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# **'Winning is Only Half the Battle': Procedural Issues Relating to the Recognition and Enforcement of Foreign Arbitral Awards**

*Antonin I Pribetic\**

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*This article addresses some procedural problems which may arise in the recognition and enforcement of a foreign arbitral award under the Model Law<sup>1</sup> and potential jurisdictional and limitation period challenges to a foreign arbitral award arising from two fundamental and inter-related issues: 1) Is the foreign arbitral award open to post-award enforcement challenges by the debtor? and 2) which enforcement procedure is most effective? Not having reference to limitation period for enforcement of arbitral awards in any of the Limitation Act, does not automatically waive the Limitation Period. Discussing various issues relating to limitation periods challenges to a foreign arbitral award, the author suggests for legislative reforms.*

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## **The Supervisory Role of National Courts**

In the recent Supreme Court of Canada decision in *Dell Computer Corp. vs. Union des Consommateurs*,<sup>2</sup> Bastarache and Lebel J J in dissent, emphasized the domestic court's superordinate role in the recognition and enforcement of a foreign arbitral award, stating:

134 One of the major differences between courts and arbitration is that contractual arbitrators are not representatives of the state, but, rather, are privately appointed. On account of this, whether an arbitration is situated in Quebec or not, in order for an arbitral award to be legally enforceable, the laws of Quebec require the decision to first be recognized by Quebec courts. *There is no difference here with how judgments from foreign courts must first be recognized before having force of law in the province.* This is noted by

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<sup>1</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 June 21, 1985, and as amended by the United Nations Commission on International Trade Law on July 7, 2006), available online at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf), accessed on October 17, 2008 [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>2</sup> *Dell Computer Corp. vs. Union des Consommateurs*, 2007 SCC 34 (SCC).

R Tremblay in "La nature du différend et la fonction de l'arbitre consensuel" (1998), 91 *R du N.* 246, at p. 252:

[Translation] However, care must be taken not to confuse the judicial function with the arbitration function. Judges derive their jurisdiction from a state's foundational institutions. Arbitrators, on the other hand, derive their jurisdiction from the mutual agreement of the parties. The difference is an important one. An arbitrator is chosen and appointed by the parties and is not a representative of the state. *Arbitrators may rule on disputes, but their decisions are not enforceable unless they are homologated; unlike a judgment, an arbitrator's decision is not enforceable on its own.* (at ¶ 134)

While the concepts of recognition and enforcement are often conflated, as Redfern and Hunter observe:

Recognition on its own is generally a defensive process.... By contrast, where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available.<sup>3</sup>

In some instances, the successful party may have previously taken steps to have the foreign arbitral award homologated (i.e., recognized and enforced) in the same jurisdiction as the arbitral seat. In other cases, the party seeking to enforce may have first sought enforcement in another jurisdiction.

Take the following hypothetical scenario. An American buyer and Russian seller enter into an international commercial contract which contains an arbitration clause specifying that any and all disputes arising from the contract shall be arbitrated in Stockholm, Sweden, under UNCITRAL Arbitration Rules.<sup>4</sup> The sole arbitrator is appointed by The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute),<sup>5</sup> which is designated as an appointing authority by the International Court of Justice at The Hague, The Netherlands. The American buyer wins and is granted a final arbitral award. Since both parties have chosen a 'neutral' arbitral seat (i.e., neither party has any physical or corporate presence in Sweden), the American buyer elects to commence enforcement proceedings in the US District Court (where the American buyer's head office is situated) and obtains a final confirmatory judgment from the US District Court. However, the Russian buyer has no assets in the US, but does have some assets in Ontario.

<sup>3</sup> Alan Redfern and Martin Hunter (2004) (with Nigel Blackaby and Constantine Partasides), *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> Edition, Student Version, Chap. 10, § 10-12 at p. 516, Sweet & Maxwell, London.

<sup>4</sup> Available online at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, accessed on October 17, 2008.

<sup>5</sup> See The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) available online at: <http://www.sccinstitute.com/uk/Home/>, accessed on October 17, 2008.

## Grounds for Refusing Recognition and Enforcement

Articles 34 and 36 of the Model Law provide the exclusive grounds by which a party may challenge a foreign arbitral award,<sup>6</sup> namely:

- Incapacity;
- Invalidity of the arbitration agreement;<sup>7</sup>
- Lack of proper notice of the arbitrator's appointment or lack of an opportunity to present its case;
- The award deals with matters outside the scope of the arbitration agreement;<sup>8</sup>
- The tribunal was not composed in accordance with the arbitration agreement;
- Non-arbitrability (i.e., the subject matter was not capable of settlement by arbitration)<sup>9, 10</sup>; or
- The award is contrary to domestic public policy.<sup>11, 12</sup>

<sup>6</sup> Under s. 1(1) of the ICAA, a 'competent court' means the Superior Court of Justice. R.S.O. 1990, c. I.9, s. 1(8); 2006, c. 19, Sched. C; s. 1(1).

<sup>7</sup> This typically includes the traditional common law contractual defenses of fraud and illegality, as well as avoidance of the contract due to undue influence, misrepresentation, coercion and mistake based upon public policy grounds. *See also*, ICC Rules, Arts. 6.2 and 6.4. Cf. UNCITRAL Rules, Art. 21 and Model Law, Art. 16. For a discussion of the concept of "Competence/competence" (the power of the arbitrator to determine his/her own jurisdiction) *see*, Redfern and Hunter, *supra* note 3, Chap. 5, § 5-39, pp. 300-302 and Chap. 9, § 9-15 at p. 487; or separability of the arbitration clause from the international commercial contract, *see* Redfern and Hunter, *supra* note 3, Chap. 2, §§ 2-01 to 2-04, §§ 2-85 to 2-94 and Chap. 3.

<sup>8</sup> With respect to timing of preliminary objections, *see*, Redfern and Hunter, *supra* note 3, at Chap. 9, § 9-15, at p. 486 citing: UNCITRAL Arbitration Rules, Art. 21(3): "not later than in the statement of defense or, with respect to a counterclaim, in the reply to the counterclaim"; Model Law, Art. 16(2): "not later than the submission of the statement of defense"; *See also*, ICC Rules, Art. 19—New Claims "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the state of the arbitration and other relevant circumstances."

<sup>9</sup> It is vitally important to determine the applicable law governing the dispute (i.e., the *lex causae*) which may differ from the law governing the arbitration (i.e., the *lex arbitri*).

<sup>10</sup> For example, *see* ICC Rules, Art. 17.

<sup>11</sup> *See* ICAA, Art. 34(2)(a)(i)-(iv), (b)(i)-(ii); and Art. 36 (1)(a)(i)-(v), (b)(i)-(ii). Note that under Art. 34(3): An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal [emphasis added].

<sup>12</sup> These exceptions reflect the grounds for refusing recognition and enforcement under the 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. For a comparative review of the grounds for challenging an international arbitration award under Art. 34 of the Model Law and the New York Convention, *see* Holtzmann H M and Neuhaus J E (1989), "A Guide To the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary", *Kluwer Law and Taxation*, Chapter VII, The Netherlands, Deventer.

**Quaere:** May an arbitrator or reviewing court raise an issue *ex officio*, concerning validity of the arbitration clause or the arbitral panel's jurisdiction? With respect to the resolution of legal issues, the civil law/inquisitorial system is based on the principle *jura novit curia* (the Court is supposed to know the law), which means that the parties need not plead the law. Conversely, the common law/adversarial system mandates that claims and defenses be framed by the pleadings, a principle recently reinforced by the Court of Appeal.<sup>13</sup> In the context of international commercial arbitration, one first looks to the arbitration agreement and, where necessary, the UNCITRAL Arbitration Rules<sup>14</sup> or any arbitration rules provided by the designated arbitral institution.<sup>15</sup>

Nevertheless, depending on the *lex arbitri* and *lex fori*, the doctrine of *ex proprio motu* (from the Latin: 'on its own accord') may also be applicable. In *Pro Swing Inc. vs. Elta Golf Inc.*, the Supreme Court of Canada, by a 4 to 3 margin, dismissed Pro Swing's appeal on the issue of recognition and enforceability of a foreign non-monetary judgment. However, Deschamps J, writing for the majority confirmed the court's inherent power or discretion (and obligation) to apply the doctrine of *ex proprio motu*, where public policy, international commitments or constitutional values were at stake:

59 Elta did not raise a public policy defense. However, public policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, *proprio motu*, issues relating to public policy. An obvious example of values a court could raise *proprio motu* can be found in *United States vs. Burns* [2001] 1 S.C.R. 283, 2001 SCC 7. In that case, the Court took Canada's international commitments and constitutional values into consideration in deciding to confirm a direction to the Minister to make a surrender subject to assurances that the death penalty would not be imposed. Public policy and constitutional requirements may also be at stake when the rights of unrepresented third parties are potentially affected by an order. In the case at bar, over and above the concerns articulated by the Court of Appeal and the defenses raised by

<sup>13</sup> *TSP-INTL Limited et al., vs. Mills et al.* (2006) 81 O.R. (3d) 266 (Ont. C.A.) per MacFarland J A (Simmons and Cronk J J A concurring). See also, Rule 25.06 of the Ontario Rules of Civil Procedure R.R.O. 1990, Reg. 194, O.Reg. 8/07 (as am.) (Pleadings in an Action-Rules of Pleading-Applicable to All Pleadings).

<sup>14</sup> *Supra* note 4.

<sup>15</sup> The Permanent Court of Arbitration (PCA), has over one hundred member states and was established in 1899 to facilitate arbitration and other forms of dispute resolution between states, see the PCA, available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=363](http://www.pca-cpa.org/showpage.asp?pag_id=363), accessed on October 17, 2008; Most of the leading international arbitration centres have their own set of arbitration rules: see Arbitration Institute of the Stockholm Chamber of Commerce, available at: <http://www.sccinstitute.com/uk/Home/>, accessed on October 17, 2008; The London Court of International Arbitration (LCIA), available at: <http://www.lcia-arbitration.com/>, accessed on October 17, 2008; and The International Court of Arbitration for the International Chamber of Commerce (ICA-ICC), available at: <http://www.iccarbitration.org/>, accessed on October 17, 2008; to name a few.

Elta, there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure.<sup>16, 17</sup>

Similarly, in the *Anglo-Iranian Oil Co.* case<sup>18</sup> Sir Arnold McNair, in separate reasons, stated: "An international tribunal cannot regard a question of jurisdiction as a question *inter partes*."<sup>19</sup> Therefore, in circumstances where the parties have submitted to the court's jurisdiction, the court must still satisfy itself *ex proprio motu* that it has jurisdiction *ratione personae* and *ratione materiae* in the instant case.

Unlike the UNCITRAL Arbitration Rules or Model Law, some international law instruments explicitly refer to the doctrine of *ex proprio motu*. Under the International Centre for Settlement of Investment Disputes (ICSID) Convention,<sup>20</sup> the powers to deal with a party in default or a non-appearing respondent are similar to those given to the International Court of Justice under its enabling Statute.<sup>21</sup> The power of an ICSID tribunal to examine jurisdiction *proprio motu* derives from Rule 41(2) which reads:

#### Rule 41—Preliminary Objections

...

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Center and within its own competence.

Article 21.4 of the Permanent Court of Arbitration—Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (Environmental Arbitration Rules) includes a similar provision which reads:

#### Pleas as to the Jurisdiction of the Arbitral Tribunal

Article 21.4: In general, the arbitral tribunal should rule on a plea concerning its jurisdiction or deal with its determination *motu proprio* of its own jurisdiction as a preliminary question. However, the arbitral tribunal in its

<sup>16</sup> *Pro Swing Inc. vs. Elta Golf Inc.* [2006] 2 S.C.R. 612, 2006 SCC 52 (S.C.C) at para. 59 per Deschamps J. (Lebel, Fish and Abella J J concurring; McLachlin C J and Bastarache and Charron J J, dissenting).

<sup>17</sup> See also, *TMR Energy Ltd. vs. State Property Fund of Ukraine*, 2003 FC 1517 (2003), 244 F.T.R. 1 (F.C.) at para. 57, where Madam Prothonotary Tabib held that, while Subsection 3(2) of the State Immunity Act imposed on the Court the duty to raise and give effect to the State Immunity Act *proprio motu*, the failure of the Court or of the parties to address the issue did not go to the jurisdiction of the Court *ratione materiae* so as to render its order a nullity.

<sup>18</sup> *Anglo-Iranian Oil Co. case (United Kingdom vs. Iran)* (1952) I.C.J. Reports 93.

<sup>19</sup> *Id.*, at p. 27.

<sup>20</sup> ICSID Convention, Art. 45 and ICSID Arbitration Rules, Rule 41(2) and 42.

<sup>21</sup> Statute of the International Court of Justice, Art. 53.

discretion may proceed with the arbitration and rule on such a plea in its final award.<sup>22</sup>

Arbitration is built upon two pillars: one contractual, the other jurisdictional.<sup>23</sup> Certainly, a national court must respect contractual freedom and party autonomy, but not at the expense of domestic and international public policy. There must be some jurisdictional limits imposed on an arbitrator deciding on the basis of *ex proprio motu* in order to uphold the principles of procedural fairness, equality, independence and impartiality. As long as the arbitrator discharges his or her duty to act judicially (i.e., respecting the rules of due process),<sup>24</sup> the doctrine of *ex proprio motu* provides another level of (internal) decisional scrutiny to offset any procedural or substantive challenges to a foreign arbitral award.

### Procedural Routes

In the hypothetical example, presuming there are no grounds to make a challenge to the foreign arbitral award under the Model Law or New York Convention, the American buyer has two options. The first option is to bring an application under the ICAA, to either:

- (1) Enforce the original Swedish arbitral award; or
- (2) Enforce the US District Court judgment confirming the Swedish arbitral award.

Alternatively, the American buyer may:

- (3) Commence a fresh action.

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<sup>22</sup> Cf. Art. 700 of the New French Code of Civil Procedure (NCCP) reads:

As provided in I of Article 75 of the Act no. 91-647 of 10 July 1991, in all proceedings, the judge shall order against the party having the burden of taxable charges or, in default, the unsuccessful party, to pay to the other party the amount which he shall fix on the basis of the sums outlaid and not included in the taxable charges. The judge shall take into consideration the rules of equity and the economic condition of the party against whom it is ordered. He may, even *ex proprio motu*, for reasons based on the same considerations, rule that there is no need for such order.

Art. 515 NCCP also provides:

In addition to cases where it is as of right, provisional enforcement may be ordered at the request of the parties or *ex proprio motu* each time the judge shall deem it proper and compatible with the nature of the matter, provided that it is not prohibited by law.

It may be ordered for all or part of the judgment. In no case may it be ordered in relation to taxable charges.

<sup>23</sup> See, The Minutes of the Committee on International Commercial Arbitration-Working Session, Monday, June 5, 2006 at 9:30 a.m., Chair: Professor Janet Walker (Canada); Comments of Professor Filip De Ly at p. 210, in *International Law Association, Report of the Seventy-Second Conference*, held in Toronto, June 4-8, 2006 Cambrian Printers, London and Abersytwyth, Wales, UK, 2006.

<sup>24</sup> Redfern and Hunter, *supra* note 3, Chap. 5, § 5-24, at pp. 291-292.

Options (1) or (2) are preferable over option (3), insofar as commencing a fresh action allows the Russian seller to re-argue the merits.<sup>25</sup> Option (1) is generally favored over Option (2), due to limitation period concerns, discussed further below.

Pursuant to Section 11(1) of the *ICAA*, an arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court. Moreover, the courts in the Ontario jurisdiction accord broad deference and respect to decisions made by arbitral tribunals pursuant to the Model Law.<sup>26</sup> Furthermore, the "double exequatur" requirement calling for judicial recognition at both the arbitral seat and the enforcement forum, was altered by the New York Convention and Model Law, such that confirmation at the place of arbitration is no longer required for the award to be recognized and enforced.<sup>27</sup> Finally, different time-limits will apply depending on the *lex arbitri*. For example, under the Model Law, an action for the annulment or review of a partial award on jurisdiction must be made within 30 days of notification of it to the party making the challenge. Similarly, under English law any challenge to an award (including any appeal therefrom) must be made within 28 days of the date of the award (or the completion of any internal review of it).<sup>28</sup>

Finality is a prerequisite for a Canadian court to recognize and enforce either a foreign arbitral award or foreign judgment.<sup>29</sup> Admittedly, the doctrine of non-merger applies in Canada, however, the leading Ontario case dealt with a foreign arbitral award which was confirmed by a domestic court where the arbitration was held, and subsequently sought to be enforced in Ontario.<sup>30</sup>

In the hypothetical above, the situation is somewhat different; the Swedish foreign arbitral award was confirmed in the US Federal Court, but recognition and enforcement is sought in Ontario. With respect to the finality requirement, whether the American buyer elects to enforce the foreign arbitral award, or the US confirmatory judgment, one needs to avoid any potential arguments that the US court has not rendered a final judgment. There may be some residual concerns that Russian defendant may try to argue that the final arbitral award has not been

<sup>25</sup> Redfern and Hunter, *id.*, Chap. 10, § 10-33, pp. 527-528.

<sup>26</sup> *Schreter vs. Gasmac Inc.* (1992) O.J. No. 257 (Ont. Gen. Div.); *Corporacion Transnacional de Inversiones, S.A. de C.B. et al., vs. STET Internacional S.p.A. et al.* (1999) O.J. No. 3573; and *United Mexican States vs. Karpa* (2005) O.J. No. 16 (Ont. C.A.).

<sup>27</sup> *Agros Trading Spolka z.o.o. vs. Dalimpex Ltd.* (2001) O.J. No. 3986, 14 C.P.C. (5<sup>th</sup>) 134 (Ont. S.C.J.) Cf. *American Marketing Systems, Inc. vs. Old THRG, Inc.* (2007) O.J. No. 1150 (Ont. C.A.) rev'g in part (2006) O.J. No. 551 (Ont. S.C.J.) where the Ontario Court of Appeal reversed in part a successful application for enforcement of an arbitration award granted in Illinois.

<sup>28</sup> Redfern and Hunter, *supra* note 3, Chap. 9, at § 9-46, p. 508.

<sup>29</sup> *Four Embarcadero Centre Venture vs. Kalen* [1988] 65 O.R.2d 551 at 563 (Ont. Gen. Div.); *Pro Swing Inc. vs. Elta Golf Inc.* (2006) SCC 52 (S.C.C.), Deschamps J (LeBel, Fish and Abella J J concurring) at ¶ 29, affg (2004) 71 O.R. (3d) 566 (C.A.), rev'g (2003), 68 O.R. (3d) 443 (Ont. S.C.J.); and per McLachlin C J dissenting (Bastarache and Charron J J concurring) at ¶'s 95-96. See also, Janet Walker, Castel and Walker (2006), *Canadian Conflict of Laws*, 6<sup>th</sup> Edition, Vol. 1, Lexis Nexis-Butterworths, Markham (rel. 3-3/2006 Pub. 5911), §§ 14.2-14.6.

<sup>30</sup> *Schreter vs. Gasmac Inc.*, *supra* note 26.



formally 'confirmed' insofar as it is not yet final and binding and *res judicata*.<sup>31</sup> The counter-argument is that the arbitral award is final and binding *inter se*, and that post-judgment enforcement efforts cannot open up the merits or alter the finality of the final arbitral award or the US confirmatory judgment. It is advisable to include in the application an affidavit from the American buyer attesting to the fact that the time to appeal the confirmatory judgment is exhausted. Under the Federal Rules of Civil Procedure (Fed. R. Civ. P.), the losing party has 30 days to appeal, but there is a one-year limitation period under Rule 60(b)(1) of the Fed. R. Civ. P., which provides for relief from a final judgment in a variety of situations including "(1) mistake, inadvertence, surprise, or excusable neglect". The rule provides that motions to obtain relief under Rule 60(b)(1) must be made within one year after the judgment was entered or taken. The American buyer has to anticipate that the Russian defendant could seek a remedy under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment". The time limitation for that provision is not one year, but is 'within a reasonable time'.<sup>32</sup>

### Limitation Issues

Both the New York Convention and Model Law 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 whether or not a foreign arbitral award made under the New York Convention or Model Law is subject to a limitation period, and, if so, what the applicable limitation period is.<sup>33</sup>

<sup>31</sup> *Dicey & Morris on the Conflict of Laws*, 13<sup>th</sup> Edition, Vol. 1, para. 14-021 at pp. 476-477. Under both Art. V.1.(e) of the New York Convention and Art. 36(1)(v) of the Model Law, one of the grounds for refusing recognition or enforcement is that "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."

<sup>32</sup> Federal Rules of Civil Procedure, 28 USC., Part V (as amended) (Fed. R. Civ. P.).

<sup>33</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 25, 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>, accessed on October 17, 2008).

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 October 17, 2008.

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. Therefore, the old limitation period in Ontario was six years, but was only triggered when the judgment debtor returned to Ontario.<sup>34</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 commenced after December 31, 2003 in Ontario is now two years, a relatively short time to sue. By contrast, in the US, the 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>35</sup>

This is further complicated by some drafting ambiguity in the Limitations Act, 2002<sup>36</sup> (the 'Limitations Act, 2002') 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 US). 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;

<sup>34</sup> *Lax vs. 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, RSBC 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 (2007), "Thinking Globally, Acting Locally: Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada", in The Honourable Justices T Archibald and R Echlin (Eds.), *Annual Review of Civil Litigation 2006*, 144-199, at 178-181 and 189, Thomson-Carswell, Toronto.

<sup>35</sup> Hunter and Redfern, *supra* note 3, Chap. 9, at § 9-46, p. 508.

<sup>36</sup> Limitations Act, 2002, S.O. 2002, Chapter 24, Sched. B (as am.)

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

**Section 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**

**Section 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).

**Section 11 (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>37</sup> but fails to refer to the international domestic statute, namely, the ICAA. However, one possible argument is that the interplay and combined effect of Section 16(b) of the Limitations Act, 2002 and Section 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. vs. Northern Sales Co.*,<sup>38</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 pleadings, including a constitutional question as to whether the New York Convention<sup>39</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:

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<sup>37</sup> Arbitration Act, 1991, S.O. 1991, c. 17 (as am.).

<sup>38</sup> *Compania Maritima Villa Nova S.A. vs. Northern Sales Co.* 137 N.R. 20 (1992) 1 F.C. 550 (F.C.A.) per Stone J (Heald and Mahoney J J concurring).

<sup>39</sup> United Nations Foreign Arbitral Awards Act, S.C. 1986, c. 21, s. 3, Schedule.

... 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 UK 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 Subsection 39(2) of the Federal Court Act, which reads:

**Subsection 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.*<sup>40</sup> [emphasis added]

Admittedly, the *Compania Maritima Villa Nova S.A. vs. Northern Sales Co.* is a federal court decision and has limited applicability for cases within provincial superior court jurisdiction, particularly in light of Section 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:

**Section 23:** 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>41</sup> [emphasis added]

Nevertheless, one should not blithely assume that just because Ontario limitations law is no longer procedural, therefore, no limitation period applies to the recognition and enforcement of a foreign arbitral award. The Alberta Court of Appeal has recently affirmed that the two-year limitation period under s.3 of Alberta's Limitations Act,<sup>42</sup> governs when a party seeks the recognition and enforcement in Alberta of a foreign arbitral award.

The dispute arose between Yugraneft Corporation (Yugraneft), a Russian company, and Rexx Management Corporation (Rexx), an Alberta company, 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 favor of Yugraneft against Rexx in the amount of \$952,614.43.

<sup>40</sup> *Compania Maritima Villa Nova S.A. vs. Northern Sales Co.*, *supra*.

<sup>41</sup> Limitations Act, 2002, *supra* note 33, s. 23. See also, Walker Janet (2005), "Twenty Questions" (about Section 23 of the Ontario Limitations Act, 2002) in Gray W, Kerbel-Caplan L and Ziegel J (Eds.), *The New Ontario Limitations Regime: Exposition and Analysis*, pp. 117-121, Ontario Bar Association, Toronto.

<sup>42</sup> R.S.A. 2000, c. L-12 (as am).

More than three years later, Yugraneft then applied pursuant to the International Commercial Arbitration Act (Alberta) for an order recognizing and enforcing the arbitral award in the province of Alberta.<sup>43</sup> 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 US which raised public policy defenses 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 are 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 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.

Yugraneft appealed. On August 5, 2008, the Alberta Court of Appeal dismissed the appeal.<sup>44</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

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<sup>43</sup> *Yugraneft Corporation vs. Rexx Management Corporation*, 2007 ABQB 450 (CanLII) (2007) 10 W.W.R. 559 (2007), 31 B.L.R. (4<sup>th</sup>) 168 (2007), 78 Alta. L.R. (4<sup>th</sup>) 86 (Alta. Q.B.).

<sup>44</sup> *Yugraneft Corporation vs. Rexx Management Corporation*, 2008 ABCA 274 (CanLII).

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.<sup>45</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 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>46</sup>

### **Conclusion**

In conclusion, while most foreign arbitral awards are recognized and enforced by Canadian courts, there still remain potential procedural hurdles facing counsel

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<sup>45</sup> *Yugraneft* recently filed an application for leave to appeal to the Supreme Court of Canada on August 6, 2008, available at: <http://www.scc-csc.gc.ca/information/cms-sgd/dock-regi-eng.asp?32738>

<sup>46</sup> See, *Morgan Stanley & Co International Ltd. vs. Pilot Lead Investments Ltd.* (2006) 4 HKC 93; (2006) HKCFI 430 (High Court of the Hong Kong Special Administrative Region); *Clarke vs. Fennooscandia Ltd.* (2004) SC 197 (Scottish Outer House), per Lord Kingarth at ¶ 31.

retained to enforce a foreign arbitral award. Aside from logistical problems and typical delays for service *ex juris*,<sup>47</sup> limitation periods are not only the 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>48</sup> a party seeking recognition and enforcement of a foreign arbitral award in an Ontario court is well advised to commence an application to enforce the final arbitral award within the new two years limitation period. □

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<sup>47</sup> Convention of November 15, 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), accessed on October 17, 2008 and Rule 17.05(1) of the Ontario Rules of Civil Procedure, *supra* note 13. *See also*, Schwenger Ingeborg and Manner Simon (2007), "The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration", *Arbitration International*, Vol. 23, No. 2, pp. 293-307 at 303.

<sup>48</sup> Nevertheless, the Canadian Federal Department of Justice has designated the Limitations Convention as 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", Quebec City, Quebec, August 10-14, 2008.