Local Limitations in International Commercial Arbitration

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On May 20, the Supreme Court of Canada released the much-anticipated decision in Yugraneft Corporation v. Rexx Management Corporation 2010 SCC 19. The decision clarifies the length of time a party can wait before seeking to have a foreign arbitral award recognized and enforced in a Canadian court.

By imposing local limitation period rules, the Yugraneft decision reinforces the need for parties in international arbitration to be alert to local rules that may seriously affect their rights. The decision also confirms that local courts and laws continue to play an important role in some aspects of the international arbitration process.

The Supreme Court of Canada unanimously held that a party can wait no longer than two years to seek recognition and enforcement of an arbitral award in the province of Alberta. The two-year period essentially runs from the time a party discovers that its debtor will not honour the award.

The Yugraneft decision is instructive for arbitral creditors seeking to have a foreign award recognized or enforced in Alberta, as well as for arbitral debtors with assets in the province. Of much broader interest is that the decision firmly establishes that local limitations laws of each province will determine how long a party can wait before seeking to have a foreign arbitral award recognized and enforced in each province.

Background

The background facts in this case are not remarkable. Yugraneft, a Russian corporation that develops and operates oil fields in Russia, purchased materials for its operations from Rexx, an Alberta corporation. Following a contractual dispute, Yugraneft launched arbitral proceedings before the International Commercial Arbitration Court in Russia. The tribunal ordered Rexx to pay just under $1 million in damages to Yugraneft.

Three and one half years later, Yugraneft applied to the Alberta Court of Queen’s Bench for recognition and enforcement of the award under the Alberta international arbitration statute. The Court dismissed the application, ruling that it was time-barred under the general two-year limitation period set out in s. 3 of the Alberta Limitations Act (the Act). The Alberta Court of Appeal upheld the lower court ruling. Yugraneft appealed to the Supreme Court of Canada.
The Supreme Court Applies Local Limitations Laws

The starting point for the Court’s decision was the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which the provinces have adopted through international arbitration legislation. The New York Convention aims to facilitate the cross-border recognition and enforcement of arbitral awards by creating a uniform set of rules to apply around the world. However, the New York Convention also allows contracting states to impose time limits on the recognition and enforcement of arbitral awards. In stating that recognition and enforcement shall be “in accordance with the rules of procedure of the territory where the award is relied upon,” the New York Convention indicates the application of domestic law. The Supreme Court held that, if a local legislature intended to subject recognition and enforcement proceedings to a limitation period, that limitation period must be construed as a “rule of procedure” under the terms of the New York Convention.

As such, time limits are determined by the limitations periods in each province or state where enforcement is sought. This is true even where a province would otherwise treat limitation periods as substantive legal rules. As a practical matter, this leads to a patchwork of potentially-applicable limitation periods across a wide variety of legal systems, traditions and rules.

Justice Rothstein characterized the application for recognition and enforcement as an application for a “remedial order” subject to the general two-year limitation period under s. 3 of the Act. He rejected arguments that an arbitral award is a “judgment or a court order for the payment of money” in Alberta (which would have made an application for recognition and enforcement in Alberta eligible for the ten-year limitation period in s. 11 of the Act). Again, this could lead to different results even within Canada, since legislatures such as British Columbia have expressly included international arbitral awards in their definition of “local judgment”, potentially attracting longer limitation periods elsewhere.

Discoverability

The two-year limitation period is also subject to a “discoverability” rule in the Act. The Court explained how the discoverability rule should be applied in this context. In this case, the injury is non-performance of an obligation – namely, the failure of Rexx to pay in compliance with the arbitral award.

The Court clarified, however, that the limitation period does not necessarily start to run on the date the award was rendered. If an award originates in a Model Law jurisdiction, or one with analogous provisions concerning the setting aside of an arbitral award, as in the present case, the award may not be sufficiently “final” for enforcement purposes until applicable appeal and review periods have expired. In other words, the limitation period will not start to run until the award can no longer be set aside by the local courts in the country where the award was rendered, or until any appeals or attempts to set aside the award have been concluded.

Taking the discoverability rule into account, Justice Rothstein concluded that Yugraneft’s application for recognition and enforcement of the foreign arbitral award was time-barred as of December 2004, which was two years after the obligation to pay crystallized.

The discoverability rule allows the courts to consider other aspects of an arbitral creditor’s circumstances that may be particularly relevant in the international arena. For example, an arbitral creditor may not know enough to start enforcement proceedings in a jurisdiction until it knows the arbitral debtor has assets in a particular jurisdiction.
Although it was obvious in the *Yugraneft* case that the debtor was an Alberta corporation that was reasonably likely to have assets in Alberta, the location of assets may not be so obvious in other cases involving parties with international operations. The court can apply the discoverability rule to benefit an arbitral creditor who, exercising reasonable diligence, learns at a later date that the arbitral debtor has assets in a jurisdiction.

**Significance**

As a result of this decision, parties intending to seek recognition and enforcement of foreign arbitral awards in a Canadian court must consult limitation laws in the province where enforcement is being sought in order to avoid their claims becoming time-barred. Similarly, international arbitral debtors with assets in a Canadian province may find themselves immune from recognition and enforcement of an award where the relevant limitation period has expired.

International arbitration is increasingly becoming the dispute resolution mechanism of choice for international commercial disputes, allowing parties a uniform platform for resolving their disputes in the face of varied legal systems. However, despite the considerable advantages of international arbitration for enforcement purposes in many jurisdictions, the *Yugraneft* decision reinforces the need for parties to be alert so that they are not disadvantaged or surprised by nuances of local law.

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