

Yugraneft v. Rexx Management:
Limitation periods under the New York Convention
A Case Comment by
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Background

In December, 2009, the Supreme Court of Canada heard an appeal in *Yugraneft Corp. v. Rexx Management Corp.*, which concerned the limitation period applicable to the recognition and enforcement of international commercial arbitration awards in Canada.

In September 2002, the International Commercial Arbitration Court, sitting in Russia, granted an arbitration award (the “Award”) in favour of Yugraneft Corp (“Yugraneft”). Yugraneft claimed that Rexx Management Corp. (“Rexx”) had failed to provide equipment, which had been paid for. In January, 2006, more than three years later, Yugraneft applied to the Alberta Court of Queen’s Bench for an order recognizing and enforcing the Award. Rexx sought dismissal of the application or a stay, pending the resolution of a racketeer-influenced and corrupt organizations case in the United States.

Alberta Court of Queens Bench

At the Court of Queen’s Bench,¹ the primary issue was the limitation periods applicable to the enforcement of a foreign arbitration award under Alberta’s *Limitations Act* (“*Limitations Act*”).² The relevant sections of the *Limitations Act* are:

¹ 2007 ABQB 450

² R.S.A. 2000, c. L-12

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,

...

3(1) Subject to Section 11, if a claimant does not seek a remedial order within

- (i) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
- (i) that the injury for which the claimant seeks a remedial order had occurred,
- (ii) that the injury was attributable to conduct of the defendant, and
- (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding; or
- (ii) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

...

11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The primary issues to be determined, therefore, were (a) whether Yugraneft’s application was for a “remedial order” and, if so, (b) whether the “remedial order” sought was “in respect of a claim based on a judgment or order for the payment of money.” The answers to these questions would determine whether section 3 or section 11 of the *Limitations Act* applied to the Award and whether Yugraneft’s application was subject to a two-year or ten-year limitation period. In short,

if the Award was assimilated to a judgment, the limitation would be 10 years; if the Award was found to be in the nature of a contract debt, the applicable limitation would be 2 years.

The chambers judge held that an action to enforce a foreign judgment is an action on a simple contract debt and that the same principle applies to foreign arbitral awards. As such, Yugraneft's application was properly characterised as an application for a remedial order, which was subject to the shorter limitation period contained in section 3 of the *Limitations Act*.³

The chambers judge noted that there was a dearth of case law concerning the limitation period applicable to international arbitration awards. However, he rejected Yugraneft's argument that no limitation period applied. The judge emphasized that the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), contained in Alberta's *International Commercial Arbitration Act* ("ICAA"),⁴ did not include limitation periods as one of the stipulated grounds for refusing recognition and enforcement of international arbitral awards.

Moreover, the Award could not be treated as a domestic judgment under the Alberta *Reciprocal Enforcement of Judgments Act*,⁵ which would subject it to s. 11 of the *Limitations Act*, because the Russian Federation is not a reciprocating state with Alberta. Instead, he found that, like foreign judgments, foreign arbitral awards are subject to a limitation period of two years under the Alberta *Limitations Act*.

Last, the chambers judge also dismissed Rexx's submission that it would be contrary to public policy to enforce the award due to fraudulent activity during the arbitral proceedings. The judge held in *obiter* that the proper forum to address this issue was before the arbitral panel.

Alberta Court of Appeal

The Alberta Court of Appeal upheld the chamber judge's finding.⁶ In particular, the Court of Appeal confirmed the following:

³ It should be noted that the two-year period prescribed by section 3 of the *Limitations Act* is a "discoverability" period; the deadline does not expire until two years after the later of the dates on which the claimant either actually knew, or in the circumstances ought to have known, of the necessary facts in relation to the claim.

⁴ R.S.A. 2000, c. I-5

⁵ R.S.A. 2000, c. R-6

⁶ 2008 ABCA 27

- For the purposes of recognition and enforcement, a foreign arbitral award should be treated as a foreign, and not a domestic, judgment. A foreign judgment is regarded as a debt because of the judgment debtor's implied promise to pay the amount of the foreign judgment. Moreover, there are no guidelines within the Model Law or the New York Convention with respect to limitation periods;
- Under section 11 of the *Limitations Act*, a “a remedial order in respect of a claim based on a judgment or order for payment of money” means a domestic judgment, not a foreign judgment;
- Even assuming the arbitral award is to be treated as a foreign judgment, the *Reciprocal Enforcement of Judgments Act* did not apply as Russia is a non-reciprocating jurisdiction;
- Unlike most other Canadian provincial limitation statutes, the *Limitations Act* does not distinguish between substantive and procedural law;
- It was not unfair to apply a relatively short limitation period to foreign arbitral awards as the same period applied to domestic judgements and arbitral awards.

As such, the action was statute-barred due to the expiry of the two-year limitation period set out in the section 3 of the *Limitations Act*.

Submissions made at the Supreme Court

Yugraneft was granted leave to appeal by the Supreme Court of Canada; the appeal was heard in December, 2009. Four parties were given leave to intervene: ADR Chambers Inc. (“ADR Chambers”), the Canadian Arbitration Congress (“CAC”), Institut de Mediation et D’Arbitrage du Quebec (“IMAQ”) and the London Court of International Arbitration (“LCIA”). Yugraneft argued for the longer limitation period, Rexx for the shorter, and the intervenors each offered their own take on the nature of foreign arbitral awards, the proper analytical framework in which to interpret the Alberta statutes and the meaning of the New York Convention and the Model Law.

Yugraneft Corp.

At Supreme Court, Yugraneft focused its submissions on the proper characterisation of international arbitral awards and the policy rationales underlying such a determination. In short, Yugraneft argued that foreign arbitral awards should be treated as judgments, rather than mere evidence of a debt or a contractual promise to pay the amount of the award. In Alberta, therefore, an international arbitral award should properly fall within the ambit section 11 of the *Limitations Act*, rather than section 3.

In addressing the nature of international arbitral awards, Yugraneft argued that such awards are not “foreign” in the same sense as a judgment of a court of a foreign jurisdiction. International arbitration is different in that an arbitral panel has no territorial base and does not derive its authority from a particular territorial jurisdiction. Yet, the arbitral process is judicial in character as an adjudication of a particular dispute, under a chosen law.

Given the nature of international arbitral awards, the New York Convention on the Recognition and Enforcement of Arbitral Awards (“*New York Convention*”) and the Model Law, such awards should be treated the same as, or better than, foreign judgments for the purposes of recognition. Therefore, they should be treated as judgments or orders for the payment of money under the *Limitations Act*.

Rexx Management Corp.

In contrast, the thrust of Rexx Management’s submissions was that section 3 of the *Limitations Act* properly applied. An application for the recognition and enforcement of a foreign arbitral award is an application for a remedial order, as contemplated by the *Limitations Act*. Arbitral awards are not judgments. Rexx Management argued that to recognize foreign arbitral awards as judgments within the meaning of section 11 of the *Limitations Act* would create inconsistency as it would result in a limitation period on foreign arbitral awards that is longer than the limitation applicable to domestic arbitral awards and judgments rendered in reciprocating jurisdictions.

Moreover, the application of local limitation periods is entirely consistent with the *New York Convention* and the Model law as they both contemplate the application of local laws.

Article III of the *New York Convention* simply requires that the procedure for recognising and enforcing an international arbitral award is not substantially more onerous than that imposed on the recognition and enforcement of domestic awards. As the limitation period applicable to domestic awards under Alberta's *Arbitration Act*⁷ is two years, with no provision for discoverability, the application of section 3 of the *Limitations Act* to foreign arbitral awards actually constitutes a less onerous procedure.

ADR Chambers Inc.

ADR Chambers took the position that no limitation period currently applies to international arbitration awards in Alberta. There is nothing in the *New York Convention*, the Alberta *ICAA*, the Model Law or the *Limitations Act* that establishes a limitation period for the recognition and enforcement of international arbitral awards. The *New York Convention*, which is incorporated into the *ICAA*, only currently requires that a minimum limitation period of ten years for all foreign arbitral awards brought into Canada for recognition and enforcement.

Canadian Arbitration Congress

The CAC (represented by Ivan Whitehall, Paul M. Lalonde, Alejandro Manevich and other members of Heenan Blaikie LLP) argued that the autonomous nature of international arbitration and of foreign arbitral awards require that Canada treat awards as equivalent to domestic judgments. The Model Law and the New York Convention, which have both been adopted by Canada, establish a comprehensive legal framework for arbitral awards. They recognize international arbitration as an autonomous legal system and dispute resolution mechanism. As an adjudicative process between consenting parties, international arbitration results in an award with the effect and status of a judgment.

Applying Alberta's limitation periods to the recognition of awards would impose additional substantive conditions inconsistent with Canada's international obligations and with their implementation in Canadian law. Instead, Canadian courts should strive to interpret legislation in accordance with Canada's international obligations.

⁷ R.S.A. 2000, c. A-43

Institut de médiation et d'arbitrage du Québec

Similarly, IMAQ argued that no limitation period currently applies to international arbitration awards in Alberta. There is nothing in the *New York Convention*, the Alberta *ICAA*, the Model Law or the *Limitations Act* that establishes a limitation period for the recognition and enforcement of international arbitral awards. Foreign judgments and foreign arbitral awards should be treated as domestic judgments for the purposes of recognition and enforcement.

London Court of International Arbitration

In contrast to the other intervenors, the LCIA argued that a limitation period should apply to international arbitration awards. The wording of Article III of the *New York Convention* is permissive and contemplates the application of local procedural rules, which include limitation periods. However, states which have adopted the *New York Convention* (“Contracting States”) should ensure that the limitation period applicable to international arbitral awards is not unreasonably short. An unduly short limitation period, that jeopardizes the effective recognition and enforcement of international awards, would be in breach of the *New York Convention*.

Conclusion – the need for a universally applicable limitation period

Currently, parties seeking recognition and enforcement of international arbitral awards are forced to navigate a collection of unforeseen obstacles, due the disparate nature of domestic limitation periods. A report by the International Chamber of Commerce (“ICC”) Commission on Arbitration, which provides a review of the limitations periods applicable to the recognition and enforcement of international arbitral awards around the world, highlights the lack of uniformity.⁸

This lack of uniformity undermines certainty in international commerce and the interests of justice. Given the global nature of commerce and the rapid movement of capital and assets across borders, it is often impossible to anticipate with certainty the jurisdictions in which the award will need to be enforced. Short and disparate limitation periods prejudice parties who can

⁸ *Guide to the National Rules of Procedure for Recognition and Enforcement of New York Convention Awards*, (2008) ICC Bulletin (Special Supplement)

no longer enforce their awards and undermine the arbitral system as a reliable and practical method for parties to resolve their disputes. Indeed, the enactment of the *UNCITRAL Convention on the Limitation Period in the International Sale of Goods* (1974) is indicative of the importance of a universally applicable limitation period in international disputes.

The *New York Convention* Contracting States must acknowledge the serious problems caused by the lack of uniformity in limitation periods and seek to find a resolution. The most effective resolution would be a single, universally applicable limitation period that is relatively long. The simplest, and most efficient, way of achieving such a result is an amendment to the *New York Convention*, to include specific commitments on limitation periods. Such an approach would promote the interests of certainty, order and justice. Leading practitioners and academics, bar associations and other arbitration-related organizations such as the LCIA, the ICC, ICCA and the AAA should advance a common position in this regard, urging the Contracting States to adopt the necessary amendments.

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