, a foreign arbitral award, like a foreign judgment, was based upon a simple contract debt. As such, the action was statute-barred due to the expiry of the two-year limitation period set out in the *Alberta Limitations Act*. Unlike s. 23 of the *Limitations Act, 2002*, the *Alberta Limitations Act* does not distinguish between substantive and procedural law and reads as follows:

<sup>10</sup> UNITED NATIONS FOREIGN ARBITRAL AWARDS ACT, S.C. 1986, c. 21, s. 3, Schedule.

<sup>11</sup> *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*, *supra*.

<sup>12</sup> *Limitations Act, 2002*, *supra* note 7, s.23. See also, Janet Walker, "Twenty Questions (About Section 23 of the Limitations Act, 2002)" in W. Gray, L. Kerbel-Caplan & J. Ziegel, eds. (Toronto, Ontario Bar Association, 2005) at pp. 117-121.

<sup>13</sup> *Yugraneft Corp. v. Rexx Management Corp.* [2007] A.J. No. 749 Alta. Q.B. per P. Chrumka J. (June 27, 2007)

<sup>14</sup> *Limitations Act*, R.S.A. 2000, c. L-12 (as am.) §1(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,  
(ii) the enforcement of a remedial order

...

#### Conflict of laws

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.<sup>15</sup>

The alternative approach is to bring a common law action to enforce a foreign judgment which previously confirmed the final arbitral award. However, this strategy may also prove to be problematic, as it has not been settled whether a Canadian court is willing to simply “rubber stamp a second-hand judgment,” a practice which has been criticized by some as the “laundering of foreign judgments.”<sup>16</sup>

In conclusion, while most foreign arbitral awards are recognized and enforced by Canadian courts, counsel retained to enforce a foreign arbitral award still face potential hurdles. Aside from logistical problems and typical delays for service *ex juris*,<sup>17</sup> limitation periods are not the exclusive bane of litigators. Unless and until there is federal and/or inter-provincial legislative reform to harmonize or unify the law of limitations for both foreign judgments and foreign arbitral awards,<sup>18</sup> a party seeking recognition and enforcement of a foreign arbitral award in an Ontario court is well advised to begin an application to enforce the final arbitral award within the new two-year limitation period.

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<sup>15</sup> *Id.*, RSA 2000 cL-12 s12.

<sup>16</sup> See, *Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd* [2006] 4 HKC 93; [2006] HKCFI 430 (High Court of the Hong Kong Special Administrative Region); *Clarke v. Fennoscandia Ltd* [2004] SC 197 (Scottish Outer House), per Lord Kingarth at ¶ 31.

<sup>17</sup> CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (available online at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17)) and Rule 17.05(1) of the Ontario *Rules of Civil Procedure*. See also, Ingeborg Schwenzer and Simon Manner, “The Claim is Time-Barred’: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration, *Arbitration International*, Vol. 23 No. 2 (2007), pp. 293-307 at 303.

<sup>18</sup> The less likely alternative would be for Canada (and each constituent province and territory) to sign, ratify and implement the *U.N. Limitations Convention*, *supra* note 4.