Commercial Litigation Bulletin

AIRD & BERLIS LLP
Barristers and Solicitors

Enforcement of Foreign Arbitral Awards in Canada: Beware Provincial Limitation Laws

Inside

1. Enforcement of Foreign Arbitral Awards in Canada
2. Ontario Court of Appeal Rejects New Defence to Enforcement of Foreign Judgments

By **John Longo** and **Gary Pattison***

International commercial arbitration is widely considered to be an effective means of dispute resolution for parties to an international commercial transaction. Chief among the reasons for this is the relative ease associated with having foreign arbitral awards recognized and enforced in the many countries which have ratified the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "**Convention**") and adopted the UNCITRAL *Model Law on International Commercial Arbitration* (the "**Model Law**").

However, notwithstanding such facility for recognition and enforcement, the recent Supreme Court of Canada decision in *Yugraneft Corp. v. Rexx Management Corp.*[1] dictates that parties applying for recognition and enforcement of foreign arbitral awards in Canadian provinces be attentive to nuances in provincial limitation period legislation in order to avoid their applications being time-barred.

The Law

In 1986, Canada, with the consent of the provinces, ratified the Convention and adopted the Model Law. Both are designed to facilitate recognition and enforcement of foreign arbitral awards, subject to limited grounds for refusal, through creation of a uniform set of rules to be applied worldwide. As a result, foreign arbitral awards can be recognized and enforced in every Canadian province, subject to the aforementioned exceptions.

The Yugraneft Case

Background

The facts were unexceptional. Yugraneft, a Russian corporation that develops and operates oilfields in Russia, purchased materials for its oilfield operations from Rexx, an Alberta corporation. Following a contractual dispute, Yugraneft commenced arbitral proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation and was awarded approximately US$1M in damages by the arbitral tribunal in September 2002. More than three years later, Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award under Alberta's *International Commercial Arbitration Act*. The court dismissed the application, ruling that it was time-barred under the general two-year limitation period set out in Alberta's *Limitations Act*. The decision was upheld by both the Alberta Court of Appeal and the Supreme Court of Canada (the "**Court**").

The Decision

Central to the Court's decision was its conclusion that while the Convention is designed to facilitate recognition and

enforcement of foreign arbitral awards, it nevertheless allows contracting states to insist that such recognition and enforcement be applied for within a prescribed time period. Specifically, Article 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." The Court held 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 Article III. In other words, limitation periods for the recognition and enforcement of foreign arbitral awards in Canadian provinces will be determined by the applicable legislation of the province where recognition and enforcement is sought.

Going Forward

The primary lesson to be extracted from this case is that parties desirous of having foreign arbitral awards recognized and enforced in Canadian provinces must be mindful not only of the enumerated grounds for refusal under the Convention and Model Law, but also any provincial limitation period legislation which could result in their applications being time-barred.

It is also important to note that while this case discussed the general two-year limitation period set out in the Alberta *Limitations Act*, limitation period legislation is not harmonized across the provinces, and therefore careful scrutiny of the applicable legislation of the province in which recognition and enforcement is sought is necessary.

Lastly, if while drafting an arbitration clause a party becomes aware that an opposing party has assets in a Canadian province, that party may, if the governing provincial legislation so permits, consider negotiating for insertion of language stating the parties' express agreement to alter the applicable limitation period in an attempt to further reduce the chances of any future application for recognition and enforcement of a foreign arbitral award being time-barred.

---

* Gary Pattison is a Summer Student at Aird & Berlis LLP.

1 Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19 (CanLII).

Ontario Court of Appeal Rejects New Defence to Enforcement of Foreign Judgments

By **John Longo** and **Gary Pattison***

While enforcement of foreign judgments in Canada has become increasingly prevalent in recent years, defences to such enforcement do exist and, more importantly, so does the possibility of new defences being created. The recent decision of the Ontario Court of Appeal in *United States of America v. Yemec*[1] ("**Yemec**") provides important judicial consideration of the factors courts may look to when determining the availability of a proposed new defence.

The Law in Canada

The leading case in Canada considering defences available to resist enforcement of foreign judgments is the Supreme Court of Canada's decision in *Beals v. Saldanha*[2] ("**Beals**"). That decision held that there are three such defences: fraud, denial of natural justice, and public policy. Broadly speaking, this means no foreign judgment will be enforced in Canada if it was obtained by fraud, a foreign legal system which fails to grant fair process, or a foreign law which is contrary to the Canadian view of basic morality. That said, the Supreme Court of Canada went on to state that the list of defences outlined in its decision is not closed and that in the appropriate circumstances a new defence might be created.

The Yemec Case

Background

For approximately 20 years the defendants operated cross-border telemarketing businesses selling Canadian and foreign lottery tickets to consumers in the United States. In 2002, the plaintiff – the United States government – brought proceedings against the defendants in Illinois and Ontario, seeking damages and to permanently enjoin the

defendants from operating. In the Illinois proceedings the plaintiff was awarded $19M and a permanent injunction was issued against the defendants. The plaintiff then moved for partial summary judgment in Ontario to enforce the Illinois judgment. The motion was dismissed as the motions judge was persuaded by the defendants' arguments that there was a genuine issue as to whether they were entitled to rely on a new defence to enforcement of foreign judgments, namely "denial of a meaningful opportunity to be heard." The plaintiff appealed the order of the motions judge.

The Decision

The Ontario Court of Appeal (the "**Court**") rejected the availability of the proposed new defence and ordered enforcement of the Illinois judgment in Ontario. The Court held that while the list of defences available to resist enforcement of foreign judgments as outlined in *Beals* is not closed, concerns of the nature implicated by the proposed new defence of "denial of a meaningful opportunity to be heard" are adequately addressed by the existing defence of denial of natural justice. In any event, on the facts the Court found that the defendants were not denied a meaningful opportunity to be heard in the Illinois proceedings.

Going Forward

Parties against whom proceedings are initiated in the U.S. ignore such proceedings at their own risk, as unless they can rely on one of the limited defences to enforcement of foreign judgments as outlined in *Beals*, there is a strong chance that judgment rendered against them in the U.S. will be enforced in Canada.

In addition, parties seeking to rely on a novel defence to enforcement of foreign judgments should take care to ensure that the defence is narrow in scope and does not raise issues already covered by existing defences.

---

* Gary Pattison is a Summer Student at Aird & Berlis LLP.

1 United States of America v. Yemec, 2010 ONCA 414 (CanLII).

2 Beals v. Saldanha, 2003 SCC 72 (CanLII).

For additional information about litigation, or to discuss your specific needs, please contact any member of the Aird & Berlis LLP Litigation Group:

Lawyers:

Eldon Bennett	416.865.7704	ebennett@airdberlis.com
Fred D. Cass	416.865.7742	fcass@airdberlis.com
William A. Chalmers	416.865.3435	wchalmers@airdberlis.com
John Harild	416.865.7746	jharild@airdberlis.com
Philip Patrick Healey	416.865.7751	phealey@airdberlis.com
Jennifer Heath	416.865.4636	jheath@airdberlis.com
Martin Henderson	416.865.7725	mhenderson@airdberlis.com
Timothy J. Hill	416.865.3432	thill@airdberlis.com
P. Christopher Lloyd	416.865.3436	clloyd@airdberlis.com
John J. Longo	416.865.7785	jlongo@airdberlis.com
Atoosa Mahdavian	416.865.4733	amahdavian@airdberlis.com
Paul V. McCallen	416.865.7723	pmccallen@airdberlis.com
Bernie McGarva	416.865.7765	bmcgarva@airdberlis.com
Pamela Miehls	416.865.3965	pmiehls@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
Dennis M. O'Leary	416.865.4711	doleary@airdberlis.com
Ian Osellame	416.865.3421	iosellame@airdberlis.com
Courtney Raphael	416.865.3088	craphael@airdberlis.com
David S. Reiter	416.865.4734	dreiter@airdberlis.com
Cynthia R. C. Sefton	416.865.4730	csefton@airdberlis.com
Sanj Sood	416.865.3083	ssood@airdberlis.com
David Stevens	416.865.7783	dstevens@airdberlis.com
Scott Stoll	416.865.4703	sstoll@airdberlis.com
Howard W. Winkler	416.865.3062	hwinkler@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

Newsletter Editor:
John J. Longo
T 416.865.7785
E jlongo@airdberlis.com

Any of the articles or papers written by our professionals can be viewed at: **www.airdberlis.com**

Commercial Litigation Bulletin offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2010 Aird & Berlis LLP.
This bulletin may be reproduced with acknowledgment.