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Business

Foreign arbitral award subject to 10-year prescription for judgments

By **Laurent Crépeau**

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(September 6, 2022, 1:47 PM EDT) -- In a recent judgment, *Itani v. Société générale de Banque au Liban SAL*, 2022 QCCA 920, the Quebec Court of Appeal ruled that an arbitral award confirmed by courts of the Lebanese arbitral seat was subject to the 10-year prescription period (a prescription period in civilian legal systems is the equivalent to a limitation period in common law legal systems) established by Article 2924 of the *Civil Code of Quebec* applicable to rights resulting from judgments.

The case is relevant to lawyers in common law provinces as it touches on similar issues as were addressed in the Supreme Court of Canada decision *Yugraneft Corporation v. Rexx Management Corporation*, 2010 SCC 19, in 2010, notably, whether an arbitral award constitutes a judgment for the purpose of applying the relevant statutory limitation period.

Yugraneft and Itani: Two-years v. 10-year limitation/prescription periods

In *Yugraneft*, the Supreme Court of Canada ruled that, in absence of a prescribed limitation period in the Alberta *International Commercial Arbitration Act* — the statute incorporating the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (commonly and hereinafter referred to as the *New York Convention*) and *UNCITRAL Model Law on International Commercial Arbitration* into Alberta law — an arbitral award had to be construed as a remedial order under s. 3 of the *Limitations Act*.

Consequently, the court applied the two-year limitation period under this section and ruled that an arbitral award was time-barred for recognition and enforcement in Alberta. The court adopted this interpretation on the basis that the *New York Convention* allows for the application of local limitation periods to international arbitral awards and that these are not subject to the *Reciprocal Enforcement of Judgments Act* since they are not considered judgments.

In *Itani,* the dispute arose out of a contract of trust and guaranty whereby a bank would hold shares as security for the payment of a loan by one of its creditors. The contract contained an arbitration clause. The bank initiated arbitration proceedings in January 2005 against its defaulting creditor and an arbitral tribunal constituted under the auspices of the Beyrouth Chamber of Commerce issued an award ordering the creditor to pay over 1.3 million Euros in August 2006.

The bank sought to enforce the award in Quebec in April 2016, since the creditor had assets in the province. The latter opposed the enforcement of the award on the basis that the prescription period to enforce an arbitral award in Quebec was three years and had lapsed. The creditor argued that this approach was warranted in view of the Supreme Court's decision in *Yugraneft*.

The Quebec Court of Appeal confirmed the reasoning of the Superior Court in ruling that even though Article 2924 of the *Civil Code of Quebec* simply states that "[a] right resulting from a judgment is prescribed by 10 years if it is not exercised," the rest of the Code's framework for prescription, including events suspending a prescription period, explicitly deal with arbitration agreements. As such, Article 2924 of the *Civil Code of Quebec* must also implicitly include them.

A tale of two cases?

Despite vastly different results, *Yugraneft* and *Itani* share more in common than may appear. Indeed, the latter decision effectively adopts several legal findings made by the Supreme Court of Canada in the former decision. First, the Quebec Court of Appeal reiterated that the *New York Convention* allows for the application of local limitation or prescription periods. Second, it upheld the distinction established by the Supreme Court in *Yugraneft* to the effect that limitation and prescription periods constitute "rules of procedure" under Article III of the *New York Convention*, even though under conflict of laws rules, these periods are considered substantive following the Supreme Court's decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. Third, it expressly found — like the Supreme Court — that an arbitration award does not constitute a judgment since it does not emanate from the state and is not directly enforceable. Fourth, the Quebec Court of Appeal agreed with *Yugraneft* that legislation applicable to judgments may also extend to arbitral awards if it so provides.

In other words, despite vastly different results, the Quebec Court of Appeal's decision is consistent with *Yugraneft*. Perhaps the most crucial yet unspoken part of *Itani*, however, is that Quebec, like Alberta, provides generally applicable statutory rules relating to prescription. While in *Itani*, these were found in the *Civil Code of Quebec*, in *Yugraneft*, the Supreme Court of Canada interpreted the *Limitations Act* to provide these absent a more specific statute in Alberta. The results of *Itani* and *Yugraneft* are impossible without these general legal frameworks.

Thus, interpreting provincial legislation consistent with the *New York Convention* requires close reading of several potentially applicable pieces of legislation, but as the *Yugraneft* and *Itani* decisions show, the *New York Convention* is sufficiently flexible to allow for its reconciliation with local law.

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