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Avoiding Black Holes and Hollow Victories: Cross-Border Litigation Comes of Age

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"[T]he business of litigation, like commerce itself, has become increasingly international." So said Justice Sopinka in Canada's seminal case on conflict of laws: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*. In the fifteen years since *Amchem* was decided, it has become clear that trade and commerce really have gone global.

In this current world, businesses and their lawyers need to understand the reach of private international law and appreciate the vast range of legal remedies that a party can obtain both at home and abroad.

While a single body of *substantive* international commercial law is still the stuff of imagination, the past quarter century has seen a proliferation of decisions that give shape to a coherent *process* of international commercial litigation. Here, we set out a description of these process-based issues by discussing core concepts of comity, *forum non conveniens*, and anti-suit injunctions.

The Cornerstone of Canadian Conflicts of Laws: Comity

When litigation arises between international actors, the plaintiff's goal is generally to obtain a judgment that can be realized upon. Often, this requires obtaining a judgment in one jurisdiction while seeking to realize on that judgment in another. The issue of dissipated or disappearing assets is a matter of particular concern in international litigation, where funds are easy to move and hide. As the English jurist Lord Nicholls of Birkenhead stated (in the context of an application for a *Mareva* – or freezing – order):

The defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which the defendant can escape out of sight and become unreachable.

In order to avoid the black holes decried by Lord Nicholls, one must understand and draw on the doctrine of comity, which is the doctrine that governs the enforcement of foreign judgments.

Until 1990, the rules in force in Canadian common law provinces for the enforcement of foreign judgments were virtually the same as the English common law rules that had been developed in the 18th and 19th centuries. These rules were based on the principle of territoriality, whereby courts gave only

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limited recognition to foreign money judgments, and then only on the theory that the domestic party had impliedly contracted with the foreign party to pay the foreign judgment based on certain factors connecting the domestic party to the foreign jurisdiction. This made enforcement of a foreign judgment a matter of the private right of the foreign party, not an obligation of the domestic court.

In 1990, in the case of *Morguard Investments Ltd. v. De Savoye*, the Supreme Court of Canada replaced the traditional English rules for the enforcement of judgments within Canada (i.e., between the different provincial jurisdictions) with the doctrine of comity. In 2003, in *Beals v. Saldhana*, the Court expressly applied the *Morguard* principles to foreign money judgments and, three years later, in *Pro Swing Inc. v. Elta Golf Inc.*, applied the same principles to non-money judgments.

Since *Morguard*, our case law has developed such that litigants must convince a Canadian court that under Canadian law, the foreign judgment deserves (or, when arguing on behalf of a defendant, does not deserve) deference. In order to do so, the court addresses such issues as: (1) whether, according to Canadian law, the foreign court had jurisdiction over the Canadian defendant; (2) whether the foreign litigant could sue a Canadian party in the foreign jurisdiction; (3) whether the resolution of disputes under foreign law would give rise to injustice under Canadian law; (4) whether the substantive foreign law is morally sound; and (5) whether the foreign trial procedures have the necessary components of fairness.

When a foreign judgment is given effect by the courts of another state, either through direct enforcement or when the enforcing state grants judgment without inquiring into the factual or legal merits of the foreign judgment, the enforcing state is effectively applying foreign law within its territory. This exercise – of a court preferring the substantive and procedural laws of a foreign country over its own – is not a judicial game of "if you scratch my back, I'll scratch yours." Rather, it is a balancing act between a state's right of autonomy and the principle of non-interference regarding disputes that are properly before the courts of a foreign state.

In what is still the leading US case on the doctrine, *Hilton v. Guyot*, the Supreme Court of the United States held:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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.

In *Hilton*, the Court explored the idea that comity is an aspect of state sovereignty, whereby states give their voluntary consent to foreign law out of courtesy, rather than obligation. Ultimately, however, the Court concluded that comity is a binding, if imperfect, obligation on domestic courts, whereby deference is required in certain situations where the foreign court has properly exercised its jurisdiction over litigants. The notion of comity as obligation is now the prevailing doctrine in private international law and drives the decision-making process in proceedings to enforce foreign judgments.

Of course, there may be scenarios where one wishes to do everything possible to prevent a party from obtaining a judgment in the first place. In such cases, two other concepts become key: the increasingly popular remedy of anti-suit injunctions and the doctrine of *forum non conveniens*.

Anti-Suit Injunctions and *Forum Non Conveniens*

An anti-suit injunction is an example of an extraordinary remedy that has been developed through the courts in common law nations in reaction to the expanding nature of global business. Although its scope has recently begun to expand, it usually arises where the plaintiff in a domestic court moves to restrain a defendant from commencing or continuing with a lawsuit in a foreign jurisdiction.

In order to understand the anti-suit injunction, one needs a firm grip on another concept, the doctrine of *forum non conveniens.* This is the doctrine that was developed to govern situations in which a defendant moves for a stay of judicial proceedings brought against it in the defendant's jurisdiction on the ground that there exists elsewhere a more appropriate forum for the airing of the dispute. As such, a stay on the ground of *forum non conveniens* is effectively the flipside to the anti-suit injunction: in a *forum non conveniens* motion, the domestic court restrains proceedings brought in its own jurisdiction. In an anti-suit injunction scenario, the domestic court restrains proceedings brought in a foreign jurisdiction.

The doctrine of *forum non conveniens* is a Scottish doctrine that was exported to the Commonwealth through the English case of *Spiliada Maritime Corp. v. Cansulex*. In applying the doctrine, and deciding whether to issue a stay order, the court applies the "real and substantial connection" test. The test considers what factors point to the court as the appropriate forum and what factors point away from it. Among the factors to be considered are:

- in a contractual dispute, the location in which the contract was signed and the applicable law of the contract (and in a tort dispute, the location in

which the tort was committed and the law governing the tort);
- the location where the majority of the witnesses reside;
- the location of the key witnesses;
- the location of the bulk of the evidence;
- the jurisdiction in which the factual matters arose;
- the residence or place of business of the parties;
- any loss of juridical advantage (such as an issue regarding limitation periods).

In Ontario, these grounds are described in *Muscutt v. Courcelles*, where the Ontario Court of Appeal cited additional factors to be considered in deciding whether there is a real and substantial connection, including:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the dispute;
- in an international case, the standards of jurisdiction, recognition and enforcement that apply elsewhere.

In Canada, as in England, the onus is on the party seeking to challenge the domestic court's jurisdiction to show that the foreign jurisdiction is clearly more appropriate by pointing to the factors from *Muscutt*. If successful, the domestic proceedings are stayed on the ground of *forum non conveniens* and the case may proceed in the foreign jurisdiction.

As stated, the flipside to a *forum non conveniens* motion is the anti-suit injunction. We enter the realm of the anti-suit injunction where the jurisdiction that is being contested is the foreign one. In *Amchem*, the Supreme Court of Canada developed a two-part test to determine whether a Canadian court should issue an anti-suit injunction.

First, the court must determine whether the domestic forum is the natural forum using the real and substantial connection test set out above. If a foreign court has already made this determination while respecting the principles of *forum non conveniens*, then the domestic court should show deference and refuse to order the anti-suit injunction. If, however, the domestic court concludes that the foreign court could not reasonably have come to the conclusion that it is the appropriate forum, then the domestic court must proceed to the second part of the test.

This second part of the test weighs the relative prejudice to the plaintiff in restricting its access to a foreign court against the prejudice to the defendant by allowing the action to proceed in the foreign jurisdiction.

The Supreme Court of Canada in *Amchem* also noted that it would be preferable that the defendant seeking the anti-suit injunction first seek a stay of the foreign proceedings in the foreign jurisdiction on *forum non conveniens* grounds. Only when this stay is denied would it be appropriate for a Canadian court to entertain an application for an anti-suit injunction on the basis that Canada is potentially the most appropriate forum.

Despite a universal appreciation that the issuing of anti-suit injunctions must be exercised with caution, attempts to restrain the circumstances in which they are granted have been rejected by the courts. For example, despite the direction of the Supreme Court of Canada, Canadian courts have not limited the granting of anti-suit injunctions to situations where a stay has been unsuccessfully sought in a foreign jurisdiction. In a striking example of a court fashioning an anti-suit injunction to fit the situation, this firm recently obtained an anti-suit injunction on behalf of an applicant in circumstances where the applicant was not a party to the foreign proceedings.

Some provinces, such as British Columbia, have codified many of the common law principles set out above. They have done so by enacting legislation based on the Uniform Law Conference of Canada's *Court Jurisdiction and Proceedings Transfer Act* (CJPTA). As the Supreme Court of Canada recently held in the 2009 case of *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, in those provinces, courts must be guided by the language of the statute. While still a comity-based approach, in those jurisdictions where CJPTA legislation exists (which currently include Saskatchewan, Nova Scotia, Prince Edward Island, and Yukon Territory), the text of the statute will guide the court's decision-making.

Many Tools at Your Disposal

The process-based issues we describe above are, of course, just the tip of the iceberg in international litigation. There are a range of extraordinary remedies that are becoming more and more popular and accessible today to assist litigants in preventing their opponents from slipping into "judicial black holes". From *Norwich* orders, which allow a party to obtain discovery from third parties in aid of litigation, to *Mareva* injunctions, which have developed in certain jurisdictions to the point where they can be obtained to freeze worldwide assets (even in the absence of a cause of action in the jurisdiction of the court issuing the order), it would appear that the outer limits of the courts' powers in cross-border cases are frequently tested and increasingly extended. □

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