"Thinking Globally, Acting Locally":† Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada

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I. INTRODUCTION

With the expansion of the global economy and burgeoning modern international commerce, it is unsurprising that the continuing evolution of the "real and substantial connection" test — reinforced by the Supreme Court of Canada decision in *Beals v. Saldanha*[1] — for the recognition and enforcement of foreign judgments remains a topic of immediate interest to Canadian litigators, legal commentators, and the judiciary. Since the landmark decision in *Morguard Investments Ltd. v. De Savoye*,[2] Canadian jurisprudence for the recognition and enforcement of foreign judgments has been dominated by judicial and legislative unilateralism: the establishment of a domestically imposed standard (the

† Borrowed from the motto "Think Globally, Act Locally" coined by René Dubos as an advisor to the United Nations Conference on the Human Environment in 1972, referring to the philosophy that global environmental problems transform into action only when the ecological, economic, and cultural differences of our local surroundings are considered. Eblen, R. A. and Eblen, W., *The Encyclopedia of the Environment* (Boston: Houghton Mifflin Company, 1994) at 702.

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1 *Beals v. Saldanha* [2003] 3 S.C.R. 416 [*Beals*].

2 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [*Morguard*].

lex fori)[3] is striving towards national uniformity informed by private international law (or conflict of laws) principles.

While the constitutional imperatives imposed by the landmark decision in *Morguard* and its progeny, culminating in the "real and substantial connection" test for jurisdiction *simpliciter*, provides a flexible analytical framework for a Canadian domestic court in assuming or declining jurisdiction over a foreign defendant, it does not completely restrict jurisdictional challenges by a non-resident (foreign) defendant. The residual discretion afforded by the *forum non conveniens* doctrine, coupled with other forms of jurisdictional challenges, remains a robust procedural tool in a litigator's arsenal, while the boundaries of the recognized defences of fraud, natural justice and public policy continue to be tested.

Furthermore, private international law principles do not exist in a jurisprudential vacuum. Thus, judicial unilateralism is tempered by bilateralism in the form of reciprocal enforcement conventions between Canada and the United Kingdom on the one hand, and among some Canadian provinces, American states and foreign nations, on the other. More recently, international efforts towards multilateralism have manifested in the recent signing of an important international convention, The *Hague Choice of Court Convention*.[4]

This paper will discuss recent Canadian caselaw applying the "real and substantial connection" test in the context of foreign judgment recognition and enforcement, as defined by *Morguard* and *Beals v. Saldanha* and the Ontario Court of Appeal decision in *Muscutt v. Courcelles*[5] (and companion cases).[6] Although the "real and substantial connection" test also applies to actions commenced in Canadian provinces involving foreign (i.e., non-resident) defendants, where the foreign defendant challenges jurisdiction based upon procedural rules (e.g., service *ex juris*) or relying upon the *forum non conveniens* doctrine,[7] [8]the focus of this paper is retrospective rather than prospective. In

3 *Lex fori* refers to "the law of the forum or court; that is, the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought or remedy sought is an integral part." *Black's Law Dictionary*, 1990, 6th ed., 910.

4 *Convention of 30 June 2005 on Choice of Court Agreements, no. 37*, concluded June 30, 2005, at the Twentieth Session of the Hague Conference on Private International Law [*Hague Choice of Court Convention*]. See Part III-Multilateralism discussion, *infra*.

5 *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), additional reasons at (2002), 2002 CarswellOnt 2313 (C.A.) [*Muscutt* cited to D.L.R.].

6 See also *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651 (Ont. C.A.) [*Gajraj*]; *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614 (Ont. C.A.); *Lemmex v. Bernard* (2002), 213 D.L.R. (4th) 627 (Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643 (Ont. C.A.) [*Sinclair*].

7 For a discussion of the *forum non conveniens* doctrine in Canada from a contractual perspective, see Antonin I. Pribetic, "'Strangers in a Strange Land': Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario" (2004) 13 Journal of Transnational Law and Policy, vol. 2, at 347-391 [Pribetic, "Strangers in a Strange Land"].

8 For an authoritative analysis of the implications of *Muscutt* and companion decisions, see Janet Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" in The Honourable Mr. Justice Todd L. Archibald & Michael Cochrane, eds., *Annual Review of Civil Litigation, 2002* (Toronto: Thomson/Carswell, 2003).

9 *Pro Swing Inc. v. Elta Golf Inc* [2006] S.C.J. No. 52, 2006 SCC 52 (S.C.C.), affirming (2004) 71 O.R. (3d) 566 (Ont. C.A.), reversing (2003) 68 O.R. (3d) 443 at 446-449, [2003] O.T.C. 1146, (2003) 30 C.P.R. (4th) 165, (2003) 128 A.C.W.S. (3d) 52 (Ont. S.C.J.) per Pepall J [*Pro Swing v. Elta Golf*].

10 *Reciprocal Enforcement of Judgements (U.K.) Act*, R.S.O. 1990, c. R-6 [*REJUKA*]. *REJUKA* is the Ontario statute that brings into force in Ontario the *Convention between Canada and the United Kingdom For The Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1984*. It has been implemented in each of the common law Canadian provinces and territories. See *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c.C.-30. See also Part II-Bilateralism discussion, *infra*.

11 *Enforcement of Foreign Judgments Act*, 2005 c.E-9.121 (effective April 19, 2006) [*Sask. EFJA*].

other words, the issue in this paper is not whether a Canadian court should assume jurisdiction over a pending domestic action, but whether a Canadian court will recognize and enforce a foreign judgment already obtained elsewhere.

In Part I, on the Canadian unilateral approach to recognition and enforcement of foreign judgments, the application of the "real and substantial connection" test will be canvassed through a review of recent court decisions, including the Supreme Court of Canada decision in *Pro Swing Inc. v. Elta Golf Inc.*[9] on the recognition and enforceability of a non-monetary judgment. Part II discusses bilateralism, with particular attention paid to the legislated defences and limits imposed on assuming jurisdiction by Canadian provinces, including recent Ontario decisions applying the *Reciprocal Enforcement of Judgments (U.K.) Act.*[10] It will also identify current provincial reciprocal enforcement of judgments legislation involving various American states and other foreign countries as signatories. The Uniform Law Commission of Canada's uniform legislation will be reviewed, most recently implemented by the Saskatchewan *Enforcement of Foreign Judgments Act.*[11] In Part III, multilateralism will be analyzed through an overview of the *Hague Choice of Court Convention* concluding with a recommendation for Canada to sign this new multilateral convention.

II. UNILATERALISM

Prof. Walker provides the following definition and principle for a foreign judgment:

> A foreign judgment is a final decision, decree or sentence of a judicial body or tribunal established and exercising the jurisdiction conferred upon it by the law

> of the state, province or territory of its creation, which determines the respective rights, obligations and claims of the parties to a suit litigated therein.
>
> At common law, a foreign judgment has no inherent right of recognition and enforcement. The law of the forum determines what effect, if any, should be given to it and the conditions that must be met for the judgment to be given effect. In considering whether to give effect to a foreign judgment, a court will not consider the merits of the claim or defence or the determinations of the foreign court in reaching its result. [12]

The recognition and enforcement of foreign judgments is primarily within the domain of private international law (or conflict of law) principles.[13] Historically, the rules of private international law were developed from the law of nations, from which the principle of "comity" is derived. It has been defined as "the deference and respect due by other states to the actions of a state legitimately taken within its territory."[14]

In *Hilton v. Guyot,*[15] the United States Supreme Court defined comity as:

> . . . the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[16]

In *Sik Choi v. Hyung Soo Kim,*[17] Lewis J. in a concurring opinion for the Third Circuit United States Court of Appeals further noted at 252:

> I do not mean to suggest that comity prevents us from subjecting the laws of South Korea to a due process evaluation in all cases, or even many cases. Rather, I would invoke comity in the prudential sense that we should avoid disparaging the law of a foreign sovereign which, though certainly not intended, I believe both the district court opinion and the majority opinion have the effect of doing. *As we have observed recently, comity, though difficult to define, is in one respect*

12 See Janet Walker, Castel & Walker, *Canadian Conflict of Laws*, 6th ed., vol. , (Markham: Lexis Nexis-Butterworths, 2006) at s.14.2 [Walker]. This paper deals only with *in personam* foreign judgments (i.e., foreign judgments which are final and conclusive between the parties and privies). For a discussion of foreign judgments *in rem,* see Walker at s.14.11 .

13 See Part Two, Bilateralism which discusses statutory recognition and enforcement of foreign judgments.

14 *Morguard, supra* note 2 at 1095.

15 *Hilton v. Guyot,* 159 U.S. 113, (Sup.Ct., 1895).

16 *Beals, supra* note 1 at 483-4 per LeBel J. (dissenting).

17 *Choi v. Kim,* 50 F.3d 244 (C.A.3, 1995) (Callaghan) 1253 USCA3 – (1995 Mar 13) United States Court Of Appeals For The Third Circuit (per Scirica, Lewis and Seitz, Circuit Judges) [cited to 50 F. 3d 244].

> *"a version of the golden rule: a 'concept of doing to others as you would have them do to you . . .'" Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994), quoting Lafontant v. Aristide, 844 F. Supp. 128, 132 (S.D. N.Y. 1994).* I would not want a tribunal in South Korea, which could resolve on narrow grounds a case involving a putative American judgment, to reach out and judge our own procedures as unjust based on South Korean notions of what process is due a litigant. [emphasis added]

The recognition of foreign judgments is one significant application of comity,[18] but also figures prominently in the doctrine of *forum non conveniens.*[19] The Supreme Court of Canada adopted the principles of international comity in the case of *Morguard Investments Ltd. v. de Savoye.*[20] Although *Morguard* was a constitutional decision regarding enforcement of inter-provincial judgments,[21] nevertheless, the Supreme Court of Canada also applied its analysis to foreign judgments.[22] Justice La Forest, writing for a unanimous Court, emphasized that Canadian courts should recognize international comity in deference to the reality of modern international commerce:

> The business community operates in a world economy and we correctly speak of a "world community" even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments, to the general advantage of litigants.[23]

The *Morguard* decision established that "the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."[24] Comity, defined by the Supreme Court of Canada as "the deference and respect due by other states to the actions of a state legitimately taken within its territory,"[25] needed to be modernized "in light of a changing world order."[26] Justice La Forest articulated the constitutional principles as follows:

18 *Morguard, supra* note 2 at 1095.

19 *Spiliada Maritime Corp. v. Cansulex Ltd.,* [1987] 1 A.C. 460 (H.L.) per Lord Goff at p. 477.

20 *Morguard, supra* note 2 at 1096. For a discussion of *forum non conveniens* from a Canadian perspective, see Pribetic, "Strangers in a Strange Land", *supra* note 7.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.* at 1098.

24 *Ibid.* at 1096.

25 *Ibid.* at 1095.

26 *Ibid.* at 1097.

> The application of the underlying principles of comity and private international law must be adapted to situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the court of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.
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> . . .
>
> A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give *full faith and credit*, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action . . . Both order and justice militate in favour of the security of transactions.[27] [emphasis added]

Justice La Forest, in *Hunt v. T & N plc*,[28] further clarified the approach by stating that the assessment of the "reasonableness" of a foreign court's assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but a decision "guided by the requirements of order and fairness."[29] In *Tolofson v. Jensen*,[30] Justice La Forest made the following observation:

> It may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. *While, no doubt, as was observed in* Morguard, *the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.* [31] [emphasis added]

In the Supreme Court of Canada decision of *Spar Aerospace Ltd. v. American Mobile Satellite Corporation*,[32] Justice Le Bel questioned whether the *Morguard* principles, applicable inter-provincially, were compatible with international jurisdictional disputes:

27 *Ibid.* at 1101-02. Compare the *UEFJA* and *Sask. EFJA* which rejects the "full faith and credit" doctrine applicable to recognition and enforcement of inter-provincial judgments, *infra.*

28 *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.) [*Hunt*]; see also, *United States v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affirmed (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused (1996), 33 O.R. (3d) xv (S.C.C.).

29 *Ibid.* at 42.

30 *Tolofson v. Jensen*, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon*) [1994] 3 S.C.R. 1022.

31 *Ibid.* at 1058.

32 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205.

> I agree with the appellants that *Morguard* and *Hunt* establish that it is a constitutional imperative that Canadian courts can assume jurisdiction only where a "real and substantial connection" exists. . . However, it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context. In particular, the two cases resulted in the enhancing or even broadening of the principles of reciprocity and speak directly to the context of interprovincial comity within the structure of the Canadian federation.[33]

1. Jurisdiction *Simpliciter*

Following *Morguard*, voluntary attornment by the defendant no longer remains a precondition to commence foreign enforcement proceedings in Canada.[34]

Thus, a foreign litigant is only required to show:

(1) that the foreign judgment was "issued by a court acting through fair process and with properly restrained jurisdiction,"[35]

(2) there exists a "real and substantial connection" between:

- the issue in the action and the location where the action is commenced;
- the damages suffered and the jurisdiction; and
- the defendant and the originating forum; [36] and

(3) the defendant fails to raise a recognized defence.[37]

Canadian courts must undertake a two-step process to ensure compliance with the constitutional standards prescribed by *Morguard* and *Hunt:*

1. *Jurisdiction simpliciter*: Based upon the dictates of constitutional imperatives, the court must first determine whether it may assume jurisdiction over the parties and the litigation;

2. *Forum non conveniens*: Where a Canadian court assumes jurisdiction, a defendant concurrently may challenge the plaintiff's choice

33 *Ibid.* at 230-1.

34 Justice Sharpe in *Muscutt* rejected the "personal subjection" approach at 597-612, and Justice LeBel, dissenting, in *Beals* at 503.

35 *Morguard, supra* note 2 at 1103.

36 *Beals, supra* note 1 at 489.

37 *Morguard* , *supra* note 2 at 1103-10.

> of forum on grounds of "inconvenience" – or, put another way, "is there another more appropriate forum". The existence of a more appropriate forum must be established clearly before the forum chosen by the plaintiffs will be displaced.[38] This approach has particular application if there are no parallel foreign proceedings pending.[39] [40]

In *Muscutt*, the Ontario Court of Appeal identified eight relevant factors when applying the "real and substantial connection" test to the threshold issue of jurisdiction *simpliciter*:

(1) the connection between the forum and the plaintiff's claim;[41]
(2) the connection between the forum and the defendant;[42]
(3) the unfairness to the defendant in assuming jurisdiction;[43]

38 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at 921 per Sopinka J. [*Amchem*]. See also, *Molson Coors Brewing Co. v. Miller Brewing Co.* [2006] O.J. No. 4236 (Ont. S.C.J.) per Lederman J.

39 *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (B.C. C.A.), per McLachlin J.A. (as she then was) at 45.

40 In *Muscutt, supra* note 5 Sharpe J.A. at 594, cites with approval the two-step jurisdictional analysis of Aitken J. in *Lemmex v. Bernard*, which held that:

> [T]he question of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of jurisdiction simpliciter is different from that of forum non conveniens. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action.

41 As noted by Sharpe J.A. in *Muscutt, supra* note 5 at 605:

> The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors. In *Moran v. Pyle National (Canada) Ltd.* at p. 409, Dickson J. spoke of "the important interest a state has in injuries suffered by persons within its territory." The *Moran* decision and the introduction of the "damage sustained" rule in 1975 were both motivated by the perception that the interests of justice required a more generous approach to assumed jurisdiction. The connection between the forum and the plaintiff's claim is therefore relevant.

42 Justice Sharpe in *Muscutt, supra* note 5 at 605-6 further remarked that any activity by the defendant in the domestic forum which has an impact on the plaintiff's claim will strengthen the case for assuming jurisdiction.

43 At para. 82, Sharpe, J.A. in *Muscutt, supra* note 5 reiterated that unfairness to either the plaintiff or defendant in assuming jurisdiction also bears scrutiny:

> The principles of order and fairness require further consideration, because acts or conduct that are insufficient to render the defendant subject to the jurisdiction may still have a bearing on the fairness of assumed jurisdiction. Some activities, by their very nature, involve a sufficient risk of harm to extraprovincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.

(4) the unfairness to the plaintiff in not assuming jurisdiction;
(5) the involvement of other parties to the suit;[44]
(6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;[45]
(7) whether the case is interprovincial or international in nature;[46] and
(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.[47] [48]

44 In *Muscutt, supra* note 5 at 607, Sharpe J.A. referring to *McNichol Estate v. Woldnik* (2001), 13 C.P.C. (5th) 61 (C.A.), leave to appeal refused (2002), 2002 CarswellOnt 1972 (S.C.C), stated that the involvement of other parties to the suit bears upon the "real and substantial connection" test and, accordingly:

> The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.

45 In *Muscutt, supra* note 5 Justice Sharpe at 608 also commented as follows:

> In considering whether to assume jurisdiction against an extra-provincial defendant, the court must consider whether it would recognize and enforce an extra-provincial judgment against a domestic defendant rendered on the same jurisdictional basis, whether pursuant to common law principles or any applicable legislation. Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them. This principle is fundamental to the approach in *Morguard* and *Hunt* and may be seen as a self-imposed constraint inherent in the real and substantial connection test. It follows that where a court would not be willing to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, the court cannot assume jurisdiction, because the real and substantial connection test has not been met.

46 *Sinclair, supra* note 6 at para. 22:

> Since this is an international case rather than an interprovincial case, assumed jurisdiction is more difficult to justify. Further, as discussed below, considerations of comity and respect for generally accepted principles of private international law do not favour the assumption of jurisdiction in the present case.

Gajraj, supra note 6 at para. 23:

> This is an international case. In my view, foreign motor vehicle accidents should be distinguished from accidents that occur in one Canadian province and result in consequential damage in another province. For the reasons given in *Muscutt*, it seems to me entirely appropriate for the Canadian legal system to provide motor vehicle accident victims ready access to the courts of their home province. However, the problems created by foreign accidents are more complex, since the issue cannot be governed entirely by Canadian jurisdictional standards. Consideration must be given to the norms that prevail elsewhere ...

47 In *Muscutt, supra* note 5, Sharpe, J.A. notes at 610:

> In Morguard at p. 1096, La Forest J. adopted the following formulation of comity expressed in Hilton v. Guyot, 159 U.S. 113 at 163-64 (1895):
>
> > T]he recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .
>
> One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere. In

Justice Sharpe also identified three avenues to establish jurisdiction *simpliciter*:

> There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.
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> . . .

interprovincial cases, this consideration is unnecessary, since the same standard necessarily applies to assumed jurisdiction, recognition and enforcement within Canada. However, in international cases, it may be helpful to consider international standards, particularly the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated.

48 The *Muscutt* "real and substantial connection" test has been applied by the Supreme Court of Canada in *Castillo v. Castillo*, [2005] 3 S.C.R. 870, per Bastarache J. at para. 45.It has also been followed by other provincial court jurisdictions:
British Columbia: *College of Physicians & Surgeons (British Columbia) v. Meagher*, 2005 BCSC 1844 (S.C. [In Chambers]) at para. 26; *Burke v. NYP Holdings Inc.* (2005), 48 B.C.L.R. (4th) 363 (S.C. [In Chambers]) at para. 30;
Alberta: *Prairieview Seed Potatoes Ltd. v. Canadian Food Inspection Agency*, 2005 ABQB 865 (Q.B.) at para. 23; *Phillips v. Phillips* (2005), 19 E.T.R. (3d) 103 (Alta. Q.B.), affirmed (2006), 2006 CarswellAlta 46 (C.A.), leave to appeal refused (2006), 2006 CarswellAlta 803 (S.C.C.), at para. 34; *Royal & SunAlliance Insurance Co. of Canada v. Wainoco Oil & Gas Co.* (2004), 364 A.R. 151 (Q.B.), affirmed (2005), 2005 CarswellAlta 813 (C.A.) at para. 39; *Nova Chemicals Corp. v. ACE INA Insurance*, [2004] I.L.R. I-4315 (Alta. Q.B.) at para. 16;
Manitoba: *Whirlpool Canada Co. v. National Union Fire Insurance Co. of Pittsburgh, PA* (2005), 198 Man. R. (2d) 18 (Q.B.) at paras. 21-40;
New Brunswick: *Coutu v. Gauthier (Succession de)* (2004) 284 N.B.R. (2d) 1 (Q.B.), affirmed (2006), 27 M.V.R. (5th) 16 (N.B. C.A.) at para. 31 (Q.B.), at para. 5 (C.A.); *Bulmer Aircraft Services Ltd. v. Bulmer* (2005), 2005 CarswellNB 627 (Q.B.) at para. 14; *MacCallum v. Raspotnik* (2004), 7 C.P.C. (6th) 388 (N.B. Q.B.) at para. 32; *Wilson v. Farrar* (2004), 276 N.B.R. (2d) 281 (N.B. Q.B.) at para. 4;
Nova Scotia: *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297 (S.C.) at para. 84;
Prince Edward Island: *HZPC Americas Corp. v. True North Seed Potato Co.* (2006), 22 C.P.C. (6th) 300 (P.E.I. C.A.) at para. 31;
Newfoundland and Labrador: *Sobeys Land Holdings Ltd. v. Harvey & Co.* (2006), 2006 CarswellNfld 121 (T.D.) at para. 40; *GRI Simulations Inc. v. Oceaneering International Inc.* (2005), 250 Nfld. & P.E.I.R. 204 (T.D) at para. 36. *Muscutt, supra* note 5 at 586.

> . . . Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.[49]

Attornment constitutes consent to the receiving jurisdiction by a positive act. In most Canadian provinces, a defendant delivering a notice of intent to defend or statement of defence triggers this.[50] [51]Consent-based jurisdiction will also be found where the parties have contractually agreed to have any disputes adjudicated in a specific forum through an enforceable forum-selection or arbitration clause.[52] The "real and substantial connection" test must always be contextualized in light of the prevailing customary international law [53] principles

49 *Ibid.* at 586.

50 See Justice Cumming's decision in *ABB Power Generation Inc. v. CSX Transportation* (1996), 1996 CarswellOnt 1122, [1996] O.J. No. 952 (Gen. Div.) at para. 31, and *Charmasson v. Charmasson* (1982), 34 O.R. (2d) 498 (C.A.); *Ngo v. Go*, 2006 BCSC 71, [2006] B.C.J. No. 114, (2006) 146 A.C.W.S. (3d) 457 (S.C.) [In Chambers]) (The defendants could not dispute the Court's jurisdiction because of prior foreign litigation as they attorned to it when they filed a statement of defence that did not merely contest the Court's jurisdiction but addressed the merits).

51 As noted by Sharpe J.A. in *Muscutt, supra* note 5 at 596, a foreign party defendant, who has no presence in Ontario and has neither consented nor attorned to the Ontario jurisdiction, may challenge service *ex juris* and "assume jurisdiction" in three ways:
> First, Rule 17.06(1) allows a party who has been served outside Ontario to move for an order setting aside the service or staying the proceeding. Second, s. 106 of the *Courts of Justice Act* provides for a stay of proceedings, and it is well established that a defendant may move for a stay on the ground that the court lacks jurisdiction. Third, Rule 21.01(3)(*a*) allows a defendant to move to have the action stayed or dismissed on the ground that "the court has no jurisdiction over the subject matter of the action." Together, this procedural scheme adequately allows for jurisdictional challenges to ensure that the interpretation and application of Rule 17.02(*h*) [damages sustained in Ontario] will comply with the constitutional standards prescribed by *Morguard* and *Hunt*.

See also, Ontario *Rules of Civil Procedure*, Rule 17.02 (m) which reads:
Judgment of Court Outside Ontario
17.02(m) "on a judgment of a court outside Ontario"

52 See Pribetic, "Strangers in a Strange Land", *supra* note 7. See also, B. Barin, A. Little and R. Pepper, *The Osler Guide to Commercial Arbitration in Canada: A Practical Introduction to Domestic and International Commercial Arbitration*, 1st ed. (The Hague: Kluwer Law International, 2006) at 33-45 and Barry Leon, "A Canadian Perspective: Choice of Law and Choice of Forum" (Autumn 2005) vol. 18, no. 2 *International Law Practicum*.

53 In the United States, Customary International Law is traditionally defined as the "general and consistent practice of states followed by them from a sense of legal obligation." See, Restatement (Third) of the Foreign Relations Law of the United States s.102(2) (1987); see also *Statute of the International Court of Justice*, June 26, 1945, art. 38, 59 Stat. 1055, 1060, online: <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> which reads:
Article 38

of uniformity, harmonization of international rules, comity and reciprocity.[54] Justice LeBel made the following cogent remarks on the issue of reciprocity:

> [T]he concept of reciprocity in the sense of equivalence of jurisdiction serve the purposes of private international law well. This idea fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. When a Canadian court takes jurisdiction over a foreign defendant, it need not inquire into the fairness of its own process, which can be taken for granted. Potential hardship to the defendant can be dealt with under *forum non conveniens*. The ultimate practical effect of the court's judgment will not be determined by its own decision to take jurisdiction, but by the decision of the courts in the defendant's home jurisdiction whether or not to recognize and enforce the Canadian judgment based on that jurisdiction's own domestic law and policy.[55]

By contrast, the ULCC's *Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA)*[56] eschews the concept of service-based jurisdiction and, conversely, implements uniform statutory rules by which courts establish jurisdiction over particular proceedings. The *UCJPTA* implements a uniform set of standards for determining the jurisdiction of Canadian courts in a matter and provide a mechanism for the court to transfer litigation to a more appropriate forum, including courts outside the applicable province, if the receiving court accepts the transfer. According to the ULCC Introductory Comments, the *UCJPTA* has four main purposes:

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. *international custom, as evidence of a general practice accepted as law;*
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. [emphasis added].

54 See Theodor Schilling, "On the Constitutionalization of General International Law", online: (June 2005) The Jean Monnet Program <http://www.nyulawglobal.org/workingpapers/documents/GLWP0505Schilling.pdf> [working paper]. For a critique of customary international law, see Edward T. Swaine, "Rational Custom", online: (2003) 52 Duke L. J. 559 <http://www.law.duke.edu/journals/dlj/articles/dlj52p559.htm#H1N2> [Swaine].

55 *Beals, supra* note 1 at 501-02, per LeBel J. (dissenting).

56 *Uniform Court Jurisdiction and Proceedings Transfer Act* [*UCJPTA*] online: (December 4, 2006) <http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf > .

> (1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
>
> (2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;
>
> (3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform Enforcement of Canadian Judgments Act; and
>
> (4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.[57]

The concept of "jurisdiction *simpliciter*" is subsumed under the term "territorial competence" which is established in a proceeding brought against a person on five grounds, namely:

> **Proceedings in personam**
>
> **3** A court has territorial competence in a proceeding that is brought against a person only if:
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.[58]

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57 *Ibid.*, Introductory comments 0.2.

58 *Ibid.*, s.3.

Sub-sections 3(a) to 3(c) reflect consent-based jurisdiction. Sub-section 3(d) relates to presence-based jurisdiction.[59] Sub-section 3(e) incorporates the "real and substantial connection" test and replaces existing rules relating to service *ex juris*. The *UCJPTA* distinguishes the concepts of "subject matter competence" and "territorial competence." "Subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence, but is otherwise undefined. Hence, any rules limiting a court's jurisdiction by reference to the amount or subject matter of the claim or any other non-territorial factors are unaffected.[60] Conversely, "territorial competence" is "to be determined solely by reference to this Part,"[61] thereby abrogating the common law jurisdiction rules that the *UCJPTA* replaces.[62] "Territorial competence" means the aspects of a court's jurisdiction that depend on a connection between:

> (a) the territory or legal system of the state in which the court is established; and
>
> (b) a party to a proceeding in the court or the facts on which the proceeding is based.[63]

A "proceeding" is defined as "an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion," the latter of which would include interlocutory injunctive proceedings in the form of "Anton Piller" and "Mareva" injunctions.[64] The list of non-exclusive factors for presumed "real and substantial connection" reflects the existing grounds for service *ex juris* in the rules of court of most provinces, with a few exceptions.[65] Sub-section 10(e) provides that a "real and substantial connection" is presumed to exist if the proceeding:

59 The factors for establishing ordinary residency for corporations in the enacting province or territory include the following: having a registered address where service of process may be served generally; having a nominated agent to accept service on behalf of the corporation; having a place of business; or exercise of central management. Factors to establish ordinary residence for a partnership in the enacting province or territory include the following: having a registered office or business address; having a place of business; or exercising central management. Ordinary residency for unincorporated associations is found where an officer of the association is ordinarily resident in, or the association is located in, the enacting province or territory for the purpose of conducting its activities. *Ibid.*, ss.7, 8, and 9.

60 *Ibid.*, Comments to section 2-2.4.

61 *Ibid.*, s.2(2).

62 *Ibid.*, Comments to section 2-2.2.

63 *Ibid.*, Part I-Interpretation-Definitions.

64 *Ibid.*, Part I-Interpretation-Definitions; Comments to section 1-2.

65 E.g., *Courts of Justice Act*, R.S.O. 1990, c.C.43, *Rules of Civil Procedure*, R.R.O. 1990. Reg. 194 (as am.) Rule 17.02(a)-(r).

10. (e) concerns contractual obligations, and:

> (i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory];
> (ii) by its express terms, the contract is governed by the law of [enacting province or territory]; or
> (iii) the contract:
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession; and
> (B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller.[66]

Sub-section 10(e)(i) emphasizes the place of performance (the "*lex solutionis*") over the place of contracting (the "*locus contractus*"), while sub-paragraph 10(e)(ii) stipulates choice of law as a prominent factor.[67] Sub-section 10(f) further includes restitutionary claims. Section 11 is a codification of the *forum non conveniens* doctrine and the language used reflects the Supreme Court of Canada's decision in *Amchem*.[68]

Finally, in Part III, the superior court of the enacting province or territory is authorized to not merely decline jurisdiction, but also to transfer or receive proceedings on the basis of a requested transfer from a court in another jurisdiction. The intended benefit is to avoid having the plaintiff recommence the action in the more appropriate forum/cooperating jurisdiction and vitiates limitation period concerns. The *UCJPTA* gives procedural guidelines on the steps to be followed to complete such a transfer and authorizes establishment of Rules of Court to govern these issues.[69]

66 *UCJPTA*, *Supra* note 56, s.10(e).

67 *Black's Law Dictionary*, 1990, 6th ed., 911. See also, Antonin I. Pribetic, "'Bringing Locus into Focus': A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims" in Pace Int'l L. Rev. (9ed.) *Pace Review of the Convention on Contracts for the International Sale of Goods (2004-2005)*, (München: Sellier European Law Publishers, 2006), at 179-223 [Pribetic, "Bringing Locus into Focus"]. *Quaere* the critical importance of exclusive choice of forum clauses in this context, see discussion in Part III-Multilateralism- Hague Choice of Court Convention, *infra*.

68 *Amchem*, *supra* note 38.

69 The *UCJPTA* has been recently proclaimed in B.C. and Saskatchewan: *See, Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, in force May 4, 2006; B.C. Reg. 117/2006; *The Court Jurisdiction and Proceedings Transfer Act*, c.C-41.1 of the *Statutes of Saskatchewan, 1997* (effective March 1, 2004); Compare *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2 (not proclaimed in force).

2. Additional Requirements

(a) Finality and certainty

A foreign judgment must be final and conclusive in the originating jurisdiction in order to be considered enforceable by Canadian courts.[70] Finality is established on two factors: (1) that the litigant has exhausted all avenues of appeal, and (2) that the foreign court judgment has no further power to rescind or vary its own decision. In other words, the foreign judgment is *res judicata* in the foreign court.[71] With respect to the first factor, if a foreign judgment is under appeal in the originating jurisdiction, a Canadian court will not refuse to enforce that foreign judgment; rather, it will often stay its decision on enforceability, pending the decision of the foreign appellate court.[72] Traditionally, the final judgment also had to be for a certain or definite sum of money, easily ascertainable or calculable (*e.g.*, in the form of liquidated damages).[73] [74]

In *Buth-na-bodhiaga Inc. (c.o.b. Body Shop) v. Lambert*,[75] the plaintiff failed in its effort to petition the defendant debtor into bankruptcy relying upon section 43(1)(a) and (b) of the *Bankruptcy and Insolvency Act*.[76][77] The petitioning creditor obtained consent judgments under the U.S. bankruptcy (Chapter 11) legislation[77] and further obtained assignments by Citibank resulting in default judgments against the Lamberts as personal guarantors of the security.[78] The Court of Appeal dismissed the appeal and affirmed the decision of Justice Cameron who had dismissed the petition on the grounds that the "Body Shop's retention of the assets and asserting the full amount of the indebtedness of the

70 *Four Embarcadero Centre Venturee v. Kalen* (1988), 65 O.R. (2d) 551 (H.C.), 563.

71 Walker, *supra* note 12, s.14.6.

72 See generally, Peter R. Barnett, "Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law" (2001).

73 Walker, *supra* note 12, s.14.6.

74 See also, *Society of Lloyd's v. Saunders* (2001), (sub nom. *Society of Lloyd's v. Meinzer*) 55 O.R. (3d) 688 (C.A.), leave to appeal refused (2002), 2002 CarswellOnt 1893 (S.C.C.), and *United States v. Levy* (2002) 1 C.P.C. (6th) 386 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 125, [2003] O.J. No. 56 (C.A.) per C. Campbell, J., at para. 17 (S.C.J.), per Carthy, Laskin and Feldman JJ.A. (C.A.); where Justice Campbell notes:

> The principle of disgorgement judgments based on U.S. agency proceedings has been recognised in Canada in several decisions and is not seriously contested by the Defendants on this motion. See United States (Securities & Exchange Commission v. Cosby, [2000] B.C.J. No. 626; United States (Securities & Exchange Commission) v. Shull, [1999] B.C.J. No. 1823; United States (Securities & Exchange Commission) v. Benlolo et al., (Ontario Court File No. 00-CV-191266).

75 *Buth-na-bodhiaga Inc. (c.o.b. Body Shop) v. Lambert*, (2002) 60 O.R.3d 787 (Ont. C.A.) [*Buth-na-bodhiaga*].

76 *Bankruptcy and Insolvency Act* R.S.C., c.C-3 (1992).

77 11 U.S.C. s.101 (2003).

78 *Buth-na-bodhiaga*, *supra* note 75 at para. 30.

Franchisees without accounting for the value of the retained assets . . . constitutes sufficient cause to dismiss the Petition."[79] [80]

In *Pro Swing v. Elta Golf*,[81] Pro Swing Inc. ("Pro Swing"), an Ohio corporation which sells a line of golf clubs and golf club heads under the trademark "Trident," filed a complaint in the United States District Court of the Northern District of Ohio Eastern Division (the "U.S. District Court") for trademark infringement and dilution, use of a counterfeit mark, unfair competition and deceptive trade practices against, a number of manufacturers, including Elta Golf Inc. ("Elta Golf") an Ontario-based defendant company. In July 1998, the parties executed a settlement agreement. On July 28, 1998, the U.S. District Court judge endorsed a consent decree that was also signed by the parties. The consent decree acknowledged that Pro Swing was the owner of a certain golf club trademark and enjoined Elta Golf from purchasing, marketing, selling or using golf clubs or golf club components bearing the mark or other confusingly similar variations. Elta Golf was ordered to surrender and deliver infringing materials to Pro Swing's counsel. The order stated that the Court would retain jurisdiction over the parties for the purposes of enforcement, and the parties agreed not to contest the jurisdiction of the U.S. District Court in any action to enforce the settlement.

In December 2002, Pro Swing determined that Elta Golf violated the decree and it launched a civil contempt proceeding to enforce the consent decree and also sought compensatory damages. Elta Golf was served but did not respond. By order dated February 25, 2003 (the "February order") the U.S. District Court found Elta Golf to be in contempt, further enjoining Elta Golf and ordering it to provide an accounting to Pro Swing. The U.S. District Court awarded Pro Swing compensatory damages based on profits earned by Elta Golf to be assessed based upon a later filing of Pro Swing's proposed damage award to the U.S. District Court, and following Elta Golf's compliance with the court ordered accounting. Elta Golf was further required to deliver up offending materials, provide names and addresses of suppliers and purchasers to Pro Swing, and recall all counterfeit and infringing golf clubs or golf club components. The U.S. District Court held that it retained jurisdiction to enforce the consent decree and the order, and awarded costs. Pro Swing then commenced proceedings in Ontario requesting judgment on the consent decree and the February order, and brought a motion for summary judgment. Elta Golf de-

79 *Ibid.* at paras. 41-42.

80 See also, *Disney Enterprises Inc. v. Click Enterprises Inc.* (2006), 2006 CarswellOnt 2045, [2006] O.J. No. 1308 (S.C.J.) per Lax J., (April 5, 2006-unreported), where the Court granted an application to recognize and enforce a U.S. District Court judgment for the Southern District of New York awarding damages against the respondents, Ontario residents, for copyright infringement and unfair competition on the basis that the respondents had had a "real and substantial connection" to New York and the applicants had satisfied the test.

81 *Pro Swing v. Elta Golf*, *supra* note 9.

fended on the grounds that the U.S. orders were incapable of recognition and enforcement on the grounds of lack of finality or certainty for a fixed sum of money. Additionally, Elta Golf argued that a contempt order was quasi-criminal in nature and, therefore, the February 2003 order was incapable of enforcement. Pepall J. granted Pro Swing summary judgment, the effect of which was to make a consent decree and part of a contempt order issued by the U.S. District Court valid and enforceable in Ontario. The motions judge reviewed the leading jurisprudence, including *Morguard, Hunt* and *Beals* and felt persuaded that the requirement for a fixed sum might be relaxed depending upon the circumstances of the case.[82] [83]

The Court of Appeal reversed and allowed Elta Golf's appeal, finding that the foreign judgment was ambiguous on important matters. While expressing some sympathy with the motions judge's views on the finality requirement, the Court of Appeal held that the certainty requirement was not met:

> [9] *We are inclined to agree that the time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments.* Indeed, such re-examination would accord with the principles expressed by the Supreme Court of Canada in *Morguard*. . .
>
> [10] That said, in the circumstances of this case, we are of the view that the motions judge erred in declaring the U.S. District Court orders to be enforceable. *However the rule is relaxed, it seems clear that a foreign judgment would have to be sufficiently certain in its terms that the Ontario courts could enforce the judgment without having to interpret its terms or vary it:* see Uniforêt Pâté Port-Cartier Inc. v. Zerotech Technologies Inc., [1998] B.C.J. No. 192, 50 B.C.L.R. (3d) 359 (S.C.). [emphasis added][84]

On December 15, 2005, the Supreme Court of Canada heard Pro Swing's appeal and reserved with Elta Golf *in absentia*.[85] [86] [87] On November 17, 2006,

82 *Pro Swing Inc. v. ELTA Golf Inc.* (2003), 68 O.R. (3d) 443 at 446-449 (S.C.J.), reversed (2004), 2004 CarswellOnt 2685 (C.A.), leave to appeal allowed (2005), 2005 CarswellOnt 1013 (S.C.C.) per Pepall, J. [cited to O.R.].

83 *Ibid.* at 450.

84 *Pro Swing v. Elta Golf, supra* note 9 at 570.

85 The Supreme Court of Canada granted leave on March 17, 2005 (without reasons). S.C.C. Bulletin, 2005, at 400.

86 Surprisingly, Elta Golf's counsel eventually removed itself as counsel of record such that no responding materials were filed. See Janet A. Allinson, "Of Foreign Non-Monetary Judgments and Contempt Orders; Will They Be Recognized in Canada? An Update on *Pro Swing Inc. v. Elta Golf Inc.*" (2nd Annual Emerging Issues in Cross-Border Commercial Litigation Seminar) Hamilton Law Association, (5 May 2006). Ms. Allinson was co-

the Supreme Court of Canada released its long awaited decision. The key issue in the appeal was whether foreign non-monetary judgments can be recognized and enforced based upon the principles set out in *Morguard* as expanded in *Beals*. As a corollary, the Court also discussed whether additional considerations were needed when expanding judicial assistance to foreign courts and litigants in this manner.

The Supreme Court of Canada held, by a narrow four to three margin, that the foreign (Ohio) court's consent decree and contempt order was unenforceable in Ontario. Deschamps J., writing for the majority,[88] agreed with the dissenting opinion of Chief Justice McLachlin[89] that the traditional common law rule restricting the recognition and enforcement of foreign orders to final money judgments should be revised.[90] However, Madam Justice Deschamps suggested that such a change "must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system."[91] The majority declined to clarify the scope or expand the existing defences of fraud, natural justice or public policy, or the finality requirement.[92] Deschamps J. expounded on the interplay between equitable orders and the underlying principles of comity, order and fairness as follows:

> 30. In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. *Forum non conveniens* and letters rogatory are mechanisms that, like the enforcement of foreign judgments, rely on comity. For these mechanisms, as for the enforcement of equitable orders, the balancing exercise of comity requires a careful review of the relief ordered by the foreign court. This review ensures that the Canadian court does not extend judicial

counsel for Pro Swing throughout the proceedings, including at the Supreme Court of Canada.

87 *Ibid.* at 6. Elta Golf's appeal documents and factum filed in the Ontario Court of Appeal were not permitted to be included in the Appellant's Record. See Rule 38 of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

88 *Pro Swing v. Elta Golf, supra* note 9, per Deschamps J. (LeBel, Fish and Abella JJ. concurring).

89 *Ibid.*, per MacLachlin C.J. dissenting (Bastarache and Charron JJ. concurring) at para. 87.

90 *Ibid.* at para. 64, Deschamps J. for the majority concludes as follows:

> 64. Private international law is developing in response to modern realities. The real and substantial connection test and the enforcement of equitable relief granted in foreign countries are but two examples of its evolution. The Internet puts additional pressure on the courts to reach out to the same extent as the Web. At the same time, courts must be cautious to preserve their nation's values and protect its people. *The time is ripe to change the common law rule against the enforcement of foreign non-monetary judgments, but, owing to problems with the orders the appellant seeks to have enforced, the Court cannot accede to its request.*[emphasis added]

91 *Ibid.* at para. 15, per Deschamps J.

92 *Ibid.* at para. 29, per Deschamps J.

> assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation. It could be tempting to use form over substance as the distinctive criterion. However, the distinction between form and substance can sometimes be elusive or even misleading. In considering the order it is asked to enforce, the domestic court should instead scrutinize the impact of the order. *Relevant considerations may thus include the criteria that guide Canadian courts in crafting domestic orders, such as: Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? Is the order limited in its scope and did the originating court retain the power to issue further orders? Is the enforcement the least burdensome remedy for the Canadian justice system? Is the Canadian litigant exposed to unforeseen obligations? Are any third parties affected by the order? Will the use of judicial resources be consistent with what would be allowed for domestic litigants?*
>
> 31 . . . . *For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.* [93] [emphasis added]

The majority concluded that the consent decree and the contempt order were problematic and thus unenforceable, for the following reasons: (i) the contempt order was quasi-criminal in nature and thus violated the rule against enforcing foreign penal law;[94] [95] (ii) the wording of the consent decree was

93 *Ibid.* at paras. 30-31, per Deschamps J. *Cf.* McLachlin C.J.'s dissent at paras. 66, 78-79.

94 Madam Justice Deschamps employed a comparative analysis to distinguish the Canadian and American approaches to contempt orders. Specifically, Deschamps J. noted that since the contempt order was in her estimation quasi-criminal or penal in nature, a Canadian court will not enforce such an order either directly or indirectly. While the United States distinguishes between civil and criminal contempt orders, in Canada, a contempt order is primarily a negative declaration that a party has acted in defiance of a court order, thereby attracting criminal sanctions including imprisonment, which raises concomitant criminal law protections involving the "public law" aspect of a contempt declaration and the "opprobrium attached to it [which] eclipse the impact of a simple restitutionary award." *Ibid.* at paras. 34-36, 49-51 and 62 per Deschamps J. *Cf.* McLachlin C.J., at paras. 105-109.

95 For a more comprehensive analysis of the foreign public law exception not discussed here, see Walker, *supra* note 12, s.14.7: "Canadian courts will not entertain an action for the enforcement, either directly or indirectly, of a foreign penal, revenue, or other public law, nor they will not enforce a foreign judgment ordering the payment of taxes or penalties or one that gives effect to the sovereign will of a foreign power." See also, James J. Fawcett, Jonathan M. Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (New York: Oxford University Press Inc., 2005) Chap. 11 "The Recognition and Enforcement of Foreign Judgments" ss.11.33 [Fawcett/Harris/Bridge].

unclear vis-à-vis the intended territorial scope of the injunctive relief sought; [96] (iii) there were alternative judicial assistance mechanisms (particularly letters rogatory) which were more appropriate methods in lending judicial assistance to the Ohio proceedings; [97] [98] and (iv) the public policy concerns over portions of the contempt order requiring disclosure of personal information that *prima facie* may be exempt from such disclosure based upon quasi-constitutional protections.[99]

McLachlin C.J. in dissent, disagreed that the contempt order was penal in nature and held that the civil contempt order should be enforceable. In the learned chief justice's view, Elta Golf conceded that the general requirements for enforcement were met. The consent decree and the portions of the contempt order the motions judge held to be enforceable in Ontario were final, complete, clear, unambiguous and required no further elaboration. The hypothetical possibility of the need for future court supervision should not have precluded the recognition of a foreign order. Accordingly, if the offending parts of the contempt order could not be enforced for public policy reasons, they were, nevertheless, severable.[100] Ambiguity aside, the traditional barriers to recognition and enforcement of foreign non-monetary judgments appear to be crumbling.[101] Recent developments in other commonwealth jurisdictions,[102] cross-border class action litigation[103] and cross-border injunctions[104] illustrate the modern trend towards functional reciprocity in the commercial context.[105]

96 *Pro Swing v. Elta Golf, supra* note 9 at para. 25, per Deschamps J.

97 *Ibid.* at paras. 42-44, 45-47, per Deschamps J.

98 *Ibid.* at paras. 25, 56-57 and 62, per Deschamps J. See also, *Society of Composers, Authors and Music Publishers of Canada v. Canadaian Association of Internet Providers,* [2004] 2 S.C.R. 427 (S.C.C.). and Elizabeth F. Judge, "Cybertorts in Canada: Trends and Themes in Cyber-Libel and Other Online Torts" in The Honourable Mr. Justice Todd L. Archibald & The Honourable Mr. Justice Randall Echlin, eds. *The Annual Review of Civil Litigation, 2005* (Toronto: Thomson/Carswell, 2006) at 149-188.

99 *Pro Swing v. Elta Golf, supra* note 9 at paras. 59-60, per Deschamps J.

100 *Ibid.* at paras. 120-121, per McLachlin C.J.

101 See *Grace Canada Inc. (Re)* [2006] O.J. No. 3643 (Ont. S.C.J. –CL) where Morawetz J. allowed the Manitoba plaintiff class representative's motion for recognition of a Manitoba court order declaring no conflict of interest in her counsel acting in the Ontario *CCAA* proceedings. Notwithstanding that the Manitoba order was non-monetary and interlocutory, it was appropriate for the Ontario court to recognize it because the Manitoba order was clear and certain and its recognition presented little risk of prejudice to the defendant.

102 See Justice C.R. Einstein and Alexander Phipps, "Trends in international commercial litigation Part II – The Future of Foreign Judgement Enforcement Law" (2005) *Praxis des internationalen Privat- und Verfahrensrechts (IPRax)* Heft 4, at 365-374.

103 See discussion in *Currie v. MacDonald's, infra* note 172.

104 See Jeffrey Berryman, "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005) 30 Advocates' Quarterly 413-438; *Molson Coors Brewing Company v. Miller Brewing Company,* 2006 CanLII 35628 (Ont. S.C.J.); *Cf. United States of America v. Yemec* (2003) 67 O.R. (3d) 394, (2003) 233 D.L.R. (4th) 169, [2003] O.T.C. 877, (2003) 125 A.C.W.S. (3d) 1060 (Ont. S.C.J.), affirmed (2005) 75 O.R. (3d) 52, (2005) 196

3. State Immunity Exception

State immunity is an exception to foreign judgment recognition and enforcement. The Canadian judicial approach has not developed beyond the traditional view of restrictive immunity towards universalism or the *jus cogens* doctrine.[106] Canada's *State Immunity Act*,[107] provides that a foreign state cannot

O.A.C. 163, (2005) 12 C.P.C. (6th) 318, (2005) 131 C.R.R. (2d) 312, (2005) 138 A.C.W.S. (3d) 156, 2005 CarswellOnt 1164 (Ont. Div. Ct.) per Carnwath, Jarvis and Swinton J.J. See also *Khan Resources Inc. v. WM Mining Co.* (2006) 79 O.R. (3d) 411 (C.A.) per, Borins, Feldman and Armstrong JJ.A., where the Ontario Court of Appeal dismissed an appeal by the Ontario plaintiff corporation from dismissal of its application for a declaration that assignments of mining interests made to the defendants in Mongolia were null and void. The Court of Appeal held that unchallenged expert evidence established that Mongolia would not enforce an Ontario order for a declaration or an injunction. Accordingly, as the relief sought related directly to enforcing rights with respect to foreign land, and was declaratory and injunctive in nature, the relief would likely not be enforceable in the jurisdiction where it needed to take effect. *Cf.* Annette Kur (Max Planck Institute for Intellectual Property, Competition and Tax Law), "A Farewell to Cross-Border Injunctions? The ECJ Decisions *GAT v. LuK and Roche Nederland v. Primus and Goldenberg*" (2006) International Review of Intellectual Property and Competition Law (IIC 2006, 37(7), 844-855.

105 Swaine, *supra* note 54 at 587-588 criticizes the concept of functional reciprocity in the context of foreign sovereign immunity, noting:

> Those applying traditional versions of custom, for example, have assumed that functional reciprocity is the foundation for according diplomatic immunity, just as do Professors Goldsmith and Posner. The latter's claim to better explain violations of custom, too, seems exaggerated. Such violations may be "inexplicable" within the terms of the immunity rule itself (though in other cases, elaborate explications are found equally unsatisfactory), but it would surprise no one to learn that rogue states (being, well, *roguish*) are more likely to breach immunity norms, or that customary rules of this kind may collapse when stakes are high. [citations omitted]

106 Justice Goudge, in *Bouzari v. Republic of Iran* (2004) 71 O.R. (3d) 675 at 690, (2004) 243 D.L.R. (4th) 406, (2004) 122 C.R.R. (2d) 26, (2004) 132 A.C.W.S. (3d) 275 (C.A.) [*Bouzari v. Iran* cited to O.R.] notes:

> . . . [W]here Canada's obligations arise as a matter of customary international law. . .customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so where the obligation is a peremptory norm of customary international law, or jus cogens. For a helpful discussion of these and related issues see Jutta Brunnée and Stephen J. Toope: "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3.

107 *State Immunity Act*, 1985 R.S.C., S.18. See also, *Smith v. Chin* [2006] O.J. No. 4091, (2006) 152 A.C.W.S. (3d) 149 (Ont. S.C.J.), per Cumming J. (summary judgment motion, based upon state immunity, brought by defendants, Allen (Honorary Consul/ Director for the Toronto-based Consulate of St. Kitts) and The Federation Of St. Kitts And Nevis, for dismissal of claims against them for fraud and negligent misrepresentation was dismissed. By delivering a statement of defence, the defendants had taken a step within the meaning of s. 4(2)(c) of the *States Immunity Act*. Alternatively, neither was immune as the proceedings related to a "commercial activity" under s. 5 of the *State Immunity Act*).

be subject to the jurisdiction of Canadian courts except for specific circumstances: where the damage occurred as part of the commercial activity of the state (section 5), or where the foreign state is responsible for death or personal injury that occurred in Canada or damage of loss of property that occurred in Canada (section 6). These exceptions reflect existing customary international law and the draft *United Nations (U.N.) Convention on Jurisdictional Immunities of States and Their Property*.[108]

In *Bouzari v. Iran*,[109] an Iranian émigré and recent Canadian citizen commenced an action in Ontario against Iran for torture which he suffered while imprisoned in an Iranian jail as a result of a failed business deal with an Iranian government-affiliate. Iran did not attorn before the Ontario court. The Government of Canada intervened to make submissions on the impugned constitutionality of the *State Immunity Act*. The trial court dismissed Bouzari's claim in May 2002, finding that the *State Immunity Act* was constitutional and that there was no international law exception to state immunity for torture. Mr. Bouzari appealed this decision to the Court of Appeal. On June 30, 2004, the Court of Appeal of Ontario rejected Bouzari's appeal, agreeing with the lower court that there was no exception to state immunity for torture. The Court of Appeal also declined jurisdiction on the grounds that Ontario was not the proper forum to hear Bouzari's claim. The Court of Appeal of Ontario opined that "Canada's treaty obligation pursuant to Article 14[110] does not extend to providing the right to civil remedy against a foreign state for torture committed abroad," a view disputed by some commentators.[111] The commercial context, which prompted the torture, was insufficient to bring the lawsuit within the "commercial activities" exception to state immunity.

108 United Nations (U.N.) Convention on Jurisdictional Immunities of States and Their Property, Resolution A/RES/59/38 adopted by the United Nations General Assembly, Fifty-ninth session (December 2, 2004). For a detailed analysis, see David Stewart, "Current Developments, The UN Convention on Jurisdictional Immunities of States and Their Property" (January 2005) American Journal of International Law (AJIL), 194.

109 *Bouzari v. Iran*, *supra* note 106.

110 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 in force in Canada as at June 26, 1987. *Cf. Zhang v. Jiang* (2006), 2006 CarswellOnt 4381, [2006] O.J. No. 2909 (Master) (The plaintiffs, Ontario residents and Falun Gong practitioners, commenced an action in Ontario alleging torture, persecution and terroristic acts suffered at the hands of five Chinese government officials. The plaintiffs alleged that the Chinese defendants acted in a personal capacity and therefore did not enjoy state immunity protection. The Court granted the plaintiffs' *ex parte* motion for an order to dispense with service of the statement of claim under the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* signed at the Hague on November 15, 1965).

111 See F. Larocque, "*Bouzari v. Iran*: Testing the Limits of State Immunity in Canadian Courts" (2003) 41 Can. Y Int'l L. 341.

In contrast, in *Crown Resources Corp. S.A. v. National Iranian Drilling Co.*,[112] the assignees in bankruptcy of a Canadian corporation commenced actions in Ontario relating to a contractual dispute for oil drilling and related services with a state-owned Iranian company. The actions arose from three contracts, executed in 1990, 1996 and 1998. The 1990 contract contained a clause specifying the Republic of Iran as the choice of forum and Iranian law as the choice of law. In contrast, the 1998 contract forum selection clause specified Ontario as the chosen forum and Ontario law as the governing law. The 1996 contract was silent on either choice of forum or choice of law. The plaintiffs were initially successful in resisting a motion for stay of proceedings on various grounds, including jurisdiction *simpliciter*, *forum non conveniens* and the state immunity exception. The motions judge concluded that state immunity did not apply because of the commercial nature of the dispute. Moreover, Ontario was the appropriate forum for the case to be heard, despite the fact that much of the dispute concerned activities in Iran, given that the plaintiff would not be able to obtain a fair trial in Iran. However, the lower court's decision was varied on appeal, with the Ontario Court of Appeal concluding that: (1) the motions judge failed to correctly apply the factors set forth in the "strong cause" test for forum selection clauses [113] all of which supported the Republic of Iran as the proper forum and Iranian law as the choice of law in the 1990 contract, including any concurrent tort claims; (2) the motions judge was correct in concluding that the second action involving the 1998 contract was within the Ontario court's jurisdiction pursuant to the parties' choice of forum (Ontario) and choice of law (Ontario law) clauses; and (3) the lower court improperly assumed jurisdiction over the second action relating to the 1996 contract, based upon the plaintiffs' failure to meet the test for jurisdiction *simpliciter*.[114]

There are a number of difficulties with the *Crown Resources* decision. Firstly, the Ontario Court of Appeal appears to have overstated the significance of the forum selection clause in the 1990 contract and the "strong cause" test set forth in *Z.I. Pompey Industrie v. ECU-Line N.V.*,[115] notwithstanding the court's acknowledgement that the parties' choice of forum is an important, but

112 *Crown Resources Corp. S.A. v. National Iranian Oil Co.*, (2005), 2005 CarswellOnt 4383 (S.C.J. [Commercial List]), varied (2006), 2006 CarswellOnt 5053, [2006] O.J. No. 3345 (C.A.) per Greer, J. (S.C.J.), per Labrosse, Laskin and Armstrong JJ.A. Application for leave to appeal filed October 23, 2006, [2006] S.C.C.A. No. 412 (S.C.C.) [*Crown Resources*].

113 *Infra*, note 253.

114 *Crown Resources, supra* note 112 at 62-64; *Muscutt, supra* note 5 and notes 40-50. The Court of Appeal stayed the plaintiffs'/respondents' claim against NIOC relating to the 1990 contract in the first action (Court File No. 03-CL-4904) and the claim against NIDC relating to the 1996 contract in the second action (Court File No. 02-CL-4718). However, the claims against NIDC in the second action based upon the 1998 contract were allowed to proceed.

115 [2003] 1 S.C.R. 450 at para. 20, *infra* note 253.

not determinative, factor in establishing or declining jurisdiction.[116] In the recent decision of *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.*,[117] the court concluded that where there are two related but separate contracts, a forum clause in one cannot oust Ontario as an appropriate forum for the purposes of another contract that does not itself have a choice of forum clause. Secondly, the Supreme Court of Canada has held in recent decisions that the *Bankruptcy and Insolvency Act* ("*BIA*")[118] *prima facie* establishes one command centre or "single control" for all proceedings related to bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy," has the burden of demonstrating "sufficient cause" under s.187(7) of the *BIA* to send the trustee (or arguably, the assignee) to multiple jurisdictions. Where a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge (or appellate court) under s.187(7) of the *BIA*, but it is not binding. There are only two methods by which *BIA* proceedings may be taken for a declaration that property in the possession of others is property of the bankrupt; namely, (i) an action by the trustee pursuant to s. 30(1)(d); and (ii) an action by creditor(s) pursuant to s. 38.[119] In a section 38 proceeding, the creditor obtaining a section 38 order does not advance an *in personam* cause of action, but rather the trustee's cause of action. Section 38 does not create a cause of action in the creditor but merely allows the creditor standing in the trustee's place to advance a cause of action vested in the trustee that the trustee has refused to take.[120] *Quaere* whether this analysis applies, *mutatis mutandis*, to an assignment of a cause of action made under s.38 of the *BIA*, particularly in view of the fact that neither of the s.38 *BIA* assignees in *Crown Resources* were privies to the 1990 contract.[121] Thirdly, since the creditor brings the s. 38 *BIA* proceedings, in essence, as the representative of the trustee, if the defendant alleges that the province where the proceedings are taken is *forum non conveniens*, the defendant has the burden to meet the appropriate test, since if the trustee had brought the proceedings,

116 *Ibid.*, per Labrosse J.A. at para. 29, citing *Mobile Mini Incorporated v. Centreline Equipment Rentals Limited* (2004), 190 O.A.C. 149 at para. 5.

117 [2005] O.J. No. 4604, (2005) 143 A.C.W.S. (3d) 276 (Ont. S.C.J.) per Master MacLeod.

118 *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (as am.).

119 See *Marco v. Levy* (2001), 25 C.B.R. (4th) 68 (Ont. S.C.J.) cited by L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, online: Westlawecarswell - Bankruptcy and Insolvency Act-Part I: Administrative Officials (ss.5-41) at C s.45-Actions by Creditors Where a Trustee Refuses to Take Proceedings; *op cit.* [Houlden & Morawetz].

120 *Ibid.* at C s.45, citing: *Re Zammit* (1998), 3 C.B.R. (4th) 193, [1998] O.J. No. 604 (Ont. S.C.J.-Bkcy.) [*Zammit*];

121 See *Sam Lévy & Associés Inc. v. Azco Mining Inc* [2001] 3 S.C.R. 978 (S.C.C.); *GMAC Commercial Credit Corporation-Canada v. T.C.T. Logistics Inc.*, [2006] S.C.J. No. 36, 2006 CarswellOnt 4621(S.C.C.); *Zammit, supra* note 120; *J.P. Capital Corp. (Trustee of) v. Perez* (1995), 36 C.B.R. (3d) 57, 1995 CarswellOnt 934 (Ont. Gen. Div.)

the onus would clearly be on the defendant to establish that the province where the proceedings are taken is not the appropriate forum.[122] Fourthly, it is also doubtful whether the doctrine of *forum non conveniens* should apply at all to bankruptcy proceedings, since no other forum can grant a Canadian receiving order, particularly given that a receiving order or adjudication of bankruptcy in a foreign jurisdiction is considered a separate proceeding.[123] Finally, choice of forum may be affected by the presence of *Sharia* law in Iran which prevents the charging of interest ("*riba*") to anyone, even a non-Muslim, whereas in Canadian courts interest is chargeable, such that there is a putative loss of juridical advantage in the Iranian courts.[124]

Notwithstanding the foregoing, it is also difficult to reconcile the *Bouzari v. Iran* and *Crown Resources* appellate decisions given the underlying commercial activities. However, under the *State Immunity Act*, a state committing human rights abuses or torture within its territory is immune to a lawsuit brought in a Canadian court, while a state or affiliated agency violating a commercial agreement with a Canadian company is not. The net effect is that it is far more likely that a foreign judgment obtained against a state based upon commercial activity may be recognized and enforced in Canada, in circumstances where there are exigible assets which fall within the commercial activity exception or there is express waiver by the state or related agency.[125]

122 *Ibid.* at C s.45, citing: *Krupp MaK Maschinenbau GmbH v. Black* (1996), 39 C.B.R. (3d) 94, 149 N.S.R. (2d) 297, 432 A.P.R. 297; affirmed on other grounds 43 C.B.R. (3d) 63 (N.S.C.A.).

123 *Ibid.*, Part II (ss. 42-49) D s.2-Place for Filing the Petition, citing: *Re Chu* (1995), 30 C.B.R. (3d) 78 (Ont. Gen. Div.).

124 T.S. Twibell, "Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a (Islamic law): Will Article 78 of the CISG be enforced when the forum is in an Islamic State?" (Spring-Fall 1997) 9 International Legal Perspectives 25 at 74, note 230, citing Mohamed Arif, *Islamic Banking* (1988) 2 Asian-Pacific Economic Literature 48 at 49.

125 Section 12 of the *State Immunity Act* provides as follows:

Execution

12. (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

(*a*) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(*b*) the property is used or is intended for a commercial activity; or

(*c*) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.

4. Defences to the Enforcement of Foreign Judgments

In *Beals*, the Supreme Court of Canada revisited the Morguard decision relating to the recognition and enforcement of a default judgment obtained in Florida against four Ontario defendants arising from a mistaken property lot description.[126] In a six to three split decision, the Supreme Court of Canada majority held that the "real and substantial connection" test, which until then only applied to interprovincial judgments, should apply equally to the recognition and enforcement of foreign judgments.[127] Both the majority and dissenting judgments in *Beals* affirmed that once the foreign court's jurisdiction is recognized, there are only three limited defences to an action for enforcement in Canada; namely,

Property of an agency of a foreign state is not immune	(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.
Military property	(3) Property of a foreign state (*a*) that is used or is intended to be used in connection with a military activity, and (*b*) that is military in nature or is under the control of a military authority or defence agency is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture.
Property of a foreign central bank immune	(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.
Waiver of immunity	(5) The immunity conferred on property of a foreign central bank or monetary authority by subsection (4) does not apply where the bank, authority or its parent foreign government has explicitly waived the immunity, unless the bank, authority or government has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal.

126 For a detailed analysis of the Supreme Court of Canada reasoning in *Beals*, including the majority and dissenting opinions, see Pribetic, "Strangers in a Strange Land", *supra* note 7. See also, Janet Walker, "Beals v Saldanha: The Great Canadian Comity Experiment Continues" (2004) 120 LQR 365; S.G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stands After *Beals*" (2004) 40 C.B.L.J. 189; Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1-22; Ronald F. Brand, "Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far" 24 J.L. & Com. No 2, 181; H. Scott Fairley, "Open season: recognition and enforcement of foreign judgments in Canada after *Beals v. Saldanha*" (2005) 11 ILSA J. Int'l & Comp. L. 305-318.

127 *Beals, supra* note 1 at 454.

(1) Fraud,
(3) Denial of natural justice, and
(3) Public policy.[128]

At both the trial court[129] and the Court of Appeal levels,[130] both parties conceded that the Florida court had jurisdiction over the plaintiffs' action pursuant to the "real and substantial connection" test set out in *Morguard*. Accordingly, "presence-based jurisdiction" rendered moot the issue of jurisdiction *simpliciter*.[131] Moreover, "consent-based jurisdiction" was recognized by the majority opinion, wherein Justice Major emphasized that the defendant, Dominic Thivy, had "attorned to the jurisdiction of the Florida court when he entered a defense to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment."[132]

(a) Fraud

With respect to the fraud defence, the majority held that the defendant must produce new and material facts, or newly discovered and material facts, which were not before the foreign court. "New" facts are facts, which came into "existence after the foreign judgment was obtained." "Newly discovered facts" refers to facts which existed at the time the foreign judgment was obtained but were not known to the defendant" and could not have been discovered through the exercise of reasonable diligence. [133]

128 *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551 (H.C.), at 571. The Supreme Court of Canada in *Beals* did not refer to the defence that the foreign judgment involves a defendant who was not a party to the foreign suit.

129 *Beals v. Saldanha* (1998), 42 O.R. (3d) 127, 134 (Gen. Div.), additional reasons at (1999), 1999 CarswellOnt 19 (Gen. Div.), reversed in part (2001), 2001 CarswellOnt 2286 (C.A.), affirmed (2003), 2003 CarswellOnt 5101 (S.C.C.).

130 *Beals v. Saldanha* (2001), 202 D.L.R. (4th) 630 (Ont. C.A.), at para. 31.

131 *Ibid.*

132 *Beals, supra* note 1 at 439 (quoting J.G. Castel & J. Walker, *Canadian Conflict of Laws* 14-10, 5th ed. (2001)). If the defendants had retained Florida counsel, they would have been able to raise a preliminary challenge based upon forum non conveniens relying upon Rule 1.061 ("Choice of Forum") under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.061 (2003).

133 *Beals v. Saldanha*, [2001] 202 D.L.R.4th 630 (Ont. CA) per Doherty, J.A., at paras. 39-40, approved by Major J. on behalf of the Supreme Court of Canada majority in *Beals, supra* note 1 at 447-8. See also, *Mill Valley Bamboo Associates, LLC v. D.T.I. Diversified Transportation Inc.* [2006] O.J. No. 4686 (Ont. S.C.J.) per E.M. Stewart J. at paras. 29-32.

(b) Denial of natural justice

The enforcing court must determine whether the defendant was granted fair process by the foreign legal system when the foreign court granted judgment. Fair process is one that "reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system." It also includes a requirement that the defendant be given adequate notice of the claim and an opportunity to defend. Major J. further noted that this "assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts."[134] Justice Major defines the defence of natural justice as follows:

> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.[135]

(c) Public policy

With respect to the public policy defence, Justice Major notes:

> The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.[136]

The public policy defence was succinctly summarized in *Beals* as follows:

> The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker at p. 14 - 28:
>
> > the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts.[137]

The use of the defence of public policy is strictly limited:

134 *Beals, supra* note 1 at 448-9, per Major J.

135 *Ibid.* at 449.

136 *Ibid.* at 453.

137 *Ibid.* at 451-2.

> The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.[138]

The Beals majority decision also confirms that bias must be proved, but makes no reference to proving reasonable apprehension of bias.[139]

Recently, two Ontario decisions have considered the scope of the public policy defence relating to alleged systemic and institutional bias within the Singapore legal system.

In *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*,[140] Oakwell Engineering, a Singapore corporation that supplies engineering works and products to the marine industry, and Enernorth, an Ontario corporation engaged in engineering, construction, shipbuilding and power generation worldwide entered into a joint venture in 1997 for a contract to build and operate power generation facilities in India. Under their agreement, they jointly formed the "Project Company" to finance, construct and operate the project. Disputes arose between the parties culminating in a settlement agreement in December 1998 which included an attornment clause providing that any future disputes would be governed by Singapore law and a choice of law clause subjecting the parties to the non-exclusive jurisdiction of the Singapore courts.[141] Under the settlement agreement, Oakwell Engineering was entitled to payment of a sum from Enernorth upon successful financing of the project, referred to as "financial closure." Enernorth failed to achieve such financial disclosure, and in August 2000, without notice to Oakwell Engineering, it divested its interest in the joint venture. Oakwell Engineering commenced an action against Enernorth in Singapore, which Enernorth defended at trial without contesting jurisdiction of the Singapore court. Enernorth was ordered to pay Oakwell Engineering all the sums owing under the settlement agreement. Enernorth unsuccessfully appealed

138 *Ibid.* at 453.

139 Major J. speaking for the majority in *Beals, ibid.*, states at 453: . . . the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased." *Cf. United States v. Shield Development Co.* (2004), 74 O.R. (3d) 583 (S.C.J.), affirmed (2005), 74 O.R. (3d) 595 (C.A.).
See Antonin I. Pribetic, "Enforcing Foreign Summary/Default Judgments: The Damoclean Sword Hanging Over Pro Se Canadian Corporate Defendants? Case Comment on *U.S.A. v. Shield Development*," Canadian International Lawyer [forthcoming].

140 *Oakwell Engineering Ltd. v. Enernorth Industries Inc.* (2005), 76 O.R. (3d) 528 (S.C.J.), affirmed (2006), 2006 CarswellOnt 3477 (C.A.) per Day, J [*Enernorth-SCJ* cited to O.R.].

141 *Ibid.* at 531.

to the Singapore Court of Appeal, but failed to raise issues of the conduct or fairness of the trial.[142]

Oakwell Engineering then applied to have the judgment of the Singapore court against Enernorth recognized by an Ontario court.[143] Justice Day concluded that the Singapore courts had jurisdiction over the dispute.[144] He also held that Singapore courts were characterized by judicial independence and the rule of law.[145] Given that Singapore's legal system, including rules of evidence and procedure, had its roots in English common law, he found that the proceedings were conducted fairly in keeping with the principles of natural justice.[146] Day J. also held that there was neither bias nor a reasonable apprehension of bias towards Enernorth.[147] In lieu of cogent evidence that alleging bias or corruption in a court case would lead to charges of sedition, it was not established that Singapore's *Sedition Act*[148] [149] barred Enernorth from bringing its objections earlier. Enernorth's affidavit evidence from their Singapore counsel alleging bias of the trial judge was rejected,[150] as was affidavit evidence from Enernorth's international law experts alleging inherent bias and corruption within the Singapore legal system.[151] The application judge found Enernorth lost the Singa-

142 *Ibid.* at 532 and 546.

143 *Ibid.* at 532.

144 *Ibid.* at 534-5.

145 *Ibid.* at 545.

146 *Ibid.* at 546.

147 *Ibid.* at 543.

148 *Ibid.* at 538 citing Cap. 290, 1985 Rev. Ed. Sing.

149 In *Belliveau v. Royal Bank* (2000), 224 N.B.R. (2d) 354, 574 A.P.R. 354 (C.A.), 362-3, per Turnbull J.A., the New Brunswick Court of Appeal held that the laws of a foreign jurisdiction are a question of fact and must be pleaded and proven, failing which the *lex fori* will prevail as it is the only law available.

150 *Enernorth-SCJ, supra* note 140 at 537.

151 *Ibid.* at 539-541. The experts who filed affidavits on behalf of Enernorth were:

- Ross Worthington is an adjunct professor of governance at Griffith University in Australia and an associate of the Asia Research Centre on Social, Political and Economic Change at Murdoch University, also in Australia. Mr. Worthington has written on governance in Singapore and performed consultancy work in the area. He has been conducting empirical research in and on Singapore since 1988. He concluded that the judicial branch of the government of Singapore is not independent from the executive branch.
- Dr. Nihal Jayawickrama is the co-ordinator and lead facilitator of the Programme on Strengthening Judicial Integrity, a program initiated by the United Nations. While Dr. Jayawickrama is an expert in the area of judicial corruption, his affidavit, as he acknowledges, is on "the existence and nature of corruption in judicial processes around the world" He did not appear to provide specific evidence of judicial corruption in Singapore.
- Mr. Francis T. Seow, a former Crown counsel and solicitor general of Singapore, is apparently regarded as a political dissident by the Singapore government now resides in the United States. Mr. Seow concluded that Singapore does not have an independent judiciary in Singapore citing three factors: (i) the autocratic nature of the government, which exercises control of the judiciary where the government may

pore case primarily due to the fact that its witnesses had contradicted themselves.[152]

Enernorth's appeal to the Ontario Court of Appeal was dismissed.[153] MacFarland J.A. for the unanimous court agreed with the application judge that there was a "real and substantial connection" with Singapore. The Court of Appeal then considered Enernorth's impeachment of the Singapore judgment "not that it resulted from a law that is contrary to the fundamental morality of the Canadian legal system, but rather that it is the product of a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law,"[154] and held:

> 23. The application judge carefully reviewed the evidence relied on by Enernorth in support of its bias argument. He considered the exchange between a witness and the Singapore trial judge concerning the correct spelling of the Koh Brothers Group's name, and the fact they now controlled Oakwell. He concluded that this evidence was insufficient to prove bias or corruption. He considered the evidence of the expert witnesses – Ross Worthington, Nihal Jayawickrama and Francis T. Seow – and concluded that their evidence was either unreliable (as in the case of Mr. Worthington) or too general to prove that there was not a fair trial in this case. He concluded there was a lack of evidence of corruption or bias in private commercial cases and no cogent evidence of bias in this specific case. [155]

The Court of Appeal held that Day J. properly concluded that public policy considerations were not relevant as Enernorth's argument was based on facts about the judicial system of Singapore, not the laws themselves. The record also supported the judge's findings about the lack of bias and the fact both Enernorth and Oakwell Engineering enjoyed fair process in the Singapore courts. The Court of Appeal further noted the following:

> 29. The application judge considered both the substantive and procedural law of Singapore, as well as its constitution and compared those laws to the Canadian rule of law. He concluded that "while Enernorth's experts, political scientists and lawyers, provide reports that aspects of the government of Singapore do not meet the standards of the rule of law in Canada, this evidence goes against Singapore's formal legal structure as evidenced by its constitution and laws" and, importantly, "furthermore, Oakwell has provided evidence to the contrary". He concluded that, on a balance of probabilities, both parties enjoyed fair process in the Singapore courts. [156]

have an interest; (ii) the judges hearing this case were known to be inclined toward the government and entities associated with the government and/or government-linked corporations; and (iii) this appears to be a case in which interests of government-linked companies were involved.

152 *Ibid.* at 539-541.

153 *Oakwell Engineering Ltd. v. Enernorth Industries Inc.* (2006), 2006 CarswellOnt 3477, [2006] O.J. No. 2289 (C.A.) per Laskin, MacFarland and LaForme JJ.A. [*Enernorth-CA*]; supplementary reasons [2006] O.J. No. 3658, (2006) 151 A.C.W.S. (3d) 756 (C.A.); application for leave to appeal filed September 8, 2006. S.C.C. Bulletin, 2006. at 1195, [2006] S.C.C.A. No. 343 (S.C.C.).

154 *Ibid.* at para. 21.

155 *Ibid.* at para. 23.

In *State Bank of India v. Navaratna*[157] three Indian Banks (the "Banks") moved for summary judgments to enforce default judgments obtained from the High Court of Singapore against the Navaratnas, as guarantors of short-term financing loans from the Banks, backed by international letters of credit.[158] The Court held that that Singapore had a real and substantial connection to the Navaratnas, in part relying upon the choice of law and forum selection clauses contained in the guarantees.[159] The Navaratnas opposed the Banks' motions, claiming that they did not defend the Singapore proceedings because they believed they would be incarcerated if they did, and that the Singapore courts were corrupt and biased in favour of banks.[160] Although Justice Sachs suggested that a trial judge may well come to a similar conclusion regarding Mr. Seow's evidence and the Singapore legal system,[161] the learned judge distinguished the facts in *Enernorth*:

> 39. . . . However, the question is whether that determination should be made by me on a summary judgment motion because of the *Oakwell* decision. In my view,

156 *Ibid.* at para. 29.

157 *State Bank of India v. Navaratna* (2006), 2006 CarswellOnt 1743, [2006] O.J. No. 1125 (S.C.J.), additional reasons at (2006), 2006 CarswellOnt 3014 (S.C.J.) per H.E. Sachs J. [*Navaratna*].

158 The parties agreed that only one of the summary judgment motions would be argued (the State Bank of India motion), but that the determination of that motion would govern the disposition of the Bank of India and Indian Bank motions as the issues were the same in each motion. *Ibid.* at 4.

159 *Ibid.* at para. 45.

160 *Ibid.* at paras. 7-8.

161 *Ibid.* at paras. 7-8. Interestingly, the Navaratnas relied upon an affidavit filed by Mr. Francis T. Seow whose expert evidence was rejected in *Enernorth-SCJ, supra,* note 140. However, his affidavit evidence was focused on the inherent bias of Singapore courts favouring banks through draconian measures to enforce debts under the Singapore *Debtors' Act:*

> Mr. Seow also deposed that the Singapore *Debtors' Act* "has been interpreted by the courts in Singapore as allowing creditors, particularly banks, to cause the passports of debtors to be imprisoned unless payment of debts are made or adequate sureties are given to the satisfaction of the creditors".
>
> The Navaratnas also filed an affidavit from Mr. S.H. Almenoar, a solicitor from Singapore, with over 30 years experience, who disagreed with the Banks' expert, Mr. G. Pannier Selvam, an author, advocate, solicitor, judge of the Supreme Court of Singapore, and law professor. The conflicting expert opinions regarding the Singapore judicial system raised genuine issues for trial, including whether in Mr. Kothari's case his fears of pre-trial incarceration under the Singapore *Debtors' Act* were reasonable and whether Mr. Kothari could have defended the proceedings in Singapore without ever having to appear in Singapore. *Ibid.* at paras. 24-31, 40-43.

> it should not. The factual issues raised are not the same. Mr. Seow's Affidavit speaks to the use of imprisonment to collect debts, an issue that was not before Day J. It also speaks to the desire of the Singapore government to protect the banking industry, another issue that was not before Day J. Mr. Seow's opinion with respect to the use of imprisonment to collect debts is supported by a U.S. Travel Advisory. Finally, on a summary judgment motion, I should not be engaged in the business of weighing evidence.[162]

The Banks claimed that the facts raised by the Navaratnas did not bring them within any of the existing defences to the enforcement of a foreign judgment and did not justify the creation of a new defence. The Navaratnas, on the other hand, argued that the facts of their situation either fell within the existing defences of public policy or natural justice, or justified the creation of a new defence; namely, duress.[163] At paragraph 46, Justice Sachs citing *Beals* noted that:

> Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, "*should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences.*" [original emphasis]

Based upon the test for summary judgment,[164] Sachs J. held that the question of whether these facts, if established, would constitute a natural justice defence to the enforcement of a foreign judgment or the creation of a new defence to that enforcement is an unsettled question that would benefit from a trial should not be decided on a motion for summary judgment. [165] [166]

It is noteworthy that the Ontario Court of Appeal in *Enernorth* distinguished the *Navaratna* decision on its facts.[167] Furthermore, it is submitted that the defence of duress is not a new category, but rather *sub-specie* the public policy defence relating to traditional contract theory, including avoidance of a

162 *Ibid.* at para. 39.

163 *Ibid.* at para. 46, citing *Beals, supra* note 1 at 442.

164 Sachs J. citing: *Aguonie v. Galia Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at p. 173 citing Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.).

165 *Navaratna, supra* note 157 at para. 61.

166 The Navaratnas also claimed that they had not defended the summary judgment because they had not been properly named in the proceedings, which the motions judge agreed should be deferred to the trial judge. Finally, the provision of the Singapore judgment with respect to interest was ambiguous, which rendered the judgment unenforceable in Ontario. On this issue, Sachs J. accepted the Banks' position that the interest portions of the judgment were severable from the rest of the judgment. *Ibid.* at paras. 62-66.

167 *Enernorth-CA, supra* note 153 at paras. 30-32.

contract due to undue influence, misrepresentation, coercion and mistake.[168] Accordingly, duress as the basis for declining recognition of a foreign judgment should be considered in context of "international public policy" or "*ordre public international,*" not Canadian domestic public policy, so defined.[169] [170] [171]

168 See Fawcett/Harris/Bridge, *supra* note 95, ss. 11.44-11.45, citing *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137 (Eng. C.A.) where the defendant alleged that the plaintiff's New York judgment was obtained through undue influence exercised over the defendant by his father to sign a contract of guarantee. The Court of Appeal rejected the public policy defence to enforcement on the grounds that the defendant failed to raise the issue overseas. The authors suggest that it "is doubtful if this is a fair view, however, given that the defence is that *English* public policy, not that of the state of origin, has been infringed."

169 See *Uniform Enforcement of Foreign Judgments Act*, Part 2 Enforcement-General, Uniform Law, Article 4(g) and explanatory comment, online: Uniform Law Conference of Canada (ULCC) http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e5 > (cite last visited 4 December 2006) which reads in part:

Reasons for refusal

4. A foreign judgment cannot be enforced in [*the enacting province or territory*] if

...

(g) the judgment is manifestly contrary to public policy in [*the enacting province or territory*];

The ULCC explanatory comments state:

> **Paragraph (g).** For common law jurisdictions, "public policy" is intended to refer to the concept that is used in the Canadian case law to determine whether a foreign judgment must be denied recognition, or a foreign rule of law denied application. Public policy, used in this sense, applies only if the foreign judgment or rule violates concepts of justice and morality that are fundamental to the legal system of the recognizing jurisdiction. The word "manifestly" is used in this paragraph to emphasize that the incompatibility with justice and morality must be convincingly demonstrated. Public policy in this context is clearly distinct from public policy in the more general sense of the aims that are supposed to be served by a rule of domestic law. A foreign judgment may be at odds with domestic legislative policy, because it gives a different result from that which domestic law would produce, but that does not mean that the judgment contravenes public policy in the sense in which it is used here. The distinction corresponds to that drawn in the civil law between *ordre public interne* (policies served by rules of domestic law) and *ordre public international* (public policy in the international sense).

170 See also, van den Berg, "Distinction Domestic-International Public Policy" (1996) XXI *Yearbook* at p. 502.

171 See also, *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Brussels) 1262 UNTS 153; 8 ILM 229 (1969) [*Brussels Convention*] online: <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm> (site last visited on December 4, 2006). The purpose of the *Brussels Convention* is "to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements." (from the Preamble of the Convention). Protocol of September 27, 1968 is annexed to the Convention. The Convention is also amended by the Accession Conventions under the successive enlargements of the European Communities. It has been replaced by Council Regulation (EC) No. 44/2001 on jurisdiction and

5. Foreign Class Actions

In *Currie v. McDonald's Restaurants of Canada Ltd.*[172] the Ontario Court of Appeal considered the issue of recognition and enforcement of a foreign class action judgment. In *Currie*, McDonald's sponsored a number of promotional contests at its restaurants in North America, retaining the services of Simon Marketing Inc.("Simon Inc.") to organize and operate the contests. A senior employee of Simon Inc. and others were subsequently indicted for embezzling prizes allocated to the contests. A class action in Illinois (the "Boland action") on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada, was settled. The Illinois court directed that notice of the class action should be given to Canadian class members by means of an advertisement in Maclean's magazine. The settlement agreement provided that the settlement was binding on all class members who did not opt out of the class by the specified date. The releases covered all claims relating to McDonald's promotional games under common law or statute.[173] The plaintiff, Currie, did not participate in the Boland action. He brought a proposed class action in Ontario against McDonald's, McDonald's

the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) which entered into force on March 1, 2002, online: <www.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_012200101l6en00010023.pdf> (site last visited on December 4, 2006).

Article 27.1 of the *Brussels Convention* reads in part:

A judgment shall not be recognized:

27.1. if such recognition is contrary to public policy in the State in which recognition is sought;

The limits and scope of the concept of "international public policy", which is more restricted than the internal or domestic public policy, was considered in *Dieter Krombach v André Bamberski*, Case C-7/98, [2000] ECR I-0000, paragraph 19, where the European Court of Justice held:

> Recourse to the public-policy clause in Article 27, point 1, of the [Brussels Convention of 27 September 1968] can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

Cf. Chapter III of the Brussels I Regulation which contains the rules governing the recognition and enforcement of foreign judgments (Arts. 32-56). Art. 34 s.1 reads:

> 34.1 The recognition or enforcement is manifestly contrary to public policy in the state addressed.

172 *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321 (C.A.), affirming (2004) 70 O.R. (3d) 53 (S.C.J.) per R.J. Sharpe, R.P. Armstrong and R.A. Blair JJ.A. [*Currie* cited to O.R.].

173 *Ibid.* at 327-329.

Canada and Simon Inc. alleging wrongdoing in relation to the McDonald's promotional contests. Another proposed class action was commenced by Parsons, who had intervened in the Boland proceedings to object to the settlement of that action. The defendants moved to dismiss or stay the actions on the ground that the claims had been finally disposed of in the Boland action.[174]

The motions judge, Justice Cullity, dismissed the Parsons action on the basis that, by appearing in the Illinois court to object to the settlement, Parsons had attorned to the jurisdiction of the Illinois court and that the Boland judgment should be recognized and enforced against him. The motion judge refused to stay or dismiss Currie's action, holding that Currie was not bound by the Boland judgment or by Parson's attornment despite the fact that the claims were identical and that the plaintiff and Parsons were both represented by the same law firm.[175] The motions judge found that the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members but that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The Court of Appeal dismissed the defendants' appeal of the motions judge's refusal to stay or dismiss the plaintiff's action.[176]

The Court of Appeal held that the rules with respect to the recognition and enforcement of foreign judgments should take into account "certain unique features of class action proceedings."[177] Before enforcing a foreign class action judgment against Ontario residents, the court should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.[178] The principal connecting factors linking the cause of action asserted in the plaintiff's proposed class action to Illinois were that the alleged wrong occurred in the United States, and Illinois is the site of McDonald's head office. That factor was a real and substantial connection in favour of Illinois jurisdiction.[179] On the other hand, the principles of order and fairness required that careful attention be paid to the situation of ordinary McDonald's customers whose rights were at stake. These non-resident class members would have no reason to expect that any legal claim they might wish to assert against McDonald's Canada as a result of visiting the restaurant in Ontario would be adjudicated in the United States.[180] The Court of Appeal further held that the consumer transactions giving rise to the claims took place entirely within Ontario. The consumers were residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The plaintiff class members

174 *Ibid.* at 327.
175 *Ibid.* at 327.
176 *Ibid.* at 341.
177 *Ibid.* at 330.
178 *Ibid.* at 330.
179 *Ibid.* at 332.
180 *Ibid.* at 330.

did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business there.

Based upon a finding of a substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, the principles of order and fairness were held to be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings. Most significantly, Sharpe J.A., for the unanimous Court of Appeal held that the right to opt out "is of vital importance to the jurisdiction of the foreign court in international class action litigation."[181] Ultimately, the Court of Appeal affirmed the motion judge's finding of a lack of notice, thereby concluding that the plaintiff and the unnamed members of the class that he sought to represent were not bound by the Boland judgment.

At pages 330-331 of the judgment, Sharpe J.A. for the Court held:

> 30. In my view, provided *(a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out.* In those circumstances, failure to opt out may be regarded as a form of *passive attornment* sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by LaForest J. in Hunt v. T & N plc., above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all possibilities. Second, *it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases*: see Muscutt v. Courcelles (2002), 60 O.R. (3d) 20 at paras. 95-100 (C.A.). [emphasis added]

6. Procedural and Limitation Issues

Unlike a domestic judgment, a foreign judgment is a simple contract debt and must be enforced by way of an action or application rather than by execution.[182] In *Nuvex Ingredients Inc. v. Snack Crafters Inc.*,[183] the applicant applied for an order under rule 14.05(3)(h) of the Ontario Rules of Civil Procedure for enforcement of a Minnesota default judgment. The Court held that where *RE-JUKA* does not apply, a foreign judgment from a jurisdiction may be enforced by action or by application.

181 *Ibid.* at 333 and 226.

182 *Lax v. Lax* (2004), 70 O.R. (3d) 520 at 526 (C.A.), application for reconsideration denied (2004), 75 O.R. (3d) 482 (C.A.), citing J.G. Castel and Janet Walker, *Canadian Conflict of Laws*, looseleaf, 5th ed., (Toronto: Butterworths, 2002) at 14.3.

183 *Nuvex Ingredients Inc. v. Snack Crafters Inc.* (2005), 74 O.R. (3d) 397 (S.C.J.), at 400.

In *Girsberger v. Kresz*,[184] the Superior Court declined to follow the well-established precedent that a foreign judgment is to be treated as a contract debt and not a judgment for the purposes of the *Limitations Act*.[185] The Court accepted the argument that this rule was inconsistent with the modern conflict of laws principles, holding that, for the purposes of enforcement, foreign judgments are to be treated as judgments and are subject to a 20-year limitation period — not a six-year limitation period.[186] Justice Paisley considered *Girsberger* in *Lax v. Lax*:

> The plaintiff submits that the applicable limitation period is 20 years, pursuant to s. 45(1)(c) of that Act. In *Girsberger v. Kresz* . . . Cumming J. concluded that the limitation period in respect of a foreign judgment which met the "real and substantial" test defined by the Supreme Court of Canada in *Morguard Investments Ltd. v. de Savoie* . . . [was 20 years.]
>
> . . . Although the Court of Appeal dismissed an appeal from the decision of Cumming J., the limitation issue was not expressly dealt with and it is submitted that the limitation issue is obiter dictum to the essential issue that Cumming J. had to decide.
>
> I am persuaded that Cumming J. came to the correct conclusion on this issue and the defendants' motion is therefore dismissed.[187]

On appeal,[188] Feldman J.A. dealt extensively with this issue and with Cumming J.'s comments in *Girsberger, supra*, stating at paragraphs 30-31:

> [30] This analysis demonstrates that as a procedural matter, for the purposes of enforcement, foreign judgments and domestic judgments are not equivalent. Cumming J.'s position in Girsberger is that, in order to give foreign judgments the full faith and credit that our new approach of comity among nations requires, we must apply the same limitation period for enforcement of both types of judgments. Therefore, the old Limitations Act must be interpreted to reflect that approach and to accomplish that goal.
>
> [31] In my view, although there is merit in the philosophical approach advocated by Cumming J., in order to achieve the type of parity between domestic and

184 *Girsberger v Kresz* (2000), 47 O.R. (3d) 145 (S.C.J.), affirmed (2000), 50 O.R. (3d) 157 (C.A.) [*Girsberger*].

185 *Ibid.* at para 48.

186 *Ibid.* at para 49.

187 *Lax v. Lax* (2003), [2003] O.J. No. 337, 2003 CarswellOnt 326 (S.C.J.) paras. 3-5 (citations omitted).

188 *Lax v. Lax*, (2004) 70 O.R. (3d) 520 at 530-1 (Ont. C.A.), *supra* note 182.

foreign judgments that he is advocating, more significant changes must be made to the enforcement scheme than interpreting 'judgment' in s. 45(1)(c) to include a foreign judgment. This would require legislative action. As long as only domestic judgments can be enforced by execution and the other methods discussed above, and therefore foreign judgments must be transformed into domestic judgments or registered before they are enforceable as domestic judgments, there is not parity of treatment.

Thus, the Ontario Court of Appeal reaffirmed that a foreign judgment constitutes a simple contract debt, and the six-year limitation period in s. 45(1)(g) of the old Act continues to apply to it. Further, a foreign judgment is not a "judgment" within the meaning of s. 45(1)(c). [189] [190]

III. BILATERALISM

1. Reciprocal Enforcement of Judgments Legislation

In addition to a judgment creditor's right to bring an action on the foreign judgment or on the original cause of action, a number of Canadian provinces have enacted reciprocal enforcement of judgments legislation which includes some American states and foreign countries as reciprocating jurisdictions.[191]

189 *Ibid.* at 532.

190 See also, *Pollier v. Laushway*, 2006 NSSC 165 (S.C.) (unreported). Section 4 of the new *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B now imposes a basic two-year limitation period.

191 British Columbia *Court Order Enforcement Act*, RSBC 1996 Chap. 78:
- United States of America -Washington State, Alaska, California, Oregon, Colorado, and Idaho
- Australia-New South Wales, State of Queensland, South Australia, Tasmania, State of Victoria, Australian Capital Territory, Australian Antarctic Territory, Coral Sea Islands Territory, Heard and McDonald Islands Territory, Northern Territory of Australia, and Territory of Ashmore and Cartier Islands
- Europe-Federal Republic of Germany including Land Berlin Republic of Austria; United Kingdom (under Part IV of the Act)

Alberta *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6; *Reciprocating Jurisdictions Regulation*, Alta. Reg. 344/1985:
- United States of America: Washington State, Idaho and Montana
- The Commonwealth of Australia

Manitoba *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20; *Reciprocal Enforcement of Judgments Regulation*, Man. Reg. 319/87 R:
- Australia-the State of South Australia, the State of Queensland, the State of Western Australia, the Australian Capital Territory, the Northern Territory of Australia, the State of Tasmania and the State of Victoria

Prince Edward Island *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6; *Order Regulations*, P.E.I. Reg. EC846/78:
- United States of America-Washington State

Newfoundland and Labrador *Reciprocal Enforcement of Judgments Act*, Reciprocating States Order under the Reciprocal Enforcement of Judgments Act, Consolidated Newfoundland And Labrador Regulation 790/96, (O.C. 96-145) Amended by 18/99:
- Ashmore and Cartier Islands Territory, Australian Antarctic Territory, Australian Capital Territory, Coral Sea Islands Territory, Heard and McDonald Islands Territory, Jervis Bay Territory, New South Wales, Northern Territory of Australia, Queensland, South Australia, Tasmania, Victoria, Western Australia
- United Kingdom

Yukon Territory *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, *Reciprocal Enforcement of Judgments Ordinance*, Order in Council 1980/283:
- Western Australia and Queensland

See *Uniform Enforcement of Judgments Conventions Act*, Uniform Law Conference of Canada (ULCC) online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u4>.

192 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 28 (1); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 1(1)(b); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 1; *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 1(1)(a); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 2(1)(a); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 1(1).

193 Professor Walker identifies discrepancies in the definition of "person" as used in the definitions of "judgment creditor" and "judgment debtor" between the British Columbia and Alberta legislative versions. Given that the Alberta legislation does not include a "partnership" within the definition of "person," while the B.C. legislation does, she concludes that "Due to these differences, in Alberta, a judgment creditor may have difficulties in trying to register a judgment in British Columbia against a partnership." Walker, *supra* note 12 s.14.24, notes 10-15, *op. cit.*

194 *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(1)(a) and (b), *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(1)(a) and (b); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 2(1); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(1).

195 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29 (1)(a) and (b); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(1)(a) and (b).

Generally, if a monetary judgment[192] has been given in a court in a reciprocating state, the judgment creditor[193] may apply to have the judgment (including a foreign judgment) registered in the Supreme Court or District Court of the applicable province. In the case of Alberta, Manitoba, the Yukon Territory, and Newfoundland and Labrador, the judgment creditor may apply within six years after the date of the judgment obtained from a reciprocating state to have the judgment registered in the Court.[194] However, B.C. and P.E.I. legislation provides that registration is available, unless the time for enforcement has expired in the reciprocating state, or 10 years have expired after the date the judgment became enforceable in the reciprocating state.[195]

The judgment creditor may apply *ex parte* for registration, provided that the judgment debtor was personally served in the original action, or, if not personally served, appeared, defended, attorned, or otherwise submitted to the jurisdiction of the original court, and the appeal period has expired and no

appeal is pending, or an appeal has been made and has been disposed of.[196] If applying *ex parte*, the application must be accompanied by a certificate in prescribed form or to the same effect setting out the particulars mentioned therein, issued from the original court and under its seal and signed by a judge or clerk of that court.[197] If the application is on notice, then the applicant must comply with the applicable rules for service or as the court deems sufficient. [198]

Once registered, the existing common law defences available are:

- that the originating court lacked jurisdiction under its own conflict of laws rules; [199]
- that the originating court acted without authority; [200]
- that the judgment debtor was not carrying on business, or ordinarily resident, or did not voluntarily appear or otherwise submit during the proceedings to the originating court's jurisdiction; [201]

196 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29 (2); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(2); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(2); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(2); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 2(2)(a) and (b); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(2)(a) and (b).

197 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, ss. 29(3) and (4); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, ss. 2(3) and (4); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, ss. 3(3) and (4); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, ss. 2(3) and (4); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 2(3) and (4); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(3)and (4).

198 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(5); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(5); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(5); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(5); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 2(5); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(5).

199 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(a)(i); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(a)(i); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(a)(i); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(a)(i); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s. 2(6)(a)(i); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(a)(i).See Walker, *supra* note 12, s.14.23, 14-84.1 who argues that the "real and substantial connection" test espoused in *Morguard* and *Hunt* must still be adhered to.

200 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(a)(ii); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(a)(ii); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(a)(ii); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(a)(ii); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189, s.2(6)(a)(ii); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(a)(ii).

201 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(b); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(b); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(b); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(b); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(b); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(b).

- that the judgment debtor was not duly served with the originating process and did not appear, notwithstanding he or she was ordinarily resident or carried on business in the originating court's jurisdiction;[202]
- fraud;[203]
- an appeal is pending or the time for an appeal to be taken has not yet expired;[204]
- the underlying cause of action resulting in the foreign judgment was against public policy; [205] or
- the judgment debtor would have had a good defence if an action were brought on the judgment.[206]

202 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(c); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(c); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(c); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(c); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(c); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(c).

203 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(d); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(d); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(d); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(d); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(d); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(d).

204 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(e); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(e); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(e); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(e); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(e); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(e).

205 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(f); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(f); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(f); *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, s. 2(6)(f); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(f); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(f).

206 *Court Order Enforcement Act*, RSBC 1996 Chap. 78, s. 29(6)(g); *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(g); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(g); *Reciprocal Enforcement of Judgments* Act, R.S.P.E.I. 1988, c. R-6, s. 2(6)(g); *Reciprocal Enforcement of Judgments*, R.S.Y. 2002, c. 189,s.2(6)(g); *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, s. 3(6)(g). This does not mean a defence on the merits, but rather a defence to the enforcement of the judgment. See Walker, *supra* note 12, s.14.25, 14-87, citing *Auger v. Hume* (2000), 137 B.C.A.C. 98 (C.A.) at paras. 9-10.

The B.C. legislation also states that if a judgment provides for the payment of money and also contains provisions for other matters, the judgment may only be registered under Part II for the payment of money. [207]

As Professor Walker notes,

> The system of registration of foreign judgments places the courts of each province and territory in a supervisory role to ensure that the courts of the reciprocating jurisdictions have not made mistakes, perpetrated injustice or acted in excess of jurisdiction. The system is more efficient than the common law method of enforcement but it can still be *cumbersome and expensive*. [208] [emphasis added] [209]

Most of the reciprocal enforcement legislation is outdated and must be interpreted in light of the constitutional safeguards established in *Morguard* and *Hunt* vis-à-vis the "real and substantial connection" test. Moreover, as provincial legislation, it remains subordinate to either bilateral or multilateral international treaties and conventions enacted federally,[210] further discussed below.

2. Reciprocal Recognition and Enforcement Convention between Canada and the United Kingdom

The *Convention between Canada and the United Kingdom For The Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1984,* [211] provides similar provisions and procedures for reciprocal enforcement of foreign judgments found in the provincial reciprocal enforcement legislation discussed above. [212] It applies to judgments rendered by the Federal Court of Canada and all reciprocating common law provinces and territories.

207 *Court Order Enforcement Act,* RSBC 1996 Chap. 78, s. 29(8).

208 Walker, *supra* note 12, s.14.24-14-85.

209 For a recent B.C. case illustrating how enforcement efforts may become "cumbersome and expensive," see *Paradise Lakes Country Club v. Mohamed Ahmed,* [2005] B.C.J. No. 2558, 2005 BCCA 573, (2005) 219 B.C.A.C. 66, (2005) 144 A.C.W.S. (3d) 821 (B.C.C.A.), application for leave to appeal dismissed without costs (without reasons) May 18, 2006. [2006] S.C.C.A. No. 28 (S.C.C.); *Cf. Farmers Insurance Co. of Oregon v. Brown,* 2005 BCCA 577 (C.A.), application for leave to appeal dismissed with costs (without reasons) (2006), 2006 CarswellBC 1243, [2006] S.C.C.A. No. 18.

210 See Daniel Dupras, "International Treaties: Canadian Practice, Government of Canada, Depository Services Program, Law and Government Division (3 April 2000) online: Government of Canada Website <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0004-e.htm#INTRODUCTION(txt)> (last visited July 14, 2006).

211 *Supra,* note 10.

212 See Walker, *supra* note 12, s.14.27-14-95-14-96 for a summary of the relevant provisions.

In *Cavell Insurance Co. (Re),*[213] the Ontario Court of Appeal recently considered whether finality was an absolute requirement for recognition and enforcement of an order under the *Reciprocal Enforcement of Judgments (U.K.) Act,* the Ontario version of the Convention.[214] In *Cavell,* the respondent, Cavell Insurance Company Limited ("Cavell"), a subsidiary of a British company, was registered in Ontario to accept property and casualty reinsurance business. In 1993, it stopped carrying on business in Canada, which comprised less than 7.5 per cent of its total operations. Cavell brought an application in the Chancery Division of the High Court of Justice in the United Kingdom for approval of a scheme of arrangement under s. 425 of the *Companies Act, 1985* (U.K.), 1985, c. 6. On December 20, 2004 the U.K. court granted an initial order in the application, ordering Cavell to convene a meeting of its creditors affected by the scheme, and providing for the location and notice to be given for the meeting. Cavell then brought an application in Ontario to enforce the U.K. order, which Farley J. granted by issuing an order recognizing the U.K. order and adding a number of terms to "implement" that order. On February 17, 2005, Justice Farley issued a second order continuing his earlier order with several further conditions. Justice Farley's orders were based upon both *REJUKA* [215] and the rules of private international law.

The Canadian insurers' appeal was dismissed. Goudge J.A., writing for the unanimous Ontario Court of Appeal panel[216] agreed with the appellants' argument that *REJUKA* and Rule 73 of the Ontario Rules of Civil Procedure could not serve as a basis for the recognition in Ontario of the U.K. order of December 20, 2004. However, the Ontario Court of Appeal noted that the principles of "real and substantial connection" and "order and fairness" espoused in *Morguard* and *Beals* were "fundamental considerations for a court to properly determine whether to recognize a foreign judgment pursuant to private international law."[217]

In rejecting the appellant's argument that the U.K. order was not final, the Court of Appeal remarked that although traditionally finality was a requirement for the recognition of a foreign judgment, the lack of finality did not have any preclusive effect on recognition in the case at bar:

> In my view, if the U.K. order of December 20, 2004, is recognized, each of these purposes will nonetheless be served. That order obviously does not finally decide the substantive issue affecting the appellant and the respondent Cavell, because it does not approve the scheme of arrangement. It merely commences the procedure which may lead to the U.K. court ultimately doing so.

213 *Cavell Insurance Co., (Re)* (2006), 2006 CarswellOnt 3070, [2006] O.J. No. 1998 (C.A.) per M. Rosenberg, S.T. Goudge and J.M. Simmons JJ.A., May 23, 2006. [Cavell].

214 *REJUKA, supra* note 10.

215 *Ibid.* note 10; *Cavell, supra* note 213, per Goudge J.A. at para. 22.

216 Rosenberg and Simmons JJ.A., concurring.

217 *Cavell, supra* note 213 at para. 38.

. . .

> Second, recognition of the U.K. order presents little if any risk of injustice to the appellant. The order does not require the appellant to pay money, or indeed to do anything. If it is subsequently amended, even to the point of cancelling the meeting altogether, this does not infringe on the appellant in any meaningful way.
>
> Finally, because of the nature of the order and the terms of its recognition, I think there is little risk of undermining public confidence if the procedure initiated by the U.K. order is changed following its recognition by the Ontario court. The U.K. order merely commences a procedure that is supervised by that court. It would be unsurprising for that court to issue subsequent orders providing further guidance for that procedure. Moreover, a term of the recognition order is that the Ontario court must be kept advised of any such changes and that Cavell must seek such further orders of the Ontario Court as are necessary as a result. The Ontario court is therefore not put in the position of issuing a recognition order whose foreign foundation may disappear.

The Ontario Court of Appeal also confirmed that the U.K. Order reflected the principles of comity and reciprocity based upon strong policy reasons. With respect to comity, Goudge J.A. observed that the U.K. court has long been accorded respect by the Ontario jurisdiction and the U.K. statutory process was quite familiar to Ontario courts. Given that there existed analogous procedures in Canadian commercial litigation legislation,[218] a recognition order would facilitate active participation of the parties involving a statutory procedure necessarily reaching across national boundaries.[219] Justice Goudge further held that reciprocity was also served through the *Canada Business Corporations Act* and the Ontario *Business Corporations Act,* which provide court procedures for the approval of solvent schemes of arrangement. An Ontario court would expect such approvals to be recognized by a U.K. court if involving U.K. residents. The Court of Appeal noted that fairness would be enhanced rather than diminished by the U.K. order, given that the conditions imposed included added notice provisions and the required video link, simplifying participation in the U.K. statutory procedure. The risk that Canadian parties would be unable to participate would thus be avoided.[220]

218 *E.g.*, statutory jurisdiction to recognize certain foreign insolvency proceedings includes the *Bankruptcy and Insolvency Act,* R.S.C. 1985 c. B-3, sections 267-275 and *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, section 18.6, neither of which was held to apply in this case; *Cavell, supra* note 213 at para. 53.

219 *Cavell, supra* note 213 at para. 48.

220 The Ontario Court of Appeal acknowledged that conditions attached to the U.K. order not only recognized it, but also established jurisdiction of the U.K. court to carry on the statutory procedure authorized by s. 425 of the U.K. *Companies Act, 1985* and provided that the Ontario court would co-ordinate with and support that procedure to the extent that it affected interests in Ontario. Also, the conditions of the recognition order that entitled an affected party to return to the Ontario court to seek the court's further assistance and requiring the U.K. evaluator to reach a commutation value applying the Office of the Superintendent for Financial Institutions (OSFI) rules also served the objective of fairness for those affected by the recognition order. Paras. 50-51.

On the issue of the finality requirement, the Ontario Court of Appeal held:

> . . . in an age where the rules of private international law are evolving to accommodate the increasingly transnational nature of commerce, I see no reason why this result should be precluded by those rules just because the foreign order to be recognized is not final. In my view the want of finality carries with it no substantive effect that should deny recognition. I would therefore conclude that the appellant's finality argument fails.[221] [222]

3. *Uniform Enforcement of Foreign Judgments Act*

The ULCC has finalized the *Uniform Enforcement of Foreign Judgments Act* ("*UEFJA*").[223] The UEFJA reflects part of the ULCC's overall Commercial Law Strategy "to modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law. It will make it easier to do business in Canada, resulting in direct benefits to Canadians and the economy as a whole."[224] According to the ULCC commentary, the following policy choices are reflected in the *UEFJA*:

> - A specific uniform act should apply to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.
>
> - The proposed uniform act indicates what kind of judgments it covers as well as to which judgments it will not apply.
>
> - The proposed uniform act applies to money judgments as well as to those ordering something to be done or not to be done.

221 *Cavell, supra* note 213 at para. 54.

222 *Cf. Society of Lloyd's v. Saunders* (2001), (sub nom. *Society of Lloyd's v. Meinzer*) 210 D.L.R. (4th) 519 (Ont. C.A.), leave to appeal refused (2002), 2002 CarswellOnt 1893 (S.C.C.), (upholding an application for enforcement of a foreign (U.K.) judgment, notwithstanding an assumed breach by Lloyd's of the prospectus requirements of the Ontario *Securities Act* when soliciting "names" in Ontario).

223 While the *UEFJA* is primarily unilateral in form and substance (*i.e.*, it does not contemplate reciprocation with any foreign jurisdictions), it does reflect the private international law principles of comity and reciprocity and is, therefore, included in this discussion under Part II for illustrative and comparative purposes.

224 See ULCC web-site "Commercial Law Strategy" available online at: <http://www.ulcc.ca/en/cls/> (site last visited December 4, 2006).

- The proposed uniform act applies to provisional orders as well as to final judgments.

- The proposed uniform act rejects the "full faith and credit" policy applicable to Canadian judgments under the *Uniform Enforcement of Canadian Judgments* (UECJA).

- The proposed uniform act identifies the conditions for the recognition and enforcement of foreign judgments in Canada. These conditions are largely based on well-accepted and long-established defences or exceptions to the recognition and enforcement of foreign judgments in Canada.

- Following on the heels of *Morguard*, the proposed uniform act adopts as a condition for recognition and enforcement of a foreign judgment that the jurisdiction of the foreign court which has rendered the judgment was based on a real and substantial connection between the country of origin and the action against the defendant.[225]

4. *Saskatchewan Enforcement of Foreign Judgments Act*

Recently, the Saskatchewan government implemented the *UEFJA* by proclaiming the *Enforcement of Foreign Judgments Act.* [226] The Sask. *EFJA* is divided into five parts. Part 1 deals with interpretation (s. 1), definitions (s.2),[227] scope of application and exceptions (s.3).[228] Part 2 generally refers to recognition and enforcement. It contains provisions on various matters, including the common law defences found in the earlier reciprocal enforcement legislation.[229] More importantly, in addition to the fraud defence, the Sask. *EFJA* incorporates the defence that the judgment was "conducted contrary to the principles of procedural fairness and natural justice." It explicitly adopts the reasoning in *Beals.*[230] The public policy defence under sub-section 2(g) refers to the "public policy in Saskatchewan," which should be read in conjunction with the ULCC commentary to the *UEFJA.*[231] The *Sask. EJFA* also includes recognition and enforcement of provisional orders and the time within which enforcement may be sought.[232] The *Sask. EFJA* contains the same 10 year limitation found in the B.C. and P.E.I. reciprocal enforcement legislation.[233]

Section 6 allows the court discretion to impose a limit on damages, which include court costs and expenses awarded, reflecting the concern over excessive U.S. punitive or multiple (non-compensatory) damage awards, as well as treble (compensatory) damage awards,[234] which offend Canadian legal principles. The defendant bears the onus of proving that the damages awarded by the foreign court were in excess of awards normally granted in Canada.[235] With respect to non-monetary awards, section 7 empowers the Saskatchewan court to modify the originating judgment (where applicable or possible); establish procedures for enforcement; or otherwise stay or limit the enforcement of the foreign judgment if it contains a condition or was obtained without notice to affected parties,[236] and in circumstances where (i) the enforcing court could have made the same order as the Saskatchewan court based upon its own procedural rules; or (ii) the judgment debtor has commenced proceedings in the originating jurisdiction to set aside, vary or obtain other relief with respect to the foreign

225 See "Enforcement law projects: Uniform Enforcement of Foreign Judgments Act [preliminary draft] – Report" (4 December 2006) online: ULCC website <http://www.ulcc.ca/en/cls/index.cfm?sec=3&sub=3g>.

226 *Supra*, note 11.

227 "Civil proceeding" means a proceeding to determine a dispute between two or more persons, one or more of whom may be a government body, the object of which is a judgment, order, decree or similar instrument that:
(a) in the case of a violation of a right, requires a party to comply with a duty or pay damages; or
(b) in any other case, determines the personal status or capacity of one or more of the parties; (« *instance civile* »).

228 *Sask. EFJA*, s.3 provides:
Exceptions
3 This Act does not apply to foreign judgments:
(a) for the recovery of taxes;
(b) arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the *Bankruptcy and Insolvency Act* (Canada);
(c) for maintenance or support;
(d) that recognize the judgment of another foreign state;
(e) for the recovery of monetary fines or penalties; or
(f) rendered in proceedings commenced before the coming into force of this Act.

229 See discussion at Part II-A, *supra* note 228.

230 *Sask. EFJA*, s.4(f).

231 *Supra*, note 224.

232 *Sask. EFJA*: s.4(h)(i) deals with situations where *lis pendens* in the enforcing court may apply in the originating process or interlocutory proceedings where the subject matter relates to the merits. S.4(h)(ii) deals with *res judicata* of an equivalent judgment in the enforcing court. S.4(h)(iii) refers to *res judicata* applying, *mutatis mutandis*, arising from a judgment from a third jurisdiction.

233 *Sask. EFJA*, s.5; *supra*, note 11.

234 Certain U.S. statutes require that after the jury has determined the amount of the plaintiff's actual damages, the court must award three times that amount: See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213 (Sup. Ct., 1998).

235 See *Hill v. Church of Scientology of Toronto*, (sub nom. *Manning v. Hill*) [1995] 2 S.C.R. 1130, at paras. 196-199. *Cf. Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (Supreme Court of Canada reinstating $1 million jury award against insurer). *Cf. Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30, 2006 SCC 30, 2006 CarswellBC 1596, ($20,000 aggravated damages award upheld while $100,000 punitive damages award set aside).

236 *Sask. EFJA*, s.7(2)(a) and (b).

judgment.[237] [238] Section 8 refers to jurisdiction of the foreign court based on voluntary submission, territorial competence or a real and substantial connection.[239]

Where the foreign judgment is obtained by default,[240] section 9 provides illustrations where a real and substantial connection may be established between the state of origin and the facts or subject-matter leading to the default judgment, including, but not limited to claims involving: (a) affiliated or related corporations[241]; (b) torts;[242] [243] (c) real property or immovables; (d) contracts; (e) trusts; (f) consumer contracts and products liability. [244] [245] Section 11 addresses situations where a successful defendant in the foreign proceedings may also defend on the grounds of issue or cause of action estoppel. Part III refers to enforcement, including registration procedure, conversion of the foreign judgment into Canadian currency; additional enforcement provisions, interest and application of

237 *Sask. EFJA*, s.7(1)(a)-(c).

238 It is unclear whether this contemplates an "antisuit" or "anti-antisuit" injunction. See Jose I. Astigarraga and Scott A. Burr, "Antisuit Injunctions, Anti-Antisuit Injunctions, and Other Worldly Wonders" in *International Litigation Strategies and Practice*, Barton Legum Ed. (Chicago: American Bar Association, Section of International Law, International Practitioner's Deskbook Series , 2005) Chap. 10.

239 *Sask. EFJA*, s.8(a)-(f).

240 As was the case in *Beals*, *supra* note 1.

241 Effectively "presence-based jurisdiction": *Muscutt*, *supra*, note 5, per Sharpe J.A.

242 Presumably, this includes concurrent claims framed in contract, tort (delictual) or restitution: See *Central & Eastern Trust Co. v. Rafuse*, (sub nom. *Central Trust Co. c. Cordon*) [1986] 2 S.C.R. 147, varied (1988), 1988 CarswellNS 601 (S.C.C.), per Le Dain J.

243 In *Beals, supra* note 1 at 435-36, Major J. in the majority judgment reinforced the Supreme Court of Canada's earlier *obiter* comments in *Morguard, supra* note 2:

> In *Moran*,[. . .] it was recognized that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced:
>
> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.
>
> *That reasoning is equally compelling with respect to foreign jurisdictions.* [emphasis added]

244 *Cf.* s.9(3) of the new Ontario *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A (2002): "Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void."

245 *Sask. EFJA*, s..10 states that a foreign judgment will not be recognized or enforced where the "real and substantial connection" requirement is not met or the state of origin did not properly assume jurisdiction.

rules of court.[246] Part IV contains the repeal and transition provisions, [247] and Part V (s.19) states that the *Sask. EFJA* comes into force upon proclamation.[248]

Although no other province to date has implemented the *UEFJA*, it represents a significant step towards the harmonization of rules for the recognition and enforcement of foreign judgments by explicitly importing the "real and substantial connection" test. The *UEFJA* is particularly beneficial in non-contractual claims, such as tort (delictual) or restitutionary claims where party autonomy is absent and choice of forum and choice of law not so easily determined. In such circumstances, it will create greater certainty for judgment creditors, while allowing judgment debtors to rely upon the substantive common law defences of fraud, natural justice and public policy. [249]

IV. MULTILATERALISM

1. Hague Choice of Court Convention

Following lengthy negotiations, the United States in 1992 made a formal request to the Hague Conference of Private International Law for the negotiation of a convention on jurisdiction and the recognition and enforcement of foreign court judgments. The original effort resulted in a Preliminary Draft Convention in 1999,[250] further revised during a Diplomatic Conference in June 2001.[251] The original goal to establish an "International Convention for Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters" while laudable, proved to be overly optimistic and talks broke down. Eventually, on June 30, 2005, the Twentieth Session of the Hague Conference

246 *Sask. EFJA*, ss. 12-16.

247 *Sask. EFJA*, s.17 repeals the predecessor *Foreign Judgments Act*.

248 *Supra*, note 11.

249 For a discussion of choice of law issues involving product liability claims subject to the *United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3. (adopted in Canada federally on May 1, 1992 by the *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13 and subsequently by all constituent provinces and territories, see Pribetic, "Bringing Locus into Focus", *supra* note 67.

250 See The Hague Conference of Private International Law, Preliminary Draft Convention, 1999, Preliminary Document No 11, online: <www.hcch.net> (site last visited December 4, 2006).

251 See Hague Conference of Private International Law, which also includes conference related preliminary documents and legislative history (*travaux préparatoires*) available online at: <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=35&cid=98> (site last visited on December 4, 2006).

on Private International Law concluded with the signing of the *Hague Choice of Court Convention.*[252]

This new multilateral treaty represents an important opportunity for harmonization of international trade law by providing greater certainty and predictability for parties involved in business-to-business agreements within the transnational litigation context. It also elevates the principles of party autonomy and contractual freedom, recently reaffirmed by the Supreme Court of Canada.[253]

(a) Scope

The purpose of the *Hague Choice of Court Convention* is to establish "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters . . . [within a] secure international legal regime that ensures the effectiveness of exclusive choice of court agreements by parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements." [254] Hence, the *Hague Choice of Court Convention* is comparable to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [255] [256] in that it establishes rules for enforcement of exclusive

252 *Supra,* note 4. The text of the *Hague Choice of Court Convention*, is available at: <http://www.hcch.net/index_en.php?act=conventions.text&cid=98%20> (site last visited December 4, 2006).

253 In *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 224 D.L.R. 4th 577 (S.C.C.), Justice Bastarche, writing for the unanimous Supreme Court of Canada, characterized the appropriate test for enforcement of forum selection clauses as the "strong cause" test referred to in *Eleftheria*. Justice Bastarche states:

> The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage. [at para. 20]

See also, *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, (sub nom. *GreCon Dimter Inc. v. J.R. Normand Inc.*) [2005] 2 S.C.R. 401.

254 *Hague Choice of Court Convention, supra* note 4, Preamble.

255 *Ibid.*, Art.4 excludes arbitration and related proceedings by virtue of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 available online at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> See *United Nations Foreign Arbitral Awards Convention Act* R.S., 1985, c. 16 (2nd Supp.) [1986, c. 21, assented to 17th June, 1986].

choice of court agreements in international commercial transactions and certain international civil matters in order to "promote international trade and investment through enhanced judicial co-operation." [257]

An "exclusive choice of court agreement" is defined as any written agreement [258] [259] [260] between two or more parties designating the court or courts of

256 *Hague Choice of Court Convention, supra* note 4, Art. 4: the Convention applies to international litigation, but not to international arbitration proceedings, the latter of which the New York Convention governs.

257 *Ibid.*, Preamble.

258 *Ibid.*, Article 3 reads:

> 3.*c)* states that "an exclusive choice of court agreement must be concluded or documented –
>
> *i)* in writing; or
>
> *ii)* by any other means of communication which renders information accessible so as to be usable for subsequent reference. . .";

259 On November 23, 2005, The United Nations Commission on International Trade Law (UNCITRAL) General Assembly adopted the *United Nations Convention on the use of Electronic Communications in International Contracting*, which addresses location of parties involving electronic communications; receipt and delivery ("e-post rule" for electronic communications; contract formation for automated message systems; and criteria used to establish functional equivalence between electronic communications and traditional paper documents — including "original" paper documents — as well as between electronic authentication methods and hand-written signatures. According to a UNCITRAL July 6, 2006 Press Release:

> The goal of the Convention is to enhance legal certainty and commercial predictability where electronic communications are used in international contracts. It does so, for instance, by setting the criteria to establish the equivalence between electronic communications and paper documents, and between electronic authentication methods and handwritten signatures. The Convention also contains rules on how to locate a party in an electronic environment, and on how to determine the time and place of dispatch and receipt of electronic communications. It further recognizes that contracts may be concluded by automated message systems.
>
> China, Singapore and Sri Lanka now join the Central African Republic, Lebanon and Senegal as signatories. Other States, including the United States, also made statements supporting the wide adoption of the Convention and stressing its importance for global e-commerce.

See online:<http://www.un.org/News/Press/docs/2006/lt4396.doc.htm.> The text of the *UN Convention on the use of Electronic Communications in International Contracting* is available online at: <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html> (site last visited December 4, 2006).

260 Article 20 of the *UN Convention on the Use of Electronic Communications in International Contracting* states that it applies to the following international conventions: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*(New York, 10 June 1958); *Convention on the Limitation Period in the International Sale of Goods* (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980); *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April 1980); *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade* (Vienna, 19 April 1991); *United Nations Convention on Independent*

one "Contracting State" to the exclusion of the jurisdiction of any other courts for the resolution of any legal disputes, unless the parties have expressly provided otherwise. Furthermore, an exclusive choice of court agreement is an independent or severable term if it forms part of a contract, and cannot be contested solely on the ground that the contract itself is invalid.[261]

(b) Exclusions

Article 2 of the *Hague Choice of Court Convention* excludes consumer agreements and employment contracts (including collective agreements) of an international character. Nor does it apply to purely domestic agreements in which "the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."[262]

Article 2 further excludes the following issues from the scope of the Convention:

> *a)* the status and legal capacity of natural persons;
> *b)* maintenance obligations;
> *c)* other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
> *d)* wills and succession;
> *e)* insolvency, composition and analogous matters;
> *f)* the carriage of passengers and goods;
> *g)* marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage;
> *h)* anti-trust (competition) matters;
> *i)* liability for nuclear damage;
> *j)* claims for personal injury brought by or on behalf of natural persons;
> *k)* tort or delictual claims for damage to tangible property that do not arise from a contractual relationship;
> *l)* rights *in rem* in immovable property, and tenancies of immovable property;
> *m)* the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
> *n)* the validity of intellectual property rights other than copyright or related rights;
> *o)* infringement of intellectual property rights other than copyright or related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

Guarantees and Stand-by Letters of Credit (New York, 11 December 1995); *United Nations Convention on the Assignment of Receivables in International Trade* (New York, 12 December 2001).

261 *Hague Choice of Court Convention*, supra note 4, Art. 3(d).

262 *Ibid.*, Art.1(2).

> *p)* the validity of entries in public registers. [263]

However, pursuant to sub-article 2(3) of the *Hague Choice of Court Convention*, the proceedings will not be excluded where one of the aforementioned matters arises merely as a preliminary question and not as an object of the proceedings. Thus, if one of the excluded matters arises solely by way of a defence, it is not necessarily excluded if it is incidental to the object of the proceedings.[264] Furthermore, interim protection measures are excluded.[265]

(c) Jurisdiction

There are three basic rules: (1) Where the parties have a valid and enforceable exclusive choice of court agreement, the chosen court has exclusive jurisdiction; (2) where exclusive jurisdiction is established, any other court must decline jurisdiction; and (3) any judgment arising from jurisdiction properly exercised must be recognized and enforced by any other "Member State" courts. Generally, the court of a specific state chosen by the parties in an exclusive choice of court agreement has jurisdiction, unless the agreement is null and void under the law of that designated state.[266] If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case.[267] A judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States (other nations that are Convention signatories).[268] Under Article 12, judicial (i.e., court-approved) settlements are enforceable on the same footing as judgments.[269] Article 13 lists the required documentation to be produced in order to prove the foreign judgment.[270] Procedure is generally governed by the law of the requested state and contains a general directive that the "court addressed shall act expeditiously." [271] Where a severable part of judgment is applied for or where only part of the judgment qualifies for recognition and enforcement, the severable part of the judgment may still be recognized and enforced.[272]

263 *Ibid.*, Art.2.(2).

264 *Ibid.*, Art.3. *Cf.* Art. 10 which states that where a "matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention."

265 *Hague Choice of Court Convention, supra* note 4, Art.7.

266 *Ibid.*, Art.5.

267 *Ibid.*, Art.6.

268 *Ibid.*, Art.8.

269 *Ibid.*, Art.12.

270 *Ibid.*, Art.13.

271 *Ibid.*, Art.14.

272 *Ibid.*, Art.15.

The foregoing rules are intended to promote certainty, ease of application and predictability in international trade through the enforcement of private party agreements on choice of court (forum), thus reducing external and internal inconsistencies in the reciprocal enforcement of foreign judgments amongst Contracting States.

(d) Escape clauses

The *Hague Choice of Court Convention* contains a few important (albeit limited) escape clauses. It allows courts not chosen to ignore choice of court agreements, if one of the parties lacks capacity, or giving effect to the agreement would lead to a manifest injustice, or would be manifestly contrary to public policy, or where the chosen court has declined to hear the case.[273] Similarly, under Article 9, the chosen court may refuse recognition or enforcement, on traditional grounds of fraud, denial of natural justice and public policy and reads:

> Article 9 Refusal of recognition or enforcement:
> Recognition or enforcement may be refused if -
>
> *a)* the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
> *b)* a party lacked the capacity to conclude the agreement under the law of the requested State;
> *c)* the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
>
> > *i)* was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
> > *ii)* was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
>
> *d)* the judgment was obtained by fraud in connection with a matter of procedure;
> *e)* recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
> *f)* the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

273 *Ibid.*, Art.6.

> *g)* the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Notably, Article 11 of the *Hague Choice of Court Convention* allows refusal of recognition and enforcement of a judgment "if, and only to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered." Contracting States may also make declarations limiting jurisdiction,[274] recognition and enforcement, [275] or with respect to certain matters.[276]

Contracting States may also declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement. [277] This provision is potentially the most significant benefit for harmonization, since the likely effect of any Contracting States who make this declaration will be to restrict the application of the *forum non conveniens* doctrine for defendants challenging jurisdiction in the context of the recognition and enforcement of foreign judgments. [278]

274 *Ibid.*, Article 19, Declarations limiting jurisdiction.
A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

275 *Ibid.*, Article 20, Declarations limiting recognition and enforcement.
A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

276 *Ibid.*, Article 21, Declarations with respect to specific matters.
1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply -
a) in the Contracting State that made the declaration;
b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

277 *Ibid.*, Art. 22.

278 See also, Vaughan Black, "The Hague Choice of Court Convention" (2006) Canadian International Lawyer, Vol. 6, No. 4, 181-195; Trevor C. Hartley, "The Hague Choice-of-Court Convention" (2006) European Law Review, Vol. 31, issue 3, at 414-424; Stephen B. Burbank, "Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States" (31 July 2006) Journal of Private International Law [forthcoming], University of Pennsylvania Law School-Scholarship at Penn Law. Paper 101, also available online at: <http://lsr.nellco.org/upenn/wps/papers/101>; Ronald A. Brand, "The New Hague Convention on Choice of Court Agreements" (26 July 2005) ASIL Insight, Washington; Ronald A. Brand, "Introductory Note to the 2005 Hague Convention on Choice of Court Agreements" (November 2005) International Legal Materials, Vol. 44, at 1291; Rashid A. Asif, "The Hague Convention on Choice of Court Agreements 2005: An Overview" (2005) Indian Journal of Interna-

V. CONCLUSION

Canada's traditional and parochial approach of unilateralism no longer fits within the private international law order. Bilateralism serves its purposes in some fashion, albeit the only bilateral reciprocal enforcement treaty Canada has ratified is with the United Kingdom. [279]

As a Member of the Hague Conference on Private International Law, Canada[280] should ratify the *Hague Choice of Court Convention* for a number of reasons:[281] (1) The *UEFJA* was drafted in the background of Canada's participation at the Diplomatic Conferences and Working Groups at the Hague Conference on Private International Law and thus reflects the principles enshrined in the *Hague Choice of Court Convention;*[282] (2) it will provide greater certainty

tional Law, Vol. 45, No 4, at 558; N. Boele-Boyadjieva, *What important consequences will the Hague Convention have on the exclusive choice of court agreements under EC law? The example of IP rights* (Masters' Thesis, Europainstitut, Universität Basel, 2005)[unpublished]; T. Kruger, "The 20th Session of the Hague Conference: a New Choice of Court Convention and the Issue of EC Membership" (2006) Int. Comp. Law Q. No 2, at 447; A.C. Schneider, "New Treaty Will Help Firms Operate Abroad" (10 October 2005) KiplingerForecasts.com; Andrea Schulz, "The Hague Convention of 30 June 2005 on Choice of Court Agreements" (2005) YPIL, Vol. 7, Sellier, Munich, at 1; Louise E. Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) AJIL Vol. LIII, No 3, p. 543; Peter D. Trooboff, "Foreign Judgments" (17 October 2005) The National Law Journal; P. Vlas, "The Hague Convention on Choice of Court Agreements in Dutch Perspective" in *Crossing Borders. Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden*, (Kluwer, Deventer, 2006) at 85; J. Yackee, "Fifty Years Late to the Party? A New International Convention for Non-Arbitral Forum Selection Agreements"(Winter 2006) The International Litigation Quarterly, Section of Litigation, American Bar Association, at 2.

279 The *Convention between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1996*, CTS 1995/10 has yet to be ratified; Walker, *supra* note 12, s.14.28. 14-97-14-98.

280 *Hague Choice of Court Convention, supra* note 4, Art. 25 refers to "non-unified systems" which would apply to the Canadian legal dualism of the Quebec civil law and common law systems of the other Canadian provinces and territories. However, under Article 28 a state may "declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time." *Cf.* Article 33 which provides that "denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies." *Quaere* whether the *Hague Choice of Court Convention* should be ratified and implemented as uniform legislation: The *Uniform Enforcement of Judgments Conventions Act* was adopted in 1997. In Ontario see *Enforcement of Judgments Conventions Act*, 1999, S.O. 1999, c. 12, Sched. C.

281 The American Bar Association has enthusiastically endorsed and recommended prompt signing, ratification and implementation of the *Hague Choice of Court Convention* by the United States. See online:<www.abanet.org/intlaw/newsletter/HCCCARRRC-FINAL.doc>.

282 See Enforcement Law Projects, *UEFJA* Preliminary Draft Report online: ULCC <http://www.ulcc.ca/en/cls/index.cfm?sec=3&sub=3g>.

for Canadian businesses involved in international transactions;[283] (3) it will offer a viable alternative to arbitration as a method of dispute resolution; (4) it will strengthen functional reciprocity between Contracting States on a multilateral level; (5) it will codify the private international law principles of comity, reciprocity, good faith and order and fairness, espoused by most common law courts, including the Supreme Court of Canada.

Alternatively, if the *Hague Choice of Court Convention* were not to gain currency or Canada declined to ratify and implement it, then the remaining Canadian provinces should adopt the *UEFJA* as a model for recognition and enforcement of foreign judgments. In this way, Canadian jurisprudence would continue to develop and reflect the twin objectives of harmonization and uniformity, the hallmarks of "Thinking Globally, Acting Locally."

283 See also, ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (New York: Cambridge University Press, 2006) which is a joint effort between the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) towards the clarification and advancement of transnational procedural rules of law. The ALI/UNIDROIT joint effort recognizes the need for a universal set of procedures that transcend national jurisdictional rules and facilitate transnational commercial transaction dispute resolution. The goal is to reduce uncertainty for parties litigating in unfamiliar jurisdictions, while promoting fairness in judicial and arbitration proceedings.