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Applying *Morguard* to foreign judgments

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As a large multinational corporation, you are assessing the benefits of relocating your head office to Canada. Although you have an impressive financial record and solid growth pattern, there are some outstanding default judgments against you in respect of a subsidiary you once had in a country whose legal system does not acknowledge the principle of limited liability. Will the assets of the company and its officers and directors be at risk?

You were encouraged by the advent of free trade to expand your Canadian manufacturing and distribution activities throughout North America. Some time ago, one of your locally-manufactured products injured an individual here and you have been engaged in settlement negotiations. Suddenly, the individual's solicitor forwards a draft originating process for an action in another North American jurisdiction, one renowned for its astronomical product liability awards, with an offer to settle for several times the amount previously contemplated. What do you do?

You have received a letter from the old country written in traditional script. It concerns a civil claim made on your business for a religious tithe retroactively assessed for the years 1985-95. You emigrated to Canada in 1987 bringing the business and its assets with you. How do you respond?

In each of these three scenarios, the advice given will turn on the state of the law in Canada with respect to the recognition of foreign judgments. In particular, it will depend on whether the principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 are applied only to Canadian judgments or whether they are extended to judgments from other countries.

This article takes a critical look at the extension to foreign judgments of the full faith and approach to interprovincial recognition and enforcement of judgments recommended in *Morguard*. It reviews the basic principles underlying the traditional rules for the recognition and enforcement of foreign judgments and argues that the *Morguard* approach cannot serve those principles in situations involving foreign judgments as it does in the recognition and enforcement of Canadian judgments. Nevertheless, it concludes that, until there is authoritative judicial or legislative guidance, it will be necessary for businesses with assets in Canada to exercise caution in deciding whether to respond to foreign proceedings.

The *Morguard* revolution

A mere five years ago, Canadian courts accorded the judgments of courts of other provinces no more respect than they did those of courts of other countries. A judgment could be enforced only if the court issuing it had taken jurisdiction over the matter on one of certain specified bases relating to the defendant's presence in the court's territory or his or her submission to its jurisdiction. An individual could often escape liability for a judgment in one province simply by moving to another and refusing to respond to service. This seemed particularly surprising within a federal system with such unifying features as a federally-appointed judiciary and a single final appellate court with plenary appellate jurisdiction.

Yet, when De Savoye moved to British Columbia from Alberta where, as a resident, he had assumed the mortgages on which he later defaulted, the law was such that he would rightly have been advised to ignore an Alberta action for the shortfall on the sale of the seized properties. As eleven judges at three levels of courts agreed, this could not be right.

The courts agreed that the rules for recognizing judgments had to be expanded to permit enforcement of the judgments of courts of a province with a real and substantial connection to the matter throughout Canada, regardless of whether the defendant was present in the province or agreed to submit to its courts' jurisdiction. Accordingly, the jurisdiction of a court may be based on a variety of factors such as:

- real or personal property in the province;
- a contract made or breached in the province;
- a tort committed in the province;
- damage sustained in the province; and
- the location of litigants and evidence in the province.

Before *Morguard*, an individual could often escape liability simply by moving to another province and ignoring notice of a proceeding

The practical effect of this change is that defendants from other provinces who object to matters being tried in a jurisdiction chosen by the plaintiff can no longer ignore service and resist the enforcement of a default judgment. They must contest jurisdiction in the plaintiff's chosen court before the matter is heard.

Within Canada, replacing restrictive rules for the recognition of the jurisdiction of other provinces' courts with the flexible standard of a *real and substantial connection* seems reasonable. Indeed, the standard

seems suitable for many of the foreign judgments sought to be enforced. Although it emphasized interprovincial comity and its domestic underpinnings in adopting the flexible standard, the Supreme Court in *Morguard* also commented extensively on commercial globalization. It observed at page 1098:

"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."

It goes without saying that if a workable system of enforceable contracts is necessary for doing business, a workable system of enforcing judgments is necessary for doing business across borders. However, it must be asked whether there is a difference between interprovincial and international comity that warrants an approach to Canadian judgments different from that taken to foreign judgments.

Traditional recognition and enforcement

The focal point of most traditional determinations of whether to recognize and enforce a foreign judgment is the jurisdiction of the foreign court over the defendant. However, the inquiry also encompasses a concern for the fairness of enforcing the foreign judgment. This concern gives rise to a range of defences that can be raised even though the foreign court has jurisdiction and delivers a judgment that is final and conclusive on the merits. Recognition and enforcement depends on both a positive determination of the jurisdiction of the foreign court and a negative determination of any allegations of specified forms of unfairness. These additional defences, sometimes referred to as grounds for *impeaching* a foreign judgment, include situations in which:

- the foreign judgment was obtained by fraud;
- its enforcement would be contrary to public policy; or
- the proceedings were contrary to natural justice.

(*See:* Castel, *Canadian Conflict of Laws* (3d ed 1994) at 270-74).

The potential for perpetuating the unfairness of an unfairly rendered foreign judgment by granting it recognition and enforcement raises serious issues of comity. As noted in *Morguard*, comity requires a court to have "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" (*see: Hilton v Guyot*, 159 US 163-64 (1895)). The rights of a defendant who is a local citizen or otherwise under the protection of local laws may require a court to refuse to enforce a foreign judgment rendered unfairly. However, it is virtually impossible to consider the fairness of a foreign judgment without appearing to engage in a critical evaluation of the administration of justice in the foreign jurisdiction. This does not sit well with the requirement to have "due regard to international duty and convenience".

This concern for comity has placed recognizing courts in an awkward position and produced two significant consequences. First, the reluctance to breach the general prohibition on re-opening the merits of the case traditionally causes courts to set a very high threshold for the establishment of a defence of this sort. Attempts to resist the enforcement of foreign judgments on this basis are routinely denied in judgments reiterating the general conclusiveness of foreign judgments.

Second, refuge is generally sought in restrictive rules for the determination of whether the court has jurisdiction over the defendant at the commencement of the action. If the authority of the issuing court to adjudicate the matter is beyond question, then any but the grossest unfairness, though unfortunate, can be overlooked on the strength of the overriding obligation to respect the acts of a foreign authority within its own territory. The emphasis on stringent jurisdictional requirements, coupled with the relative rarity of impeachment, assimilated the concern for fairness into the question of jurisdiction.

Adapting rules to suit Canadian judgments

Any concerns of Canadian courts regarding the quality of justice in another jurisdiction are inapplicable to the enforcement of a Canadian judgment. As Mr Justice La Forest observed in *Morguard* at 1099-1100:

"The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada...Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada."

This makes the rigorous examination of jurisdiction unnecessary for Canadian judgments and it reduces considerably the possibility of impeachment. It suggests that recognition and enforcement are principally, if not solely, questions of the issuing court's jurisdiction which, when dealing with Canadian judgments, are properly consolidated into a single flexible jurisdictional test of whether the issuing court's province has a real and substantial connection to the matter.

Evaluating the quality of justice

The soundness of the principles enunciated in *Morguard* for the enforcement of Canadian judgments may be beyond controversy. Why, then, in the five years since its release, has it not been adopted in other common law countries as a general basis for recognition and enforcement of foreign judgments? For example, despite their current preoccupation with the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (SI 1990/2591), English courts have shown no inclination to adopt *Morguard* principles in cases in which the common law continues to apply. The answer may lie in a critical examination of the Canadian decisions that have extended *Morguard* principles to foreign judgments.

It is unlikely that Canadian courts would feel comfortable in assessing the quality of justice in other countries

To date, Canadian courts have chosen to extend the principles of *Morguard* to the recognition and enforcement of foreign judgments on more than a dozen occasions (*See: Edinger* (1993) 22 Cdn Bus LJ 29). The basis on which they have done so was addressed by the Ontario Court (General Division) in *Arrowmaster Inc v Unique Forming Ltd,* (1993) 17 OR (3d) 407. The issue of recognition and enforcement could have been decided in *Arrowmaster* on the traditional basis, because the defendant had submitted to the jurisdiction of the foreign court and defended the action, but Mr Justice MacPherson considered whether *Morguard* principles should be applied to foreign judgments. On page 411 he explained why they should:

"I think it is fair to say that the overarching theme of La Forest J's reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure...This should not be an absolute rule — there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process."

In theory, this analysis is sound. As a practical matter, the judgments sought to be recognized that have provided the impetus for the extension of *Morguard* principles have been American. When a court has confidence in the legal system from which a judgment has emanated, it is happy to say so and when, in rare cases, some aspect to the foreign judgment is outrageous, a court may feel free to deny recognition on, *inter alia,* public policy grounds. However, it is unlikely that judges at first instance will be at ease in adjudicating the many borderline cases where the quality of justice in the foreign system is genuinely in issue.

The extradition example. The general discomfort of Canadian courts with the evaluation of foreign legal systems has been demonstrated clearly in other areas. For example, facilitating the exercise of jurisdiction by a foreign court is the essence of the extradition process and this has made the fairness of foreign justice systems a focal point for challenges to extradition requests. However, far from encouraging extradition courts to develop doctrines for evaluating the fairness of foreign justice systems, the Supreme Court of Canada has charted a decisive course away from evaluating the quality of justice in the requesting state through extensive deference to the executive.

The existence of a treaty, to which the courts should give fair and liberal interpretation, is said to indicate the fundamental soundness of the foreign penal law system; and the adjudication of allegations of unfairness of the foreign system is regarded beyond the court's jurisdiction and properly a matter for the discretion of the Minister of Justice in deciding to surrender the individual. The rule of *non-inquiry* is viewed as a central requirement of comity in Canadian extradition law.

Assessing civil justice. In assessing the quality of civil justice in other states, Canadian courts are even less equipped to respond to distinctions in foreign systems because there are no treaties to give guidance as to which legal systems should be accepted as sound for the purpose of recognizing the civil judgments they issue. The difficulties are compounded by the fact that, unlike extradition, it is not a two-step process in which decisions affecting comity can be left with the executive.

Nor should it be assumed that Canadian courts will feel more at ease in undertaking this analysis in the civil sphere. In the case of *Hunt v T&N plc* [1993] 4 SCR 289, the application of a blocking statute to litigation in another province was tolerated by two levels of courts before the Supreme Court of Canada found that the constitutionality of provincial legislation could be determined by any Canadian superior court. The fact that a Court of Appeal was hesitant to engage in a kind of constitutional review that has been found to be within the jurisdiction of any Canadian tribunal, simply because it involved the laws of another province, strongly suggests that there are likely to be few judges at first instance willing to deny recognition to a foreign judgment based on criticism of the foreign legal system.

Remaining options. Given their reluctance to evaluate the fairness of foreign legal proceedings, Canadian courts are faced with the options of: (a) returning to the traditional model for recognition and enforcement with its narrow jurisdictional rules and opportunities for impeachment; and (b) ignoring concerns they may have for the fairness of enforcing foreign judgments and the rights of those under their protection. Neither option is ideal. Indeed, the experience of the European Community suggests that the success of regional arrangements requires enhanced recognition of the judgments of member states and, therefore, the importance of establishing a basis for extending the *Morguard* approach to Canada's closest trading partners.

However, equally important to such a development is the mutuality of enhanced recognition. While the principles of interprovincial comity could be extended to international situations through judicial rulings or uniform or national legislation, an international convention is required to ensure mutuality. Absent treaty initiatives, the obligation of comity to have due regard to international duty and convenience does not include adopting a more expansive approach to the recognition and enforcement of foreign judgments than generally taken in other common law jurisdictions.

Ripe for reappraisal

The Canadian approach to the recognition and enforcement of foreign judgments may, as Mr Justice La Forest suggests, be ripe for reappraisal. However, unilateral judicial initiatives in this area give rise to the spectre of enforcing foreign judgments of questionable merit against local defendants.

Clarification of the rules for recognizing and enforcing foreign judgments is urgently required to remove the significant risks now posed by the participation of Canadian individuals and businesses in the opportunities provided by the globalization of the world economy. In the meantime, it is unwise for persons with assets in Canada that may be affected by a foreign proceeding to assume that they can simply ignore the proceeding. In the many decisions involving investments and other business transactions in or from Canada, it is important to seek advice to ensure those assets are not jeopardized by foreign judgments. ■

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