SUPREME COURT OF CANADA

CITATION: Yugraneft Corp. *v.* Rexx Management Corp., 2010 SCC 19

DATE: 20100520
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BETWEEN:

Yugraneft Corporation
Appellant
and
Rexx Management Corporation
Respondent
- and -
ADR Chambers Inc., Canadian Arbitration Congress, Institut de médiation et d'arbitrage du Québec and London Court of International Arbitration
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 65) Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring)

YUGRANEFT CORP. *v.* REXX MANAGEMENT CORP.

Yugraneft Corporation *Appellant*

v.

Rexx Management Corporation *Respondent*

and

ADR Chambers Inc.,
Canadian Arbitration Congress,
Institut de médiation et d'arbitrage du Québec and
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2010 SCC 19

File No.: 32738.

2009: December 9; 2010: May 20.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Limitation of actions — Foreign arbitral award — Recognition and enforcement — Limitation period applicable to recognition and enforcement of foreign arbitration award in Alberta — Limitations Act, R.S.A. 2000, c. L-12, ss. 3, 11.

Arbitration — Foreign arbitral award — Recognition and enforcement — Whether placing time limit on recognition and enforcement proceedings violates Convention on the Recognition and Enforcement of Foreign Arbitral Award — Whether limitation periods fall under rubric "rules of procedure" under Convention — Convention on the Recognition and Enforcement of Foreign Arbitral Award, Can. T.S. 1986 No. 43.

Y Corp., a Russian corporation that develops and operates oilfields in Russia, purchased materials for its oilfield operations from R Corp., an Alberta corporation. Following a contractual dispute, Y Corp. commenced arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. On September 6, 2002, the arbitral tribunal ordered R Corp. to pay $952,614.43 US in damages to Y Corp. Y Corp. applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27, 2006. The court dismissed the application, ruling that it was time-barred under the two-year limitation period in s. 3 of the Alberta *Limitations Act*. The Court of Appeal upheld the ruling.

Held: The appeal should be dismissed.

Alberta is required to recognize and enforce eligible foreign arbitral awards. The recognition and enforcement of foreign arbitral awards in Alberta is governed by the *International Commercial Arbitration Act*, which incorporates both the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the United Nations *Model Law on International Commercial Arbitration*. The Convention requires all Contracting States to recognize and enforce arbitral awards made in the territory of another state, whether or not they are party to the Convention, except on enumerated grounds. It was ratified and implemented by legislation in Alberta and each of the other provinces. The Model Law, a codification of international "best practices", recommends terms identical to those in the Convention and has also been adopted, subject to some modifications, by every jurisdiction in Canada, including Alberta.

The Convention allows Contracting States to impose local time limits on the recognition and enforcement of foreign arbitral awards if they so wish. While limitation periods are not included in the list of grounds upon which a Contracting State may refuse to recognize and enforce a foreign arbitral award, the Convention stipulates that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon". If the competent legislature intended to subject recognition and enforcement proceedings to a limitation period, the limitation period in question will be construed as a "rule of procedure" as that term is understood under the Convention. The domestic characterization of limitation periods as substantive or procedural is immaterial. In the case of federal states, local time limits are to be determined by the law of the enforcing jurisdiction within the federal state. In those cases, the relevant unit will be the enforcing jurisdiction within the Contracting State, not the Contracting State in its entirety. In order to comply with the Convention, Alberta need only provide foreign awards with treatment as

generous as that provided to domestic awards rendered in Alberta.

The only Alberta law applicable to the recognition and enforcement of foreign arbitral awards is the *Limitations Act*. The *Arbitration Act* expressly excludes foreign awards, and the *Reciprocal Enforcement of Judgments Act* only applies to judgments and arbitral awards rendered in reciprocating jurisdictions. Russia is not a reciprocating jurisdiction. By contrast, the scheme of the *Limitations Act* and its legislative history indicate that the Alberta legislature intended to create a comprehensive and exhaustive limitations scheme applicable to all causes of action except those excluded by the Act itself or covered by other legislation. Foreign arbitral awards are not so excluded and are therefore subject to the *Limitations Act*. An application for recognition and enforcement of a foreign arbitral award is an application for a "remedial order" within the meaning of the Act. However, as an arbitral award is not "a judgment or a court order for the payment of money", it is not eligible for the 10-year limitation period set out in s. 11 of the Act. Rather, the application is subject to the general two-year limitation period applicable to most causes of action, which is found in s. 3 of the Act.

The two-year limitation period in s. 3 is subject to a discoverability rule. Where, as here, the injury is the "non-performance of an obligation" and the arbitral creditor seeks to have a foreign arbitral award recognized and enforced, the date of the issuance of the award will not normally be considered to be the date of non-performance of the obligation to pay. The limitation period under s. 3 will not be triggered until the possibility that the award might be set aside by the local courts in the country where the award was rendered has been foreclosed. In the case of Russia, a Model Law jurisdiction, there is no indication in the record that the three-month appeal period to set aside

an award set out in s. 34 of the *Model Law on International Commercial Arbitration* was modified, and no appeal was launched during that period. Failure to make payment on the date the award becomes final satisfies the first two elements of discoverability set out in s. 3(1)(a)(i) and (ii): the arbitral creditor would know that the injury has occurred and that it was attributal to the arbitral debtor. The third element is also met. Under s. 3(1)(a)(iii), a court could delay commencement of the limitation period until the arbitral creditor knew or ought to have known that the injury it received warrants bringing a proceeding. In this case, however, there was no need to delay the running of time. Since the debtor is registered in Alberta where its head office is located, Y Corp. could not claim — and has not claimed — that it did not know or ought not to have known that a proceeding was warranted in Alberta at the time of the expiry of the three-month appeal period following receipt of notice of the award. Even taking into account the discoverability rule, Y Corp.'s application for recognition and enforcement of the foreign arbitral award was time-barred as of December 2004.

Cases Cited

Distinguished: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; **referred to:** *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Daniels v. Mitchell*, 2005 ABCA 271, 51 Alta. L.R. (4th) 212; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Novak v. Bond*, [1999] 1 S.C.R. 808.

Statutes and Regulations Cited

Arbitration Act, R.S.A. 2000, c. A-43, ss. 2(1), 51.

Civil Code of Québec, S.Q. 1991, c. 64, art. 2924.

Constitution Act, 1867, s. 92.

International Commercial Arbitration Act, R.S.A. 2000, c. I-5, s. 3.

Limitation Act, R.S.B.C. 1996, c. 266, ss. 1, 6(4).

Limitation of Actions Act, R.S.A. 1980, c. L-15 [rep. 1996, c. L-15.1, s. 16].

Limitations Act, R.S.A. 2000, c. L-12, ss. 1, 2(1), 3, 11, 12.

Reciprocal Enforcement of Judgments Act, R.S.A. 2000, c. R-6, ss. 1(1)(b), 21(1).

International Documents

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APPEAL from a judgment of the Alberta Court of Appeal (Costigan, O'Brien and Rowbotham JJ.A.), 2008 ABCA 274, 93 Alta. L.R. (4th) 281, 297 D.L.R. (4th) 168, 433 A.R. 372, 429 W.A.C. 372, 47 B.L.R. (4th) 205, [2008] 11 W.W.R. 28, 59 C.P.C. (6th) 91, [2008] A.J. No. 843 (QL), 2008 CarswellAlta 1035, affirming a decision of Chrumka J., 2007 ABQB 450, 78 Alta. L.R. (4th) 86, 423 A.R. 241, 31 B.L.R. (4th) 168, [2007] 10 W.W.R. 559, [2007] A.J. No. 749 (QL), 2007 CarswellAlta 911, dismissing an application for recognition and enforcement of a foreign arbitration award. Appeal dismissed.

Scott A. Turner and *Sam de Groot*, for the appellant.

David R. Haigh, Q.C., *Michael J. Donaldson* and *Sonya A. Morgan*, for the respondent.

Babak Barin, *James E. Redmond*, *Q.C.*, and *Andrew McDougall*, for the intervener the ADR Chambers Inc.

Ivan G. Whitehall, *Q.C.*, and *Paul M. Lalonde*, for the intervener the Canadian Arbitration Congress.

Stefan Martin and *Pierre Grenier*, for the intervener Institut de médiation et d'arbitrage du Québec.

Pierre Bienvenu, *Frédéric Bachand* and *Alison Fitzgerald*, for the intervener the London Court of International Arbitration.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This case is about the limitation period applicable to the recognition and enforcement of foreign arbitral awards in the province of Alberta. For the reasons set out below, I am of the view that the applicable limitation period is two years and that Yugraneft Corporation's application for recognition and enforcement of a foreign arbitral award is therefore time-barred. Under

international arbitration law, the matter of limitation periods is left to local procedural law of the jurisdiction where recognition and enforcement is sought. The applicable limitation period in this case must therefore be found in the limitations law of Alberta. As an arbitral award is not a judgment or a court order for the payment of money, an application for recognition and enforcement in Alberta is not eligible for the 10-year limitation period set out in s. 11 of the *Limitations Act*, R.S.A. 2000, c. L-12. Rather, the application is subject to the general two-year limitation period applicable to most causes of action, which is found in s. 3 of the *Limitations Act*.

II. Facts

[2] The appellant, Yugraneft Corporation ("Yugraneft"), is a Russian corporation that develops and operates oil fields in Russia. The respondent, Rexx Management Corporation ("Rexx") is an Alberta corporation that at one time supplied materials to Yugraneft for its oil field operations. Following a contractual dispute, Yugraneft commenced arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("Russian ICAC"). The arbitral tribunal issued its final award on September 6, 2002, ordering Rexx to pay US$952,614.43 in damages to Yugraneft.

[3] Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27, 2006, more than three years after the award was rendered. Rexx resisted enforcement on two grounds. First, it argued that Yugraneft's application was time-barred under the Alberta *Limitations Act*. Second, it argued that enforcement proceedings should be stayed pending resolution of an ongoing criminal case in the United States. It claimed that the

criminal case would demonstrate that the award had been obtained as a result of fraudulent activity.

III. Judicial History

[4] Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award pursuant to the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5 ("ICAA"). Chrumka J. ruled that the application was time-barred under the *Limitations Act*: 2007 ABQB 450, 78 Alta. L.R. (4th) 86. The Act creates two limitation periods, one for "remedial order[s]" (s. 3) and one for the enforcement of "judgment[s] or order[s] for the payment of money" (s. 11). Applications under s. 3 are subject to a two-year limitation period, while those under s. 11 are subject to a 10-year time limit. Yugraneft argued that foreign arbitral awards should be considered "judgments" under s. 11. Chrumka J. disagreed, finding instead that the two-year limitation period in s. 3 applied. The application was therefore dismissed.

[5] The Alberta Court of Appeal unanimously upheld the ruling of Chrumka J.: 2008 ABCA 274, 93 Alta. L.R. (4th) 281. It concluded that a foreign arbitral award could not be considered a "judgment" pursuant to s. 11 because that term encompassed only domestic judgments. Accordingly, it found that Yugraneft's application should be characterized as a claim for a remedial order under s. 3 of the Act and was therefore time-barred. The appeal was dismissed.

IV. Positions of the Parties

[6] Yugraneft argues that a foreign arbitral award should be treated as a domestic judgment

under s. 11 of the *Limitations Act* because arbitration is an adjudication of a legal dispute and as such possesses all the characteristics of a judgment. In the alternative, it argues that foreign arbitral awards should be treated as at least equivalent to a foreign judgment, and that foreign judgments fall within the meaning of "judgment" under s. 11 of the *Limitations Act*. It points to recent jurisprudence of this Court showing a trend away from the traditional conception of foreign judgments as a mere contract debt and towards a practice of granting them "full faith and credit" (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1100-1101; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at paras. 164-74). Finally, Yugraneft argues that the *Limitations Act* is ambiguous and that this ambiguity should be resolved in its favour. While an arbitral award may not share all the properties of a domestic judgment, neither does it fit well within the scheme created by s. 3. Since statutory provisions creating limitation periods must be interpreted strictly in favour of the plaintiff, this ambiguity must be resolved by applying the 10-year limitation period found in s. 11.

[7] Rexx argues that the two-year limitation set out in s. 3 should apply. Its principal argument is that the *Limitations Act* was intended to simplify the law of limitations by imposing a single limitation period on most causes of action. Unless an action falls under one of the exceptions set out in the Act, it is subject to the two-year limitation period found in s. 3. Since Yugraneft's action is not excluded from the scope of s. 3, it is time-barred.

V. Analysis

A. *Relevant Legislation*

[8] In Alberta, the recognition and enforcement of foreign arbitral awards is governed by the ICAA, which incorporates both the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43 (the "New York Convention" or "Convention"), and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, ann. 1 (1985) (the "Model Law"), into Alberta law. The relevant provisions of each instrument are found in the appendices attached hereto (Appendix A for the Model Law and Appendix B for the Convention).

[9] The New York Convention was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. The purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply worldwide. It requires each Contracting State to recognize and enforce arbitral awards made in the territory of another State, and that recognition and enforcement can only be refused on the limited grounds set out in art. V (see Appendix B). Pursuant to art. I, the obligation to recognize foreign awards applies not only to awards granted in other Contracting States, but also to those granted in all States other than the one in which enforcement is being sought, regardless of whether or not they are party to the Convention.

[10] The Convention is currently in force, having been ratified by over 140 countries, and is considered a great success. Lord Mustill, former judge of the Court of Appeal of England and Wales and member of the House of Lords, and former Vice-President of the International Court of Arbitration of the International Chamber of Commerce, has stated that the New York Convention

> has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in

> the entire history of commercial law.
>
> (M. J. Mustill, "Arbitration: History and Background" (1989), 6 *J. Int'l Arb.* 43, at p. 49)

The Convention was ratified by Canada on May 12, 1986, once each provincial legislature had enacted the necessary implementing legislation.

[11] The Model Law was developed in 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). Unlike the New York Convention, which is a treaty, the Model Law is not an international agreement intended for ratification. Rather, it is a codification of international "best practices" intended to serve as an example for domestic legislation. The explanatory note of the UNCITRAL secretariat states that the Model Law

> reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
>
> (Model Law, Part Two, at para. 2)

The Model Law has been adopted, subject to some modifications, by every jurisdiction in Canada. Like the Convention, the Model Law limits the ability of national courts to interfere with international arbitration proceedings. Article 36 of the Model Law also limits the grounds on which enforcement of an international arbitral award may be refused (Appendix A). These grounds are essentially identical to those set out in art. V of the New York Convention.

[12] Having adopted both the Convention and the Model Law in 1986 as part of the ICAA, there is no doubt that Alberta is required to recognize and enforce eligible foreign arbitral awards.

The question before the Court is what limitation period, if any, applies to the recognition and enforcement of foreign arbitral awards in Alberta.

[13] There are three Alberta statutes that are potentially relevant in this connection: the *Limitations Act*, the *Arbitration Act*, R.S.A. 2000, c. A-43, and the *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6 ("REJA"). The relevant provisions of each statute are in appendices C, D, and E, respectively.

B. *Does the Convention Allow Local Limitation Periods to Apply?*

[14] As neither the Convention nor the Model Law expressly imposes a limitation period on recognition and enforcement, a threshold question is whether *any* limitation period can apply. Article V of the Convention and art. 36 of the Model Law purport to set out an exhaustive list of the grounds on which the recognition and enforcement of an award may be refused, but make no mention of local limitation periods. This omission might be taken to mean that a Contracting State cannot refuse to recognize and enforce a foreign arbitral award on the grounds that the application was brought after the expiration of a local limitation period.

[15] However, art. III of the Convention stipulates that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon". Thus, the "rules of procedure" of the jurisdiction in which enforcement is sought will apply, insofar as they do not conflict with the express requirements of the Convention. The question then is whether limitation periods fall under the rubric of "rules of procedure", as that term is used in the

Convention.

[16] This question arises because not all legal systems treat limitation periods — or extinctive prescription, as it is known in civil law jurisdictions — alike. Those built on the common law tradition have tended to conceive of them as a procedural matter, while those following the civil law tradition generally consider them to be a question of substantive law (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at pp. 1068-70). If limitation periods are characterized as being procedural in nature for the purposes of the Convention, then recognition and enforcement of a foreign arbitral award may lawfully be refused on the grounds that it is time-barred. If instead they are characterized as substantive in nature, then placing a time limit on recognition and enforcement proceedings would appear to violate the Convention, which only allows local procedural rules, and not local substantive law, to apply.

[17] Both parties agree that, as a general matter, art. III allows Contracting States to impose a time limit on the recognition and enforcement of foreign arbitral awards. However, whether Alberta was in conformity with the Convention is not determined by the consent of the parties. It is necessary for the Court to ascertain if there is a legal basis for the application of local limitation laws under the Convention.

[18] In my view, art. III permits (although it does not require) Contracting States (or, in the case of a federal State, a sub-national territory with jurisdiction over the matter) to subject the recognition and enforcement of foreign arbitral awards to a time limit. However, it should not be viewed as automatically recognizing and imposing either the traditional common law or civil law

approaches to limitation periods. Rather, the phrase "in accordance with the rules of procedure of the territory where the award is relied upon" should be understood as indicating application of domestic law on such matters. Thus, notwithstanding art. V, which sets out an otherwise exhaustive list of grounds on which recognition and enforcement may be resisted, the courts of a Contracting State may refuse to recognize and enforce a foreign arbitral award on the basis that such proceedings are time-barred. I reach this conclusion for three reasons.

[19] First, as a treaty, the Convention must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 31(1). In this case, the Convention's context and purpose provide indications as to how its terms, in particular art. III, should be read. The Convention's text was designed to be applied in a large number of States and thus across a multitude of legal systems (N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (5th ed. 2009), at pp. 70 and 72-73; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2nd ed. 2007), at p. 868). One leading author has described the Convention as a "constitutional instrument" that "leaves a substantial role for national law and national courts to play in the international arbitral process" (G. B. Born, *International Commercial Arbitration* (3rd ed. 2009), at p. 101). The text of the Convention must therefore be construed in a manner that takes into account the fact that it was intended to interface with a variety of legal traditions.

[20] This context and purpose is important when interpreting the Convention's effect on the applicability of local limitation periods to the recognition and enforcement of foreign arbitral

awards. When the Convention was drafted, it was well known that various States characterized limitation periods in different ways, and that States in the common law tradition generally treated them as being procedural in nature. All else being equal, if the Convention were applied in a common law State, the term "rules of procedure" found in art. III would *prima facie* include any local limitation periods applicable to the recognition and enforcement of foreign arbitral awards by virtue of local law. It is therefore significant that the Convention's drafters did not include any restriction on a State's ability to impose time limits on recognition and enforcement proceedings. Such an omission implies that the drafters intended to take a permissive approach.

[21] The second reason why art. III should be viewed as permitting the application of local limitation periods is that this reflects the practice of the Contracting States. In interpreting a treaty, courts must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (*Vienna Convention on the Law of Treaties*, art. 31(3)). A recent study indicates that at least 53 Contracting States, including both common law and civil law States, subject (or would be likely to subject, should the issue arise) the recognition and enforcement of foreign arbitral awards to some kind of time limit (International Chamber of Commerce, "Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards", *ICC Bull. – 2008 Special Supp.*, at pp. 343-46; see also UNCITRAL, *Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 41st Sess., U.N. Doc. A/CN.9/656/Add.1 (2008), at pp. 2-3).

[22] Third, leading scholars in the field appear to take it for granted that art. III permits the

application of local limitation periods to recognition and enforcement proceedings (see for example: Blackaby and Partasides, at pp. 631-32; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 240; Poudret and Besson, at p. 869). This suggests that the application of local time limits is not a controversial matter.

[23] Thus, the lack of any explicit restriction on a Contracting State's ability to impose a limitation period can be taken to mean that, for the purposes of the Convention, any limitation period that, under domestic law, is applicable to the recognition and enforcement of a foreign arbitral award is a "rule of procedure" pursuant to art. III.

[24] Although they agree that, as a general matter, the Convention allows Contracting States to impose limitation periods on recognition and enforcement proceedings, both the Canadian Arbitration Congress ("CAC") and the ADR Chambers, argue that, on the facts of the present case, art. III of the Convention prevents this Court from applying Alberta limitations law. However, each of them relies on a different part of art. III to support its claim.

[25] The CAC argues that Alberta limitations law cannot apply to the recognition and enforcement of foreign arbitral awards because Canadian common law considers such rules to be substantive in nature. The *Limitations Act* or any other statute imposing a general limitation period therefore does not qualify as a "rule of procedure" under art. III.

[26] In making this argument, the CAC relies primarily on the ruling by this Court in *Tolofson*, which rejected the traditional common law approach to limitation periods (pp. 1071-72).

The CAC contends that, because Canadian common law now generally considers limitation periods to be substantive, statutory limitation periods, such as those found in the *Limitations Act*, are inapplicable under art. III of the Convention.

[27] It is true that the majority in *Tolofson* held that, in a conflict of laws context, limitation periods should, as a general matter, be treated as substantive in nature, so that a claim will be subject to the limitation period of the *lex loci delicti* (or, in this case, the *lex loci contractus*). However, the question in this case is not whether *Canadian law* considers limitation periods to be "substantive" or "procedural" in nature. Rather, the question is whether local time limits intended to apply to recognition and enforcement fall within the ambit of "rules of procedure" as that term is used in art. III of *the Convention*.

[28] The answer to this must be yes. As noted above, the Convention takes a permissive approach to the applicability of local limitation periods. The only material question is whether or not the competent legislature intended to subject recognition and enforcement proceedings to a limitation period. If it did, the limitation period in question will be construed as a "rule of procedure" as that term is understood under the Convention. How domestic law might choose to characterize such a time limit, either in the abstract or in a conflict of laws context, is immaterial. The question at issue in *Tolofson* is not relevant to the matter at hand.

[29] The CAC's contention is therefore misplaced. Even if this Court were to characterize a given statutory limitation period, such as the one found in s. 3 of the *Limitations Act*, as "substantive" in nature, that would not in and of itself prevent the limitation period in question from

being applicable to the recognition and enforcement of foreign arbitral awards. Instead, the Court must determine whether a potentially applicable limitation period was intended to apply to the recognition and enforcement of foreign arbitral awards. If it was, then it may properly be applied as a local "rule of procedure" pursuant to art. III.

[30] Like the CAC, the intervener ADR Chambers argues that art. III prevents the *Limitations Act* from applying to Yugraneft's action. However, it does so on a different basis. ADR Chambers concedes that a local limitations period may apply in this case, but argues that art. III of the Convention bars Alberta from imposing a limitation period shorter than the longest limitation period available anywhere in Canada for the recognition and enforcement of domestic arbitral awards.

[31] Article III provides that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." ADR Chambers takes the view that a "domestic" arbitral award means any award rendered within the Contracting State. Thus, no Canadian province can impose a time limit more onerous than the most generous time limit available anywhere in Canada for domestic awards. At the present time, both Quebec and British Columbia provide for a 10-year limitation period on the recognition and enforcement of arbitral awards rendered within the province: *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2924; *Limitation Act*, R.S.B.C. 1996, c. 266. Consequently, Alberta is prohibited under the Convention from imposing a shorter time limit on the recognition of foreign arbitral awards.

[32] This argument must also be rejected. The position advanced by ADR Chambers is fundamentally at odds with Canada's federal constitution, under which the recognition and enforcement of arbitral awards is a matter within provincial jurisdiction (s. 92(13) "Property and Civil Rights" and s. 92(14) "Administration of Justice" of the *Constitution Act, 1867*). Allowing the legislation of one province to dictate the range of legislative options available to another province concerning matters within its exclusive jurisdiction would be contrary to the constitutional legislative authority of each province under s. 92 of the *Constitution Act, 1867*. Furthermore, ADR Chambers' position rests on a misreading of the Convention, which was intended to be respectful of the internal constitutional order of federal states like Canada. Article XI explicitly recognizes that some Contracting States will be federal or "non-unitary" and that jurisdiction over the subject matter of the treaty may lie with a sub-national entity. Article XI therefore tempers the international obligations of federal Contracting States accordingly (see Appendix B). Consequently, I would not agree with ADR Chambers' contention that applying s. 3 of the *Limitations Act* to foreign arbitral awards would place Canada in violation of its international obligations.

[33] Moreover, art. III, in which the term "rules of procedure" is found, distinguishes between "Contracting States", on the one hand, and "the territory where the award is relied upon", on the other. Read in conjunction with art. XI, this indicates that, for the purposes of art. III, the relevant unit is the enforcing jurisdiction within the Contracting State (i.e. Alberta) and not the Contracting State in its entirety. In order to comply with the Convention, Alberta need only provide foreign awards with treatment as generous as that provided to domestic awards rendered in Alberta.

[34] The conclusion must be that the New York Convention was intended to allow

Contracting States to impose local time limits on the recognition and enforcement of foreign arbitral awards if they so wished. In the case of federal states, such limitations are to be determined by the law of the enforcing jurisdiction within the federal state.

C. *What Limitation Period, if Any, Applies to the Recognition and Enforcement of Foreign Arbitral Awards Under Alberta Law?*

[35] I now turn to the issue of whether or not Alberta law subjects the recognition and enforcement of foreign arbitral awards to a limitation period. Three Acts were referred to by the parties and interveners in this connection: the *Arbitration Act*, the REJA, and the *Limitations Act*. However, only the *Limitations Act* applies in this case. The *Arbitration Act* provides a two-year time limit on the enforcement of arbitral awards (s. 51(3)) and therefore would provide no assistance to Yugraneft. In any event, foreign awards such as the one at issue in this case are expressly excluded from the Act (s. 2(1)(b)). The REJA provides a six-year limitation period for judgments and arbitral awards rendered in reciprocating jurisdictions (s. 2(1)), but the award in this case was rendered in Russia, which is not a reciprocating jurisdiction. Therefore, the REJA does not apply.

[36] Alberta's general law of limitations is found in the *Limitations Act*. Unlike the *Arbitration Act* and the REJA, the *Limitations Act* does not expressly exclude the appellant's award from its scope. The Act was intended to create a comprehensive and simplified limitations regime to replace the previous *Limitation of Actions Act*, R.S.A. 1980, c. L-15. As the Alberta Court of Appeal noted in *Daniels v. Mitchell*, 2005 ABCA 271, 51 Alta. L.R. (4th) 212, at para. 30:

> [A] main purpose of the [*Limitations Act*] was the simplification of limitations law, by the imposition of one period (two years) for nearly all causes of action . . . [D]ebates

> in the Legislative Assembly repeatedly emphasized that the new legislation would simplify and clarify the system while eliminating inconsistencies and special treatment for certain defendants.

Thus, the purpose of the Act was to streamline the law of limitations by limiting the number of exceptions and providing a uniform limitation period for most actions.

[37] The comprehensiveness of the Act is most clearly established by s. 2(1), which provides that it applies in all cases where a claimant seeks a "remedial order". A remedial order is defined as "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" (s. 1(i)). This is very broad language that encompasses virtually every kind of order that a court may grant in civil proceedings. Only certain types of relief are excluded, and these are enumerated in s. 1(i): "a declaration of rights and duties, legal relations or personal status", "the enforcement of a remedial order", "judicial review", and "a writ of habeas corpus".

[38] The comprehensive nature of the Act is reinforced by s. 12, a provision that appears specifically designed to counteract the effects of this Court's decision in *Tolofson* in a conflict of laws situation. Section 12, which is labeled "Conflict of laws", provides that "[t]he limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order." This ensures that all proceedings brought within the province are subject to the local limitation period, notwithstanding any other limitation period that may also be applicable pursuant to a conflict of laws analysis like that performed in *Tolofson*.

[39] In my view, the overall scheme of the Act is intended to be pervasive. In particular, s.

12 ensures that Alberta's limitations law will apply even to claims subject to foreign law. This indicates that the *Limitations Act* was intended to apply to all claims for a remedial order not expressly excluded by statute. According to the maxim *expressio unius est exclusio alterius*, the fact that the legislature enumerated specific exceptions to the definition of a "remedial order" indicates that anything fitting the general description and not expressly excluded are, by implication, deemed to fall within the meaning of that term (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 243-45). Thus, by necessary implication, the recognition and enforcement of foreign arbitral awards is subject to the *Limitations Act*.

[40] In oral argument, counsel for the London Court of International Arbitration ("LCIA") made no submission on the proper interpretation of the legislation in issue. However, in its factum, the LCIA argued that the *Limitations Act* should not apply in this case. It contended that only a clear expression of legislative intent can subject the recognition and enforcement of a foreign arbitral award to procedural requirements not contained in the Model Law and that the *Limitations Act* is not sufficiently explicit in this regard. It says that the Model Law was intended to set out a comprehensive and exhaustive list of the circumstances in which a local court may interfere with arbitral proceedings. To this end, art. 5 of the Model Law provides that "no court shall intervene except where so provided in this Law". The LCIA argues that, in the absence of a clear derogation from this principle, local procedural rules not contained in the statute enacting the Model Law should not apply. In its factum, it identified what it called a dichotomy between the Model Law, which contains no limitation period and the *Arbitration Act*, which provides a two-year limitation period for domestic arbitrations (s. 51(3)). It submitted that this dichotomy "reinforces the proposition that had the Legislature intended applications for the recognition and enforcement of

foreign awards to be subject to a time limitation, it would have clearly stated its intention" (para. 24).

[41] I cannot agree that the *Limitations Act* fails to provide the requisite clarity of legislative intent. The new *Limitations Act* was adopted well after the ICAA, and in my view the scheme of the Act and its legislative history indicate that the Alberta legislature intended to create a comprehensive and exhaustive limitations scheme applicable to all causes of action. Only causes of action excluded by the Act itself or covered by other legislation, such as the *Arbitration Act* would be exempt from its requirements. It is not necessary to expressly refer to foreign arbitral awards in order to make them subject to comprehensive legislation, which the *Limitations Act* clearly is.

[42] The question at this point is how to characterize an application for recognition and enforcement of a foreign arbitral award under the *Limitations Act*. The Act essentially creates three streams, each of which is subject to a different limitation period: ten years, two years, or no limitation period. An application for a "remedial order" based on a "judgment or order for the payment of money" is subject to a 10-year limitation period (s. 11). All other applications for a remedial order fall under a two-year limitation period, subject to a discoverability rule (s. 3). Judgments or orders that are not remedial as defined in s. 1(i) are not subject to a limitation period.

[43] Yugraneft concedes that what it seeks constitutes a "remedial order" under the *Limitations Act*. However, it contends that an arbitral award is akin to a judgment and that an

application for recognition and enforcement of that award is therefore a "claim based on a judgment or order for the payment of money" under s. 11 of the Act, which is subject to a 10-year limitation period.

[44] Yugraneft's position must be rejected. An arbitral award is not a judgment or a court order, and Yugraneft's application falls outside the scope of s. 11. In *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, Deschamps J., writing for the majority, noted that "[a]rbitration is part of no state's judicial system" and "owes its existence to the will of the parties alone" (para. 51). See also *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, in which LeBel J., for the Court, wrote, "[i]n general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators" (para. 41).

[45] Unlike a local judgment, an arbitral award is not directly enforceable. In Alberta, it must first be recognized by the Court of Queen's Bench (ICAA, s. 3), and this recognition can be resisted by the arbitral debtor on the grounds set out in art. V of the Convention. Furthermore, in those cases where the legislature intended the word "judgment" to encompass both the decisions of courts and arbitral awards it did so expressly, as in s. 1(1)(b) of the REJA. A similar approach is taken in the British Columbia *Limitation Act* which expressly provides that the term "local judgment" includes international arbitral awards (s. 1). It would therefore be incorrect to conclude that the Alberta legislature intended foreign arbitral awards to receive the same treatment as local judgments without express words to that effect.

[46] In the alternative, Yugraneft contends that the text of the *Limitations Act* is ambiguous on the question of whether a foreign arbitral award should fall under s. 3 or s. 11. It submits that this ambiguity must be resolved in its favour. In its view, an application for recognition and enforcement does not fit cleanly into either s. 3 or s. 11 of the Act. It says that even if one accepts that a foreign arbitral award is not properly considered a "judgment" as this term is used in s. 11, it finds no better home in the terms of s. 3. Section 3 purports to apply to claims for a remedial order based on an "injury". Yugraneft suggests that by using the word "injury" the legislature intended s. 3 to apply only to new causes of action. Given the adjudicative function of an arbitral tribunal and the final character of an arbitral award, an application for recognition and enforcement cannot be considered a new cause of action or an action on an "injury" and so falls outside the scope of s. 3. If recognition proceedings do not fit cleanly within either s. 3 or s. 11, it is necessary to conclude that the *Limitations Act* is ambiguous. Since statutory provisions creating limitation periods must be interpreted strictly in favour of the plaintiff (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 136), this ambiguity must be resolved in a manner that preserves Yugraneft's rights.

[47] Yugraneft is correct that ambiguity in a limitations statute will be construed in favour of allowing the action to proceed. However, I do not agree that the Act is ambiguous in this case. The legislature has made it clear elsewhere that when it intends the word "judgment" to include a foreign arbitral award, it provides express words to that effect. For instance, in the REJA, it explicitly included arbitral awards in the definition of "judgment" (s. 1(1)(b)). In the absence of such express words, a foreign arbitral award cannot be held to fall within the meaning of "judgment". Thus, there is only one possible meaning, not two. An application for recognition and enforcement of a foreign arbitral award is an application for a remedial order within the meaning

of s. 3.

[48] In addition, applying a 10-year limitation period to the recognition and enforcement of foreign arbitral awards would result in an incoherent limitations regime. In Alberta, arbitral awards from reciprocating jurisdictions are subject to a six-year time limit (REJA, s. 2(1)). It would be incongruous to accord foreign arbitral awards from *non-reciprocating* jurisdictions more favourable treatment than those from jurisdictions with which Alberta has deliberately concluded an agreement for the reciprocal enforcement of judgments. Such an interpretation is to be avoided (see: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27).

[49] Applying the limitation period set out in s. 3 is consistent with the overall scheme of Alberta limitations law. It also provides more generous treatment for foreign awards than for domestic awards and is therefore consistent with art. III of the Convention. The limitation period in s. 3 of the *Limitations Act* is subject to a discoverability rule, which is not the case for the time limit set out in s. 51 of the *Arbitration Act* governing domestic awards. This makes ample allowance for the practical difficulties faced by foreign arbitral creditors, who may require some time to discover that the arbitral debtor has assets in Alberta.

D. *Is Yugraneft's Application for Recognition and Enforcement Time-Barred Under Section 3 of the Limitations Act?*

[50] Having determined that Yugraneft's application for recognition and enforcement is subject to s. 3 of the *Limitations Act*, there remains the question of whether or not the application was time-barred when it was filed on January 27, 2006. As noted above, the two-year limitation

period set out in s. 3(1)(a) is subject to a discoverability rule. Only if the conditions for discoverability are met will the limitation period begin to run. Under s. 3, a claim for a remedial order must be brought within two years after 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, . . .

In the context of this case, the injury is "non-performance of an obligation" (*Limitations Act*, s. 1(e)(iv)), i.e. Rexx's failure to comply with the arbitral award and pay Yugraneft US$952,614.43.

[51] Neither Yugraneft nor Rexx has made submissions concerning the starting point of the limitation period in this case. Both parties appear to have assumed that if this Court finds that s. 3, and not s. 11, applies to the recognition and enforcement of foreign arbitral awards, Yugraneft's application would be time-barred. I believe this assumption to be correct for the following reasons.

[52] In order to determine whether a proceeding is time-barred, it is necessary to ascertain when the injury occurred. In the case of non-performance of an obligation, the question is when the non-performance occurred.

[53] In the context of a proceeding to recognize and enforce a foreign arbitral award, if non-performance is assumed to occur on the date the award was issued, Yugraneft would have

commenced its proceeding in Alberta approximately 16 months after the two-year limitation period had expired. However, I do not think the date of the issuance of the award can normally be considered as the date of non-performance of the obligation to pay.

[54] The Model Law provides that a party to an arbitration has three months to apply to the local courts to have an award set aside, beginning on the day it receives the award (art. 34(3) — see Appendix A). At least until that deadline has passed, the arbitral award may not have the requisite degree of finality to form the basis of an application for recognition and enforcement under the Convention. If an award is open to being set aside, it may be considered "not binding" under art. V(1)(e) of the Convention (Blackaby and Partasides, at pp. 649-50). The same can be said when proceedings to set aside the award are under way. Thus, if an award originates in a Model Law jurisdiction, or one with analogous provisions concerning the setting aside of an arbitral award, an arbitral creditor would not know and would have no reason to think that recognition and enforcement proceedings are warranted on the very date the award is rendered. In those circumstances, the limitation period under s. 3 of the *Limitations Act* will not be triggered until the possibility that the award might be set aside by the local courts in the country where the award was rendered has been foreclosed.

[55] That would appear to be the case here. Russia is a Model Law jurisdiction, and there is no indication in the record before this Court that Russia modified art. 34 in its adoption of the Model Law (Award of the Russian ICAC (English translation), A.R., vol. 2, at p. 84). Thus, the courts of any State party to the Convention would be entitled to refuse to grant recognition and enforcement of the award at issue in this case until the three-month appeal period had expired; or,

if an appeal was launched, until the appeal was concluded.

[56] Accordingly, it is my view that for the purposes of the *Limitations Act*, Rexx's obligations under the award did not crystalize until three months after Yugraneft had received the award. The award was issued on September 6, 2002, and Yugraneft has provided no indication that it received the award at a later date. As a result, non-performance of its obligation to pay Yugraneft would not have occurred before December 6, 2002. This would suggest that Yugraneft had two years after December 6, 2002, to commence proceedings against Rexx in Alberta, meaning that its action, which was brought on January 27, 2006, was clearly time-barred.

[57] A second consideration in the context of a recognition and enforcement of foreign arbitral awards is whether non-performance of the arbitral debtor's obligation to pay arises when the award becomes final or only when an actual refusal to pay the award becomes apparent to the arbitral creditor. In my opinion, the obligation to pay the award becomes exigible on the date the appeal period expires or, if an appeal is taken, the date of the appeal decision. Failure to make payment on that date would constitute non-performance of the obligation. Thus, the injury has occurred and the conditions set out in s. 3(1)(a)(i) and (ii) are satisfied on that date.

[58] However, s. 3(1)(a)(iii) provides that the limitation period will run only if the claimant knew or ought to have known that the injury "warrants bringing a proceeding". There may be situations in which an application for recognition and enforcement is not immediately "warranted", and it will be open to the courts in such cases to delay commencement of the limitation period accordingly.

[59] In *Novak v. Bond*, [1999] 1 S.C.R. 808, McLachlin J. (as she then was) noted that discoverability rules of this kind are the product of a long-term trend in the law of limitations towards an approach that balances the interests of both plaintiffs and defendants. The traditional rationales for the imposition of a limitation period on actions were centred on the interests of the defendant: a) the need for certainty concerning legal rights and obligations; b) the need to minimize the risk that evidence necessary to defend against a claim would deteriorate over time; and c) a concern for ensuring that defendants not be required to defend themselves against stale claims because a plaintiff has failed to act diligently (para. 64). Over time, however, courts, law reform commissions and legislatures came to realize that this approach was one-sided and that a "more contextual view of the parties' actual circumstances" was required (para. 65). Accordingly, at para. 66, McLachlin J. wrote:

> Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant — certainty, evidentiary, and diligence — with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in [*Murphy v. Welsh*, [1993] 2 S.C.R. 1069], "[a] limitations scheme must attempt to balance the interests of both sides" (p. 1080).

[60] Section 3(1)(a)(iii) provides that the limitation period will commence only once the plaintiff knew or ought to have known that the injury it received warrants bringing a proceeding. Thus s. 3(1)(a) ensures that the scheme created by the *Limitations Act* balances the interests of both plaintiffs and defendants. However, much like its counterpart in the B.C. *Limitation Act* at issue in *Novak v. Bond*, s. 3(1) measures the conduct of the plaintiff against an "objective" standard. Section 6(4) of the B.C. Act provides that the limitation period will not commence until the facts available

to the plaintiff are such that a "reasonable person . . . would regard those facts as showing" that the plaintiff was a) able to bring a claim, and b) that the claim had a reasonable prospect of success. Section 3(1) of the Alberta Act does not refer to a "reasonable person" and its discoverability criteria are not identical with those in s. 6(4) of the B.C. Act. However, it does subject the knowledge elements of its discoverability rule to an objective test: the plaintiff must know or "ought to have known" the elements that trigger the running of the limitation period. Thus, constructive or imputed knowledge, in addition to actual knowledge, will trigger the limitation period.

[61] Section 3(1)(a)(iii) therefore allows the courts to consider aspects of an arbitral creditor's circumstances that would lead a reasonable person to conclude that there was no reason for the arbitral creditor to know whether proceedings were warranted in Alberta. For example, it is not infrequent for the parties to an international arbitration to have assets in a number of different states or jurisdictions within a federal state. An arbitral creditor cannot be presumed to know the location of all of the arbitral debtor's assets. If the arbitral creditor does not know, and would have no reason to know, that the arbitral debtor has assets in a particular jurisdiction, it cannot be expected to know that recognition and enforcement proceedings are warranted in that jurisdiction. Thus, in my view, recognition and enforcement proceedings would only be warranted in Alberta once an arbitral creditor had learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.

[62] Nevertheless, a delay on this account would not be open to Yugraneft in this case. The contract entered into by Yugraneft and Rexx on October 1, 1998, indicates that Rexx was identified as an Alberta corporation (Contract No. 157, A.R., vol. 2, at p. 41). An arbitral creditor might well

not be expected to know every location in the world in which an arbitral debtor might have assets, but this cannot be said of the jurisdiction where the debtor is registered and where its head office is located. In such circumstances, Yugraneft has not claimed and could not claim that it did not know or ought not to have known that a proceeding was warranted in Alberta at the time of (or indeed earlier than) the expiry of the three-month appeal period following receipt of notice of the award.

[63] Thus, I have no difficulty concluding that even taking into account the discoverability rule in s. 3(1)(a) of the *Limitations Act*, Yugraneft's proceedings are time-barred.

E. *The Public Policy Argument*

[64] In addition to claiming that Yugraneft's application is time-barred, Rexx has also argued that enforcement of the award should be refused on public policy grounds (Convention, art. V(2)(b)), alleging that it was tainted by fraud. In light of my conclusion regarding the applicable limitation period, there is no need to rule on this issue and I refrain from doing so.

VI. Conclusion

[65] I would dismiss the appeal, with costs.

Appendix A

UNCITRAL Model Law on International Commercial Arbitration

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

. . .

(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.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Article 35. Recognition and enforcement

(1) 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 this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was

otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(*a*)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Appendix B

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have

submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) 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, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of the country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Appendix C

Limitations Act, R.S.A. 2000, c. L-12

Definitions

1 In this Act,

(a) “claim” means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) “claimant” means the person who seeks a remedial order;

(c) “defendant” means a person against whom a remedial order is sought;

(d) “duty” means any duty under the law;

(e) “injury” means

(i) personal injury,

(ii) property damage,

(iii) economic loss,

(iv) non-performance of an obligation, or

(v) in the absence of any of the above, the breach of a duty;

(f) “law” means the law in force in the Province, and includes

(i) statutes,

(ii) judicial precedents, and

(iii) regulations;

(g) “limitation provision” includes a limitation period or notice provision that has the effect of a limitation period;

(h) “person under disability” means

(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act* or a person in respect of whom a certificate of incapacity is in effect under the *Public Trustee Act*, or

(ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim;

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

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or

(iv) a writ of habeas corpus;

(j) "right" means any right under the law;

(k) "security interest" means an interest in property that secures the payment or other performance of an obligation.

Application

2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

Limitation periods

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.

. . .

Judgment for payment of money

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 the claim.

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.

Appendix D

Arbitration Act, R.S.A. 2000, c. A-43

Application of Act

2(1) This Act applies to an arbitration conducted under an arbitration agreement or authorized or required under an enactment unless

(a) the application of this Act is excluded by an agreement of the parties or by law, or

(b) Part 2 of the *International Commercial Arbitration Act* applies to the arbitration.

. . .

Limitation periods

51(1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action.

(2) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order is excluded from the computation of the time within which an action may be brought on a cause of action that was a matter in dispute in the arbitration.

(3) An application for the enforcement of an award may not be made more than

(a) 2 years after the day on which the applicant receives the award, or

(b) 2 years after all appeal periods have expired,

whichever is later.

Appendix E

Reciprocal Enforcement of Judgments Act, R.S.A. 2000, c. R-6

Interpretation

1(1) In this Act,

(a) "Court" means the Court of Queen's Bench;

(b) "judgment" means a judgment or order of a court in a civil proceeding whereby a sum of money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the jurisdiction where it was made, has become enforceable in the same manner as a judgment given by a court in that jurisdiction, but does not include an order for the payment of money as alimony or as maintenance for a spouse or former spouse or an adult interdependent partner or former adult interdependent partner or a child, or an order made against a putative father of an unborn child for the maintenance or support of the child's mother;

. . .

Order for registration

2(1) When a judgment has been given in a court in a reciprocating jurisdiction, the judgment creditor may apply to the Court of Queen's Bench within 6 years after the date of the judgment to have the judgment registered in the Court, and on the application the Court may order the judgment to be registered accordingly.

Appeal dismissed with costs.

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Solicitors for the respondent: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the intervener the ADR Chambers Inc.: B C F, Montréal.

Solicitors for the intervener the Canadian Arbitration Congress: Heenan Blaikie, Ottawa.

Solicitors for the intervener Institut de médiation et d'arbitrage du Québec: Fraser Milner Casgrain, Montréal.

Solicitors for the intervener the London Court of International Arbitration: Ogilvy Renault, Montréal.