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# When Do Foreign Arbitral Awards Become Ripe For Enforcement In Canada?

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**At the conclusion of an arbitration, it is not uncommon for successful parties to ask their counsel when proceedings can be commenced to enforce an award. Oftentimes, they are concerned that the losing parties might liquidate their assets or move them to a jurisdiction where enforcement is more difficult. However, there is some uncertainty, both internationally and in Canada, with respect to when arbitral awards become ripe for enforcement. This article examines that uncertainty, and suggests that arbitration practitioners should commence enforcement proceedings as soon as possible following the conclusion of an arbitration to avoid the foregoing risks.**

## Introduction

Following the conclusion of an arbitration, it is not unusual for the successful party to ask its lawyers when proceedings can be commenced to enforce the award. Frequently, successful parties are concerned that the losing party might liquidate its assets or move them to another jurisdiction in which enforcement may be more difficult. Accordingly, clients are often keenly interested in commencing enforcement proceedings as soon as possible.

In Canada, it is uncertain precisely when foreign arbitral awards are ripe for enforcement. This article examines that uncertainty, and suggests that arbitration practitioners should commence enforcement proceedings as soon as possible following the conclusion of an arbitration.

## Discussion

In Canada, almost every province and territory has incorporated the *New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards* (the "Convention") and the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law").[1] Both the Convention and Model Law provide for the enforcement of foreign arbitral awards in Canada.

Article III of the Convention provides that courts "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". Similarly, Article 35(1) of the Model Law states that arbitral awards "shall be recognized as binding and, upon application in writing to the competent court, shall be enforced".

Article V of the Convention and Article 36 of the Model Law set forth the grounds upon which the enforcement of awards may be refused. Most relevantly, they state that enforcement may be refused where "[t]he award has not yet become binding on the parties".

Accordingly, for a foreign award to be enforceable in Canada, it must have become "binding on the parties", but neither the Convention nor the Model Law specify when an award becomes binding. This has led to considerable uncertainty with respect to when an award has become ripe for enforcement.

[1] Although Ontario has incorporated the Model Law, it has not incorporated the Convention..

Some international authorities have taken the view that awards become binding and ripe for enforcement from the moment they are issued, while others have maintained that an award only becomes binding after the time for set-aside proceedings has expired. In this respect, the Convention and Model Law state that an application to set-aside an award may be made up to three months after the award has been issued in the jurisdiction in which the award was rendered.

The same uncertainty appears to exist in Canada. For example, lower courts in Canada have taken a very liberal view, and ruled that they have the discretion to enforce an award from the moment it is issued, without regard to potential or even pending set-aside proceedings.[2] However, in cases where enforcement is sought where set-aside proceedings have already been commenced, lower courts have been inclined to stay enforcement and order that the losing party post security for the full amount of the award pending the outcome of the set-aside proceedings.[3]

By contrast, in *Yugraneft Corp. v. Rexx Management Corp.*,[4] the Supreme Court of Canada recently observed that an arbitral award may not be ripe for enforcement until after the set-aside period has expired. In particular, it noted that "[a]t 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"[5] and that "[i]f an award is open to being set aside, it may be considered 'not binding' under art. V(1)(e) of the Convention".[6]

Nevertheless, it is unclear to what extent – if any – this overrules or is otherwise inconsistent with the approach adopted by the lower courts. To begin, the foregoing comments were arguably stated in passing, as the main issue in *Yugraneft* was the date on which the limitation period begins to run for enforcement proceedings, not the date on which an award becomes ripe for enforcement. Further, the Supreme Court of Canada did not foreclose that awards may be ripe for enforcement before the expiration of the set-aside period. Rather, it ruled that an award "may" not be ripe for enforcement until that time. Indeed, the Supreme Court of Canada only stated that courts "*would be entitled* to refuse to grant recognition and enforcement of [an] award"[7] until the set-aside period expired, not that courts *must* refuse to grant enforcement until that time. In this respect, the Supreme Court of Canada's comments may be viewed as consistent with the discretionary approach adopted by the lower courts.

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[2] *See, e.g., Agros Trading Spolka z.o.o. v. Dalimpex Ltd.*, [2001] O.J. No. 3986 (*rev'd on other grounds in Dalimplex Ltd. v. Janicki*, 172 O.A.C. 312 (Ont. C.A.); *Powerex Corp. v. Alcan Inc.*, 2004 BCSC 876 (B.C.S.C.) ("*Powerex*"); *Europcar Italia S.p.A. v. Alba Tours International Inc.*, [1997] O.J. No. 133 (Ont. C.J.) ("*Europcar*"); *Wires Jolley LLP v. Jean Estate*, 2010 BCSC 391 (B.C.S.C.) ("*Wires Jolley*").

[3] *Powerex*; *Europcar*; *Wires Jolley*. This is consistent with Article VI of the Convention and Article 36(2) of the Model Law which provide that "[i]f an application for setting aside or suspension of an award has been made … 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".

[4] 2010 SCC 19 ("*Yugraneft*").

[5] *Yugraneft*, ¶ 54.

[6] *Yugraneft*, ¶ 54.

[7] *Yugraneft*, ¶ 55 [emphasis added].

**Conclusion**

No court in Canada has addressed when a foreign award becomes ripe for enforcement since the *Yugraneft* decision, and it remains to be seen whether lower courts will adjust their approach. However, Canadian case law can be viewed as providing that courts have the discretion to enforce foreign awards from the moment they are issued, or at the least to stay enforcement and order the losing party to post security for the full amount of the award pending the outcome of set-aside proceedings or the expiration of the set-aside period.

Accordingly, upon the conclusion of a foreign arbitration, and where a losing party has assets in Canada, successful parties would be well-advised to immediately commence Canadian enforcement proceedings in order to prevent the losing party from liquidating its assets or moving them to a less arbitration-friendly jurisdiction.

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