Avoiding False Starts and Hollow Victories: Equipping Yourself for Cross-Border Litigation

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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 conflicts of laws: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*.[1] In the 15 years since *Amchem* was decided, it has become clear that trade and commerce really have gone global. As businesses increasingly push across boundaries and borders, business clients have come to expect their lawyers to do the same. As a result, the arena of international commercial litigation, once a bastion of a token few jet-setting lawyers in major business centers, has become a dynamic field that is populated with lawyers whose practices were, up until recently, based only in the domestic sphere.

Lawyers practicing in the international milieu know that their clients are no longer satisfied with top-notch advice at home; they expect an equal level of proficiency when their case takes an international turn. In order to service these clients properly, all business litigators must have at least a basic understanding of private international law and an appreciation of the vast range of legal remedies that a party can obtain both at home and in a foreign jurisdiction.

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 seek to give shape to a coherent process of international commercial litigation. This paper is meant to equip litigators with a basic understanding of these process-based issues by discussing issues of comity, the doctrine of *forum non conveniens*, and anti-suit injunctions. These are matters that litigators should consider before providing the international advice that their clients are increasingly coming to expect.

The Cornerstone of Canadian Conflicts of Laws: Comity

In cross-border litigation, the enforcement of a foreign judgment is often the end-game. As such, we see it as a useful starting point to discuss the tools that all cross-border litigators need.

When litigation arises between international actors, the plaintiff's goal is generally to obtain a judgment that can be realized upon. Often, this requires a party to obtain an order in one jurisdiction while seeking to realize on that order in another jurisdiction (usually, the jurisdiction where the defendant's assets are found). In order to obtain an order in one country and enforce it in another, the cross-border litigator in Canada needs to understand the doctrine of comity, which is the doctrine that governs the enforcement of foreign judgments.

Until 1990, the rules in force in the 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 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 a world of international capital flows, commercial intercourse and movement of people, people and businesses increasingly found themselves caught by or commencing foreign legal proceedings. As Canadians and Canadian businesses grew voluntarily to connect themselves to many different legal systems and in many different ways, the rules changed to make the enforcement of foreign judgments more predictable.

In 1990, in the case of *Morguard Investments Ltd. v. De Savoye*,[2] the Supreme Court of Canada replaced the traditional English rules for the enforcement of judgments within Canada (i.e., between the different provincial jurisdictions in Canada) with the doctrine of comity. In 2003, in *Beals v. Saldhana*,[3] the Court expressly applied the *Morguard* principles to foreign money judgments and, three years later in *Pro Swing Inc. v. Elta Golf Inc.*,[4] applied the same principles to non-money judgments.

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, rather than its own law. 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 on the one hand and the principle of non-interference in regard to disputes that are properly before the courts of the foreign state on the other hand.[5]

Comity has been defined as "accepted rules of mutual conduct as between state and state, which each state adopts in relation to other states and expects other states to adopt in relation to itself."[6] In what is still the leading US case on the doctrine, *Hilton,*[7] 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.[8]

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 drew the conclusion that comity is a binding, albeit 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 implicitly accepted by those who use the doctrine in private international law, including, since the 1990s, the Supreme Court of Canada.[9]

Of all of the justifications for a binding set of rules regarding the enforcement of foreign judgments, one rationale stands out: the need for international order in the arena of international commerce. In the foundational Canadian case on this doctrine, *Morguard*, Justice La Forest said that "in a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skill and people across state lines in a fair and orderly manner."[10] In another important Canadian case on this topic, *Tolofson*, La Forest J. again said that "to accommodate the movement of people, wealth and skills across state lines, a by product of modern civilization, they [states' courts] will in great measure recognize the determination of legal issues in other states."[11]

Nonetheless, foreign judgments are not, even under *Hilton*, to be automatically recognized and enforced in all cases. Rather, the Supreme Court of the United States proposed conditions that a party seeking to enforce a foreign judgment would need to satisfy for domestic enforcement of a foreign judgment:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation of or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in the procuring of the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought upon the judgment, be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[12]

The reasoning above has been codified in the United States,[13] whereby two preconditions must be met for a foreign judgment to be enforced domestically: first, the judgment must have been rendered by a legal system that provides impartial tribunals and procedures compatible with due process of law; second, the court that rendered the judgment must have had jurisdiction over the defendant in accordance with the law of the rendering state and American law.

Since *Morguard*, Canadian case law has developed in the same way. Cross-border lawyers in Canada must therefore be prepared to 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 lawyer must address 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.[14]

As stated, the purpose of enforcing foreign judgments is to ensure that your client's victory in another jurisdiction is not a hollow one. 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 Law Lord, 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.[15]

In order to avoid having the defendant slip into one of the black holes decried by Lord Birkenhead, it is essential that business litigators equip themselves with a basic understanding of comity. The savvy cross-border lawyer will consider matters of comity before committing a client to a given course on international legal matters. After all, it is not of much use to advise a client to sue in Country A if the judgment that is obtained will not be recognized in Country B where the money is located.

Of course, there may be scenarios where it is in a client's interest to do everything possible to prevent a party from obtaining a judgment in the first place. In such cases, the lawyer must be equipped to draw on two other concepts that we wish to highlight here: 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.

Technically, the anti-suit injunction is an equitable remedy that is not binding on the foreign legal system; rather, it functions *in personam* on the litigant. Practically, however, the effect is that it restrains the judicial system of another jurisdiction from taking or continuing to exercise jurisdiction over the dispute between the parties.

In order to understand the anti-suit injunction, lawyers must have a firm grip on the concept of *forum non conveniens*. *Forum non conveniens* is the doctrine that was developed to govern situations where a defendant moves for a stay of judicial proceedings in a given jurisdiction on the ground that there exists elsewhere a more appropriate forum for the airing of the dispute. As such, a stay on the grounds of *forum non conveniens* is effectively the flipside to the anti-suit injunction: in a *forum non conveniens* motion, the domestic court restrains its own proceedings. In an anti-suit injunction scenario, the domestic court restrains the foreign proceedings.

The doctrine of *forum non conveniens* was a Scottish doctrine that was exported to the Commonwealth through the English case of *Spiliada Maritime Corp. v. Cansulex*.[16] There, the test was developed whereby the defendant seeking the stay has to show[17] that the domestic court is not the appropriate forum in which to resolve a dispute and that a more appropriate forum exists for the airing of the dispute. To determine whether to issue the stay, the court applies the real and substantial connection test, whereby it considers what factors point to it 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 by parity of reasoning, 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 where the bulk of the evidence will come from;
- 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).[18]

In Ontario, these grounds are described in *Muscutt v. Courcelles*,[19] where the Ontario Court of Appeal cited additional

other 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 jurisdiction to show that the foreign jurisdiction is clearly more appropriate by pointing to the factors from *Muscutt* and *Amchem*. If successful, the domestic proceedings are stayed on grounds of *forum non conveniens* and the foreign proceedings continue.

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 the question of 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 Court summarized this part of the test as follows:

> The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum[. . .].The loss of a personal or juridical advantage is not necessarily the only potential cause of injustice in this context but it will be, by far, the most frequent.[20]

The Supreme Court of Canada also noted that it would be preferable that the party 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 was 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.[21] 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[22] — nor where the foreign jurisdiction is an appropriate jurisdiction but the plaintiff's injuries rendered her unfit to travel to abroad.[23] In a striking example of the court issuing an anti-suit injunction to fit the situation, the Superior Court of Ontario recently issued an anti-suit injunction in circumstances where the applicant was not even a party to the foreign proceedings.[24]

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 Pharmacal*[25] 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,[26] it would appear that the outer limits of the courts' powers in cross-border cases is bound only by the skills and creativity of the lawyers that appear before them. By equipping yourself with the key tools, you will be able to respond quickly when your client needs you to obtain an order that takes you beyond your borders. ■

1. [1993] 1 S.C.R. 897 at 911 [*Amchem*].
2. [1990] 3 S.C.R. 1077 [*Morguard*].
3. [2003] 3 S.C.R. 416 [*Beals*].
4. [2006] 2 S.C.R. 612 [*Pro Swing*].
5. *Buck v. Attorney-General*, [1965] 1 All E.R. 882 at 887 [*Buck*].
6. *Ibid.*
7. *Hilton v. Guyot*, 159 U.S. 113 (1895) [*Hilton*].
8. *Ibid.* at 163-164.
9. See *Morguard*, *Beals*, and *Pro Swing*, *supra*.
10. *Supra* note 2 at para. 31.
11. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1047.
12. *Supra* note 7 at 202-203.
13. Restatement of the Law Third, foreign Relations Law of the United States §482 (Washington, D.C.: The American Law Institute) (1987).
14. See *e.g. Oakwell Engineering Ltd. v. Enernorth Industries Inc.* (2006), 81 O.R. (3d) 288 (C.A.).
15. *Mercedes Benz AG v. Leiduck*, [1996] A.C. 284 (P.C.) at 305. See also: *Mareva Compania Naviera SA v. International Bulkcarriers SA,* [1975] 2 Lloyd's Rep 509.
16. [1987] A.C. 460 per Lord Goff.
17. *Ibid.* Note, in some cases, the burden of proof is reversed. For example, where the plaintiff has to seek leave to serve the defendant outside the jurisdiction in order to commence the litigation, it has been held that the plaintiff bears the burden of convincing the court to maintain jurisdiction if the defendant subsequently raises a challenge to the venue.
18. In Canada, see *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.). This case was based on *Amchem*, *supra* note 1, among other cases.
19. (2002), 60 O.R. (3d) 20 (C.A.).
20. *Amchem, supra* note 1 at 933.
21. *Castanho v. Brown*, [1981] 1 All E.R. 143 (H.L.).
22. See e.g. *Bell'O International LLC v. Flooring and Lumber Co.* (2001), 11 C.P.C (5th) 327 (Ont. Sup. Ct.) (between Ontario and New Jersey). In order to obtain the anti-suit injunction, the defendant had to explain why it had not sought a stay of the action in New Jersey. The defendant explained that it did not have the resources to do so, as its resources were being concentrated on the action in Ontario, and to expend further resources on the foreign legal proceedings would put it out of business. The Court accepted the defendant's explanation. As seeking a stay to the foreign proceeding was only described as "preferable" in *Amchem*, the Court took a flexible approach and granted the anti-suit injunction.
23. *Hudon v. Geos Language Corp.,* (1997) 34 O.R. (3d) 14 (Div. Ct) (where both Japan and Canada were held to be appropriate jurisdictions). There, too, the party that obtained the injunction had failed to seek a stay of proceedings in Japan.
24. *Shaw v. Shaw,* [2007] *CanLII* 27337 (Ont. Sup. Ct.). The parties were husband and wife and were litigating in Ontario as to which of their respective companies held the patent for an item used in children's shoes. The products were distributed by the wife's company throughout North America. The husband commenced actions in New Jersey against the wife's customers. Despite the fact that she was not a party to those proceedings, the wife sought an anti-suit injunction to halt the New Jersey proceedings, because the litigation provoked concern among her customers and risked putting her out of business. Since the outcome of the New Jersey actions would ultimately hinge on the outcome in the Ontario proceedings (which the husband, it should be noted, had commenced), the Ontario court granted the wife the injunctive relief sought.
25. *Norwich Pharmacal & Others v. Customs and Excise Commissioners*, [1974] A.C. 133. In Canada, see *Glaxo Wellcome PLC v. Canada (Minister of National Revenue – M.N.R.)* (1998), 162 D.L.R. (4th) 433 (F.C.A.) and *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (C.A.).
26. See *e.g. Solvalub Limited v. Match Investments Limited and Others,* [1996] O.F.L.R. 152 (Jersey Court of Appeal).

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