

**RECENT PRIVATE INTERNATIONAL LAW DEVELOPMENTS  
BEFORE THE SUPREME COURT OF CANADA**

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A trilogy of interesting cases involving private international law have recently wended their way to the Supreme Court of Canada: (1) *King v. Drabinsky*<sup>1</sup> (an Ontario case addressing the applicability of the Charter in respect of the enforcement of a foreign judgment); (2) *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*<sup>2</sup> (a British Columbia case on parallel proceedings and *forum non conveniens*); and (3) *Yugraneft v. Rexx Management Corporation*<sup>3</sup> (an Alberta case which affirmed that the two-year limitation period under s.3 of Alberta's Limitations Act, governs when a party seeks the recognition and enforcement in Alberta of a foreign arbitral award).

***(1) King v. Drabinsky***

The first case, *King v. Drabinsky*, involved theatre impresario, Garth Drabinsky and his fellow director, Myron Gottlieb, in the aftermath of the Livent insolvency. The appeal addresses the applicability of the Charter in respect of the enforcement of a foreign judgment. The appellants, King et al. were investors in Livent Inc. (Livent), an Ontario corporation which operated in both Canada and the United States. Drabinsky et al. were officers and directors of Livent. In 1998, the respondents, King et al, commenced a U.S. class action in New York State against the appellants, alleging misrepresentations of Livent's financial situation in a 1997 registration statement signed and filed by the appellants with the U.S. Securities and Exchange Commission (SEC) in support of a distribution of unsecured notes. In 1998, after Livent restated its financial results reporting significantly reducing net income; it subsequently was insolvent, rendering the unsecured notes worthless. The appellants, Drabinsky et al. were concurrently facing criminal charges in the U.S., but extradition was unavailable, ostensibly on the basis that they were facing similar criminal charges in Canada. Depositions were conducted in Canada and subsequently filed in the U.S. proceeding, whereby the appellants "pleaded the Fifth" (i.e. the right to remain silent protection afforded under the U.S. Constitution's Fifth Amendment) and refused to answer any questions on the grounds that such answers would be self-incriminatory. Drabinsky et al. did not seek a stay of the U.S. civil action and asserted the defence of due diligence. The respondents, Dorian King and Diane King, representative plaintiffs in a U.S. class action proceeding, moved for summary judgment by the New York Court, which was granted and an appeal and a motion to vary on the basis of fresh evidence were both unsuccessful. The Kings then applied to have the foreign judgment enforced in Ontario. The application judge, Wilton-Siegel J., recognized as enforceable the U.S. civil judgment against them in the amount of \$36,617,696 U.S.D. The appellants argued that the Ontario courts should decline to recognize the U.S. judgment on the basis that they were denied a full opportunity to defend the proceedings. That denial, they argued, arose because outstanding criminal charges effectively precluded them from testifying in the U.S. civil proceeding. The application judge rejected the appellants' argument and recognized the U.S. judgment. Both the motions judge and the Court of Appeal found that the New York judgment should be enforced.

On appeal, King and Gottlieb claimed that if they had testified in civil action instead of invoking the Fifth Amendment, they would have lost *Charter* protection against self-incrimination in criminal proceedings and thus were denied a meaningful opportunity to be heard. Speaking for the Court, Lang, J.A. (Watt and Epstein, JJ.A. concurring) held that Section 13 protection under the *Charter* would be available, as the issue of whether evidence is incriminating is to be determined at the time the evidence is sought to be used, and the words "any proceeding" are broad enough to encompass extraterritorial proceedings.<sup>4</sup> The Court of Appeal agreed with the application judge, Wilton-Siegel, J. that "the approach to protection against self-incrimination differs in the U.S. from the approach in Canada, the decision in *United States v. Levy*<sup>5</sup> had determined that the difference did not constitute a valid objection to the recognition of the judgment."<sup>6</sup> He saw no reason to distinguish *Levy* from the facts of this case. Furthermore, protection under Sections 7 and 11 of the *Charter* was also available.<sup>7</sup> Lang, J.A. confirmed that a trial judge also has common law discretion to exclude evidence, such that the protection would extend to derivative evidence necessary to establish a due diligence defence.<sup>8</sup>

With respect to the extra-territorial application of the *Charter*, Justice Lang relied upon the Supreme Court of Canada's recent decision in *R. v. Hape*, stating:

"[33] The decision in *R. v. Hape* 2007 SCC 26 (CanLII), (2007), 220 C.C.C. (3d) 161 (S.C.C.) is helpful on this issue. The court in *Hape* considered the extraterritorial application of the *Charter* to searches conducted by Canadian officers in the Turks and Caicos relying on that jurisdiction's requirements for a legal search. LeBel J., writing for the majority, held that the *Charter* did not apply to the searches. Yet he also observed at para. 96: "there is no impediment to extraterritorial adjudicative jurisdiction pursuant to which evidence gathered abroad may be excluded from a Canadian trial, as this jurisdiction simply attaches domestic consequences to foreign events". This important observation applies to this case. LeBel J. made it clear, referring to *Harrer*, that the rights of an accused in Canada are still respected at the trial stage. As he said at para. 100: "Where the Crown seeks at trial to adduce evidence gathered abroad, the *Charter* provisions governing trial processes in Canada ensure that the appropriate balance is struck and that due consideration is shown for the rights of an accused being investigated abroad."

[34] Thus, I take two things from *Hape*. First, *Hape* supports the reasoning in *Dubois*, that when considering the protection provided by s. 13 of the *Charter*, the "timing" of the *Charter* application is concerned with the moment when the incriminating evidence is to be adduced at the criminal trial. Second, the *Charter* can have "extraterritorial adjudicative jurisdiction" particularly where the application of that jurisdiction results in purely domestic consequences and does not interfere with the jurisdiction of the foreign country. This supports my view that the term "any proceedings" under s. 13 of the *Charter* is not necessarily restricted to a proceeding that occurs in Canada; a court will have the jurisdiction to consider "any proceedings" in the context in which they occurred. "<sup>9 10</sup>

The Court of Appeal rejected the appellants' argument for creating a fourth category or new impeachment defence to those confirmed by the Supreme Court of Canada decision in *Beals v. Saldanha*<sup>11</sup> (namely, fraud, natural justice and public policy) in respect of the recognition and enforcement of foreign judgments:

“[41] The appellants argue that a fourth category or defence should be added to the categories accepted in *Beals* on the basis of a denial of a meaningful opportunity to defend. In my view, as aptly identified by the application judge, the considerations raised by the appellants under the proposed new category are the same considerations as under the rubric of the natural justice defence. I would not give effect to the appellants' arguments on this issue.”<sup>12</sup>

On Thursday, February 12, 2009, the Supreme Court of Canada dismissed the application for leave to appeal, with costs.<sup>13</sup>

## (2) *Teck Cominco v. Lloyd's*

The second case before the Supreme Court of Canada<sup>14</sup>, dealt with parallel proceedings and *forum non conveniens*.

### *The U.S. Proceedings*

Teck Cominco Metals Ltd. (TCML) and its predecessors carried on the business of mining and smelting in British Columbia for many years, and one of its subsidiaries carried on business in the State of Washington. TCML notified its insurers, Lloyd's, about claims from its B.C. operations including from the discharge of waste into the Upper Columbia River, some of which accumulated in the river in Washington. Some aboriginal tribes brought a Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)<sup>15</sup> action against TCML in the U.S. District Court for the Eastern District of Washington, which the State of Washington also joined as a plaintiff a few months later asserting claims similar to the other plaintiffs. TCML challenged jurisdiction of the Washington courts unsuccessfully. The Ninth Circuit found that TCML's lead and zinc smelter in Canada discharged slag and other hazardous substances into the Upper Columbia River.<sup>16</sup> These discharges lead to the release of arsenic, cadmium, copper, zinc, and lead, which the Ninth Circuit found caused “harm to human health and the environment.”<sup>17</sup> The Ninth Circuit further held that, although the original source of the hazardous substances was in a foreign country, the application of CERCLA to TCML is domestic not extraterritorial because the contamination occurred within the boundaries of the United States. In addition, the Ninth Circuit found that a party could be liable under Section 9607(a) (3) of CERCLA if it arranged for disposal of its own waste. TCML's petition for *certiorari* to the U.S. Supreme Court was denied.<sup>18</sup>

### *The B.C. Proceedings*

Lloyd's denied liability under the policies. After termination of their standstill agreement, both parties set off on a "race to the courthouse": TCML commenced an action against Lloyd's in Washington for a positive declaration of coverage under the policies; Lloyd's concurrently commenced actions in British Columbia for negative declarations of no duty to defend and indemnify. Lloyd's unsuccessfully challenged the jurisdiction of the Washington courts. Meanwhile, TCML sought a stay of the BC coverage action arguing that Washington was a more convenient or appropriate forum. The stay was denied because the B.C. court held that BC was the more appropriate forum. TCML appealed. The appeal was denied. The B.C. Court of Appeal held that the *Court Jurisdiction and Proceedings Transfer Act* ["CJPTA"]<sup>19</sup> provisions for *forum non conveniens* were intended to be assimilated into the existing body of law and, thus, that the lower court was right to consider existing case law, that the judge had weighed the various factors to be considered, and that there was ample evidence to support his conclusion. Comity did not require the court to treat the prior assertion of jurisdiction by a foreign court as conclusive on the question of *forum non conveniens*. The complexity of the analysis precludes a simplistic approach that defers to the first court to assert jurisdiction. This analysis includes a consideration of the proper law to be applied, the interest of the State of Washington in the litigation and whether the foreign forum was selected to avoid the laws of the jurisdiction whose court is the most appropriate forum.

### *The Supreme Court of Canada's Decision*

Leave to Appeal was granted on November 29, 2007. In brief reasons released on February 20, 2009,<sup>20</sup> the Supreme Court of Canada dismissed the appeal with costs. TCML argued that where a foreign court has assumed jurisdiction in parallel proceedings, the usual multifactored test under s. 11 of the *CJPTA* should be subsumed by a "comity-based" test that respects the foreign court's decision to take jurisdiction. TCML emphasized the temporal distinction between a foreign court as a potentially appropriate forum, and the situation where a foreign court "*has in fact asserted jurisdiction.*" Alternatively, TCML argued that a foreign court's prior assertion of jurisdiction is an overwhelming significant factor in *forum conveniens* analysis, such that the British Columbia courts ought to be effectively bound to stay the parallel actions.

Writing for the unanimous Court, the Chief Justice rejected both of TCML's arguments. As a starting point, McLachlin, C.J. noted that Section 11 of the *CJPTA* is a codification of the *forum non conveniens* doctrine<sup>21</sup> and the language used reflects the Supreme Court of Canada decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* ["*Amchem*"].<sup>22</sup> Section 11 reads:<sup>23</sup>

Discretion as to the exercise of territorial competence

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to try the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to try a proceeding, shall consider the circumstances relevant to the proceeding, including:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.<sup>24</sup>

McLachlin, C.J. further observed that the CJPTA is modeled from the Uniform Law Conference of Canada's *Uniform Court Jurisdiction and Proceedings Transfer Act* ["UCJPTA"], which parenthetically defines a "proceeding" as "an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion", the latter of which includes interlocutory injunctive proceedings, including anti-suit injunctions (and presumably other forms of equitable remedies, including declaratory relief).<sup>25</sup> As the learned Chief Justice observes:

[22] Section 11 of the *CJPTA* was intended to codify the *forum non conveniens* test, not to supplement it. The *CJPTA* is the product of the Uniform Law Conference of Canada. In its introductory comments, the Conference identified the main purposes of the proposed Act, which included bringing "Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897" (*Uniform Law Conference of Canada – Commercial Law Strategy* (loose-leaf), at p. 3). Further, the drafters of the model Act confirmed that s. 11 of the *CJPTA* was intended to codify the common law *forum non conveniens* principles in "comments to section 11":

**11.1** Section 11 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past. [p. 11]

Section 11 of the *CJPTA* thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions."<sup>26</sup>

In rejecting TCML's arguments, McLachlin C.J. stated her preference for a "holistic approach" towards judicial comity, where multiplicity of proceedings is one of a variety of factors to be considered in the overall *forum non conveniens* analysis. In support of this view, the Chief Justice emphasized policy considerations and harmonization of interprovincial and international enforcement regimes, which militate against a foreign court's prior assertion of jurisdiction as an "overriding and determinative factor in the *forum non conveniens* analysis". At paragraphs 29 and 30, the learned Chief Justice writes:

[29] Finally, policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis. To adopt this approach would be to encourage a first-to-file system, where each party would rush to commence proceedings in the jurisdiction which it thinks will be most favourable to it and try to delay the proceedings in the other jurisdiction in order to secure a prior assertion in their preferred jurisdiction. Technicalities, such as how long it takes a particular judge to assert jurisdiction, might be determinative of the outcome. In short, considerations that have little or nothing to do with where an action is most conveniently or appropriately heard, would carry the day. Such a result is undesirable and inconsistent with the language and purpose of s. 11, discussed above.

[30] Also, the extent to which approaches to the exercise of jurisdiction differ on an international level also weighs in favour of rejecting Teck's approach. A distinction should be made between situations that involve a uniform and shared approach to the exercise of jurisdiction (e.g. inter-provincial conflicts) and those, such as the present, that do not. In the latter, blind acceptance of a foreign court's prior assertion of jurisdiction carries with it the risk of declining jurisdiction in favour of a jurisdiction that is not more appropriate. A holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the *forum non conveniens* issue with due comity to foreign courts.<sup>27</sup>

Interestingly, the Court did not address the fact that TCML previously submitted to the jurisdiction of the British Columbia Supreme Court during the course of the proceedings. Arguably, the B.C. court also had territorial competence over the subject-matter of the dispute pursuant to s.3(b) of the *CJPTA*.<sup>28</sup> Moreover, even if TCML had not otherwise attorned, a real and substantial connection existed amongst the subject-matter of the dispute (*i.e.* the insurance policies); the corporate residency of both parties (*i.e.* territorial competence/presence-based jurisdiction); and the domestic forum (British Columbia). Hence, British Columbia was not only a natural forum; it was the appropriate forum.

The Court agreed with the Chambers Judge's view that B.C. law and not Washington law applied to the subject-matter of the dispute.<sup>29</sup> An additional point is that in lieu of a forum selection clause or exclusive jurisdiction clause, the applicable law (the "*lex causae*") governing the insurance contract was British Columbia law, namely, s. 5 of the *Insurance Act* which provides that a contract of insurance is "deemed to have been made in British Columbia and must be construed accordingly."<sup>30 31</sup>

As the chambers judge previously noted, the Washington court judge “did not reach a conclusion, tentative or otherwise, as to what law the Court would apply to the policies.”<sup>32</sup> Put another way, the legal issue of whether the slag produced by TCML is an expected by-product of TCML’s operations and is, therefore, not an “insurable occurrence” under TCML’s excess insurance policies, is arguably properly before the British Columbia Supreme Court. In this commentator’s view, the determination of whether Lloyd’s has a duty to defend under the applicable insurance policies should have no bearing on the determination of liability, causation, apportionment of fault and damage assessments in the U.S. concurrent proceedings.

The Court also minimized the impact of parallel proceedings, stating:

[38] Teck argues that a refusal to stay the B.C. Coverage Action places the parties in the difficult position of having legal proceedings on the issue of insurance coverage in two separate jurisdictions. While I am sympathetic to the difficulties presented by parallel proceedings, the desire to avoid them cannot overshadow the objective of the *forum non conveniens* analysis, which is “to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties” (*Amchem*, at p. 912).<sup>33</sup>

Somewhat disappointingly, the Court’s jurisdictional analysis demurs on the issue of anti-suit injunctions. In addition to jurisdiction simpliciter/territorial competence, the three additional prerequisites for an anti-suit injunction were also present:

- (i) There is a foreign proceeding pending;
- (ii) Lloyd’s has been unable to obtain relief from the assumption of jurisdiction in the foreign jurisdiction; and
- (iii) the domestic forum is the most appropriate forum and has been established by the B.C. court as the appropriate forum.<sup>34 35</sup>

The late Justice Sopinka in *Amchem* held that anti-suit injunctions may only be granted to prevent “serious injustice” which may be the “result of the failure of [the] foreign court to decline jurisdiction.”<sup>36</sup> In order to determine whether the foreign court improperly failed to decline jurisdiction over a Canadian resident (*i.e.* a non-U.S. resident), some form of comparative law analysis is necessary, however rudimentary; albeit keeping firmly in mind the private international law principles of comity, order and fairness as a counterpoise to any perceived judicial parochialism or chauvinism.

*A Comparative Analysis of Canadian and American Approaches to Jurisdiction and Forum Non Conveniens: Morguard and Sinochem*

The Canadian and American conflict of laws approaches to jurisdiction *simpliciter* and *forum non conveniens* differ somewhat. Following this Court's landmark decision in *Morguard Investments Ltd. v. De Savoye*,<sup>37</sup> a two-step jurisdictional analysis is required:

1. *Jurisdiction simpliciter*: Whether a court can assume jurisdiction over the parties and the litigation based upon the existence of a "real and substantial connection";
2. *Forum non conveniens*: Whether a court should assume jurisdiction over the parties and the litigation by asking "is there another more appropriate forum?" The existence of a more appropriate forum must be established clearly before the forum chosen by the plaintiffs will be displaced.<sup>38</sup> This approach has particular application if there are no parallel foreign proceedings pending.<sup>39</sup>

By contrast, in *Sinochem Int'l Co., Ltd. v. Malaysia International Shipping Corp.*,<sup>40</sup> Justice Ginsburg, writing for a unanimous U.S. Supreme Court, held that "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection," such as subject-matter jurisdiction over the dispute or personal jurisdiction over the parties. It then characterized *forum non conveniens* dismissal as a preliminary determination denying the plaintiff a decision on the merits because the merits ought to be decided elsewhere—a determination that "does not entail any assumption by the court of a substantive law-declaring power".<sup>41</sup> Therefore, the Supreme Court concluded, *forum non conveniens* is a non-merits ground for dismissal for which jurisdiction need not be established. This means that "[a] district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction . . ." <sup>42</sup> However, when considering the private interest and public interest factors which inform the overall *forum non conveniens* analysis, the U.S. Supreme Court noted the following:

"A federal court has discretion to dismiss on forum non conveniens grounds "when an alternative forum has jurisdiction to hear[the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *American Dredging Co. v. Miller*, 510 U. S. 443, 447–448. Such a dismissal reflects a court's assessment of a "range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Quackenbush v. Allstate Ins. Co.*, 517 U. S. 706, 723. A defendant invoking forum non conveniens ordinarily bears a heavy burden in opposing the plaintiff's chosen forum. *When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor "applies with less force," for the assumption that the chosen forum is appropriate is then "less reasonable."* *Piper Aircraft Co. v. Reyno*, 454 U. S. 235, 255–256. Pp. 5–6." [emphasis added]

It is arguable that the Washington court's dismissal of Lloyd's' motion to dismiss on grounds of lack of jurisdiction and venue and *forum non conveniens*, including a denial of its subsequent motion for reconsideration, was erroneous, conclusory and unreasonable. In brief reasons, Judge Suko suggests that his dismissal order is both "final" and "interlocutory" in nature and effect for the purposes of appeal. The learned judge further opines that "practical considerations" should outweigh the Washington court's obligation to undertake a fulsome *forum non conveniens* analysis, stating:

"...While the Defendants take issue with the Court's earlier ruling, no new material facts are cited nor do the parties suggest an intervening change in the law. In essence, the Defendants respectfully argue that the Court *erred on jurisdiction and venue*, and misinterpreted the record. Lombard has also submitted materials currently being considered by the British Columbia court hearing *parallel litigation in Canada* and Plaintiff has responded to these filings.

While this judicial officer readily acknowledges the right of any party to appeal from a *final order*, *practical considerations* suggest that this be done only when the record has been fully developed and *all issues bearing on liability* have been determined at the *trial court level*. Moreover, piecemeal appeals are not favored. Additionally, the possibility that finality will result in this litigation by allowing an *interlocutory appeal* to go forward is speculative, at best. On the contrary, an early appeal may have just the opposite effect and result in increased costs, inconvenience and uncertainty for all parties. Given the Ninth Circuit's affirmance of the Pakootas litigation, the time is ripe to go forward in deciding with *finality* all matters at issue in this pending litigation. Although the Defendants urge additional delay by this Court pending a decision in British Columbia, virtually all of the arguments they now make were either expressly or by inference considered previously. In light of the foregoing, Defendants' motions for reconsideration or certification for appeal and for stay (Ct. Recs. 179, 180 and 182) are hereby DENIED." [emphasis added]<sup>43</sup>

Similarly, the Washington court failed to extend judicial comity to the B.C. court. In particular, the Washington court unduly relied on "practical considerations" when denying Lloyd's motion for reconsideration, without applying those same "practical considerations", *mutatis mutandis*, to the B.C. court. This form of judicial unilateralism gives rise to a "serious injustice". The Washington court failed to advert to the lack of any territorial locus between TCML and Lloyd's on the one hand, and the State of Washington, on the other.

Following *Sinochem*, the Washington court could have declined jurisdiction on the following grounds:

1. B.C. is an alternative forum which has jurisdiction to hear the case;
2. A trial in the chosen Washington forum would establish oppressiveness and vexation to Lloyd's as a defendant out of all proportion to TCML's convenience;
3. The chosen Washington forum is inappropriate because of considerations affecting the Washington court's administrative and legal problems, including proof of foreign (Canadian) law, location of evidence and witnesses; etc.;

4. The range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in the Washington court favoured a dismissal; and
5. Where TCML's choice forum was not its home forum, the presumption of an appropriate forum has less force and is less reasonable.

*A fortiori*, in light of the existence of an alternative forum, the Washington court should have alternatively dismissed TCML's action on *forum non conveniens* grounds. In particular, the Washington court failed to consider two critical factors when it rejected Lloyd's *forum non conveniens* arguments: (1) TCML had previously attorned to the B.C. jurisdiction and (2) TCML had failed to demonstrate any loss of a personal or juridical advantage; which together constitutes a "serious injustice" against Lloyd's.

The criterion of "juridical advantage" is a relevant factor in both *forum non conveniens* analysis and in the context of an anti-suit injunction.<sup>44</sup> On the one hand, TCML unsuccessfully argued for a stay against the U.S. plaintiffs, Pakootas on the grounds that the United States lacked personal and subject-matter jurisdiction over it. On appeal, TCML essentially conceded that the U.S. district court had personal and subject matter jurisdiction.<sup>45</sup> On the other hand, it asked the B.C. court to grant a stay on the basis that the Washington court is the more convenient forum, on the speculative pretext that its interpretation of the insurance policies will be more favourably received there—which is not a personal or juridical advantage—arguably a transparent attempt at forum shopping. Despite the availability of injunctive relief in the U.S. District Court, TCML neither sought a pre-emptive anti-suit injunction nor an "anti-anti-suit injunction" in support of its positive declaratory action in the Washington court. Similarly, TCML never demurred to the *lis alibi pendens* in the B.C. court by way of a counterclaim seeking a positive declaration of a duty to defend and indemnification.<sup>46</sup>

From a comparativist perspective, "[w]here 'parallel actions' are filed in different forums and move forward, U.S. courts will often allow both cases to proceed until one results in an enforceable judgment."<sup>47</sup> The problematic issues of public policy and *res judicata*, arising from inconsistency and unenforceability of conflicting judgments, is, therefore, manifest.<sup>48</sup> To paraphrase the Bard: "the quality of justice should not be restrained."

According to one commentator:

"Even in the event that the invocation of the citizen's suit provision [under CERCLA] is successful, there remains a question as to whether a judgment compelling TCML to comply with the order would be enforced by the Canadian courts. Significantly, there are some indications that the EPA's unilateral approach is not an isolated response to the Trail Smelter dispute, but is part of a broader intention to apply CERCLA to transboundary contexts."<sup>49</sup>

The Supreme Court of Canada has also recently confirmed that where a superior court establishes jurisdiction *simpliciter* over a foreign (*i.e.* non-resident) defendant, the exercise of its competent jurisdiction includes the power to issue injunctive orders, including those with extraterritorial effects. The fact that a superior court may encounter difficulty in enforcing sanctions for non-compliance in no way restricts a court's power to issue such injunctive relief.<sup>50</sup> Given that TCML is domiciled or resident in B.C., the Supreme Court of Canada may have also concluded that an anti-suit injunction would not present the B.C. court with any such difficulty in enforcing compliance and maintaining judicial control over the court's process to ensure the fair and orderly administration of justice.

Finally, the existence of concurrent (or parallel) proceedings does not derogate from the private international law principles of comity, order and fairness. As Sopinka, J. in *Amchem* noted:

“The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.”<sup>51</sup>

### **(3) *Yugraneft v. Rexx Management Corporation***

The third case before the Supreme Court of Canada involved a leave application from a recent Alberta Court of Appeal which affirmed that the two-year limitation period under s.3 of Alberta's *Limitations Act*,<sup>52</sup> governs when a party seeks the recognition and enforcement in Alberta of a foreign arbitral award. The Supreme Court of Canada granted leave on February 26, 2009.<sup>53</sup>

The dispute between Yugraneft Corporation (Yugraneft), a Russian company, and Rexx Management Corporation (Rexx), an Alberta company, arose based upon Yugraneft's claim for money paid to Rexx for equipment which Rexx failed to deliver. Yugraneft then commenced foreign arbitral proceedings against Rexx. On September 6, 2002, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation made an award in favour of Yugraneft against Rexx in the amount of \$952,614.43 USD.

Yugraneft then applied more than three years later pursuant to the *International Commercial Arbitration Act* (Alberta) for an order recognizing and enforcing the arbitral award in the province of Alberta. Rexx sought the dismissal of the application on the grounds that the limitation period had prescribed, or, alternatively, sought a stay pending resolution of a related RICO case pending in the U.S. which raised public policy defences that (1) Yugraneft had been fraudulently acquired by another company through corruption within the Russian judicial system; (2) forgery of shareholder meeting minutes, and (3) unlawful seizure of Yugraneft's office by a "machine-gun toting private army".

Chrumka, J. 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*, concluding that Yugraneft's application was time-barred. With respect to the public policy argument, the court held at paragraphs 79-80 as follows:

"[79] There is some dispute as to whether the issue of the apparently illegal takeover of TNK was raised during the arbitration hearing. I have two conflicting affidavits on this issue and there are no transcripts of the hearing. However, there is no mention of this argument at all in the Tribunals' decision. If Rexx had raised the issue of the alleged takeover and the Tribunal failed to address it, then the remedy was an appeal. On the other hand, if Rexx did not raise the issue at the jurisdictional hearing it was incumbent upon them to raise it at after this issue had been resolved. Rexx chose not to take any action.

[80] In this case, Rexx had the opportunity to have a full hearing and make full arguments in front of the arbitrators. In my opinion, it was incumbent upon Rexx to raise the issue of the alleged takeover at this time. The Tribunal consisted of three Russian jurists, one of whom was Rexx's nominee. Rexx benefited from the presence of their chosen arbitrator. The decision of the Tribunal was unanimous. I see no evidence of corruption or fraud on the part of the Tribunal. In this case Rexx has not established that the Award would offend the basic principles of morality of Alberta." <sup>54</sup>

Yugraneft appealed. On August 5, 2008, the Alberta Court of Appeal dismissed the appeal.<sup>55</sup> Like the lower court judge, the Alberta Court of Appeal noted that since there are no comparable guidelines within the *Model Law* and the *New York Convention, 1958* 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 most other Canadian provincial limitation statutes, the Alberta *Limitations Act* does not distinguish between substantive and procedural law and reads as follows:

**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.

The Alberta Court of Appeal decision in *Yugraneft* confirms previous Canadian jurisprudence that both foreign judgments and foreign arbitral awards are not automatically homologated and do not stand on equal footing with domestic judgments or domestic arbitral awards. It is noteworthy that the two-year limitation period prescribed by section 3 of the *Limitations Act* (Alberta) incorporates a "discoverability" element, allowing for extension of the 2 year limitation period from the earlier of the dates on which the claimant either actually knew, or in the circumstances ought to have known,

the necessary facts in relation to the putative claim. Two potential discoverability arguments that Yugraneft appears not to have raised are: (1) whether any potential prejudice arose from delays in enforcement efforts in Russia, or (2) the extent of Yugraneft's knowledge of the location and exigibility of Rexx's assets in Alberta. Yugraneft then filed an application for leave to appeal to the Supreme Court of Canada on August 6, 2008.<sup>56</sup> The issues before the Supreme Court of Canada were stated thusly:

Whether the limitation period for a claim for recognition and enforcement of a foreign arbitration award in Alberta is the two-year discovery period in s. 3 of the Limitations Act, R.S.A. 2000, c. L-12 or the 10-year period set out in s. 11 - Whether the lower courts erred in treating the arbitration award merely as evidence of a debt, rather than an "order for the payment of money" as that term is used in s. 11 of the Limitations Act - Whether, on a proper interpretation of the Limitations Act, the Model Law on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a foreign arbitral award, once "recognized", should be treated on the same footing as a domestic judgment - Whether *Rutledge v. U.S. Savings & Loan Co.* (1906), 37 S.C.R. 546 and other older decisions have been modified by more recent decisions such as *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72.

An alternative strategy 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 is unsettled 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>57 58</sup>

### *Conclusion*

The *Teck Cominco v. Lloyd's* decision affirms that "Section 11 of the *CJPTA* is itself a comity-based approach...[which] is not necessarily served by an automatic deferral to the first court that asserts jurisdiction."<sup>59</sup> To this end, the Supreme Court of Canada's judgment provides clarity in this important facet of private international law.<sup>60</sup> Although declining to hear the *Drabinsky v. King* appeal, the granting of leave in *Yugraneft v. Rexx Management Corporation* offers cautious optimism for a definitive ruling by Canada's highest court on the issue of the applicability of provincial limitation periods to the recognition and enforcement of foreign arbitral awards. Hopefully, the Supreme Court of Canada will address the vexing problem of the lack of harmonization or unification between federal and/or inter-provincial statutory regimes under the law of limitations respecting foreign judgments and foreign arbitral awards.<sup>61</sup> Until then, a party seeking recognition and enforcement of a foreign arbitral award is cautioned to commence an application to enforce the final arbitral award within the applicable provincial limitation period.

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<sup>1</sup> *King v. Drabinsky*, 2008 CarswellOnt 4489, 2008 ONCA 566, 58 C.P.C. (6th) 223, 295 D.L.R. (4th) 727, 91 O.R. (3d) 616, (Ont. C.A.) [hereinafter “*King v. Drabinsky*”].

<sup>2</sup> *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 (SCC) per McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. concurring) available online at: <http://scc.lexum.umontreal.ca/en/2009/2009scc11/2009scc11.html>. [hereinafter “*Teck Cominco v. Lloyd's*”].

<sup>3</sup> *Yugraneft Corporation v. Rexx Management Corporation*, 2007 ABQB 450 (CanLII), [2007] 10 W.W.R. 559, (2007), 31 B.L.R. (4th) 168, (2007), 78 Alta. L.R. (4th) 86 (Alta. Q.B.); aff'd *Yugraneft Corporation v. Rexx Management Corporation*, 2008 ABCA 274 (CanLII), Application for leave to appeal filed (August 6, 2008) [hereinafter “*Yugraneft v. Rexx Management*”].

<sup>4</sup> *King v. Drabinsky*, *supra* note 1, at ¶ 30.

<sup>5</sup> [2002] O.J. No. 2298 (Ont. S.C.J.), aff'd (Ont. C.A.)

<sup>6</sup> *King v. Drabinsky*, *supra* note 1, at ¶ 8.

<sup>7</sup> *Id.*, at ¶¶ 35-40.

<sup>8</sup> *Id.*, at ¶¶ 23, 37-40.

<sup>9</sup> *Id.*, at ¶¶ 23, 33-34.

<sup>10</sup> For recent commentary on the *R v. Hape* decision, see H. Scott Fairley, “The Supreme Court of Canada Formally Admits International Customary Law into Canadian Common Law” *The Globetrotter*, Volume 13, No. 1 October/Octobre 2008 available online: [http://www.oba.org/En/International\\_en/newsletter\\_en/v13n1.aspx](http://www.oba.org/En/International_en/newsletter_en/v13n1.aspx) and Noemi Gal-Or, “Case comment: *R v. Hape*, 2007 SCC 26” *CBA International Law Section Bulletin*, June 2008, available online: [http://www.cba.org/CBA/newsletters/pdf/06\\_08\\_intl-hape.pdf](http://www.cba.org/CBA/newsletters/pdf/06_08_intl-hape.pdf).

<sup>11</sup> *Beals v. Saldanha*, 2003 SCC 72, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 314 N.R. 209, 182 O.A.C. 201, [2003] 3 S.C.R. 416, 113 C.R.R. (2d) 189, 70 O.R. (3d) 94 (note), REJB 2003-51513, J.E. 2004-127, 234 D.L.R. (4th) 1, 127 A.C.W.S. (3d) 648 (S.C.C.)

<sup>12</sup> *King v. Drabinsky*, *supra* note 1, at ¶ 8. For related discussions on the *Beals v. Saldanha* decision in respect of the impeachment defences of fraud, natural justice and public policy, see Antonin I. Pribetic, “Enforcing Foreign Summary/Default Judgments: The Damoclean Sword Hanging Over *Pro Se* Canadian Corporate Defendants? *U.S.A. v. Shield Development*”, (2007) 7 *Can. Int'l Lawyer* (No.1), 8-23 and 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, ARCHIBALD, Mr. Justice Todd L. and ECHLIN, Mr. Justice Randall (eds.) (Toronto: Carswell, 2007) pp. 141-199.

<sup>13</sup> Application for leave to appeal dismissed with costs (February 12, 2009): [http://scc.lexum.umontreal.ca/en/news\\_release/2009/09-02-12.3a/09-02-12.3a.html](http://scc.lexum.umontreal.ca/en/news_release/2009/09-02-12.3a/09-02-12.3a.html).

<sup>14</sup> *Lloyd's Underwriters v. Cominco Ltd.*, leave to appeal allowed, 39 C.P.C. (6th) 20, [2007] B.C.W.L.D. 3032, [2007] B.C.J. No. 841, 48 C.C.L.I. (4th) 1, 28 C.E.L.R. (3d) 191, (sub nom. *Lombard General Insurance Co. of Canada v. Cominco Ltd.*) 240 B.C.A.C. 218, (sub nom. *Lombard General Insurance Co. of Canada v. Cominco Ltd.*) 398 W.A.C. 218, 2007 BCCA 249, 2007 CarswellBC 864, [2007] 7 W.W.R. 281, 279 D.L.R. (4th) 257, 67 B.C.L.R. (4th) 101 (B.C. C.A.); Affirmed, [2006] 12 W.W.R. 486, 24 C.E.L.R. (3d) 1, [2006] B.C.W.L.D. 5625, 60 B.C.L.R. (4th) 261, 2006 BCSC 1276, 2006 CarswellBC 2083, 40 C.C.L.I. (4th) 182, [2006] B.C.J. No. 1917, 31 C.P.C. (6th) 34 (B.C. S.C.)

<sup>15</sup> 42 U.S.C. §9601 (1997).

<sup>16</sup> See *Pakootas v. Teck Cominco Metals, Ltd.*, 2004 US Dist. LEXIS 23041. (ED Wash., 2004); *Pakootas v. Teck Cominco Ltd.*, 452 F.3d 1066; 2006 U.S. App. LEXIS 16684 (9th Cir. 2006), Petition for Panel Rehearing and Rehearing “en banc” denied (No. 05-35153) (cited to F. 3d.) [hereinafter “*Teck Cominco v. Pakootas*”].

<sup>17</sup> *Teck Cominco v. Pakootas*, *id.*, at 1070.

<sup>18</sup> *Teck Cominco Metals Ltd. v. Pakootas*, No. 06-1188, available online: <http://www.supremecourtus.gov/docket/06-1188.htm>.

<sup>19</sup> *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, in force May 4, 2006; B.C. Reg. 117/2006.(CJPTA), ss.3(b),(d) and (e) available online: [http://www.leg.bc.ca/37th4th/3rd\\_read/gov31-3.htm#section11](http://www.leg.bc.ca/37th4th/3rd_read/gov31-3.htm#section11) [hereinafter “*CJPTA*”].

- <sup>20</sup> *Teck Cominco v. Lloyd's*, *supra* note 2 at ¶¶ 35-37.
- <sup>21</sup> *Id.*, at ¶ 21.
- <sup>22</sup> *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 (S.C.C.)
- <sup>23</sup> [Uniform Court Jurisdiction and Proceedings Transfer Act](#) (UCJPTA) Part I- Interpretation-Definitions; Comments to section 1-2 [hereinafter "*UCJPTA*"].
- <sup>24</sup> *CJPTA*, *supra* note 19, s.11.
- <sup>25</sup> *UCJPTA*, *supra* note 23, Comments to section 11.
- <sup>26</sup> *Teck Cominco v. Lloyd's*, *supra* note 2, at ¶ 22.
- <sup>27</sup> *Id.*, at ¶¶ 29-30.
- <sup>28</sup> *CJPTA*, *supra* note 19, s. 3.
- <sup>29</sup> *Teck Cominco v. Lloyd's*, *supra* note 2, at ¶¶ 34-36.
- <sup>30</sup> *Insurance Act*, R.S.B.C. 1996, c. 226, s.5.
- <sup>31</sup> *Lloyd's Underwriters v. Cominco Ltd.* (B.C.C.A.), *supra* note 14.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Teck Cominco v. Lloyd's*, *supra* note 2, at ¶ 38.
- <sup>34</sup> *Amchem*, *supra* note 22, at 914. Admittedly, TCML did not seek the remedy of an anti-suit injunction in the case at bar. See *Lloyd's Underwriters v. Cominco Ltd.*, (B.C.C.A.), *supra* note 14, at ¶2.
- <sup>35</sup> Janet Walker "A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims" (1996) 33 *Osgoode Hall L J* 549 at 561-3.
- <sup>36</sup> *Amchem*, *supra* note 22, at 914.
- <sup>37</sup> *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, (1990) 76 D.L.R. (4th) 256 (S.C.C.).
- <sup>38</sup> *Amchem*, *supra* note 22 at 921 per Sopinka J. See also, *Molson Coors Brewing Co. v. Miller Brewing Co.* [2006] O.J. No. 4236 (Ont. S.C.J.) per Lederman, J.
- <sup>39</sup> *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (B.C.C.A.) per McLachlin J.A. (as she then was) at 45.
- <sup>40</sup> *Sinochem Int'l Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102 (slip opinion) (March 5, 2007) available online: <http://www.supremecourtus.gov/opinions/06pdf/06-102.pdf>.
- <sup>41</sup> *Id.*, at 8-9.
- <sup>42</sup> *Id.*, at 8.
- <sup>43</sup> *Teck Cominco Metals Ltd. v. Seaton Ins. Co.* (Slip Copy) 2006 WL 2129296 (E.D. Wash) July 28, 2006 (Court File No. CV-05-411-LRS)
- <sup>44</sup> *Amchem*, *supra* note 22, at 933.
- <sup>45</sup> *Teck Cominco v. Pakootas*, *supra* note 16 at 1072.
- <sup>46</sup> For an interesting academic debate on the differing analytical approaches to parallel proceedings vis-à-vis enforceability, see Vaughan Black and John Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?" (2008), 46 *C.B.L.J.* 292 and Austen L. Parrish, "Comity and Parallel Foreign Proceedings: A Reply To Black And Swan- *Lloyd's Underwriters v. Cominco Ltd.*" (September 15, 2008), [Electronic copy available at: http://ssrn.com/abstract=1268511](http://ssrn.com/abstract=1268511) Although McLachlin, C.J. cited the Black and Swan article in *Teck Cominco v. Lloyd's*, *supra* note 2, at ¶ 38, the Chief Justice demurred in dealing with the thorny enforcement issue, stating:

"[39] ... If the U.S. District Court proceeding (which has been temporarily stayed pending the outcome of this appeal) were to conclude first, the resultant judgment would ordinarily be enforceable in Canada. Would the British Columbia court be bound to recognize the judgment, thus effectively nullifying the British Columbia proceeding? Or would recognition of the foreign judgment be precluded on the basis that there is ongoing litigation on the same subject matter in British Columbia? Professor Black and Mr. Swan suggest the availability of three approaches to this problem: (1) a race where the first judgment handed down prevails; (2) an absolute preference for local proceedings; or (3) a middle ground that adopts a general first-to-judgment rule but affords additional defences to enforcement that may be engaged in some circumstances: V. Black and J. Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?" (2008), 46 *C.B.L.J.* 292.

[40] I do not propose to answer this question, as it was not fully developed in the courts below or before us; nor is the answer necessary in order to dispose of the appeal. As

mentioned above, the enforcement issue was disposed of by the chambers judge on the basis that he was satisfied that it was unlikely that Teck would have to resort to execution proceedings in order to obtain satisfaction from the Insurers.”

<sup>47</sup> Jose I. Astigarraga and Scott A. Burr, “Antisuit Injunctions, Anti-Antisuit Injunctions, and Other Worldly Wonders” in *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE*, Barton Legum (Ed.) (Chicago, IL: ABA International Practitioner’s Deskbook Series, 2005) Chap. 10, 89 at 92 (citations omitted).

<sup>48</sup> *Vervaeke (Formerly Messina) v. Smith* [1983] AC 145, [1982] 2 All ER 144, [1982] 2 WLR 855 (HL) (per Lord Hailsham of St. Marybelbone).

<sup>49</sup> Neil Craik, “Transboundary Pollution, Unilateralism and the Limits of Extraterritorial Jurisdiction: The Second Trail Smelter Dispute” in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION*, Rebecca M. Bratspies and Russell L. Miller (eds.) (New York: Cambridge University Press, 2006) 109 at 116, citing: Castel & Walker, *CONFLICT OF LAWS* §14.5 (5<sup>th</sup> Ed. 2004) and noting “[i]n the event that TCML has sufficient U.S. assets enforcement in Canada may not be required”, and also Gerald George, “Over the Line - Transboundary Application of CERCLA”, 34 *Env. L. Rep.* 10275, 10275 (2004)...”Even the United States courts, while upholding CERCLA’s liability scheme, have commented on its potential for unfairness. See *U.S. v. Alcan Aluminum Co.*, 990 F.2d. 711, 716-7 (2<sup>nd</sup> Cir. 1993).

<sup>50</sup> *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, 2007 SCC 20, [2007] 1 S.C.R. 867 (S.C.C.)

<sup>51</sup> *Amchem*, *supra* note 22 at 914.

<sup>52</sup> [R.S.A. 2000, c. L-12](#), (as am).

<sup>53</sup> *Yugraneft Corporation v. Rexx Management Corporation* (Alta.) (Civil) (By Leave) (32738): “The application for leave to appeal is granted with costs to the applicant in any event of the cause.” (per McLachlin, Fish and Rothstein JJ. (February 26, 2009): [http://scc.lexum.umontreal.ca/en/news\\_release/2009/09-02-26.3a/09-02-26.3a.html](http://scc.lexum.umontreal.ca/en/news_release/2009/09-02-26.3a/09-02-26.3a.html)).

<sup>54</sup> [Yugraneft Corporation v. Rexx Management Corporation](#), per Chumka, J., *supra* note 3, at ¶¶ 79-80.

<sup>55</sup> [Yugraneft Corporation v. Rexx Management Corporation](#), 2008 ABCA 274 (CanLII), *supra*, note 3.

<sup>56</sup> Supreme Court of Canada case summary available at: <http://www.scc-csc.gc.ca/information/cms-sgd/dock-regi-eng.asp?32738>.

<sup>57</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>58</sup> For an insightful analysis, see Alex Manevich, “Limitation periods and enforcement of international arbitral awards, (November 27, 2008) available online at: <http://www.slaw.ca/2008/11/27/limitation-periods-and-enforcement-of-international-arbitral-awards/>. See also, Antonin I. Pribetic, “Winning is Only Half the Battle’: Procedural Issues Relating to the Recognition and Enforcement of Foreign Arbitral Awards”, in V.V.L. Gayathri (Ed.) *INTERNATIONAL COMMERCIAL ARBITRATION- CLAIMS AND COUNTERCLAIMS*, (Hyderabad, India: Amicus Books-ICFAI University Press, 2009).

<sup>59</sup> *Teck Cominco v. Lloyd’s*, *supra* note 2, at ¶ 23.

<sup>60</sup> See also, the Law Commission of Ontario (LCO) Consultation Paper entitled “*The Codification of Judicial Jurisdiction in Ontario*” (forthcoming: <http://www.lco-cdo.org/en/courtjuris.html>) a project undertaken by Professor Janet Walker, the Osgoode Hall Law School LCO Scholar in Residence, directed at the improvement of the capacity of the judicial system to address cross-border litigation. Professor Walker has gathered a “Private International Law Working Group” to assist her with this project, composed of experts in the area from law faculties across Canada. The Consultation Paper will consider whether Ontario should enact the CJPTA, in its current draft form or to reflect changes in law and practice in the last 15 years or so since it was first drafted. It will also consider the use of technology in transferring matters to a court in a reciprocating jurisdiction.

<sup>61</sup> THE [UNAMENDED] CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (NEW YORK, 1974) has received accession from 18 countries, including the United States, and generally imposes a four-year limitation period. 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) accessed on 12 February 2009. The Canadian Federal Department of Justice has designated the Limitations Convention as

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a “high priority” under its treaty implementation strategy: See, Uniform Law Conference Of Canada-Civil Section “Activities And Priorities Of The Department Of Justice In International Private Law-Report Of The Department Of Justice Canada” 2008 Quebec City, Quebec, August 10-14, 2008.