Yugraneft Corporation v. Rexx Management Corporation, 2007 ABQB 450 (CanLII)

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Legislation cited (available on CanLII)

- Arbitration Act, R.S.A., 2000, c. A-43
- International Commercial Arbitration Act, R.S.A., 2000, c. I-5
- Judgment Interest Act, R.S.A., 2000, c. J-1
- Limitations Act, R.S.A., 2000, c. L-12
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- Ace Bermuda Insurance Ltd. v. Allianz Insurance Company of Canada, 2005 ABQB 975 (CanLII) — 390 AR 342
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Court of Queen's Bench of Alberta

Citation: Yugraneft Corporation v. Rexx Management Corporation, 2007 ABQB 450

Date: 20070629

Docket: 0601 01294

Registry: Calgary

Between:

Yugraneft Corporation

Applicant

- and -

Rexx Management Corporation

Respondent

Reasons for Judgment

of the

Honourable Mr. Justice P. Chrumka

I. Introduction

[1] This is an application by the Yugraneft Corporation ("Yugraneft"), for an Order recognizing and enforcing an international arbitration award (the "Award"). The application is made pursuant to the *International Commercial Arbitration Act,* R.S.A. 2000, c. I-5 (the "ICAA").

[2] Rexx Management Corporation (“Rexx”) seeks dismissal of the application, or alternatively, a stay of the application pending resolution of a Rackateer Influenced and Corrupt Organisations (“RICO”) case which, Rexx submitted, will definitively determine whether Yugraneft was stolen through abuses of a Russian court case.

[3] The Award, dated September 6, 2002, was issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (“Russian ICAC”), following hearings before a panel of three arbitrators (the “Tribunal”), held in Moscow, Russian Federation, on May 21 and June 27, 2002.

[4] The Tribunal granted the Award in favour of Yugraneft against Rexx in the principal amount of $935,729.43 (U.S.), plus costs of the arbitration in the amount of $16, 885.00 (U.S.), for a total of $952,614.43 (U.S.).

[5] Yugraneft now seeks to have the Award recognized and enforced, together with interest thereon, pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1.

II. Facts

[6] Yugraneft is a joint stock company duly incorporated under the laws of the Russian Federation. Rexx is a corporation duly incorporated under the laws of the Province of Alberta.

[7] The parties entered into a contract dated October 1, 1998, which the parties called “Equipment and Materials Supply Contract No. 157" (the “Contract”). Pursuant to

the terms of the Contract, Rexx agreed to supply and Yugraneft agreed to purchase equipment and materials required for Yugraneft's operational activities.

[8] Rexx was formed to provide logistics to Yugraneft after a change in law prevented Yugraneft from doing so through a wholly owned subsidiary. Phil Murray was the senior vice president of Yugraneft until the alleged illegal takeover of the company as noted below, and is now the director of Rexx.

[9] Clause 4.5 of the Contract is an arbitration agreement. It provides that disputes arising under the Contract will be referred by the parties to arbitration in Russia.

[10] A dispute arose between the parties under the Contract. Yugraneft alleged that it had prepaid invoices in the total amount of $940,382 (U.S.) but that Rexx had delivered equipment valued at only $4,652.57 (U.S.). According to Yugraneft, it demanded the money but Rexx refused to return the money. Yugraneft commenced arbitration proceedings under the Contract.

[11] The matter was referred to the Russian ICAC. The arbitration proceedings were conducted in accordance with the Rules of the Russian ICAC.

[12] The Arbitration Panel consisted of three members each of whom was appointed by the Chamber of Commerce and Industry of the Russian Federation. Rexx's nominee on the Tribunal was Oleg N. Sadikov. Mr. Sadikov is a Doctor of Law and Chief Research Fellow with the Institute of Legislation and Comparative Law of the Government of the Russian Federation. Yugraneft's nominee, Gainan E. Avilov, is the Deputy Chairman of the Private Law Research Centre of the President of the Russian Federation. The Chair of the Tribunal was Mikhail G. Rosenberg, a professor at the Faculty of Private Law at the Russian Academy of Foreign Trade.

[13] Rexx made a preliminary application in writing, received by the Russian ICAC, to have the arbitration proceedings terminated on the basis that the Russian ICAC had no jurisdiction to consider the dispute. The parties appeared before the Tribunal in Moscow on May 21, 2002, to argue the issue of jurisdiction. The Tribunal ruled, by written decision dated May 21, 2002, that the Russian ICAC had jurisdiction to settle the dispute. The Tribunal directed that a hearing of the case on the merits be held in Moscow on June 27, 2002.

[14] The Russian ICAC advised Rexx and its counsel that Rexx had the right to appeal from the Jurisdictional Decision under the Law of the Russian Federation on International Commercial Arbitration of 1993.

[15] A further hearing was held before the Tribunal in Moscow on June 27, 2002. No representative of Rexx attended. After noting the failure of Rexx to attend, the Tribunal declared the oral hearing of the case to be concluded and advised that it would issue an award in writing within 90 days.

[16] On September 6, 2002, the Tribunal issued its written Award granting judgment in favour of Yugraneft in the amount of $935,729.43 (U.S).

[17] Rexx has asserted that the Tribunal refused to accept or deliberate the argument with respect to the alleged illegal takeover of Yugraneft by Tyumen Oil Company (“TNK”). Mr. Anatoly Kleimenov, Rexx’s lawyer, deposed in an Affidavit that he attempted to raise the argument but the Arbitration court refused to hear this argument. This statement is disputed by Mr. Kirill Vadimovich Nam, lawyer for Yugraneft, who stated that Mr. Kleimenov only raised the question of the competency of the Tribunal to consider the dispute between Yugraneft and Rexx. There is no transcript of the hearing.

[18] Rexx does not admit that Yugraneft forwarded $935,729.43.

[19] Rexx has not appealed from, nor has it moved to set aside, either the Jurisdictional decision or the Award.

[20] Yugraneft commenced these proceedings by way of Originating Notice dated January 27, 2006.

[21] In support of its application, and in compliance with the ICAA, Yugraneft filed certified copies of the Contract, the Jurisdictional decision and the Award, together with certified translations of the same.

[22] Rexx filed the affidavit of Phil Murray, sworn March 28, 2006, an Expert Declaration of Marina V. Telyukina and various other Declarations.

Affidavit of Mr. Phil Murray

[23] Rexx provided the affidavit of Mr. Phil Murray, Director of Rexx and former senior vice-president of Yugraneft. Mr. Murray deposed that what is now NoreX, entered into a Joint Venture with a Russian company, Chernogorneft, to form Yugraneft, with NoreX eventually owning about 97% of the Joint Venture. In his affidavit Mr. Murray stated that TNK took control of the Joint Venture through the use of an ordered bankruptcy.

[24] According to Rexx, the use of ordered bankruptcies as a corrupt business tool in Russia is well documented. This is noted by the Expert Declaration of Professor Marina V. Telyukina which is attached as an Exhibit to Mr. Murray's affidavit.

[25] After seizing control of the Russian partner to the joint venture and another company, TNK and NoreX came into conflict over the repayment of an oil debt owed to Yugraneft.

[26] TNK brought court proceedings without valid notice to NoreX to declare NoreX's contributions to the joint venture invalid, thereby reducing the number of shares NoreX could vote at the Annual General Meeting. The lack of notice was accomplished by sending blank pieces of paper to counsel for NoreX in Russia and NoreX's headquarters in Cyprus, in violation of Russian law and the relevant treaty between Russia and Cyprus.

[27] According to Mr. Murray, after the legal proceedings, TNK fabricated minutes of a shareholder meeting appointing a new Director General of the joint venture. TNK then seized control of the company's office through force.

[28] Rexx alleged that when TNK took over Yugraneft, it failed to pay outstanding amounts owed to various subsidiaries and related companies to Yugraneft, including NoreX for oil field specialists and Rexx for the purchase of all equipment for the latest shipment to Yugraneft. Allegedly, Yugraneft owed some $1,000,000.00 to Rexx and NoreX.

[29] As a result of TNK's illegal actions in stealing Yugraneft from NoreX, NoreX commenced a RICO case in the US Federal Court of the Southern District of New York on February 28, 2002. The Defendants to that action include TNK which controlled

Yugraneft subsequent to the armed seizure. The Defendants applied to have the action dismissed on the basis of *forum non-conveniens.* The application was granted at first instance but was then reversed on appeal, first by a regular panel of the Court of Appeal and again by the Court *en banc*.

[30] According to Rexx, the RICO action will determine whether the takeover of Yugraneft by TNK was legal.

III. Issues

[31] The main issues in this Application are as follows:

1. Whether the application is barred by operation of the *Limitations Act,* R.S.A. 2000, c. L-12.
2. Whether enforcement of the Award would be contrary to public policy in Alberta.

IV. Parties Positions

A. Applicant's Position

1. Limitation Period

[32] Yugraneft seeks two things in this application: the "recognition" and "enforcement" of the Award. Yugraneft argued that the "recognition" of the Award is in

the nature of a declaration and therefore falls outside the scope of the *Limitations Act.* Yugraneft also seeks the enforcement of the Award. Yugraneft submitted that the Award is the equivalent of a "judgment or order requiring a defendant to pay damages". Therefore, Yugraneft argued that it is seeking the enforcement of a remedial order, and not a "remedial order" *per se.*

[33] Yugraneft argued that s.11 of the *Limitations Act* provides that a claimant must seek a "remedial order" in respect of a claim based on a "judgment or order for the payment of money" within ten years after such a claim arises. Yugraneft submitted that once "recognized" a foreign arbitral award must be seen as the equivalent of a "judgment or order for the payment of money" in this province.

[34] Yugraneft agreed that traditionally an action on a foreign judgment has been considered to give rise to an independent cause of action, in the nature of a claim for a debt, which arises at the time the original judgment is made: *Canada Mortgage & Housing Corp.* v. *Horsfall,* 2004 MBQB 124 (CanLII), [2004] 11 W.W.R. 761 (Man. Q.B.), 2004 MBQB 124; *Lax v. Lax,* 2004 CanLII 15466 (ON CA), [2004] 70 O.R. (3d) 520 (C.A.).

[35] However, Yugraneft argued that in *Banque Nationale de Paris (Canada)* v. *Opiola,* 2000 ABQB 191 (CanLII), (2000), 263 A.R. 157 (Q.B.), 2000 ABQB 191; aff'd 2001 ABCA 25 (CanLII), (2001), 277 A.R. 80, 2001 ABCA 25, a more modern approach was taken, more in keeping with the principles of comity between nations. In *Banque National de Paris (Canada)*, Justice Wilson held, relying on the reasoning in the Ontario case of *Girsberger v. Kresz et al.,* 2000 CanLII 22329 (ON SC), [2000] 47 O.R. (3d) 145 (Ont. Sup. Ct.); aff'd 2000 CanLII 22406 (ON SC), (2000), 50 O.R. (3d) 157 (C.A.), that a foreign judgment is the same as a domestic judgment for limitations purposes. Yugraneft has urged this Court to adopt the more modern approach.

[36] Furthermore, Yugraneft argued that I need not find that the *Limitations Act* applies to this proceeding at all. The *ICAA* incorporates the Model Law on International Commercial Arbitration (the "Model Law"), which applies in Alberta. In the result, the Model Law is of the same force and effect as any other Alberta statute. The Model Law contains no specific limitation of the time within which an application for enforcement must be brought. Article 35 simply provides that an arbitral award, irrespective of the country in which it was made shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of Articles 35 and 36.

[37] Yugraneft submitted that the *Arbitration Act,* R.S.A. 2000, c. A-43 does not apply to an international commercial arbitration and is not relevant to this inquiry.

[38] Yugraneft also argued that it makes sense to allow a foreign litigant, in this case a Russian company, a longer period of time to enforce a foreign award than a domestic litigant. A domestic litigant would understand the laws of Alberta and to know how long it has to enforce the award.

2. Public Policy

[39] Rexx has raised public policy as a ground for refusing enforcement of the Award. Yugraneft agreed that Article 36(1)(b)(ii) of the Model Law provides that recognition or enforcement of an arbitral award may be refused if such recognition or enforcement would be contrary to public policy of the state in which recognition or enforcement is sought.

[40] Yugraneft argued that the alleged fraudulent activity raised by Rexx should have been brought before the Arbitral Tribunal. Furthermore, pursuant to *Beals v. Saldanha*, 2003 SCC 72 (CanLII), [2003] 3 S.C.R. 416, 2003 SCC 72, Rexx is precluded from raising the issue of the alleged illegal takeover of Yugraneft as a ground for refusing enforcement of the Award.

[41] Second, Yugraneft submitted that the RICO action would provide no assistance to this Court. Yugraneft argued that the relief sought in the RICO action is an award of damages in favour of NoreX. The Respondent, Rexx Management, is not a party to the RICO action.

B. Respondent's Position

1. Limitation Period

[42] The general rule pursuant to the *Limitations Act* is that an action must be commenced within two years of knowledge of the cause of action. Rexx submitted that there is no dispute that Yugraneft knew about its action more than two years before it commenced the action. The only dispute is what limitation period applies to this action. Rexx argued that in substance, Yugraneft is seeking a "remedial order" and therefore the two year limitation period is triggered.

[43] Rexx cited *Daniels v. Mitchell* 2005 ABCA 271 (CanLII), (2005), 371 A.R. 298, 2005 ABCA 271, where Madam Justice Hunt, speaking for the majority, set out the policy goal of the new *Limitations Act* which was to have a uniform limitation period of two years. In that case, the Court determined that the applicants were seeking in substance a remedial order not a declaration.

[44] Furthermore, Rexx submitted that it is long settled law that an action on a foreign judgment is considered to give rise to an independent cause of action, in the nature of a claim for a debt, which arises at the time the original judgment is made: *Rutledge v. United States Savings and Loan Co.,* 1906 CanLII 37 (SCC), [1906] 37 S.C.R. 546. Rexx argued that it is clear that the Applicant in these proceedings is seeking a "remedial order"; that is, they are suing on a debt and seeking an Order from this Court that the monies are owing. Therefore the limitation period of two years applies.

[45] Rexx noted that in the decision in *Banque Nationale de Paris* Justice Wilson relied on the Ontario trial level decision of *Girsberger* which was decided before the Ontario Court of Appeal decision in *Lax.* In *Lax,* the Ontario Court of Appeal specifically affirmed that enforcing a foreign judgment is an independent cause of action, in the nature of a claim for a debt, which arises at the time the original judgment is made. Furthermore, the Alberta Court of Appeal in *Banque Nationale* declined to follow the trial judge's reasoning in *Banque Nationale* and instead decided the matter on the basis that it was a federal matter and applied the federal limitation period.

[46] Finally, Rexx pointed out that the only legislation that deals with the limitation period for enforcing an arbitral award is the *Arbitration Act*. The limitation period for taking enforcement proceedings under the *Arbitration Act* is two years from the date of the award, pursuant to s.51(3). Rexx argued that it would seem odd if this court gave a foreign arbitration award different treatment than a domestic arbitration award.

[47] Rexx submitted that to give effect to comity between nations would mean enforcing the two year period which would be consistent with the common law cases dealing with the enforcement of a foreign judgment which treats it as an action on a debt.

2. Public Policy

[48] Rexx argued that the evidence illustrated that there was fraudulent activity in this case and therefore the enforcement of this Award would be against public policy. Article 36(1)(b)(ii) of the ICAA provides that recognition or enforcement of an arbitral award may be refused if such recognition or enforcement would be contrary to public policy. Rexx cited several cases to support this argument including *Schreter v. Gasmac Inc.* reflex, (1992), 89 D.L.R. (4th) 365 (Ont. Ct. of J. Gen.Div.) and *Corporacion Transnacional de Inversions, S.A. de C.V. v. STET International,* S.p.A., 1999 CanLII 14819 (ON SC), (1999) 45 O.R. (3d) 183 (C.A.), leave to appeal refused [2000] S.C.C.A. No. 581.

[49] Rexx submitted that the Affidavit of Phil Murray disclosed that there is at least a triable issue with respect to the propriety of TNK's takeover of Yugraneft. Should this Court give effect to Yugraneft's actions, it will be condoning the fraudulent takeover of the company. This Court should base its decision to enforce the Award on the circumstances under which the Award was granted including the conduct of the parties. Specifically, Rexx alleges that TNK fraudulently stole the company by: abusing the Russian judicial system; forging shareholder meeting minutes; and seizing the offices of Yugraneft through armed force.

[50] Finally, Rexx argued that this action should be stayed pending determination of the RICO action.

V. ANALYSIS

A. Introduction

[51] Yugraneft seeks two items in this application: recognition and enforcement of the Award. According to A. Redfern and M. Hunter in *Law and Practice of International Commercial Arbitration,* 4th ed. (London: Sweet and Maxwell, 2004) recognition of an award is generally a defensive process and will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. When 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. A court that is prepared to grant enforcement of an award will do so because it recognizes the award as validly made and binding upon the parties to it and, therefore, suitable for enforcement.

[52] The enforcement of international arbitrations in Alberta is governed by the ICAA. The ICAA incorporates both the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (the "Convention"), and the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on June 21, 1985. The *Model Law* contains no specific limitation on the time within which an application for enforcement must be brought. Article 35 of the *Model Law* simply provides that an arbitral award, irrespective of the country in which it was made shall be recognized as binding and enforceable upon application.

[53] Yugraneft has supplied me with various cases illustrating the broad deference and respect that must be accorded to the decisions of international commercial arbitrations. I am mindful of these general principles of comity and echo the words of Justice Hawco in *ACE Bermuda Insurance Ltd. v. Allianz Insurance Co. of Canada* 2005 ABQB 975 (CanLII), (2005), 390 A.R. 342, 2005 ABQB 975 at para. 41:

> The purpose of the legislation under which the Tribunal acted is to facilitate and resolve disputes subject to international commercial arbitrations. In *Corporacion Transnational de Inversiones S.A. de C.V. et al. v. Stet International S.p.A. et al.* 1999 CanLII 14819 (ON SC), (1999), 104 O.T.C. 1; 45 O.R. (3d) 183 (Sup. Ct.),

aff'd. 2000 CanLII 16840 (ON CA), (2000), 136 O.A.C. 113; 49 O.R. (3d) 414 (C.A.) at p. 191 [O.R. [Sup. Ct.], Lax J. said this:

> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* 1994 CanLII 1871 (ON CA), (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale; *Kaverti Steel & Crane Ltd. v. Kone Corp.* 1992 ABCA 7 (CanLII), (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

2. Limitation Period

[54] There is a dispute as to the applicable limitation period and whether the *Limitations Act* governs international arbitration awards. The *Limitations Act* came into effect on March 1, 1999 and applies to any claim in a proceeding commenced in an Alberta court after March 1, 1999 "where a claimant seeks a remedial order".

[55] For convenience, I have reproduced the relevant sections of the *Limitations Act:*

1(1)“remedial order” means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right but excludes

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

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

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

(b) 10 years after the claim arose,

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

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

[56] As is seen from above, in Alberta an action upon a judgment has a limitation period of ten years after the cause of any such action arose or the recovery of such judgment whereas an action upon a simple contract debt has a limitation period after the cause of any such action arose (two years).

[57] Yugraneft submitted that the term “judgment” in s.11 of the *Limitations Act* should be interpreted as including both domestic and foreign judgments and therefore, both types of judgments are subject to a 10 year limitation period. On the other hand, Rexx argued that the term “judgment”refers only to domestic judgements and the limitation period of two years applies.

[58] It is worth noting that the *Reciprocal Enforcement of Judgments Act* R.S.A. 2000, c. R-6 (“REJA”) does not apply in this case. In REJA, an application to enforce a judgment given in a court in a reciprocating jurisdiction must be made within six years after the date of the judgment. The Russian Federation is not a reciprocating state with Alberta, and accordingly the procedures of REJA are not available to Yugraneft.

[59] I disagree with Yugraneft’s assertion that a foreign arbitration award is merely a declaration and should therefore be exempt from the *Limitations Act.* They have urged me to determine that the original recognition procedure process is akin to a proceeding for a declaration of rights and duties, and thus falls outside the definition of “remedial order” in s. 1(i)(i) of the *Limitations Act.* Yugraneft argued that the next step in the process under the Model Law is enforcement of the now “recognized” foreign arbitral award.

[60] I cannot agree with the above characterization. In *Daniels*, Madam Justice Hunt, speaking for the Court of Appeal stated at para. 50:

> First, there is nothing in the history or language of the *New Act* to suggest that the Legislature intended that in rem mortgage remedies be subject to no limitation period. Second, the purpose of a declaration is to clarify and define the existence and extent of an applicant’s legal rights. A declaration is unlike most judicial rulings in that it “merely declares and goes no further in providing relief to the applicant”: Lazar Sarna, *The Law of Declaratory Judgments*, 2nd Ed. (Toronto: Carswell, 1988) at 1. A prime example is *Calder v. Attorney General of British Columbia,* 1973 CanLII 4 (SCC), [1973] S.C.R. 313, where the appellants sought

> a declaration that aboriginal title had not been extinguished, without further remedy.

[61] Although, the above case considered an *in rem* mortgage, the principles are applicable in the present case. The essence of the enforcement of an international arbitration award is remedial not declaratory.

[62] The case law illustrates that in Canada there has been a distinction between domestic judgments and foreign judgments when it comes to both enforcement and limitation periods. In relation to the applicable limitation period for such actions, it has long been held that an action to enforce a foreign judgment is an action upon a simple contract debt (see: *Rutledge).* Castel and Walker in *Canadian Conflict of Laws*, 6th ed., (Markham: Butterworths, 2005) comment as follows with respect to this issue at 14-3:

> A foreign judgment is regarded as creating a debt between the parties to it, which is said to be based on the judgment debtor's implied promise to pay the amount of the foreign judgment;...The debt so created is a simple contract debt and not a specialty debt, and it is subject to the appropriate limitation period...

[63] However, this characterization has not been without criticism. In *Girsberger,* Cumming J. suggested that as a result of cases such as *Morguard Investments Ltd. v. De Savoye,* 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077 and those following it, the common law has advanced and has been modernized as it relates to the recognition and enforcement of foreign judgments. Cumming J. stated at para. 45:

> In light of these decisions and the clear evolution of the principles of comity, order and fairness, I fail to understand why the characterization of *in personam* foreign judgments from beyond Canada as simple contract debts should continue to be the law. In the 19th century, the reasoning behind the historical characterization of *in personam* foreign judgments, as I understand it, was the need for Canadian courts to create a new "starting point" when a foreign judgment was recognized and enforced. The principle of territoriality incited the English courts to create a new "starting point" which inferred a promise to pay the amount of the judgment as though it was simple contract debt: see *Bedell v. Gefaell (*No. 1), [1938] O.R. 718 at p. 724, [1938] 4 D.L.R. 467 (C.A.).

> In light of *Morguard*, Canadian courts no longer need to continue to apply this legal fiction. Why do Canadian courts need a new "starting point"? Why not recognize truly foreign judgments for what they are, "judgments"?

[64] However, this decision was overruled by the recent Ontario Court of Appeal decision in *Lax.* Madam Justice Feldman dealt extensively with this issue and with Cumming J.'s comments in *Girsberger.* She stated at paras 29-31:

> In summary, a foreign judgment cannot be enforced in Ontario except by first suing on the judgment to obtain a domestic judgment against the debtor. That action must be brought within six years from when the cause of action arose which is the date of the foreign judgment. However, if the debtor was not in Ontario on the date of the judgment, then the six years does not commence until the debtor returns to Ontario. Once the domestic judgment is obtained it can be enforced in the usual way and is subject to the 20-year limitation period.
>
> This analysis demonstrates that as a procedural matter, for the purposes of enforcement, foreign judgments and domestic judgments are not equivalent. Cumming J.s' position in *Girsberger* is that, in order to give foreign judgments the full faith and credit that our new approach of comity among nations requires, we must apply the same limitation period for enforcement of both types of judgments. Therefore, the old *Limitations Act* must be interpreted to reflect that approach and to accomplish that goal.
>
> In my view, although there is merit in the philosophical approach advocated by Cumming J., in order to achieve the type of parity between domestic and foreign judgments that he is advocating, more significant changes must be made to the enforcement scheme than interpreting "judgments" in s. 45(1)(c) to include a foreign judgment. This would require legislative action. As long as only domestic judgments can be enforced by execution and the other methods discussed above, and therefore foreign judgments must be transformed into domestic judgments or registered before they are enforceable as domestic judgments, there is not parity of treatment.

[65] Madam Justice Feldman concluded that without legislative action it was not appropriate to depart from the established interpretation of the *Ontario Limitations Act* when it came to foreign judgments.

[66] The only Alberta decision on this issue is *Banque Nationale de Paris (Canada),* where the Court held, relying on the reasoning of Mr Justice Cumming in *Girsberger,* that a foreign judgment is the same as a domestic judgment for limitations purposes. The Court of Appeal did not find it necessary to determine this issue as they found that the province of Quebec's limitation law governed. Notably, this case was decided prior to the Ontario Court of Appeal decision in *Lax.* Rexx argued that the decision in *Banque Nationale* was effectively overruled.

[67] It is noteworthy that the approach taken in *Lax* was recently confirmed in *Pollier v. Laushway,* 2006 NSSC 165 (CanLII), (2006), 244 N.S.R. (2d) 386, 2006 NSSC 165, where A.C.J. Smith stated at para. 26:

> While I agree with the suggestion in *Lax, supra,* that there is merit in the philosophical approach advanced by Cumming J. in *Girsberger, supra,* I conclude that the law remains that an action to enforce a foreign judgment is an action upon a simple contract debt in Nova Scotia, the applicable limitation period for such an action is six years after the cause of any such action arose.

[68] I agree that there is merit to the argument that a more modern approach in keeping with the principles of comity may be required with respect to foreign judgments. If this is the case, it is my view that legislative intervention may be necessary. In my opinion, the current state of the law is that an action to enforce a foreign judgment is an action upon a simple contract debt; therefore the applicable limitation period is two years. I acknowledge that this limitation period raises certain issues with respect to foreign judgments. For example, it may take more time for the parties to locate assets,

lawyers and start proceedings. However, this would be more appropriately addressed at the legislative level.

[69] The next question is whether foreign arbitrations should be given the same treatment as foreign judgments. There is no case law that addresses the appropriate limitation period for an international arbitration. As noted by Rexx, the limitation period for a domestic arbitration is two years.

[70] Yugraneft argued that there is no binding precedent in relation to foreign arbitrations. Furthermore, Yugraneft submitted that the Model Law applies to foreign arbitrations and there is no comparable statutory provision with respect to foreign judgments. Yugraneft argued that Article 36 of the *Model Law* sets out various grounds for refusing recognition or enforcement of an international arbitral award, none of these imposes a specific time limitation with respect to bringing an application for recognition or enforcement of an award. Accordingly, while it may be that foreign judgments historically have been treated as giving rise to claims in debts, in the case of a foreign arbitral award the court must look to the ICAA and the Model Law to determine the nature of the proceeding. Yugraneft has also submitted that this Court should be guided by emerging principles of comity, as articulated by the Supreme Court of Canada in *Beals* and *Morguard Investments Ltd*.

[71] I agree that there is no comparable legislation (i.e. the Model Law and the ICAA) with respect to foreign judgments. However, as there are no guidelines within the Model Law or the ICAA with respect to limitation periods I find that I must look elsewhere to determine the applicable limitation period. I am not persuaded that it follows that there is no applicable limitation period when it comes to foreign arbitration awards.

[72] My interpretation of the current status of the law is that the applicable limitation period for foreign judgments is two years. The same principles apply with respect to a

foreign arbitration award. The Award was granted on September 6, 2002. The originating notice was filed on January 27, 2006. As a result, this action is statute barred.

3. Public Policy

[73] The second issue in this application is whether it would be against public policy to enforce the Award. As I have determined that this action is barred by the *Limitations Act* it is not strictly necessary to address the second issue with respect to public policy. However, as both parties provided me with briefs and arguments and in the event of an appeal, I will address this issue.

[74] Article 36(1)(b)(ii) of the Model Law provides that recognition and enforcement of an arbitral award may be refused if such recognition or enforcement would be contrary to public policy of the state in which recognition or enforcement is sought.

[75] The public policy ground for resisting enforcement of an arbitral award was narrowly construed in the Ontario decision of *Schreter.* In this case, the Ontario Court was asked to enforce an arbitral award that was obtained in the state of Georgia. The award gave the plaintiff accelerated royalty payments for breach of contract which the Respondent said was not available under the laws of Ontario. Madam Justice Feldman referred with approval to a report of the UN Commission on International Trade Law on the work of its 18th session (June 3-21, 1985). This report provides a commentary on the Model Law and gives guidance on the intended scope of the public policy grounds for refusal of recognition. Madam Justice Feldman referred to the relevant section in the Report, at 379:

> 297. ...It was understood that the term "public policy" which was used in the 1958 New York Convention and many other treaties,

> covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

[76] Madam Justice Feldman went on to say at 379:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

> It is true that arbitral awards have been viewed with less confidence than judgments of a court because the procedures of the courts are more regulated and standardized, and judges are sworn to uphold those procedures and to apply the law, while the qualifications and training of arbitrators may diverge greatly. And it is of concern to a court in this jurisdiction that a party to a foreign arbitration may feel that justice was not done or that the award is perverse in law.
>
> However, if this court were to endorse the view that it should reopen the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.

[77] Madam Justice Lax in *Corporacion Transnacional de Inversiones S.A. de C.V.* refused an application to set aside an international arbitration award. This case involved a dispute between four Mexican companies and an Italian company and its Dutch subsidiaries. After the arbitration tribunal found that it had jurisdiction, the Mexican respondents refused to attend the hearing. Following the Award, the Mexican parties applied to an Ontario court to set aside the award on the basis that they were denied equality of treatment and the opportunity to present their case and that the awards were in conflict with the public policy of Ontario. After referring to the governing principles of the Model Law and the broad deference and respect which should be accorded to decisions made by arbitral tribunals the Court made the following comment with respect to public policy at 193:

> Accordingly, to succeed on this ground the awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the awards are contrary to the essential morality of Ontario.

[78] Madam Justice Lax found that by boycotting the hearing, the Mexican parties had deliberately forfeited their right to be heard. She also commented on the fact that the Mexican parties benefited from the presence of their chosen arbitrator.

[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.

[81] Rexx has asked me to stay proceeding until the RICO action has been determined in the United States. Rexx is not a party to that action. The relief sought in that case is an award of damages in favour of NoreX. Therefore, that case would not provide any assistance to the present case.

VI. CONCLUSION

[82] For the reasons given, the applicable limitation period in this case is two years. Therefore, the action is statute barred.

[83] It was further argued that the Award should not be recognized or enforced on the basis of public policy. While it was not necessary to deal with this issue in light of the conclusion I have already reached, I note that I would not have set aside the Award on this basis.

VII. COSTS

[84] Costs may be spoken to if desired.

Heard on the 7th day of September, 2006.

Dated at the City of Calgary, Alberta this 27th day of June, 2007.

P. Chrumka

J.C.Q.B.A.

Appearances:

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