

LIMITATION PERIOD FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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Abstract

*When seeking the recognition and enforcement of foreign arbitral awards, the limitation period is one of the factors that award creditors need to consider. The limitation period, however, varies significantly in different countries. This article conducts a comprehensive survey of the limitation periods in the Contracting States of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“New York Convention”] by studying relevant legislation, case law, and survey reports. The author argues that the current diversified practice on limitation periods among the Contracting States undermines certainty and predictability in international commercial transactions, and at the same time, prejudices commercial parties’ interest. To solve the problem, the article proposes three solutions. First, the best approach is to harmonise limitation periods at the international level by providing a uniform limitation period in the New York Convention. Second, another viable approach is to urge the Contracting States to provide specific limitation periods in their domestic laws, so as to provide a clear and predictable time for both award creditors and award debtors. Alternatively, with no further changes at either the international or the domestic level, the only option for award creditors would be to seek enforcement in another forum or enforce the arbitral awards in the form of judgments in certain jurisdictions.*

**I. Introduction**

For commercial parties who choose to settle their disputes through arbitration, winning a favourable award is only half the battle. Sometimes, the losing party may refuse to perform the arbitral tribunal’s decision, and under such a circumstance, one of the steps that award creditors can take is to seek enforcement of the arbitral award before national courts.<sup>1</sup> Enforcement of foreign arbitral awards has thus become a new battlefield for both parties.<sup>2</sup>

To promote the recognition and enforcement of arbitral awards worldwide, the United Nations Conference on International Commercial Arbitration adopted the New York Convention in 1958, which has been honoured as the “most successful international instrument in the field of arbitration”.<sup>3</sup> Even though the New York Convention has achieved great success in the past six

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<sup>1</sup> See REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 607 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015); see also Le Nguyen Gia Thien, *Time Limit to File Petition for the Recognition and Enforcement of Foreign Arbitral Awards: A Comparative Perspective*, 35(1) ASA BULL. 95, 97 (2017) [hereinafter “Thien”].

<sup>2</sup> See Sumru Akter, *Flipping the Hourglass: Time Limits for the Recognition and Enforcement of Foreign Arbitral Awards*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 85, 86 (Katia Fach Gómez & Ana M. Lopez-Rodriguez eds., 2019).

<sup>3</sup> See M. J. Mustill, *Arbitration: History and Background*, 6(2) J. INT’L ARB. 43, 49 (1989).

decades, there are still many unsettled issues that may hinder the enforcement of arbitral awards, and the issue of limitation periods is one of them.<sup>4</sup>

Limitation periods (also known as statutes of limitations,<sup>5</sup> time limits,<sup>6</sup> time limitations,<sup>7</sup> and prescription periods)<sup>8</sup> are a controversial issue during the process of enforcing foreign arbitral awards under the New York Convention. The New York Convention is silent on whether Contracting States can refuse to enforce foreign arbitral awards on the grounds of the expiration of a limitation period.<sup>9</sup> In practice, however, the Contracting States have “*diversified laws and practices*” on limitation periods,<sup>10</sup> and divergences exist in characterisation, the applicable law to determine the limitation period, its duration, its commencement as well as its interruption, suspension, and extension.

The issue of limitation period has begun to receive more attention from scholars and practitioners in recent years. For instance, Gary Born noticed that even though the New York Convention does not provide any limitation period for enforcing foreign arbitral awards,<sup>11</sup> many Contracting States have imposed such limitation for enforcement.<sup>12</sup> For an arbitral award whose limitation period has expired, he proposed that the award creditors can seek a foreign court judgment confirming the award and then apply for the enforcement of that foreign judgment.<sup>13</sup> Robert Morgan also noticed that limitation periods may bar the enforcement of foreign arbitral awards,<sup>14</sup> and in some jurisdictions, limitation periods may be ambiguous.<sup>15</sup> He worried that the ambiguity and uncertainty would “*be of little comfort*” to award creditors.<sup>16</sup> Lecturer Le Nguyen Gia Thien compared various statutes and case law on limitation periods in civil law and common law countries.<sup>17</sup> He made a very interesting argument that Vietnam’s amendment to the Code of Civil

<sup>4</sup> Considering 164 countries have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* “New York Convention”], this article mainly focuses on the recognition and enforcement of foreign arbitral award under the regime of the New York Convention.

<sup>5</sup> See George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of The New York Convention by National Courts*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 67-68 (George A. Bermann ed., 2017).

<sup>6</sup> See Andreas Börner, *Article III*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 126–127 (2010) [*hereinafter* “Börner”]; Akter, *supra* note 2, at 85-97; Thien, *supra* note 1, at 95–107.

<sup>7</sup> See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3725–3730 (2d ed. 2014).

<sup>8</sup> See María Blanca Noodt Taquela, *Interpretation and Application of the New York Convention in Argentina*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 92 (George A. Bermann ed., 2017).

<sup>9</sup> BORN, *supra* note 7, at 3725.

<sup>10</sup> See United Nations Commission on International Trade Law, Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), at 3, U.N. Doc. A/CN.9/656 (2008) [*hereinafter* “UNCITRAL Report”]. See also Akter, *supra* note 2 at 86.

<sup>11</sup> BORN, *supra* note 7, at 3726.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3729–3731.

<sup>14</sup> Robert Morgan, *Tick, Tock - Limitation Periods and the Enforcement of Arbitral Awards*, 12 ASIAN DISP. REV. 113, 115 (2010).

<sup>15</sup> *Id.* at 115 (“*Yugraneft* dispels ambiguity as to the applicability of limitation periods in jurisdictions where the enforcement of Convention awards is sought”).

<sup>16</sup> *Id.*

<sup>17</sup> Thien, *supra* note 1, at 100–106.

Procedure in 2015, which provides a clear and longer limitation period for enforcement, may increase Vietnam's attraction amongst commercial parties who are seeking the enforcement of arbitral awards worldwide.<sup>18</sup> Further, in a recent book chapter, Sumru Akter introduced various practices on limitation period across the world.<sup>19</sup> She observed that many countries failed in providing express limitation periods in their domestic laws,<sup>20</sup> and the lack of clear guidance may result in “*contradicting interpretations and uncertain enforcement regime*”.<sup>21</sup> As a solution, Akter “*strongly*” proposed that Contracting States provide a clear limitation period in their domestic laws so as to increase commercial parties' foreseeability.<sup>22</sup>

Based on these earlier studies, this article seeks to provide a comprehensive analysis of the application of limitation periods for enforcement in different States, by looking to their legislative provisions and court judgments as well as relevant academic literature. The article proceeds in four parts.

Part II starts by analysing a threshold question and concludes with the observation that it does not contravene the New York Convention if the Contracting States refuse to enforce foreign arbitral awards by reason of the expiration of the limitation period. Part III continues to discuss the applicable law to determine the limitation period and mainly analyses three choice of law rules: *lex fori*, *lex causae*, and *lex loci arbitri*. Part IV considers the duration of the limitation period, the commencement of the limitation period and the factors that may interrupt, suspend, or extend the same. Part V argues that Contracting States' diversified practice on limitation periods undermines certainty and predictability in international commercial transactions. In the author's opinion, the most ideal approach to solve this problem is to provide a uniform limitation period in the New York Convention so as to eliminate the divergences. Another practicable approach is specifying the limitation period for the enforcement of a foreign arbitral award in domestic law. Without further measures taken at both international and domestic levels, the author opines that award creditors need to realise the importance of limitation periods and identify the specific limitation period in the enforcing State. By being aware of the same, if the limitation period for enforcement has expired in the enforcing State, the last available approach for award creditors is to try and enforce the award in another forum where a longer limitation period is provided or in the form of a judgment in certain jurisdictions.

## **II. Limitation period under the New York Convention: another ground for refusing enforcement?**

The New York Convention does not impose any limitation period on enforcement proceedings.<sup>23</sup> As for the grounds for refusal of recognition and enforcement of foreign arbitral awards, Article V contains an exclusive and narrow list of exceptions to the Contracting State's duty to recognise and enforce foreign arbitral awards, among which a limitation period is not

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<sup>18</sup> *Id.* at 107.

<sup>19</sup> Akter, *supra* note 2, at 89–94.

<sup>20</sup> *Id.* at 89.

<sup>21</sup> *Id.* at 94.

<sup>22</sup> *Id.* at 97.

<sup>23</sup> See BORN, *supra* note 7, at 3725.

clearly stated.<sup>24</sup> Therefore, a threshold question is whether the New York Convention allows for refusal of enforcement based on expiration of the limitation period.

There are probably two grounds that may justify the imposition of a limitation period on enforcement proceedings. *First*, it is argued that the limitation period may cause a public policy issue, especially where extremely long or extremely short limitation periods could harm vulnerable parties' interest.<sup>25</sup> *Second*, under Article III of the New York Convention, the Contracting States may follow local rules of procedure to enforce foreign arbitral awards. If a limitation period belongs to the enforcing States' "rules of procedure," it seems natural for Contracting States to refuse enforcement by reason of the expiration of a limitation period. Therefore, the threshold question turns to two separate questions: *first*, whether the expiration of Contracting States' limitation period constitutes a violation of public policy and *second*, whether the limitation period falls into the scope of "rules of procedure".

#### A. Limitation period as public policy under Article V of the New York Convention

Article V of the New York Convention contains an exclusive list of the grounds for refusing enforcement, among which public policy is the only ground that arguably justifies the application of a limitation period to refuse enforcement.<sup>26</sup> As mentioned before, inadequate or lengthy limitation periods could prejudice parties' interest, thus raising public policy concerns.<sup>27</sup> A Japanese scholar once noted that, for a foreign judgment whose limitation period has expired, a Japanese court may refuse to enforce it out of public policy concern.<sup>28</sup> Although the enforcement of foreign judgments differs from the enforcement of foreign arbitral awards, the rationale behind the limitation period would be the same, or, at least, can be considered for reference.

Refusing enforcement on the ground of public policy, however, is sometimes debatable. Because even if limitation period may raise public policy concern, it does not mean that the violation of local rules on limitation period equals the violation of public policy. As admitted by the same Japanese scholar earlier mentioned, a foreign judgment that is time-barred by Japanese law may still be enforced in Japan.<sup>29</sup>

To clarify the difference between the violation of local rules on limitation period and the violation of public policy, this article focuses on the scope and objective of public policy under the New York Convention. As noted by a prestigious scholar, public policy is one of the most controversial bases for refusing enforcement of foreign arbitral awards.<sup>30</sup> In most cases, "*public policy is a very unruly horse, and when once you get astride it you never know where it will carry you*".<sup>31</sup> For this

<sup>24</sup> The grounds for refusing enforcement under the New York Convention include: 1) incapacity or invalidity of the arbitration agreement; 2) lack of proper notice of the arbitrator's appointment or lack of an opportunity to present its case; 3) the award deals with matters outside the scope of the arbitration agreement; 4) the tribunal was not composed in accordance with the arbitration agreement; 5) the suspension or setting aside of the award; 6) non-arbitrability; and 7) violation of public policy. See New York Convention, *supra* note 4.

<sup>25</sup> Morgan, *supra* note 14, at 115.

<sup>26</sup> See *supra* note 24.

<sup>27</sup> See Morgan, *supra* note 14, at 115.

<sup>28</sup> See Toshiyuki Kono, *Country Report Japan, in* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA 114 (Adeline Chong ed., 2017).

<sup>29</sup> *Id.* at 114–15, n.56.

<sup>30</sup> See BORN, *supra* note 7, at 1250.

<sup>31</sup> See *Richardson v. Mellish* [1824] 130 Eng. Rep. 294 C.P. (Burrough, J.) (Eng.).

reason, the New York Convention's structure and objectives are "*strongly against the notion that Contracting States would be free to define national public policy expansively*".<sup>32</sup> Accordingly, many national courts tend to interpret public policy narrowly and thus the violation of local mandatory rules does not necessarily constitute the violation of public policy. For instance, a United States federal court once held that refusing enforcement based on public policy is justified only when the "*forum state's most basic notions of morality and justice*" have been violated.<sup>33</sup> Similarly, in *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd.*,<sup>34</sup> the Australian court considered public policy as the "*fundamental, core questions of morality and justice*" in the forum state.<sup>35</sup> Further, in *Adviso NV v. Korea Overseas Constr. Corp.*,<sup>36</sup> the Korean court took a comparable approach, concluding that only when Korea's "*good morality and other social order*" is prejudiced, will the Korean court refuse the recognition and enforcement of the award.<sup>37</sup> Thus, under the above interpretations, public policy is normally described as "*the guardian of the forum state's most basic moral certitude or policies*" and "*the forum state's most basic notions of morality and justice*".<sup>38</sup> Therefore, in the phase of arbitral award enforcement, even though the expiration of a limitation period may violate the Contracting State's law, this does not necessarily constitute a violation of public policy.

B. Limitation periods as "rules of procedure" under Article III of the New York Convention

As earlier mentioned, Article III of the New York Convention provides that Contracting States shall enforce foreign arbitral awards in accordance with the enforcing States' "*rules of procedure*".<sup>39</sup> Whether limitation period falls within the scope of Article III depends on the interpretation of "*rules of procedure*". Generally, "*rules of procedure*" is interpreted as enforcing States' procedural laws, and therefore, the enforcing State's law shall govern the procedural issues during enforcement.<sup>40</sup> Following this interpretation, if the limitation period is characterised as a procedural matter, the enforcing state is allowed to refuse enforcement of time-barred foreign arbitral awards based on its procedural laws.<sup>41</sup>

Limitation periods, however, are not necessarily a procedural issue. Most civil law jurisdictions, e.g., Germany and the Netherlands, characterise limitation periods as substantive.<sup>42</sup> For States where the limitation period is characterised as substantive, imposing a limitation period on enforcement seems to violate the New York Convention since Article III allows Contracting States to apply only local procedural laws rather than local substantive laws.<sup>43</sup> Therefore,

<sup>32</sup> See BORN, *supra* note 7, at 3662.

<sup>33</sup> *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (U.S.).

<sup>34</sup> *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (Austl.).

<sup>35</sup> *Id.* ¶ 105.

<sup>36</sup> See *Adviso N.V. v. Korea Overseas Constr. Corp.*, Supreme Court [S. Ct.], 6363, Feb. 14, 1995 (S. Kor.), *reprinted in* 21 Y.B. COMM. ARB. 612–616 (Albert Jan van den Berg ed., 1996).

<sup>37</sup> *Id.* at 614.

<sup>38</sup> See Byung Chol Yoon & Brian C. Oh, *The Standards for Refusing to Enforce An Arbitral Award on Public Policy Grounds: A Korean Case Study*, 6 ASIAN INT'L ARB. J. 64, 68 (2010).

<sup>39</sup> See New York Convention, *supra* note 4, art. III.

<sup>40</sup> See Börner, *supra* note 6, at 119.

<sup>41</sup> See *Yugraneft Corp. v. Rexx Mgmt. Corp.*, [2010] 1 S.C.R. 649, ¶ 16 (Can.) [*hereinafter* "Yugraneft Corp."].

<sup>42</sup> Ingeborg Schwenzer & Simon Manner, *The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 296 (2014).

<sup>43</sup> *Yugraneft Corp.*, [2010] 1 S.C.R. 649, ¶ 16 (Can.).

interpreting “*rules of procedure*” as local procedural laws would lead to a situation of non-uniformity under the New York Convention. An application for enforcement of a foreign arbitral award may be time-barred in Contracting States where limitation periods are characterised as a procedural issue;<sup>44</sup> while that same application would not be refused in Contracting States where limitation periods are characterised as substantive. This situation would “*render established national practices meaningless, especially those that regulate limitation expressly for enforcement of awards*”.<sup>45</sup>

In *Yugraneft Corp v Rexx Management Corp.* [“**Yugraneft Corp.**”],<sup>46</sup> the Supreme Court of Canada solved the characterisation issue by interpreting “*rules of procedure*” as the enforcing State’s “*domestic law*,”<sup>47</sup> which includes both procedural and substantive laws. The facts of the case are straightforward: Yugraneft won a favourable arbitral award against Rexx Management on September 6, 2002.<sup>48</sup> On January 27, 2006, Yugraneft sought to enforce this arbitral award in Alberta, Canada.<sup>49</sup> Rexx resisted the enforcement, claiming that the two-year limitation period for enforcement as provided under the Alberta Limitation Act has expired.<sup>50</sup> In this case, the first question raised before the Canadian court was whether the New York Convention allows local rules on limitation period provided in Alberta laws to apply. The Canadian court answered affirmatively and reached the conclusion based on three reasons.

*First*, the Court primarily analysed the context and purpose of the New York Convention to find that it “*was designed to be applied in a large number of States*” and “*intended to interface with a variety of legal traditions*”.<sup>51</sup> Judge Rothstein observed that the drafters were fully aware of the divergence in characterising limitation periods among different States when drafting the New York Convention, and the drafters should foresee that the term “*rules of procedure*” under Article III may include limitation periods in States where limitation periods are regarded as procedural.<sup>52</sup> Judge Rothstein then concluded that the drafters did not restrict the States’ ability to impose limitation periods on enforcement with the knowledge that some States would do so, showing that the drafters intended to take a “*permissive approach*” to the applicability of the local limitation period.<sup>53</sup>

*Second*, the Court believed that the imposition of a limitation period on enforcement under the New York Convention accorded with Contracting States’ practice. To support this argument, Judge Rothstein referred to two reports conducted by the International Chamber of Commerce [“**ICC**”] and the United Nations Commission on International Trade Law [“**UNCITRAL**”],

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<sup>44</sup> *Id.*

<sup>45</sup> See Akter, *supra* note 2, at 87.

<sup>46</sup> See *Yugraneft Corp.*, [2010] 1 S.C.R. 649 (Can.).

<sup>47</sup> *Id.* ¶ 18.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* ¶ 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶ 19.

<sup>52</sup> *Id.* ¶ 20.

<sup>53</sup> *Id.*

which indicated that “at least 53 Contracting States, including both common law and civil law States, subject the recognition and enforcement of foreign arbitral award to some kind of time limit”.<sup>54</sup>

Last but not the least, the Court found subjecting enforcement to limitation periods is also supported by leading scholars in the field of arbitration. Judge Rothstein mentioned that scholars “appear to take it for granted that Article III permits the application of limitation periods to recognition and enforcement proceedings,” which, in the eyes of the Judge, suggested that the imposition of limitation period on enforcement is not a “controversial matter”.<sup>55</sup>

From the reasons provided above, it seems the second reason given by Judge Rothstein is the most persuasive one. As already noted by Judge Rothstein, when interpreting an international treaty, the Vienna Convention on the Law of Treaties requires the Court to take Contracting States’ “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” into consideration.<sup>56</sup> Given the fact that many Contracting States have their own limitation periods for enforcement proceedings, it seems unreasonable to deny their practice, especially when some States have specified a limitation period for enforcement proceedings in their domestic laws or case law.<sup>57</sup>

The interpretation of “rules of procedure” in *Yugraneft Corp.* justified the application of limitation periods in enforcement proceedings. According to the Court’s interpretation, the characterisation of a limitation period in a Contracting State is “immaterial,”<sup>58</sup> and Contracting States may refuse to enforce foreign arbitral awards based on their domestic rules on limitation periods.<sup>59</sup> In *Norman Bard et Shirley Bard v. Randall S. Appel* [“**Norman Bard**”],<sup>60</sup> the Superior Court of Quebec followed the interpretation in *Yugraneft Corp.*, holding that the Contracting States of the New York Convention are allowed to “impose local time limits on the recognition and enforcement of foreign arbitral awards if they so wished”.<sup>61</sup>

In summary, the New York Convention can be said to allow Contracting States to refuse enforcement of foreign awards for the expiration of limitation periods. The ground for refusal, however, is not the public policy exception in Article V. This is because, under the New York Convention, the public policy exception mainly focuses on enforcing State’s fundamental policy as well as basic morality and social order, while the expiration of limitation can hardly be considered as a violation of such policy or order. The Contracting States, however, can refuse to enforce time-barred awards based on Article III, since, as per what Canada’s Supreme Court has decided in the leading case of *Yugraneft Corp.*, “rules of procedure” under Article III can be interpreted as including local rules on limitation period.

<sup>54</sup> See *Yugraneft Corp.*, [2010] 1 S.C.R. 649, ¶ 21 (Can.) (quoting Int’l Chambers Comm. (ICC), Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention 343–346 (ICC Pub. No. 727, ICC Spec. Supp. 2008)).

<sup>55</sup> See *Yugraneft Corp.*, [2010] 1 S.C.R. 649, ¶ 22 (Can.).

<sup>56</sup> See Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

<sup>57</sup> See *infra* Part IV(A).

<sup>58</sup> See *Yugraneft Corp.*, [2010] 1 S.C.R. 649, ¶ 28 (Can.).

<sup>59</sup> *Id.* ¶ 18.

<sup>60</sup> See *Norman Bard et Shirley Bard v. Randal S. Appel*, [2015] Q.C.C.S. 4752 (Can. Que.), reprinted in 41 Y.B. COMM .ARB. 355–356 (Albert Jan Van den Berg ed., 2017) [*hereinafter* “Norman Bard”].

<sup>61</sup> *Id.* at 356.

### III. Law applicable to determine limitation period

Since Contracting States can impose local limitation periods on recognition and enforcement proceedings, the award creditors need to determine what the enforcing State's limitation period is. The first step is to clarify the enforcing State's law applicable to determine limitation periods. According to the practice of Contracting States, there are basically three approaches to determine the applicable law: 1) the *lex fori* approach; 2) the *lex causae* approach; and 3) the *lex arbitri* approach.

#### A. Lex fori

Many Contracting States determine the limitation period according to the *lex fori* or the law of the forum where enforcement is sought. For instance, in *Yukos Capital S.A.R.L. (Luxembourg) v. OAO Tomskneft VNK* ["**Yukos Capital**"],<sup>62</sup> Yukos Capital sought to enforce an ICC arbitral award in Russia. One of the claims that OAO Tomskneft VNK made was that Yukos Capital had missed the deadline for submitting its application for enforcement.<sup>63</sup> The Russian court, applying the three-year limitation period stipulated in Russian law, determined that the limitation period for enforcement has not expired.<sup>64</sup> Similarly, in *Shanghai Jewell Machinery Co. Ltd. v. Retech Aktiengesellschaft* ["**Jwell**"],<sup>65</sup> the Chinese court applied the limitation period stipulated in Chinese Civil Procedure Law to determine whether Jwell's application for enforcement had missed the deadline.<sup>66</sup>

According to the report conducted by UNCITRAL, the forum laws that regulate the limitation period can be found in a variety of sources including but not limited to arbitration statutes, civil codes or laws of civil procedure, limitation acts, etc.<sup>67</sup> or their equivalents.<sup>68</sup>

#### B. Lex causae

In jurisdictions where the limitation period is characterised as substantive, the applicable limitation period is determined by the *lex causae* (the law applicable to the merits of the dispute).<sup>69</sup> Courts that take the *lex causae* approach normally determine the applicable limitation period through two steps: *first*, the courts would determine the *lex causae* based on their country's conflict of laws rules<sup>70</sup> and *second*, if the *lex causae* is foreign law, the courts need to apply the foreign law's limitation period to enforce the foreign arbitral award.<sup>71</sup> If the *lex causae* is the law of the enforcing State, then the courts would apply its own substantive rules on limitation periods.<sup>72</sup> Taking Portugal as an example, if the law of Portugal is the *lex causae*, the limitation period for

<sup>62</sup> See *Yukos Capital S.à r.l. (Lux) v. OAO Tomskneft VNK*, Postanovlenie VAS RF Tomsk Oblast ot 7 iyulya 2010 g. No. A67- 1438/2010 [Ruling of the Highest Arbitration Court of the District of Tomsk of July 7, 2010, No. A67-1438/2010] (Russ.), reprinted in 35 Y.B. COMM. ARB. 435–437 (Albert Jan van den Berg ed., 2010) [hereinafter "Yukos Capital"].

<sup>63</sup> *Id.* ¶ 27.

<sup>64</sup> *Id.*

<sup>65</sup> *Shanghai Jewell Machinery Co., Ltd v. Retech Aktiengesellschaft*, Guiding Case No. 37 (Jud. Comm. of Sup. People's Ct. Dec. 18, 2014) (China) (transl. available at <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/09/GC37-English.pdf>) [hereinafter "Jwell"].

<sup>66</sup> *Id.* at 6-8.

<sup>67</sup> UNCITRAL Report, *supra* note 10, at 3.

<sup>68</sup> *Id.*

<sup>69</sup> See Bermann, *supra* note 5, at 68.

<sup>70</sup> See Akter, *supra* note 2, at 90.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

enforcement of foreign arbitral awards before a Portuguese court is 20 years.<sup>73</sup> Courts in Bulgaria,<sup>74</sup> Czech Republic,<sup>75</sup> Hungary,<sup>76</sup> Poland,<sup>77</sup> Slovenia,<sup>78</sup> and Uruguay<sup>79</sup> are also said to follow this approach.<sup>80</sup>

When the *lex causae* is foreign law but cannot be proved or ascertained, the enforcing State may apply its own laws on the limitation period. In *Norman Bard*,<sup>81</sup> the Superior Court of Quebec held that the applicable law to the limitation period is the law applicable to the merits of the dispute.<sup>82</sup> In this case, the law governing the disputes was Florida law. However, since the Claimants neither pleaded nor proved the law of Florida, which was supposed to be applied, the Court finally decided to apply the ten-year limitation period provided under Quebec law.<sup>83</sup>

Compared with the *lex fori* approach, *lex causae* may “create a procedural burdle and extend the duration of the proceedings” because the court would need to ascertain the applicable foreign law if the *lex causae* is not the law of the enforcing State.<sup>84</sup>

### C. Lex arbitri

Some Contracting States determine the limitation period pursuant to the law of the place where the award was made. Chile and Finland are argued to apply *lex arbitri* as the law applicable to the limitation period for enforcement.<sup>85</sup> In addition, the arbitral award will be incapable of being enforced in Romania<sup>86</sup> and Syria<sup>87</sup> if the application for enforcement of an award issued by a New York Convention State is time-barred under the law of that country.<sup>88</sup> The rationale of the *lex arbitri* approach is that “an award arguably becomes unenforceable if the enforcement time limit in the *lex arbitri* has expired”.<sup>89</sup> Therefore, the enforcing court would look to the limitation period of the *lex arbitri* to determine whether to enforce the award. It should be noted that not all States have

<sup>73</sup> See Bermann, *supra* note 5, at 68.

<sup>74</sup> See ICC, *ICC Guide to National Rules of Procedure for Recognition and Enforcement of Foreign Awards under the New York Convention*, Bulgaria, ¶ C6, ICC DIGI. LIBR., available at <https://library.iccwbo.org/dr-enforcementguide.htm> [hereinafter “ICC Enforcement Guide”].

<sup>75</sup> See Akter, *supra* note 2, at 91 (citing ICC, *ICC Guide to National Rules for Recognition and Enforcement of Awards under the New York Convention*, 23 ICC BULL. SPL. SUPP. 10 (2012) [hereinafter “ICC Supplement”]).

<sup>76</sup> ICC Enforcement Guide, *supra* note 74, Hungary, ¶C6.

<sup>77</sup> *Id.* Poland, ¶C6.

<sup>78</sup> Bermann, *supra* note 5, at 68.

<sup>79</sup> *Id.*

<sup>80</sup> See *id.*; Akter, *supra* note 2, at 68.

<sup>81</sup> See Norman Bard, 41 Y.B. COMM. ARB. 355–356 (Albert Jan Van den Berg ed., 2017).

<sup>82</sup> *Id.* at 356.

<sup>83</sup> *Id.*

<sup>84</sup> See Akter, *supra* note 2, at 91–92.

<sup>85</sup> *Id.* at 92; see also ICC Enforcement Guide, *supra* note 74, Chile, ¶ C6.

<sup>86</sup> ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6. There is a controversy regarding the limitation period for enforcement in Romania. According to the ICC Enforcement Guide, there is no limitation period imposed on the application for enforcement, and a foreign arbitral award would not be enforced if it is time-barred based on the law of the country where the arbitration is seated. However, a scholar once noted that, according to Article 705(1) of the Romanian Civil Procedure Code, a three-year limitation is applicable when award creditors seek the enforcement of a foreign arbitral award. See Radu Bogdan Bobei, *Interpretation and Application of the New York Convention in Romania, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS* 791 (George A. Bermann ed., 2017).

<sup>87</sup> UNCITRAL Report, *supra* note 10, at 22.

<sup>88</sup> See UNCITRAL Report, *supra* note 10, at 22; see also ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6.

<sup>89</sup> See Akter, *supra* note 2, at 92.

adopted the *lex arbitri* rule. Case law show the Netherlands is one of the countries that does not follow such approach. In *Kompas Overseas Inc. v. OAO Severnoe Rechnoe Parokhodstvo* [“**Kompas Overseas**”], Kompas Overseas Inc. [“**Kompas**”] commenced three separate arbitral proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation [“**ICAC**”].<sup>90</sup> In the third arbitral proceeding, the ICAC rendered an award in favor of Kompas on March 26, 2002.<sup>91</sup> OAO Severnoe Rechnoe Parokhodstvo [“**OAO**”] refused to comply with the award and sought annulment of the arbitral award.<sup>92</sup> On May 19, 2005, after OAO’s several unsuccessful attempts to annul the award, the ICAC confirmed that the arbitral award had become final.<sup>93</sup> Kompas then sought enforcement of the arbitral award in the Netherlands. According to Russian law, the limitation period for enforcement of foreign arbitral awards is three years.<sup>94</sup> However, according to the Dutch Civil Code, the limitation period for enforcement in the Netherlands is 20 years.<sup>95</sup> Based on Russian law, OAO claimed the arbitral award was no longer enforceable since the limitation period for enforcement in Russia had expired. The Amsterdam Court of First Instance refused to adopt OAO’s argument, holding that “[e]ven if it is correct that the right of Kompas to enforce the arbitral award in the Russian Federation has expired, this does not mean that this right has expired also under Dutch law”.<sup>96</sup>

#### IV. Calculation of the limitation period

After clarifying the law applicable to determine limitation period, the award creditors then need to determine the specific limitation period for enforcement in the enforcing State. Three factors would influence the calculation of limitation period: the duration of limitation period, the date from which the limitation period begins to run, and whether there are factors that interrupt, suspend, or extend the limitation period.

##### A. Duration of limitation period

Contracting States’ practice on the limitation period varies significantly. Some jurisdictions do not impose any limitation period on enforcement proceedings; for the States that specify limitation period for enforcement proceedings, the limitation period ranges from three months to 30 years, and the most frequent limitation periods are three, six, and ten years.<sup>97</sup>

A few Contracting States prescribe specific limitation periods for enforcement proceedings. States like Kazakhstan,<sup>98</sup> Kyrgyzstan,<sup>99</sup> Latvia,<sup>100</sup> Lithuania,<sup>101</sup> Russia,<sup>102</sup> Thailand,<sup>103</sup> the U.S.,<sup>104</sup>

<sup>90</sup> See IJN: BW7066, Rechtbank Amsterdam 10 mei 2012 (*Kompas Overseas Inc./OAO Severnoe Rechnoe Parokhodstvo* (N. River Shipping Co.)) (Neth.), reprinted in 35 Y.B. COMM. ARB. 277, 278 (Albert Jan van den Berg ed., 2012) [hereinafter “Kompas Overseas”].

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 279.

<sup>94</sup> ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).

<sup>95</sup> Kompas Overseas, 35 Y.B. COMM. ARB. 281 (Albert Jan van den Berg ed., 2012).

<sup>96</sup> *Id.*

<sup>97</sup> See UNCITRAL Report, *supra* note 10; see also ICC Enforcement Guide, *supra* note 74.

<sup>98</sup> See CIVIL PROCEDURE CODE, art. 253(3) (2015) (Kaz.) (“The application for issuing an enforcement order shall be filed no later than three years from the date when the term for the voluntary execution of the arbitration award expires.”).

<sup>99</sup> See UNCITRAL Report, *supra* note 10, at 17.

<sup>100</sup> See CIVIL PROCEDURE LAW, § 636 (1998) (Lat.).

<sup>101</sup> See CODE OF CIVIL PROCEDURE, art. 387 (2002) (Lith.).

Ukraine,<sup>105</sup> Uzbekistan,<sup>106</sup> and Vietnam,<sup>107</sup> all impose a three-year limitation period on actions to enforce foreign arbitral awards.

Most commonly, some States' statutes do not impose specific limitation periods on proceedings to recognise and enforce foreign arbitral awards. In this case, there are probably four possibilities for the application of a limitation period.

*First*, there may be no limitation period for enforcement of foreign arbitral awards, and award creditors may apply for enforcement at any time, provided the delay is not excessive.<sup>108</sup> Although Contracting States can impose a limitation period on enforcement based on “*rules of procedure*” under Article III of the New York Convention, they are not required to do so.<sup>109</sup> According to an UNCITRAL report, a significant number of States do not impose limitation periods for enforcement of foreign arbitral award, including Algeria, Bahrain, Belgium, Botswana, the Czech Republic, Dominica, Iran, Luxemburg, Malta, San Marino, Saudi Arabia, Slovakia, Sweden, Turkey, Uganda, and Venezuela.<sup>110</sup>

*Second*, some States determine the limitation period for enforcement by combining statutory law and case law. In some common law countries, the issue of limitation period is governed by their respective limitation acts. Rather than providing a specific limitation period for enforcement of foreign arbitral awards, the limitation acts only provide limitation periods for general causes of action. Under such a circumstance, case law help to clarify the definite limitation period applicable to enforcement proceedings. Taking Canada's Alberta Province as an example, the Alberta Limitation Act provides two main limitation periods for different causes of action: *first*, a ten-year limitation period for the enforcement of a remedial order based on a “*judgment or order for the payment of money*”;<sup>111</sup> and *second*, a two-year limitation period for the enforcement of a “*general*” remedial order.<sup>112</sup> The Alberta Limitation Act, however, does not make it clear which limitation period applies to enforcement of foreign arbitral awards. In *Yugraneft Corp.*, the Supreme Court of Canada clarified that an arbitral award is not a remedial order based on a judgment or a court order, which means that an application for enforcement of a foreign arbitral award is subject to the general two-year limitation period.<sup>113</sup> With the interpretationS in *Yugraneft Corp.*, the limitation period

<sup>102</sup> See ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).

<sup>103</sup> See Arbitration Act, B.E. 2545, § 42 (2002) (Thai).

<sup>104</sup> See 9 U.S.C. § 207; see also RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

<sup>105</sup> See UNCITRAL Report, *supra* note 10, at 23.

<sup>106</sup> See *id.* at 24.

<sup>107</sup> See CODE OF CIVIL PROCEDURE, art. 451 (2015) (Viet). There may be a slip of pen regarding the limitation period in the English version of Vietnam's 2015 Code of Civil Procedure, *available at* <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf>. The English version offers a “*3 months*” limitation period. However, according to an article, the limitation period under the 2015 Code of Civil Procedure of Vietnam should be “*3 years*”. See Thien, *supra* note 1, at 106.

<sup>108</sup> E.g., although Israeli law does not impose limitation period for the enforcement, Israeli court may refuse to enforce a foreign arbitral award if there are excessive delays in submitting the application for enforcement. See Akter, *supra* note 2, at 92.

<sup>109</sup> See BORN, *supra* note 7, at 3727.

<sup>110</sup> See UNCITRAL Report, *supra* note 10, at 11–24.

<sup>111</sup> See Limitations Act, R.S.A. 2000, c L-12, § 11 (Can.).

<sup>112</sup> See *Id.* § 3.

<sup>113</sup> See *Yugraneft Corp.*, [2010] 1 S.C.R. 649, ¶ 44 (Can.).

for enforcement in Alberta thus has become clear. Some other States, including Brunei,<sup>114</sup> Cayman Islands,<sup>115</sup> Ireland,<sup>116</sup> Kenya,<sup>117</sup> Malaysia,<sup>118</sup> Singapore,<sup>119</sup> and the United Kingdom,<sup>120</sup> also belong to this category.

*Third*, some States tend to impose the limitation period that is applicable to the enforcement of judgments by analogy.<sup>121</sup> Taking China as an example, Article 239 of Chinese Civil Procedure Law only provides a two-year limitation period for the enforcement of foreign judgments.<sup>122</sup> As for the limitation period for the enforcement of foreign arbitral awards, the Chinese Supreme People's Court provided that the limitation period applicable to enforcement of foreign judgment also applies to foreign arbitral awards.<sup>123</sup> In Cameroon,<sup>124</sup> Colombia,<sup>125</sup> Croatia,<sup>126</sup> Estonia,<sup>127</sup> Lebanon,<sup>128</sup> Luxembourg,<sup>129</sup> there is no specific limitation period applicable to the action for recognising and enforcing foreign arbitral awards, and it is argued that limitation period applicable to actions for the enforcement of judgments also applies to foreign awards.

*Fourth*, the limitation period becomes far more complicated in civil law jurisdictions. Some civil law jurisdictions have argued to apply the general limitations period, mostly found in the civil code or its equivalent, to actions for recognition and enforcement proceedings. These States include Argentina,<sup>130</sup> Bolivia,<sup>131</sup> Costa Rica,<sup>132</sup> Panama,<sup>133</sup> Peru,<sup>134</sup> and Qatar.<sup>135</sup> Some civil law countries, however, believe that the limitation period is a substantive issue and will be governed by the law applicable to the merits of the dispute rather than the law of the forum.<sup>136</sup> Thus, the

<sup>114</sup> Limitation Act, (2000) Cap. 14, 34 § 46 (Brunei).

<sup>115</sup> Limitation Law (1996 Revision), No. 12 of 1991, § 9 (Cayman Is.).

<sup>116</sup> Statute of Limitations, 1957 (Act No. 6/1957), §§ 11, 75 (Ir.); see UNCITRAL Report, *supra* note 10, at 17.

<sup>117</sup> Limitation of Actions Act (Rev. 2012), Cap. 22 § 4(1) (Kenya).

<sup>118</sup> Limitation Act 1953 (1981 Revision), No. 254, § 6 (Malay.).

<sup>119</sup> Limitation Act, Cap. 163, § 6(1)(c) (Sing.).

<sup>120</sup> Limitation Act 1980, c. 58, § 7 (Eng.).

<sup>121</sup> See BORN, *supra* note 7, at 3725.

<sup>122</sup> See Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) (2017 revision), art. 239 (China) ("The limitation period for submission of an application for enforcing judgment shall be two years. The termination or suspension of the limitation period for submission of an application for enforcement shall be governed by the provisions of law on the termination or suspension of the limitation of action.").

<sup>123</sup> See Interpretations of the Supreme People's Court concerning the "Civil Procedure Law of the People's Republic of China", art. 547 (China) (the time period for a party concerned to apply for recognition and enforcement of a legally binding judgment or ruling rendered by a foreign court or a foreign arbitration award shall be governed by Article 239 of the Law of Civil Procedure.).

<sup>124</sup> See ICC Enforcement Guide, *supra* note 74, Cameroon, ¶C6.

<sup>125</sup> *Id.* Colombia, ¶C6.

<sup>126</sup> *Id.* Croatia, ¶C6.

<sup>127</sup> *Id.* Estonia, ¶C6.

<sup>128</sup> *Id.* Lebanon, ¶C6.

<sup>129</sup> *Id.* Luxembourg, ¶C6.

<sup>130</sup> Bermann, *supra* note 5, at 68.

<sup>131</sup> ICC Enforcement Guide, *supra* note 74, Bolivia, ¶C6.

<sup>132</sup> *Id.* Costa Rica, ¶C6.

<sup>133</sup> *Id.* Panama, ¶C6.

<sup>134</sup> *Id.* Peru, ¶C6.

<sup>135</sup> *Id.* Qatar, ¶C6. See also Kompas Overseas, 35 Y.B. COMM. ARB. 277–281 (Albert Jan van den Berg ed., 2012) (wherein the court decided the 20-year limitation period under art. 3:324 BW (Neth.) applied to application for enforcement of foreign arbitral award.).

<sup>136</sup> Akter, *supra* note 2, at 90.

general limitation period provided in their civil codes will only apply when their domestic law governs the merits of the arbitral disputes.<sup>137</sup> In Switzerland, for example, if Swiss law is the *lex causae*, the application for enforcement of a foreign arbitral award should be filed within ten years.<sup>138</sup> Pursuant to the German Civil Code, the applicable limitation period for enforcement of foreign arbitral award is argued to be 30 years if German law is the *lex causae*.<sup>139</sup> States like Bulgaria, Cyprus, Hungary, and Poland also take this approach.<sup>140</sup>

B. Commencement of limitation period

Regarding the date that limitation periods begin to run, Contracting States' practice also varies greatly. Inconsistencies may even exist within the same country.

i. Accrual of cause of action

In some common law countries, the limitation period starts to run when the cause of action accrues. Taking the U.K. as an example, Section 7 of the Limitation Act 1980 provides that the action to enforce an award shall not be brought after the expiration of six years from the date on which the cause of action accrued.<sup>141</sup> Lagos State of Nigeria also requires that the limitation period for enforcement begin to run from the date on which the cause of action accrued.<sup>142</sup> A question that arises here is when does the cause of action “accrue”? Regarding the interpretation of this term, English and Nigerian courts have taken different approaches thus far.

English courts hold that an arbitral award creates a new cause of action and the cause of action accrues when the award debtor fails to perform its obligation under the award. In *Agromet Motoimport Ltd. v. Maulden Engineering Co. Ltd.* [**“Agromet”**],<sup>143</sup> the award creditor obtained a favourable award in 1980 and sought enforcement in 1983. The award debtor argued that cause of action accrued in 1976 when the Defendant refused to obey the distributorship agreement, and therefore, the award creditor’s application was time-barred by the six-year limitation period.<sup>144</sup> Judge Oulton opined that the action to enforce an award is an independent cause of action which is distinct from the cause of action for initiating arbitration proceedings.<sup>145</sup> Thus, the cause of action under Section 7 of the Limitation Act 1980 accrued when the Defendant failed to honour the award. In *International Bulk Shipping and Services Ltd. v. Minerals and Metals Trading Corporation of India* [**“International Bulk Shipping”**],<sup>146</sup> the Court held that “*the six year limitation period began whenever the claimants became entitled to enforce the award; in legal terms, when his cause of action arose*”.<sup>147</sup> Seven years later, in *Good Challenger Navegante S.A. v. Metalexportimport S.A.*

<sup>137</sup> *Id.*

<sup>138</sup> See SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 137(2) (Switz.) [*hereinafter* “Swiss Civil Code”].

<sup>139</sup> See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 197(1)(2) (Ger.) [*hereinafter* “German Civil Code”].

<sup>140</sup> See ICC Enforcement Guide, *supra* note 74.

<sup>141</sup> See Limitation Act 1980, c. 58, § 7 (Eng.).

<sup>142</sup> Limitation Law of Lagos State (1994) Cap. 118, § 8(1)(d) (Nigeria).

<sup>143</sup> See *Agromet Motoimport Ltd. v. Maulden Engineering Co. (Beds) Ltd.* [1985] 2 All ER 436 (Eng.), *reprinted in* 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987) [*hereinafter* “Agromet Motoimport”].

<sup>144</sup> *Id.* at 523.

<sup>145</sup> *Id.* at 525.

<sup>146</sup> *Int’l Bulk Shipping & Servs. Ltd. v. Mins. & Metals Trading Corp. of India* [1996] 1 All ER 1017 (Eng.) [*hereinafter* “Int’l Bulk Shipping and Services”].

<sup>147</sup> *Id.* at 118.

[“**Good Challenger**”],<sup>148</sup> the Court of Appeal reaffirmed the holdings in *Agromet* as a “*common ground*”.<sup>149</sup> The Court clarified that the limitation period for enforcement starts to run “*from the date when the paying party is in breach of its implied obligation to pay the award,*”<sup>150</sup> rather than “*from the date upon which the award is made or published*”.<sup>151</sup>

Unlike the English courts, the Nigerian courts maintain that the cause of action for enforcement proceedings accrues when the cause of action for initiating arbitration proceedings arises. In *Murmansk Steve Steamship v. Kano Oil Millers Ltd.* [“**Murmansk**”],<sup>152</sup> the award creditor, in 1972, sought to enforce a foreign arbitral award rendered in 1966. The original dispute arose in 1964. The Supreme Court of Nigeria refused to enforce the award on the ground that the limitation period started to run in 1964, and thus the six-year limitation period for enforcement had already expired.<sup>153</sup> In 1977, the Supreme Court of Nigeria was again invited to determine when the cause of action for enforcement accrued in *City Engineering Ltd., v. Federal Housing Authority* [“**City Engineering**”],<sup>154</sup> and the Court followed the approach taken in *Murmansk*, holding that the limitation period begins from the date on which the cause of action for arbitration arises.<sup>155</sup>

In *Murmansk* and *City Engineering*, although the Supreme Court of Nigeria only addressed the accrual of the cause of action issue in the context of Lagos State’s Limitation Act, it is believed these judgments reflect Nigeria’s general judicial position towards limitation periods.<sup>156</sup> Nigeria’s interpretation regarding the accrual of cause of action has been criticised. As Judge Octon mentioned in *Agromet*, interpreting accrual of the cause of action as the original breach of contract would lead to a “*surprising result*”<sup>157</sup>: the limitation period for enforcement would have already expired if an arbitral award was made more than six years after the breach.<sup>158</sup> The Court in *International Bulk Shipping* also observed that “*it cannot seriously be argued that the cause of action arose before the awards were published*”.<sup>159</sup> The Nigerian Court’s interpretation may also harm arbitration’s role as an efficient dispute resolution mechanism since the losing party, who would be reluctant to enforce the unfavourable award, may take every measure to keep the arbitration proceeding running so as to have the limitation period for enforcement expire.<sup>160</sup>

While the Nigerian courts have not changed their position reflected in *Murmansk* and *City Engineering*, the legislators of Nigeria seem determined to take a new approach. On February 1, 2018, the Nigerian Senate passed the Arbitration and Conciliation Act (Repeal and Enactment)

<sup>148</sup> Good Challenger Navegante S.A. v. Metalexportimport S.A. [2003] EWCA (Civ.) 1668 (Eng.) [*hereinafter* “Good Challenger”].

<sup>149</sup> *Id.* ¶9, citing *Agromet Motoimport*, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *Murmansk State S.S. Line v. Kano Oil Millers Ltd.* [1974] All NLR 893 (Nigeria), *reprinted in* 7 Y.B. COMM. ARB. 349–350 (Pieter Sanders ed., 1982).

<sup>153</sup> *Id.* at 350.

<sup>154</sup> *City Eng’g Ltd. v. Fed. Hous. Auth.* [1997] 9 NSCC 590 (Nigeria).

<sup>155</sup> *Id.*

<sup>156</sup> See Adebayo Adaralegbe, *Limitation Period for the Enforcement of Arbitral Award in Nigeria*, 22(4) ARB. INT’L 613, 623 (2006).

<sup>157</sup> *Agromet Motoimport*, 12 Y.B. COMM. ARB. 525 (Albert Jan Van den Berg ed., 1987).

<sup>158</sup> *Id.*

<sup>159</sup> See *Int’l Bulk Shipping*, [1996] 1 All ER 1017, 1022 (Eng.).

<sup>160</sup> See Adaralegbe, *supra* note 156, at 621.

Bill to amend the existing Nigerian Arbitration and Conciliation Act.<sup>161</sup> Regarding the calculation of limitation period for enforcement of foreign arbitral award, the Bill suggested exclusion of the “*period between the commencement of the arbitration and the date of the award*”.<sup>162</sup> In this way, even if the limitation period for enforcement started to run from the date that the dispute leading to arbitration arose, the “*surprising result*” that Judge Octon worried about would no longer exist.

In addition to the U.K. and Nigeria, Australia,<sup>163</sup> Brunei,<sup>164</sup> Cayman Islands,<sup>165</sup> Ireland,<sup>166</sup> Kenya,<sup>167</sup> Malaysia,<sup>168</sup> Singapore,<sup>169</sup> and Trinidad and Tobago<sup>170</sup> also calculate the limitation period from the date when the “*cause of action accrued*”. In *Antclizo Shipping Corp. v. Food Corp. of India*,<sup>171</sup> the Supreme Court of Western Australia held that the “*limitation period begins to run when award debtor fails to perform payment obligation under the award within a reasonable period*”.<sup>172</sup> In *Hallen v. Angleda*,<sup>173</sup> the Court of New South Wales also mentioned that the six-year limitation period<sup>174</sup> is “*not concerned with a limitation on components of the cause of action giving rise to the arbitration, but with the cause of action to enforce an Award*”.<sup>175</sup> As for other countries like Brunei,<sup>176</sup> Cayman Islands, Ireland, Kenya, Malaysia, Singapore,<sup>177</sup> and Trinidad and Tobago,<sup>178</sup> for the lack of case law, it is not clear which approach they follow to determine when the cause of action “*accrued*”.

ii. The discoverability rule

The discoverability rule is also considered by some courts to determine the commencement of limitation period.<sup>179</sup> Under the discoverability rule, the limitation period begins to run when the

<sup>161</sup> Dr. Ademola Bamgbose, *The proposed amendment of Nigeria’s Federal Arbitration Law could see the arbitration landscape in Nigeria improve significantly*, PRACTICAL L. BLOG (Feb. 20, 2020), available at, <http://arbitrationblog.practicallaw.com/the-proposed-amendment-of-nigerias-federal-arbitration-law-could-see-the-arbitration-landscape-in-nigeria-improve-significantly/>.

<sup>162</sup> *Id.*

<sup>163</sup> E.g., *Limitation Act 1985*, s 11(1) (Austl.); *Limitation Act 1969 No 31* (NSW) s 20(1); *Limitation of Actions Act 1974* (Qld) s 10(c).

<sup>164</sup> *Limitation Act* (2000) (Cap. 14), § 11 (Brunei).

<sup>165</sup> *Limitation Law* (Revision 1996), No. 12 of 1991, § 9 (Cayman Is.).

<sup>166</sup> *Statute of Limitations, 1957* (No. 6/1957), §§ 11, 75 (Ir.). See also UNCITRAL Report, *supra* note 10, at 17.

<sup>167</sup> *Limitation of Actions Act* (Rev. 2012), Cap. 22§4(1) (Kenya).

<sup>168</sup> *Limitation Act 1953* (1981 Revision), No. 254, § 6(1) (Malay). See also UNCITRAL Report, *supra* note 10, at 18.

<sup>169</sup> *Limitation Act*, Cap. 163, § 6(1)(c) (Sing.).

<sup>170</sup> *Limitation of Certain Actions*, Cap. 7:09, § 3(1)(b) (Trin. & Tobago).

<sup>171</sup> *Antclizo Shipping Corp. v Food Corp. of India* [1998] WASC 342 (Austl.).

<sup>172</sup> Richard Garnett & Michael Pryles, *Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand*, 25 J. INT’L ARB. 899, 902 (2008).

<sup>173</sup> *Hallen v Angledal* [1999] NSWSC 552 (Austl.) [*hereinafter* “Hallen”].

<sup>174</sup> *Limitation Act 1969 No 31* (NSW) s 20 (Austl.).

<sup>175</sup> Hallen, [1999] NSWSC 552, ¶¶ 34–36 (Austl.).

<sup>176</sup> The limitation period for enforcement in Brunei is unclear. Brunei’s *Limitation Act* provides that “an action to enforce an award ... shall not be brought after the expiration of six years from the date on which the cause of action accrued”. According to the ICC Enforcement Guide, the six-year limitation period in Brunei starts to run “from the date on which the judgment became enforceable”. See ICC Enforcement Guide, *supra* note 74, Brunei, ¶C6. However, as per the UNCITRAL report, there is no limitation period for enforcement of foreign arbitral award in Brunei. See UNCITRAL Report, *supra* note 10, at 12.

<sup>177</sup> When a limitation period begins to run is also debatable in Singapore. The ICC Enforcement Guide indicates that it starts “from the date on which it becomes binding on the parties”. See ICC Enforcement Guide, *supra* note 74, Singapore, ¶C6. The UNCITRAL Report states the limitation period begins to run from the date when the arbitral award is made. See UNCITRAL Report, *supra* note 10, at 22.

<sup>178</sup> Trinidad and Tobago is said to follow the United Kingdom’s approach in *Agromet Motoimport*, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987). See UNCITRAL Report, *supra* note 10, at 23.

<sup>179</sup> Akter, *supra* note 2, at 93.

award creditor discovers that the award debtor has assets or appears in the enforcing state.<sup>180</sup> In *Jwell*,<sup>181</sup> Shanghai Jwell, the award creditor, sought to enforce an award made by the China International Economic and Trade Arbitration Commission [“CIETAC”] on September 18, 2006. After an unsuccessful attempt for enforcement before a Swiss court, Jwell discovered that the award debtor’s machinery was on exhibition in Shanghai on July 30, 2008. On the same day, Jwell applied to a Shanghai court to enforce the award.<sup>182</sup> Retech objected to the enforcement by claiming that Jwell’s application for enforcement has exceeded the six-month limitation period under Chinese Civil Procedure Law.<sup>183</sup> The Shanghai court held that under Chinese law the award creditors obtain the right to request civil compulsory enforcement of an arbitral award when the award debtor fails to perform the obligation under that award.<sup>184</sup> Thus, enforcement jurisdiction is the basis and precondition of an award creditor’s right to request civil compulsory enforcement.<sup>185</sup> The Court stated that the Shanghai court did not obtain enforcement jurisdiction until July 30, 2008 since neither the award debtor nor its property appeared in China before then. The Court concluded that the limitation period for enforcement began to run when the court’s enforcement jurisdiction was confirmed, which was the date on which the award creditor discovered the property available for enforcement in China.<sup>186</sup> In the end, the Shanghai court decided that the limitation period began to run on July 30, 2008 and Jwell’s application for enforcement was not time-barred.

It should be noted that the discoverability rule followed by the Shanghai court in *Jwell* does not mean it would apply to all enforcement proceedings before Chinese courts. According to the Chinese Civil Procedure Law, the two-year limitation period shall be calculated from the last day of the period specified by the legal document for its performance; if the legal document specifies that it shall be performed in separate stages, the time limit shall be calculated from the last day of the period specified for each stage of performance.<sup>187</sup>

The Supreme Court of Canada also adopted the discoverability rule. In *Yugraneft Corp.*, *Yugraneft* won a favourable arbitral award on September 6, 2002 and applied for enforcement on January 27, 2006.<sup>188</sup> The Court reasoned that:

*“[...] 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 asset in a particular jurisdiction, it cannot be expected to know that recognition and enforcement proceedings are warranted in that jurisdiction. Thus...once an*

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<sup>180</sup> *Id.*

<sup>181</sup> *Jwell*, Guiding Case No. 37 (Jud. Comm. of Sup. People’s Ct. Dec. 18, 2014) (China).

<sup>182</sup> *Id.* at 4.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 7

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 8.

<sup>187</sup> Civil Procedure Law of the People’s Republic of China (promulgated by Order No. 44 of the President of the People’s Republic of China, Apr. 9, 1991) (2017 revision), art. 239. (China).

<sup>188</sup> *Yugraneft Corp.*, [2010] 1 S.C.R. 649, at ¶ 2–3(Can.).

*arbitral creditor had learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.*<sup>189</sup>

*iii. The date when the award is made*

Some States calculate the limitation period from the date on which the arbitral award is rendered or made. According to the ICC Enforcement Guide, Jordan<sup>190</sup> and Kuwait<sup>191</sup> provide a 15-year limitation period from the date of the issuance of the award. Peru requires a ten-year limitation period from the date on which the foreign award is rendered.<sup>192</sup> Similarly, in Italy, the limitation period for filing an application to enforce a foreign arbitral award begins to run from the date on which the award is made.<sup>193</sup>

Under the Federal Arbitration Act [“FAA”] of the U.S., an action to enforce a foreign New York Convention award in the U.S. is subjected to a three-year limitation period, beginning to run when the award is made.<sup>194</sup> The disputes surrounding this provision mainly focus on the meaning of the word “made”. In *Seetransport Wiking Trader Schiffahrt-gesellschaft MBH & Co. v. Navimpex Centrala Navala* [“Seetransport Wiking”],<sup>195</sup> the Court of Arbitration of the ICC issued interim and final awards in favour of Seetransport Wiking Trader Schiffahrt-gesellschaft MBH [“Seetransport”] on November 2, 1982 and March 26, 1984, respectively. Dissatisfied with the outcome, Navimpex Centrala Navala [“Navimpex”] appealed to the Court of Appeal of Paris for annulment, and the same was dismissed on March 4, 1986.<sup>196</sup> Later, on March 28, 1988, Seetransport sought to enforce the ICC award in the U.S.<sup>197</sup> Regarding the question of whether Seetransport’s application for enforcement was time-barred, Seetransport argued the word “made” means “became final,” which in the present case is the date on which the Paris court dismissed Navimpex’s appeal.<sup>198</sup> Navimpex contended that an award is “made” when the award is decided by the arbitrators.<sup>199</sup> The U.S. court, by analysing the term’s literal meaning under the FAA, finally accepted Navimpex’s interpretation and found the application for enforcement to be time-barred.<sup>200</sup>

*iv. The date when the award comes into force*

Some other States calculate the limitation period from the date that the award comes into force. For example, Vietnam’s law provides the time limit is running from the day when the award enters into force.<sup>201</sup> Similarly, in *Yukos Capital*, the Arbitrazh (Commercial) Court of the Tomsk

<sup>189</sup> *Id.* ¶61.

<sup>190</sup> ICC Enforcement Guide, *supra* note 74, Jordan, ¶ C6.

<sup>191</sup> *Id.* Kuwait ¶C6.

<sup>192</sup> *Id.* Peru ¶C6.

<sup>193</sup> Bermann, *supra* note 5, at 67. When the limitation period starts to run seems to be debatable in Italy. According to the ICC Enforcement Guide, the limitation period for enforcement in Italy is ten years “from the date on which a court action can be brought”. See ICC Enforcement Guide, *supra* note 74, Italy, ¶ C6.

<sup>194</sup> See 9 U.S.C. § 207. See also RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

<sup>195</sup> See *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993) (U.S.).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 581.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

District of Russia decided that foreign arbitral awards may be presented for mandatory enforcement no later than three years from the date on which it came into force.<sup>202</sup> The limitation period in Latvia also starts to run from the day when the award has lawful effect.<sup>203</sup>

*v.*The date when award creditors receive the award

In some jurisdictions, the limitation period does not run until the award creditor receives the award. For instance, in *Noy Vallesina Engineering Spa v. Jindal Drugs Limited Company* [**Noy Vallesing**],<sup>204</sup> the High Court of Bombay applied a three-year limitation period for the recognition and enforcement of an ICC award that began to run from the day on which the prevailing party received the award, rather than the day on which the award entered into force.<sup>205</sup> In Mexico, if the ten-year limitation period is applied for enforcement of foreign arbitral award, it will begin running from the date the final award is notified to the party requesting enforcement of the award.<sup>206</sup> According to one scholar, the limitation period in France also begins to run from the date of notification of the award to the parties.<sup>207</sup>

*vi.*Other methods

In addition to the methods mentioned above to calculate the commencement of limitation periods, there are still other approaches taken in different jurisdictions. In Thailand, the limitation period starts to run when the award becomes enforceable.<sup>208</sup> Albania requires that limitation period starts running from the date the award becomes final.<sup>209</sup> Costa Rica is unusual in making the date on which the limitation period begins to run depend on the date the award becomes binding under the *lex arbitri*.<sup>210</sup> According to the law of Ecuador, the award creditor needs to first apply for recognition within ten years from the moment the award becomes *res judicata* in accordance with the law of the place of arbitration.<sup>211</sup> The award creditor can then seek enforcement within ten years from the moment the award is recognised in Ecuador.

C. Interruption, suspension, and extension of the limitation period

Whether there are factors that interrupt, suspend, or extend the limitation period also matters significantly in determining the limitation period for enforcement. However, both Contracting States' legislation and relevant case law seldom provide detailed information regarding the interruption, suspension, and extension of limitation periods. Most of the relevant discussions can only be found in particular cases or academic literature.

Interruption of the limitation period means that a new limitation period begins after the original one was interrupted by some factor.<sup>212</sup> Such interruption may happen due to the award debtor's

<sup>202</sup> See Yukos Capital, 35 Y.B. COMM. ARB. 437 (Albert Jan van den Berg ed., 2010).

<sup>203</sup> See UNCITRAL Report, *supra* note 10, at 18.

<sup>204</sup> See *Noy Vallesina Eng'g Spa v. Jindal Drugs Ltd. Co.*, 2006 (5) Bom CR 155, ¶ 10 (India) [*hereinafter* "Noy Vallesina"].

<sup>205</sup> *Id.* ¶ 10 (India).

<sup>206</sup> ICC Enforcement Guide, *supra* note 74, Mexico, ¶ C6.

<sup>207</sup> See Akter, *supra* note 2, at 90.

<sup>208</sup> Thien, *supra* note 1, at 104.

<sup>209</sup> ICC Enforcement Guide, *supra* note 74, Albania, ¶ C 6.

<sup>210</sup> *Id.* Costa Rica, ¶ C6.

<sup>211</sup> *Id.* Ecuador, ¶ C6 citing Civil Code, arts. 2414, 2415 (Ecuador).

<sup>212</sup> *Id.*

acknowledgement or partial payment.<sup>213</sup> In *Good Challenger*,<sup>214</sup> one of the issues before the Appeal Court was whether a 1998 telex message from the losing party agreeing to honour the award amounted to a written and signed acknowledgement within the meaning of the Limitation Act 1980 so as to bring the enforcement action within the time-bar set by the statute. The Court resolved the issue in the affirmative.

In addition, an award creditor's application for enforcement also constitutes an interruption of the limitation period. In *Lugana Handelsgesellschaft mbH v. OAO Ryazan Metal-Ceramic Instrument Factory*,<sup>215</sup> the Russian court decided the limitation period was interrupted when Lugana "made submission of a statement of claim" for enforcement.<sup>216</sup> In *Norman Bard*,<sup>217</sup> the award creditor applied to the Quebec Court on June 1, 2015 to enforce an award rendered on December 4, 2002.<sup>218</sup> Appel, the award debtor, was declared bankrupt in 2003. On October 2, 2003, Norman Bard, the award creditor, obtained a judgment from the Bankruptcy Court for the Eastern District of New York, stating that Appel's bankruptcy did not exempt him from his obligation under the award [**Bankruptcy Judgment**].<sup>219</sup> According to the Quebec Civil Code, the filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption.<sup>220</sup> The Superior Court of Quebec held that Norman Bard's application for the Bankruptcy Judgment constitutes "filing of a judicial application"<sup>221</sup> under the Quebec Civil Code, and therefore, interrupts the limitation period for enforcement of the arbitral award.

Suspension of limitation period may occur when award creditors withdraw their application for enforcement. In *O'KEY Logistics LLC v. Guangdong SouthFortune Import & Export Co., Ltd.*,<sup>222</sup> O'KEY Logistics sought to enforce an arbitral award before a Chinese court. The award was made on December 8, 2010. On April 19, 2012, O'KEY Logistics first filed an application to enforce the award. Later, on November 5, 2012, O'KEY withdrew the application for the reason that it would take a long time to get the relevant evidence certificated and notarised. On January 24, 2013, more than two years after the award was made, O'KEY Logistics submitted its application for enforcement again.<sup>223</sup> The Guangzhou Intermediate People's Court held that O'KEY's withdrawal of application for enforcement led to the suspension of the limitation

<sup>213</sup> See Akter, *supra* note 2, at 93; see also Lafi Mohammad Mousa Daradkeh, Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law) 93 (Feb. 2005) (unpublished Ph.D. dissertation, University of Jordan), available at <http://etheses.whiterose.ac.uk/494/2/DX231171.pdf>.

<sup>214</sup> See *Good Challenger*, [2003] EWCA (Civ.) 1668 (Eng.).

<sup>215</sup> See *Lugana Handelsgesellschaft mbH (Ger.) v. OAO Ryazan Metal-Ceramic Instrument Factory (Russ.)* ot 2 fevralya 2010 g. No. 13211/09 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of February 2, 2010, No. 13211/09], reprinted in 35 Y.B. COMM. ARB. 429–431 (Albert Jan van den Berg ed., 2010).

<sup>216</sup> *Id.*

<sup>217</sup> See *Norman Bard*, 41 Y.B. COMM. ARB. 356 (Albert Jan Van den Berg ed., 2017).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See Civil Code of Quebec, S.Q. 1991, c. 64, art. 2892 (Can.) ("The filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than 60 days following the expiry of the prescriptive period.").

<sup>221</sup> *Norman Bard*, 41 Y.B. COMM. ARB. 355–356 (Albert Jan Van den Berg ed., 2017).

<sup>222</sup> See *O'KEY Logistics LLC v. Guangdong SouthFortune Import & Exp. Co., Ltd.*, (2013) Sui Zhongfa Minsi Chuqi No. 12 (The Guangzhou Intermediate People's Court of Guangzhou Dec. 3, 2013) (China).

<sup>223</sup> *Id.* ¶ F.

period. Therefore, O'KEY's application filed on January 24, 2013 did not exceed China's two-year limitation period under the Chinese Law of Civil Procedure.

In the U.S., the three-year limitation period for recognition of New York Convention awards is subject to the federal doctrine of equitable tolling. A limitation period can be tolled if the award debtor has wrongfully impeded the award creditor's ability to seek recognition, or if extraordinary circumstances prevented the award creditor from seeking recognition despite diligent efforts.<sup>224</sup>

Extension of limitation period happens after the original limitation period expires under certain circumstances. One scholar mentioned that one of the circumstances that extends the limitation period is when the award debtor gives a false statement about its financial circumstances or its assets.<sup>225</sup>

#### V. A call for more certain and predictable limitation periods in international commercial arbitration

Parts III and IV of this article reveal how diverse the legislation and practices are among Contracting States. The diversified legislation and practices can influence an award creditor's right for remedy, especially when the award creditor's application for enforcement is time-barred. Furthermore, it may impact arbitration's status as an effective dispute resolution mechanism since all the advantages of arbitration, e.g., "*expedition, efficiency, convenience of enforcement,*" will be less attractive to commercial parties when the arbitral award cannot be enforced due to varying and unclear practices regarding limitation periods in different states.<sup>226</sup> In Part V(A), this article argues that the ideal approach is to provide a uniform limitation period in international instruments. Part V(B) agrees with Akter's proposal that national legislators shall specify the limitation periods applicable to the enforcement of foreign arbitral awards in their domestic legislation. Part V(C) suggests that award creditors must take the limitation period into serious consideration when applying for enforcement before foreign courts. By doing so, when the limitation period for enforcement has expired pursuant to enforcing State's law, the award creditor can still try to enforce the award in another forum or enforce the award in the form of a judgment.

##### A. The ideal approach: uniform limitation period in an international instrument

For certainty and predictability, some scholars and institutions have urged for a uniform limitation period for the enforcement of foreign arbitral award in international instruments. This suggestion has been considered by the Working Group on International Contract Practices [**Working Group**] which has provided two approaches to include a limitation period provision in the Model Law on International Commercial Arbitration [**Model Law**].

The first approach is providing a uniform five-year limitation period for enforcement of foreign arbitral awards, along with the conditions that calculate the running and cessation of the limitation period. This approach needs to consider "*whether a request to a court for enforcement in any*

<sup>224</sup> See *Everplay Installation Inc. v. Guindon*, 2009 U.S. Dist. LEXIS 113054 (D. Colo. Dec. 2, 2009), 2009 WL 4693884 (D. Colo. Dec. 2, 2009) (U.S.).

<sup>225</sup> See IHAB AMRO, *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THEORY AND IN PRACTICE: A COMPARATIVE STUDY IN COMMON LAW AND CIVIL LAW COUNTRIES* 408 (2d. 2014).

<sup>226</sup> See Morgan, *supra* note 14.

*State should cause the cessation of the running of the limitation period or whether the cessation is to be confined only to the State where the request for enforcement is made”.*<sup>227</sup> Following this approach, the Working Group designed the following draft provision:

*“Article G, Alternative A*

*(1) The limitation period for enforcement of the arbitral award shall be [five] years from the date when the award was received by the party requesting the enforcement. The limitation period shall cease to run when that party requests a court in any State that the arbitral award be enforced, provided that he has taken all reasonable steps to ensure that the other party is informed of the request for enforcement.*

*(2) Where enforcement proceedings have ended without success for reasons other than the merits of the request for enforcement, the limitation period shall be deemed to have continued to run. If, at the time such enforcement proceeding ended, the limitation period has expired or has less than one year to run, the party requesting enforcement shall be entitled to a period of one year from the date on which the enforcement proceeding ended.”*<sup>228</sup>

The second approach suggests a fixed limitation period which would run continuously without a possibility of cessation or extension of its running.<sup>229</sup> A draft provision of this approach suggested by the Working Group provides as follows:

*“Article G, Alternative B*

*Enforcement of the arbitral award may not be requested after [ten] years from the date when the award was received by the party requesting the enforcement.”*<sup>230</sup>

Reaching a uniform limitation period for enforcement of foreign arbitral awards is not easy. As noted by the Working Group, “many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonization of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law as aspects of States”.<sup>231</sup> Due to the consideration of national policies behind the limitation period, most international treaties seldom provide a uniform limitation period for enforcement. Rather, they prefer to leave this issue to be determined by the Contracting States.

The difficulty in achieving a uniform limitation period is also reflected in the Draft New York Convention, presented by Professor Van den Berg in 2008, in which a limitation period for enforcement of foreign arbitral awards is not included. Under the section “Provisions Not Included

<sup>227</sup> See U.N. Secretariat, Model Law on International Commercial Arbitration: Possible Further Features and Draft Articles of a Model Law, ¶ 42, U.N. Doc. A/CN.9/WG/II/WP.41 (Jan. 12, 1983).

<sup>228</sup> *Id.* ¶ 45.

<sup>229</sup> *Id.* ¶ 44.

<sup>230</sup> *Id.* ¶ 45.

<sup>231</sup> See HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1157 (1989).

in the Draft Convention,” it is explained that the limitation periods vary considerably among States, ranging from six months in China to 20 years in the Netherlands.<sup>232</sup>

B. The practical approach: providing a clear and reasonable limitation period in domestic law

Many States do not specify the limitation period for enforcement of foreign arbitral awards in domestic laws, making the limitation period for enforcement a highly controversial issue. This situation has arisen frequently in India. Article 136 of the Indian Limitation Act 1963 provides a 12 year limitation period for the “execution of any decree of any civil court” when the decree becomes enforceable.<sup>233</sup> Meanwhile, Article 137 stipulates that for any other application for which no limitation period is provided elsewhere, the limitation period is three years from the time when the right to apply accrues.<sup>234</sup> As a result, which limitation period applies to the enforcement of foreign arbitral award has become a controversial issue among the Indian courts.

The High Courts of Bombay, Madras, and Delhi have discussed the applicable limitation period in separate cases but drawn different conclusions. In *Noy Vallesina*, the High Court of Bombay held that an arbitral award is “deemed to be a decree only when the court to which the application is made for enforcement of the foreign award is satisfied that the foreign award is enforceable”.<sup>235</sup> Under this approach, the limitation period for filing an action to enforce a foreign arbitral award would be three years as stipulated in Article 137.<sup>236</sup> Further, once the Indian Court decides that the foreign award is enforceable as a decree, then award creditors can seek to enforce the same within 12 years based on Article 136 of the Limitation Act. In *Compania Naviera SODNOC v. Bharat Refineries Ltd.* [**Compania Naviera**],<sup>237</sup> the High Court of Madras took a different approach and held that a foreign award is already stamped as a decree under the scope of Article 136.<sup>238</sup> Thus, the award creditors can apply for enforcement within 12 years from the date the award becomes enforceable.<sup>239</sup> In the past few years, the view taken in *Compania Naviera* has gained more recognition among Indian courts. In *Imax Corporation v. ECity Entertainment (I) Pvt. Ltd.*<sup>240</sup> and *Cairn India Ltd & Ors v. Government of India*,<sup>241</sup> the Indian courts agreed with *Compania Naviera* that the limitation period for enforcement of foreign arbitral award is 12 years as provided in Article 136. At first glance, it seems that the court split on limitation period has come to an end in India. However, in the recent case *Bank of Baroda v. Kotak Mahindra Bank Ltd.* [**Bank of Baroda**],<sup>242</sup>

<sup>232</sup> See ALBERT JAN VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS 15 (2009), available at [http://newyorkconvention1958.org/index.php?lvl=notice\\_display&id=2873&opac\\_view=1](http://newyorkconvention1958.org/index.php?lvl=notice_display&id=2873&opac_view=1).

<sup>233</sup> Limitation Act, No. 36 of 1963, art. 136 (India).

<sup>234</sup> *Id.* art. 137.

<sup>235</sup> See *Noy Vallesina*, 2006 (5) Bom CR 155, ¶ 8 (India).

<sup>236</sup> *Id.* ¶ 9.

<sup>237</sup> *Compania Naviera ‘SODNOC’ v. Bharat Refineries Ltd.*, AIR 2007 Mad. 251 (India).

<sup>238</sup> *Id.* ¶ 42.

<sup>239</sup> *Id.*

<sup>240</sup> *Imax Corp. v. ECity Ent. (I) Pvt. Ltd.*, (2018) 18 SCC 313 (India).

<sup>241</sup> *Cairn India Ltd. & Ors. v. Gov’t of India*, OMP (EFA) (COMM.) No. 15/2016 (decided by the Delhi High Court on Feb. 19, 2020) (India).

<sup>242</sup> *Bank of Baroda v. Kotak Mahindra Bank Ltd.*, Civil Appeal No. 2175 of 2020 (decided by the Supreme Court of India on Mar. 17, 2020) (India) [*hereinafter* “Bank of Baroda”].

the Indian Supreme Court's decision has "reopened the limitation conundrum".<sup>243</sup> In *Bank of Baroda*, the Supreme Court held that Article 136 "only deals with decrees passed by Indian courts",<sup>244</sup> which means a foreign arbitral award is not a "decree" under Article 136 and the 12-year limitation period will not be applicable to enforcement of foreign arbitral awards. It can be predicted that ambiguity and controversy surrounding the limitation issue will continue to exist in India.

As discussed in Part IV(A), only a few States have specific limitation periods for the enforcement of foreign arbitral awards in domestic law. In some jurisdictions, whether there is a limitation period and if so, what is the limitation period applicable to the enforcement of foreign arbitral award is unclear, which in turn leads to contradicting opinions among experts and judges.<sup>245</sup> For example, except for the inconsistencies mentioned before, controversies over the limitation period largely exist in France,<sup>246</sup> Germany,<sup>247</sup> and Switzerland.<sup>248</sup> Under such circumstances, both the award creditors who seek to enforce the arbitral award and the award debtors who prepare to rebut award creditors' application would get lost in various limitation periods. The need for certainty and predictability in international commercial transactions requires that Contracting States provide a clear and reasonable limitation period in their domestic law.

Providing clear limitation period means that the Contracting States must specify limitation periods for enforcement of foreign arbitral award in domestic laws. This proposal is strongly advised by Akter in her noted book chapter.<sup>249</sup> The relevant domestic laws can be, including but not limited to arbitration acts, laws of civil procedure, limitation acts, or any legislation that implements the New York Convention.<sup>250</sup> In 2015, Vietnam amended its Code of Civil Procedure to improve its legal procedures, and Article 451 now clearly provides for a three-year limitation period running from the day when the award enters into force for enforcing foreign

<sup>243</sup> Smriti Shukla & Yash Raj, *Supreme Court Reopens the Limitation Period for Enforcement of Foreign Awards*, INDIA CORPLAW (Apr. 9, 2020) available at, <https://indiacorplaw.in/2020/04/supreme-court-reopens-the-limitation-period-for-enforcement-of-foreign-awards.html>.

<sup>244</sup> Bank of Baroda, Civil Appeal No. 2175 of 2020, ¶ 36.

<sup>245</sup> Akter, *supra* note 2, at 92.

<sup>246</sup> The limitation period for enforcement of foreign arbitral awards in France is controversial. There is no specific limitation period for enforcement of foreign arbitral awards. Some argue that the five-year limitation period under Article 2224 of the Civil Code shall apply to actions to enforce foreign arbitral awards. See ICC Enforcement Guide, *supra* note 74, France ¶ C6. See also Akter, *supra* note 2, at 90, citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2224 (Fr.); ICC Supplement, *supra* note 75, at 168. Some others believe the five-year limitation period under Article 2224 is irrelevant. Accordingly, the party seeking recognition and enforcement can request enforcement any time. See AMRO, *supra* note 225, at 410.

<sup>247</sup> Regarding the limitation period for enforcement of foreign arbitral awards in Germany, some argue the 30-year limitation period under Article 197(1)(2) of the German Civil Code shall apply, because recognition and enforcement equals to a claim for performance of debt or a legal action to reclaim ownership of real rights from the award debtor. See Thien, *supra* note 1, at 101. Some argue there is no limitation period for enforcement of foreign arbitral awards in Germany, and the party seeking recognition and enforcement can bring its application whenever it considers appropriate. See AMRO, *supra* note 225, at 410; Bermann, *supra* note 5, at 68. The third opinion argues that the German court will apply its own conflict of law rules to determine the *lex causae* and apply the limitation period under that law. If the *lex causae* is German law, then the 30-year limitation period would apply to proceedings for recognition and enforcement of foreign arbitral award. See Börner, *supra* note 6, at 127; Akter, *supra* note 2, at 91.

<sup>248</sup> See Akter, *supra* note 2, at 90–91 (Akter argues the limitation period for enforcement of foreign arbitral awards in Swiss is subject to *lex causae*. When the *lex causae* is Swiss law, the ten-year limitation period under Article 137(2) of the Swiss Civil Code applies.); see Thien, *supra* note 1, at 100 (Thien seems to believe that the ten-year limitation period would apply regardless of whether Swiss law is the governing law.)

<sup>249</sup> Akter, *supra* note 2, at 97.

<sup>250</sup> UNCITRAL Report, *supra* note 10, at 3.

arbitral award.<sup>251</sup> This amendment is believed to “*help Vietnam stand out as a more arbitration friendly jurisdiction*”.<sup>252</sup>

Specifying a reasonable limitation period for enforcement of foreign arbitral awards means avoiding extremely long or extremely short limitation periods and providing a proper date for the commencement of the limitation period.<sup>253</sup> As discussed in Part IV(B), the Nigerian Court’s erstwhile approach<sup>254</sup> to interpret “*accrual of cause of action*” as “*the date of the dispute leading to arbitration arose*” is unreasonable, because under this approach, the limitation period for enforcement may expire before the award creditor can apply for enforcement. Thus, being aware of this problem, the Nigerian legislators have made some changes in the Arbitration and Conciliation Act (Repeal and Enactment) Bill, proposing to exclude the “*period between the commencement of the arbitration and the date of the award*” when calculating the limitation period.<sup>255</sup> This amendment undoubtedly would improve the reasonableness of Nigeria’s practice on limitation period. In addition, federal countries need to consider whether to provide a uniform limitation period at the federal level like the U.S. or to allow each State to regulate the limitation period under different states laws like Canada. For the purpose of achieving certainty and predictability, the U.S. model is preferable. Critique regarding the Supreme Court of Canada decision in *Yugraneft Corp.* also mentioned 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*”.<sup>256</sup>

### C. The alternative approaches

Award creditors who endeavour to enforce arbitral awards in foreign countries need to realise the importance of a limitation period during the enforcement proceedings. *First*, they need to determine the enforcing States’ relevant legislation and practices to make sure that their applications for enforcement are filed within the required time frame. Additionally, in situations where the limitation period for enforcement has expired in the enforcing State, they can still try to enforce the arbitral award in another forum where a longer limitation period is provided, or they can seek to enforce the arbitral award in the form of a judgment in a certain jurisdiction, such as the U.S.

#### *i. Understanding Contracting States’ divergent practice on limitation period*

When considering the recognition and enforcement of foreign arbitral awards, the award creditors and their lawyers need to judge whether their application for enforcement is time-barred in the enforcing state. Basically, there are four steps to follow.

*First*, the limitation period can raise choice of law issues. As discussed in Part III, there are basically three approaches to determine the applicable law to limitation period. Many States adopt the *lex fori* approach, and some States, mostly common law countries, adopt the *lex causae*

<sup>251</sup> Thien, *supra* note 1, at 106.

<sup>252</sup> See Thien, *supra* note 1, at 97.

<sup>253</sup> *Id.* at 99.

<sup>254</sup> See *supra* notes 152–162 and accompanying text.

<sup>255</sup> *Id.*

<sup>256</sup> See Jonnette Watson Hamilton, *Much Ado about Little: The Supreme Court’s Decision in Yugraneft Corp. v. Rexx Management Corp.*, ABLAWG.CA (Jun 4, 2010), available at <https://ablawg.ca/2010/06/04/much-ado-about-little-the-supreme-court%E2%80%99s-decision-in-yugraneft-corp-v-rexx-management-corp/>.

approach. In addition, some States follow *lex arbitri* approach and would apply the limitation period of the State where the award was rendered.

*Second*, after identifying the law applicable to the limitation period, the award creditors can determine the duration of the limitation period by examining enforcing States' legislation and case law. The Contracting States regulate limitation periods through different legislation and impose various limitation periods on the application for enforcement. Some Contracting States do not impose a limitation period;<sup>257</sup> other States prescribe specific limitation periods for enforcement, and the periods range from three months to 30 years.<sup>258</sup>

*Third*, when the limitation period starts to run matters significantly in judging whether the application was time-barred. In this regard, inconsistencies also arise as to the date that the limitation period begins to run. Some States believe the limitation period is running when the "cause of action accrued". For States that follow the discoverability rule, the limitation period will not start to run until the award debtor is found to appear or have property in the enforcing States. Additionally, there are many different approaches taken to commence the running of the limitation period, including the date when the award is made, the date when the award attains legal force, the date when the award becomes enforceable, the date when award creditors receive the award, the date award becomes final, etc.

Last but not the least, the award creditors also need to pay attention to the factors that interrupt, suspend, or extend the limitation period for enforcement. These factors, however, are ambiguous since they are mainly discussed in academic literature and are rarely found in Contracting States' legislation and case law.<sup>259</sup>

ii. *Enforcing arbitral awards in the form of foreign judgments*

In some States where the limitation period for enforcing foreign judgments is longer than enforcing foreign arbitral awards, the award creditor may seek to turn the arbitration award into a judgment and then seek enforcement of the judgment.<sup>260</sup> In *Commissions Import Export S.A. v. Republic of the Congo* ["**Commissions Import Export S.A.**"], the Commissions Import Export S.A. ["**Commission Import**"], the Plaintiff, successfully obtained the enforcement of a limitation-expired arbitral award in the form of foreign judgment.<sup>261</sup> In 2000, Commission Import won a favorable arbitral award in France.<sup>262</sup> Pursuant to FAA, an application for enforcement of foreign arbitral award in the U.S. must be filed "[w]ithin three years after an arbitral award falling under the [New York] Convention is made".<sup>263</sup> Nine years after the issuance of the arbitral award, however, Commission Import failed to seek award enforcement. In 2009, Commission

<sup>257</sup> *Id.*

<sup>258</sup> UNCITRAL Report, *supra* note 10, at 3.

<sup>259</sup> For example, some scholars believe an award debtor's acknowledgement or partial payment may lead to the interruption of limitation period. See Akter, *supra* note 2, at 93; see also Daradkeh, *supra* note 213. See AMRO, *supra* note 225 (Amro holds that limitation period may be extended if award debtors give false statement(s) about their financial circumstances or assets).

<sup>260</sup> BORN, *supra* note 7, at 3729–3730.

<sup>261</sup> *Comm'ns Imp. Exp. S.A. v. Republic of the Congo & Caisse Congolaise d'Amortissement*, 757 F.3d 321 (D.C. Cir. 2014) (U.S.) [*hereinafter* "Commissions Import"].

<sup>262</sup> *Id.* at 323.

<sup>263</sup> See 9 U.S.C. § 207; see also RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

Import obtained a judgment from the English High Court, which recognised the French arbitral award and ruled that the arbitral award is enforceable in the same manner as an English judgment.<sup>264</sup> Later, Commission Import commenced court proceeding before the U.S. District Court for the District of Columbia, applying for enforcement of the English judgment. According to the District of Columbia’s Uniform Foreign-Country Money Judgments Recognition Act [**D.C. Judgment Act**], “[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country”.<sup>265</sup> Thus, the central issue before the U.S. court turned to whether the three-year limitation period under the FAA, a federal law, pre-empts the longer period under the D.C. Judgment Act, a state law.

The Court of Appeals for the District of Columbia, by referring to the U.S. Supreme Court’s decision in *Hines v. Davidowitz*,<sup>266</sup> first identified that the federal law would preempt state law when the state law “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress”.<sup>267</sup> After examining the objectives of the FAA, the U.S. court held that the “basic purpose” of FAA was to “implement the New York Convention”,<sup>268</sup> and the “overriding purpose” of FAA is to “facilitate international commercial arbitration by ensuring...valid arbitral awards are enforced”.<sup>269</sup> The U.S. court thus concluded that enforcing the English judgment based on state law accords with FAA’s objective and “pose no obstacle” to its purpose.<sup>270</sup> Therefore, the U.S. court decided that the English judgment that confirmed the French award was enforceable. Following the decision in *Commissions Imp.*, when the limitation period for the enforcement of arbitral awards has expired, the award creditors may seek to enforce the award in the form of judgment in the U.S.

### iii. Enforcing arbitral award in another forum

The New York Convention does not impose restrictions on the number of times a prevailing party can seek to enforce an award.<sup>271</sup> As noted by leading scholars, the fact that an application to enforce an arbitral award was time-barred in one State does not necessarily mean the award cannot be enforced in another.<sup>272</sup> Thus, if an arbitral award was refused enforcement in one Contracting State, the award creditor can still seek to enforce the award in another forum where the law provides no limitation period or a longer limitation period for the enforcement of foreign arbitral awards.<sup>273</sup>

<sup>264</sup> *Commissions Import*, 757 F.3d 325 (D.C. Cir. 2014) (U.S.)

<sup>265</sup> Uniform Foreign-Country Money Judgments Recognition Act of 2011, Feb. 24, 2012, D.C. Law 19-86, § 2(b), 58 DCR 11186, § 15-369 (Colum.).

<sup>266</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941) [*hereinafter* “Hines”].

<sup>267</sup> *Commissions Import*, 757 F.3d 326 (D.C. Cir. 2014) citing *Hines*, 312 U.S. 52 (1941).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 330.

<sup>270</sup> *Id.* at 329.

<sup>271</sup> See *Thien*, *supra* note 1, at 99.

<sup>272</sup> See *BORN*, *supra* note 7, at 3729.

<sup>273</sup> See *Akter*, *supra* note 2, at 93.

**VI. Conclusion**

No one wants to fail at the final hurdle, and especially not award creditors who have spent millions of dollars to secure a favourable arbitral award. Although the New York Convention itself is silent on whether the expiration of a limitation period constitutes a ground for refusing enforcement, the purpose of the New York Convention and Contracting States' practice tend to justify the imposition of limitation periods on enforcement. In practice, award creditors may fail at the final hurdle because their applications for enforcement exceeded the limitation period. To solve the uncertainty caused by Contracting States' varying limitation periods, it is argued to provide a uniform limitation period at the international level. As an alternative, legislators need to consider specifying specific limitation periods for enforcement of foreign arbitral awards. Finally, as a last resort, award creditors can also seek to enforce the arbitral award in the form of judgments or enforce the award in other forums where no limitation period or a longer limitation period is provided. By considering these options and giving due importance to the question of limitation, parties can avoid disappointing ends to their committed pursuit of favourable arbitral awards.