

## **Much Ado about Little: The Supreme Court's Decision in *Yugraneft Corp. v. Rexx Management Corp.***

**By Jonnette Watson Hamilton**

### **Cases Considered:**

[\*Yugraneft Corporation v. Rexx Management Corporation\*](#), 2010 SCC 19

An Alberta company, Rexx Management Corporation, was ordered to pay an almost \$1 million US arbitration award in favour of a Russian company, Yugraneft Corporation. Yugraneft waited more than three years before applying to the Alberta Court of Queen's Bench for recognition and enforcement of that arbitration award. When Yugraneft failed to gain recognition from the Court of Queen's Bench, it appealed to the Alberta Court of Appeal and, when unsuccessful again, was granted leave to appeal and did appeal to the Supreme Court of Canada. Thirteen judges have now heard the case and all thirteen judges have agreed: the two-year limitation period in section 3 of Alberta's *Limitations Act* applied to Yugraneft's application for recognition and enforcement and thus Yugraneft acted too late. With that degree of unanimity, one has to wonder what all the fuss in the international commercial arbitration community has been about. The case was monitored closely as it wound its way through the courts and several arbitration institutions intervened at the Supreme Court of Canada.

In this post, after briefly setting out the facts and procedural history, I will focus on one of the issues dealt with by the Supreme Court, the threshold issue. The key decision by all the levels of court that considered the matter was the decision that domestic legislation imposing any kind of limitation period was applicable. I will then deal with the question of which limitation period: ten years, six years or two years? After this discussion of the case itself, I will comment on two matters. The first is the question of whether this case really is a case of public importance. The second is speculation about what action proponents of international commercial arbitration might take now, following their loss in the Supreme Court.

### **Facts**

The facts considered relevant by the courts are simply stated. Yugraneft Corporation is a Russian company that develops and operates oilfields in Russia. It purchased materials from Rexx Management Corporation, an Alberta company. A dispute arose. As required by their contract, Yugraneft commenced arbitration proceedings before the [International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry](#) (ICAC). On September 6, 2002, the ICAC arbitral tribunal issued its award and ordered Rexx to pay almost \$1 million US in damages to Yugraneft. Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27, 2006. Rexx opposed the application on two grounds. It argued Yugraneft's application was time-barred under the *Limitations Act*, but it also argued that the enforcement proceedings should be stayed pending the resolution of a case

against Yugraneft in the United States that would prove the award was obtained as a result of fraudulent activity. The second ground might well be more factually interesting, and might hint at some of the reasons behind the parties' behaviour, but the courts did not have to deal with the second ground after deciding the matter in Rexx Management's favour on the first ground. A few more details are available in the Court of Queen's Bench decision at [2007 ABQB 450](#) at paras. 6-30.

In the Court of Queen's Bench, Justice Paul Chrumka dismissed Yugraneft's application, holding that it had been brought too late and thus was barred under the two year limitation period in section 3 of the Alberta [Limitations Act](#), R.S.A. 2000, c. L-12. The Alberta Court of Appeal — Justices Peter Costigan, Clifton O'Brien and Patricia Rowbotham — upheld that decision unanimously: see [2008 ABCA 274](#). Then, on May 20, 2010, a unanimous nine-person Supreme Court of Canada upheld that decision.

### **The Threshold Issue**

As already mentioned, the key issue was whether any limitation period applies to the recognition and enforcement of foreign arbitration awards in Alberta. The resolution of this issue in favour of a limitation period specified by domestic law was decisive. The Supreme Court addresses this threshold issue at length — 21 paragraphs of the 65 paragraph decision are devoted to it.

Yugraneft applied for recognition and enforcement of its arbitration award under the [International Commercial Arbitration Act](#), R.S.A. 2000, c. I-5 ("ICAA"). The ICAA incorporates both the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), Can. T.S. 1986 No. 43 (the "New York 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. One major purpose of the 1958 New York Convention was to facilitate the recognition and enforcement of arbitration awards across state boundaries. The treaty requires courts of Contracting States to recognize and enforce awards made in other States, subject to specific and very limited exceptions. Canada ratified the New York Convention in 1986, after each province had implemented the necessary legislation (such as Alberta's ICAA.) The Model Law was created by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 to help States reform and modernize their arbitration laws to meet the needs of international commercial arbitration. Every jurisdiction in Canada, including Alberta, has adopted the Model Law in some form or another. Like the New York Convention, the Model Law limits the ability of a State's courts to interfere with international commercial arbitration proceedings and awards and limits the grounds on which national courts can refuse to enforce international arbitration awards. Given Alberta's ICAA and its adoption of the New York Convention and the Model Law, there is no doubt, as Justice Rothstein concludes (at para. 12) that Alberta must recognize and enforce foreign arbitration awards.

Article V of the New York Convention and Article 36 of the Model Law purport to set out an exhaustive list of the grounds on which a national court can refuse to recognize and enforce a foreign arbitration award. The five listed grounds do not include domestic limitation periods. Perhaps then, national courts cannot refuse recognition and enforcement of foreign arbitration awards on the basis of time limits in their domestic law. Interestingly, neither of the parties and none of the intervenors apparently made the argument that the New York Convention did not allow Contracting States to impose limitation periods on recognition and enforcement proceedings. Nevertheless, Justice Rothstein addressed this issue at length.

Justice Rothstein addresses this argument by looking to Article III of the New York Convention which provides as follows:

### 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. [emphasis added]

Thus the Court's answer to the question of whether Article V of the New York Convention and Article 36 of the Model Law set out an exhaustive list of the grounds on which a national court can refuse to recognize and enforce a foreign arbitration award was to ask another question, namely, "whether limitation periods fall under the rubric of "rules of procedure" as that term is used in Article III of the New York Convention. The qualifying phrase "as that term is used in Article III of the New York Convention" is key because not all legal systems treat limitation periods the same way. As the Court notes in this case (at para. 16) and has remarked upon before (in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1068-70), common law legal systems tend to treat limitation periods as procedural matters and civil law legal systems tend to consider the matter as a substantive issue. Whether or not the imposition of limitation periods violated the New York Convention or not was seen as being dependent upon whether limitation periods are classified as procedural or substantive in nature. If they are procedural, then domestic law is applicable and the recognition and enforcement of a foreign arbitration award can be refused on the ground that it was time-barred, even though that was not one of the grounds for refusal enumerated in Article V of the New York Convention and Article 36 of the Model Law. However, the Court does not actually decide at this point whether domestic limitation periods are procedural. It certainly implies they are, but Justice Rothstein does not set out or defend such a characterization directly.

Instead, Justice Rothstein provides reasons for finding that "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" (at para.18). The Court set out three reasons for reaching this conclusion. First, the New York Convention had to be interpreted as a treaty, "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)). Its terms were intended to be applied in a variety of legal systems and there was a role for domestic law and national courts. In one of the major legal systems, the common law tradition, limitation periods were usually treated as procedural matters and national courts of those systems would see limitation periods as applicable to foreign arbitration awards unless the Convention placed some restriction on their ability to do so.

Second, if Article III was interpreted to permit the application of domestic limitation periods, such an interpretation would reflect the practice of Contracting States. Justice Rothstein refers (at para. 21) to a study that indicated that at least 53 Contracting States, both common law and civil law States, subject or would be likely to subject the recognition and enforcement of foreign arbitral awards to some kind of time limit: see the 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 343-46.

Justice Rothstein’s third reason (at para. 22) was that leading scholars in the field appear to take it for granted that Article III permits the application of domestic limitation periods to recognition and enforcement proceedings. He concludes that this suggests that the application of national time limits is not a controversial matter.

Essentially then, the reasons for holding that 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 even though such a ground is not part of the New York Convention’s Article V list of grounds for refusing recognition and enforcement amount to: (1) the absence of an explicit restriction on Contracting States’ power to impose limitation periods in the face of knowledge that some do because they consider them procedural in nature; (2) the fact that some Contracting States do impose limitation periods, considering them procedural in nature; and (3) some scholars writing in the area assume the imposition of domestic limitation periods is permitted, because some Contracting States impose them without controversy. The practice of Contracting States appears to be the key.

Having concluded that domestic limitation periods were allowed by the New York Convention, the Court was not done with the threshold issue. Justice Rothstein indicated (at para. 24) that while two of the four intervenors — the [Canadian Arbitration Congress](#) (“CAC”) and the [ADR Chambers](#) — agreed with his conclusion, they argued that the Alberta limitation law could not apply on the facts of the case (and if the Alberta limitation law did not apply, then none would).

The CAC argued that Alberta limitations law could not apply to the recognition and enforcement of foreign arbitration awards because Canadian common law considers such rules to be substantive in nature. Thus, any statute imposing a general limitation period would not qualify as a “rule of procedure” under Article III. Recall that, to this point, the Court did not decide that domestic limitation periods are procedural. The CAC relied on the Supreme Court’s earlier decision in [Tolofson v. Jensen](#), [1994] 3 S.C.R. 1022. In that 1994 decision, the majority of the Supreme Court rejected the traditional common law position that characterized limitation periods as procedural in nature and held that, as a general matter, limitation periods in the conflict of law context should be treated as substantive in nature.

Justice Rothstein rejected the CAC argument, noting that “the question in this case is not whether [Canadian law](#) considers limitation periods to be “substantive” or “procedural” in nature” (para. 27, emphasis in original). This is an interesting move because it was the characterization of limitation periods as substantive or procedural by Contracting States such as Canada that was behind Justice Rothstein’s conclusion that 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 even though such a ground is not part of the New York Convention’s Article V list of grounds for refusing recognition and enforcement. The practice of Contracting States was the key to interpreting Article III. Now the characterization by Canadian law is “immaterial” and the question in *Tolofson* — with its emphasized conflict of laws context — is “not relevant” (at para. 28).

Instead, the real issue is said to be “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*” (at para. 27, emphasis added). Justice Rothstein asserts (at para. 28) that the answer

to this question must be affirmative. Because he concluded the New York Convention permits the applicability of domestic limitation periods, he states that "the only material question is whether or not the competent legislature intended to subject recognition and enforcement proceedings to a limitation period" (at para. 28). If it did, the limitation period would be seen as a "rule of procedure" as that term is understood in Article III. So it is not whether limitation periods are procedural or substantive in nature that matters, but whether the Alberta legislature intended to include international commercial arbitration awards in the *Limitations Act*. The reasoning at this point in the judgment is a little difficult to follow. The shift in emphasis from practice to intent is unexplained at this juncture. It is not until later, when Justice Rothstein begins to discuss the submissions of the London Court of International Arbitration, that the reason for the shift in emphasis to legislative intent is given. However, even when legislative intent is discussed explicitly, that intent never seems to amount to more than the fact that the *Limitations Act* was intended to be comprehensive and to apply to everything unless another legal instrument applied. Justice Rothstein notes (at para. 41) that "[o]nly causes of action excluded by the Act itself or covered by other legislation, such as the *Arbitration Act* would be exempt from its requirements." But the issue of whether another legal instrument applied — such as the New York Convention and its Article V, incorporated into the *International Commercial Arbitration Act* — was what the court was deciding as the threshold issue. The reasoning on this point appears to be circular.

Later in his judgment (at para. 40), Justice Rothstein notes that the London Court of International Arbitration (LCIA) argued in its factum 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. According to the LCIA, domestic procedural rules should be located in the statute enacting the Model Law if they are to apply to international commercial arbitrations. Justice Rothstein did not agree. A comprehensive provincial statute of general application was a clear enough expression of legislative intent. He relies, for example (at para. 36), on a passage from the Alberta Court of Appeal's decision in *Daniels v. Mitchell*, 2005 ABCA 271, 51 Alta. L.R. (4th) 212, at para. 30:

[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. [emphasis added]

The intervenor, ADR Chambers, also argued that Article III of the New York Convention prevented Alberta's *Limitations Act* from applying in this case. While conceding that domestic limitation periods may apply, ADR Chambers argued that Article II prevented Alberta from imposing a limitation period shorter than the longest limitation period imposed anywhere in Canada for the recognition and enforcement of foreign arbitration awards. This argument is based on the second sentence in Article III (quoted above) and an interpretation of "any domestic arbitral award" that has "domestic" referring to any award rendered in the Contracting State. Both Quebec and British Columbia have 10 year limitation periods for the recognition and enforcement of awards rendered in each province. ADR Chambers was arguing that Alberta could not impose a limitation period shorter than 10 years. Justice Rothstein rejects this argument (at para. 32) as being "fundamentally at odds with Canada's federal constitution" which does not allow one province to dictate to another and a misreading of the New York Convention which explicitly recognizes that some Contracting States may be federal ("non-unitary") and that jurisdiction might lie with a sub-national entity. Justice Rothstein held (at para 33) that, for the purposes of Article III, the relevant entity is the enforcing entity, i.e., the province.

## The Exact Limitation Period Issue

Having determined that a provincial limitation period was allowed by the New York Convention, the only issue left to be determined was which one. Was it to be the ten year limitation on the enforcement of court judgments in the *Limitations Act*? Or the six year period specified in the [Reciprocal Enforcement of Judgments Act](#), R.S.A. 2000, c. R-6? Or was it the two year limitation period that applies to almost everything in the *Limitations Act*? Those were the options argued by the parties and analyzed by the courts: ten years, six years, or two years. This is a far less interesting legal question than the threshold issue, but nevertheless important in the arbitration arena. The main problem with the two-year limitation period that the Court settled on appears to be that it is too short, even if it is subject to a discoverability rule.

The relevant provincial legislation is the *Limitations Act*. The *Reciprocal Enforcement of Judgments Act* was put forward, but it provides for a six-year limitation period for judgments and arbitration awards rendered in reciprocating jurisdictions only. Russia is not a reciprocating jurisdiction so the *Reciprocal Enforcement of Judgments Act* did not apply. The domestic [Arbitration Act](#), R.S.A. 2000, c. A-43, does not apply to international commercial arbitrations and, in any event, provides for only a shorter two-year limitation period for enforcement of awards.

The main argument within the issue of “which limitation period?” was whether the ten-year limitation period for a “remedial order” based on a “judgment or order for the payment of money” provided for in section 11 of the *Limitations Act* applied or whether it was the two-year limitation period provided for in section 3 for all other remedial order.

Yugraneft argued that its foreign arbitration award was like a judgment or court order and that the section 11 ten-year limitation period should apply. On this point, the Supreme Court’s insistence on the autonomy of commercial arbitration in its past decisions appears to come back to bite those who focus on that feature. As Justice Rothstein notes, in the Court’s decision in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, Justice Deschamps, writing for the majority, stated that “[a]rbitration is part of no state’s judicial system” and “owes its existence to the will of the parties alone” (para. 51). In *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, Justice 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). Ironically, the New York Convention and this case are pretty good examples of just how dependent arbitration is on a state’s legal system and how ineffectual arbitration would be without state force to back up arbitration agreements, processes and awards. Be that as it may, the Supreme Court’s insistence on tying arbitration to parties’ contracts, in this case, is not as supportive of international commercial arbitration as such a position usually is. As Justice Rothstein concludes (at para. 44) in quickly dismissing Yugraneft’s argument, “[a]n arbitral award is not a judgment or a court order. . .”.

Section 3 of the *Limitations Act* was left to apply. It provides for a two-year limitation period for all other types of “remedial orders.” It could not seriously be contended that a foreign arbitral award was not a remedial order, which is defined in section 1(i) of the *Limitations Act* 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.” As Justice Rothstein noted (at para. 37),

"this is very broad language that encompasses virtually every kind of order that a court may grant in civil proceedings."

The two-year limitation period in section 3 of the *Limitations Act* is not as short as it sounds. In compliance with Article III of the New York Convention, it provides a more generous treatment for foreign awards than for domestic ones because the limitation period in section 3 of the *Limitations Act* is subject to a "discoverability rule" while the two-year limitation period applicable to domestic arbitration awards is not. Under section 3, the two-year period does not start to run until a claimant such as Yugraneft

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, . . .

The injury in this case was the "non-performance of an obligation" under section 1(e)(iv) of the *Limitations Act*, i.e., Rexx Management's failure to pay the arbitration award. The date of issuance of the award is not the date of non-performance, however. Instead, Justice Rothstein held the date of non-performance of an obligation was tied to how long a party to the arbitration had to appeal or apply to set aside the award. As Russia is a Model Law jurisdiction, Article 34(3) of the Model Law applied; a party to an arbitration has three months to apply to the local courts to set aside the award, calculated from the date it receives the award. The award in this case was issued September 6, 2002 and thus non-performance of Rexx Management's obligation to pay would not have occurred until December 6, 2002.

Yugraneft did not argue under section 3(1)(a)(iii) that it did not know the injury "warrant[ed] bringing a proceeding" in Alberta. Its contract with Rexx Corporation identified Rexx as an Alberta company and so such an argument would have been futile. However, parties to international commercial arbitrations often have assets in different jurisdictions. Justice Rothstein makes it clear (at para. 61) that "[a]n 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." The start date of the two-year period is uncertain under a discoverability rule. Potentially, the two-year limitation period that is subject to a discoverability rule could provide a much longer period of time for action.

### **A Case of Public Importance?**

It is difficult to see why the Supreme Court of Canada granted leave to appeal in this case. The [\*Supreme Court Act\*](#), R.S.C. 1985, c. S-26, section 40 states that an application for leave may be granted when the Supreme Court finds that the case raises an issue of public importance. No reasons are ever given by the court for granting or refusing leave. Nevertheless, it was unusual for the Court to grant leave and hear the appeal of a decision by a provincial appellate court interpreting and applying provincial legislation. True, the decision has applicability outside the province of Alberta. The threshold issue — the issue of whether 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 even though such a ground is not part of the New York Convention's Article V

list of grounds for refusing recognition and enforcement — is applicable throughout Canada and one of the reasons I have characterized that issue as the key issue. It is also true that this case seems to be the first time a Canadian court has considered the applicability of domestic limitation period legislation to international commercial awards. But the fact it is the first time the issue has been raised, when the New York Convention has been in force since 1986 might suggest the issue is not a live one. Additionally, the fact that Justice Rothstein (at para. 22) relies on scholarly opinion to the effect that the application of domestic limitation periods is not a controversial issue also suggests a certain lack of public importance. He cites Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford: Oxford University Press, 2009) at 631-32, Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer, The Netherlands: Kluwer Law and Taxation, 1981, reprinted 1994) at 240, and Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed., trans. by Stephen V. Berti and Annette Ponti (London: Sweet & Maxwell, 2007) at 869 for apparently taking it for granted that Article III of the New York Convention permits the application of domestic limitation periods.

Nevertheless, this case was said to be "not only of national importance but of international importance . . . [going] to the heart of the benefits of international commercial arbitration: the ability to enforce an international arbitration award relatively easily in most countries around the world." (James Redmond, "[Will the Supreme Court of Canada Hear High-Profile International Arbitration Case?](#)") Others wrote of the Alberta Court of Appeal decision as an "obstacle" on the "long road to full recognition and acceptance of the arbitration process" (Christopher J. Matthews, "[Recent Developments Affecting Arbitrations and Arbitration Awards in Canada](#)" (19 March 2010)). The Alberta Court of Appeal decision was seen to severely restrict enforcement of foreign arbitration awards in Alberta to the detriment of international business and the Supreme Court of Canada decision to the same effect may produce the same type of overwrought response. But it is still relatively easy to enforce an international arbitration award in Alberta; one merely has to not dawdle in doing so, once one finds out that Alberta is an appropriate jurisdiction for collection efforts. If the business which owes under the award is a business with its home office in and obvious ties to Alberta, as was Rexx Management, it has to act in Alberta within two years of the date of the award and its appeal period. Is that really such a lot of time pressure on a company that presumably wants to enforce its award and be paid in a timely fashion? Is it really a severe restriction on enforcement?

### **What now?**

Having lost in the Supreme Court of Canada, we might expect proponents of international commercial arbitration to begin lobbying for legislative change and harmonization within Canada. The speed by which all provincial legislatures in Canada adopted the New York Convention and Model Law in the mid-1980s is an illustration of how attentive politicians have been to claims that laws stand in the way of international trade. One of the criticisms of the Court of Appeal decision was that it makes no sense for Canada to have a collection of different limitation periods when our largest trading partner, the United States, has one limitation period for the recognition and enforcement of foreign arbitration awards: see Babek Barin, "To harmonize or not – that is the question: Whether 'tis nobler in Canada to ignore the spirit and words of the New York Convention or to take arms against the sea of troubles and by legislating end them", (March 2010) 15(1) *Arbitration News* 184 at 185. The U.S. Federal Arbitration Act imposes a three-year limitation period for actions to recognize and enforce New York Convention awards.



A desire for harmonization is motivated at least in part by desire for certainty and predictability. The multitude of limitations periods of various lengths is seen as a major cause for concern. As Paul M. Lalonde and Mark Hines put it, in “[Yugraneft v. Rexx Management: Limitation periods under the New York Convention](#)” (a case comment prepared for the Canadian Bar Association National Section on International Law 2010 International Law Conference: The Future of Canada-U.S. Cross-Border Relations, Vancouver, May 6-7, 2010, at page 7), due to the disparate nature of limitations periods, “. . . parties seeking recognition and enforcement of international arbitration awards are forced to navigate a collection of unforeseen obstacles.” Disparity undermines certainty. However, the multitude of limitation periods of varying lengths exists not only within Canada but also among the Contracting States. The preferred solution might be international. The solution that would offer the most uniformity would be an amendment to the New York Convention that set out one, relatively long and universally applicable limitation period for the recognition and enforcement of international arbitration awards.

However, the draft of a revised New York Convention that was presented by Professor van den Berg at the 2008 International Council for Commercial Arbitration (ICAA) Congress was silent on the issue of limitation periods. See Albert van den Berg, “[Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards](#).” The only explanation in the accompanying explanatory note, under the subheading “Provisions not included in the Draft Convention” is a statement that limitation periods vary considerably, from six months in the People’s Republic of China to twenty years in the Netherlands: see Alberta van den Berg, “[The Draft Dublin Convention 2008 – An Explanation of the Proposed Changes](#)”. One might wonder then about the appetite for a universal limitation period within the international commercial arbitration community as a whole. Perhaps it is just Canadian members of that community who are worried there are too many limitation periods across Canada and they are too short.

The main concern, when all is said and done, appears to be that Alberta’s two-year limitation period is too short. The two-year period is, of course, potentially much longer than it would appear because it is subject to a discoverability rule, as previously mentioned. The two years does not begin to run until the applicant knew or ought to have known the facts listed in section 3 of the *Limitations Act*. Nevertheless, Barry Leon of Perley-Robertson, Hill & McDougall LLP was quoted as saying that Alberta should re-think its short limitation period “as it is an easy way to assist a province’s own companies to do business internationally. Making it easier to enforce international arbitration awards in a province reduces the risk to the other party in the underlying business transaction, and this will result in a lower cost for Canadian companies doing business internationally” (Julius Melnitzer, “[Yugraneft enhances ‘arbitration-friendly’ Canada](#)” (21 May 2010), *Financial Post*).

However, the enforcement of judgments and awards, both foreign and domestic, was recently the topic of Alberta Law Reform Institute (ALRI) Final Report No. 94, [Enforcement of Judgments](#). The basis for that report was three uniform acts prepared by the [Uniform Law Conference of Canada](#): the *Uniform Enforcement of Canadian Judgments and Decrees Act*, the *Uniform Enforcement of Foreign Judgments Act*, and the *Uniform Court Jurisdiction and Proceedings Transfer Act*. If adopted, the uniform legislation would impose a uniform ten-year limitation period in Alberta for both foreign and domestic judgments and also raise the limitation period in the *Reciprocal Enforcement of Judgments Act* from six to ten years. The recommended ten year period is not subject to a discoverability rule. The adoption of the uniform acts is recommended

in the ALRI Report (at v) because it will "encourage businesses operating elsewhere in Canada or the world, to conduct their business within Alberta due to the certainty that almost any judgment obtained from outside Alberta will be recognized by the Alberta courts and enforceable in Alberta." In the pro-business context of the ALRI report, it is difficult to believe that arbitration was merely overlooked. Still, lobbying efforts might be directed towards persuading the Alberta legislature to reform the law with respect to the recognition and enforcement of arbitration awards in the same way ALRI and the ULCC have recommended for foreign and domestic judgments.

In addition to efforts to change the international convention or domestic laws, proponents of international commercial arbitration might try to avoid the applicability of Alberta's *Limitations Act*. It has been suggested, for example, that "[parties to an arbitration agreement should be very particular in identifying the choice of law applicable and whether it is procedural and substantive, and how they wish that law to be applied": see the conclusions of Joel Richler, Mitchell Cohen and David Tupper of Blakes in ["International Commercial Arbitration: Supreme Court of Canada Enforces Domestic Limitation Period on Application to Enforce Foreign Arbitration Award."](#) The same authors also ask "whether in the arbitration context, or in litigation in the courts, the time limits in the Alberta *Limitations Act* cannot, on public policy grounds, be altered by agreement by the parties to a contract." This might seem like a fairly extreme response and the sort of thing that earns transnational corporations reputations for being, or desiring to be, above the law. But historically the whole point of international commercial arbitration has been to transcend or evade the laws of nation states and contract has been the method for doing so.

Yet another suggestion is imported from the context of the recognition and enforcement of foreign judgments. Yugraneft could apply for the recognition of its award in the courts of British Columbia, where the limitation period is ten years, or in Montana, and then, with a British Columbia or Montana judgment at hand, apply in Alberta under the *Reciprocal Enforcement of Judgments Act*, as both British Columbia and Montana are reciprocating jurisdictions under that statute. Some are of the opinion that Rexx Management could not cry *res judicata* in such circumstances and that no prescription defence would be available: see Babek Barin, "To harmonize or not – that is the question: Whether 'tis nobler in Canada to ignore the spirit and words of the New York Convention or to take arms against the sea of troubles and by legislating end them", (March 2010) 15(1) *Arbitration News* 184 at 185. However, the practice of "rubber stamping" a second hand judgment — the recognition of a recognition judgment — has been criticized by some as "judgment laundering": see, e.g., *Clarke v. Fennoscandia Ltd*, 2004 SC 197 at para. 31, per Lord Kingarth; affirmed [2007] UKHL 56. Whether a Canadian court would be willing to grant recognition of a recognition judgment appears not to have been tested. For a brief discussion of the issue, see Antonin I. Pribetic, ["Time is on my side, Yes it is \(No its not\)': Are proceedings to enforce a foreign arbitral award subject to a limitation period?"](#), *CBA International Law Section Bulletin* (February, 2008).

There are undoubtedly other creative ideas out there for getting around the Supreme Court of Canada's decision in *Yugraneft Coproation v. Rexx Managemnt Corporation*. Those who have collectively created and maintained a separate and private justice system for international commerce that has received the enthusiastic support of state legal systems do not lack for either creativity or brio. If the Supreme Court of Canada's decision is an obstacle to the conduct of business in Alberta and Canada, then I would expect to see legislative change within the year.