

I Fought The Law (And The Law Won): Developments In The Law Of Enforcement Of Foreign Judgments

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A. The “Historical” Approach

Dicey, Morris & Collins—the Conflicts of Laws

1. **Rule 42:** If the foreign court had jurisdiction, the domestic court will enforce non-tax judgments if they are: (1) for debt or a fixed sum of money and (2) final and conclusive.
2. **Rule 43:** The foreign court will have *in personam* jurisdiction if and only if:
 - a. the defendant was present in the foreign jurisdiction when the claim was commenced;
 - b. the defendant in the domestic court was the claimant in the foreign court;
 - c. the defendant appeared in the foreign court to contest the matter on the merits; or
 - d. the defendant had agreed to have matters adjudicated in the foreign court.
3. Amongst other things a “**real and substantial connection**” between the defendant or the matters in issue **will NOT found jurisdiction**.

B. Developments in Canada

1. *Morguard Investments Ltd. v. de Savoye*, [1990] 3 SCR 1077
 - a. Unanimous judgment of the Supreme Court of Canada that Alberta judgment would be enforced in British Columbia even though did not meet the requirements of Rule 43.
 - b. Court of the Provinces should give “full faith and credit” to one another’s judgments even though this doctrine did not appear in the Canadian Constitution.
 - c. The courts of a Province will have prima facie jurisdiction over a defendant where there is a “real and substantial connection” with the matter.
2. *Beals et al v. Saldanha et al*, [2003] 3 S.C.R. 416
 - a. Majority Judgment of the Supreme Court of Canada which extended Morguard internationally. Florida judgment enforced in Ontario.
 - b. Final, money Judgments of foreign courts will be enforced if there is “a real and substantial connection” between the jurisdiction and the subject matter or the defendant.
 - c. The Court left open three defences:
 - i. the foreign judgment is contrary to Canadian public policy (ie the values enshrined in the Canadian Charter of Rights and Freedoms or the judgment would shock the conscience of the reasonable Canadian);

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- ii. the foreign judgment was contrary to natural justice (there was want of due process); or
 - iii. the foreign judgment was obtained by fraud (which must be fraud that was not discoverable prior to the grant of the foreign judgment).
3. *Pro Swing Inc. v. Elta Golf Inc.* [2006]2 SCR 612
- a. Judgment of the Supreme Court of Canada unanimously holding that in certain circumstances non-money foreign judgments should be enforced in Canada, though the Court split on whether this particular foreign non-money judgment should be enforced.
 - b. The court must have all of the flexibility of equity in deciding whether to enforce the foreign non-money judgment.
 - c. The judgment must have been rendered by a competent court (ie one with a real and substantial connection or other recognised basis for recognition), it must be final and it must be of a nature that the principle of comity requires the domestic court to enforce.

C. The Judicial Committee of the Privy Council

1. *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] AC 508
 - a. Unanimous judgment of the Privy Council on appeal from the Isle of Man regarding the enforceability of a New York Federal Bankruptcy court order that the shares of a Manx company should vest in creditors pursuant to a plan. The Manx company's shares were owned by a Cayman company.
 - b. At first instance the Deemster refused to recognise the New York order on the basis that it was an *in rem* order and purported to address title to assets in a foreign jurisdiction. On appeal the Court of Appeal reversed on the ground that the Order was *in personam* and the respondents had *de facto* submitted to the jurisdiction because their parent company had done so.
 - c. The Privy Council held that bankruptcy orders are neither *in personam* nor *in rem* orders and that the usual rules of enforcement did not apply. It went on to dismiss the appeal and reinstate the Court of Appeal's view that the Manx court should vest the shares in the creditors. It should in essence enforce a foreign injunction.
2. *Pattni v. Ali & Anor* [2006] UKPC 51 (IOM)
 - a. Unanimous judgment of the Privy Council released 3 days after the SCC decision in *Pro Swing* on the issue of whether a Judgment of the Kenyan High Court was validly made and whether it was *in rem* or *in personam*.
 - b. Dispute was in respect of shares in an Isle of Man company that owned a shopping mall in Kenya. Kenyan court ordered the Defendants to, amongst others things, convey the shares in the Isle of Man company to the Plaintiff.
 - c. At first instance, the Courts below considered the Order was *in rem* and not validly made because it purported to determine title to and transfer property which was not in the jurisdiction at the time of the judgment.
 - d. The Privy Council reversed on the basis that the Order was an *in personam* order for specific performance and stated that "their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property ...situate in state B, the courts of state B can and should recognise the foreign court's *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B. (emphasis added)".

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D. Canada, England and the Offshore World United?

1. *Miller v. Gianne* [2007] CILR 18
 - a. Decision of the Grand Court of the Cayman Islands, on amongst other things, whether to grant leave to amend a pleading to provide that if the order of the California Court ordered the transfer to the wife of various properties in Cayman from the husband, the Cayman Islands would recognise and enforce it. The argument was essentially whether it was arguable that as a result of the decisions in *Pattni v. Ali* and *Pro Swing* the prohibition on the enforcement of non-money judgments had been abolished in the Cayman Islands.
 - b. Importantly, Smellie CJ made reference to the quotation referred to above from *Pattni v. Ali* found it was not *obiter dicta*, and indeed was central to the decision. Smellie CJ seemed to indicate that he felt that an argument that foreign non-money judgments were enforceable in Cayman would meet with favour.
2. *Bandone Sdn bhd. And Brunei Investment Agency v. Sol Properties* [2008] CILR 301
 - a. Application for recognition and enforcement by the Grand Court of the Cayman Islands of an *in personam* order for specific performance issued the High Court of Brunei.
 - b. The court ordered the rectification of the list of members of the Defendant company to reflect the order of the Brunei courts on the authority of *Pro Swing*, *Pattni v. Ali* and *Miller v. Gianne*.
3. *Brunei Investment Agency and Bandone Sdn bhd.* [2008] JRC 152
 - a. The representor sought orders for the transfer of shares in two Jersey companies beneficially owned by Prince Jefri on the basis of the same Orders of the High Court of Brunei considered by the court of the Cayman Islands.
 - b. Orders granted on the basis of the decisions in *Pattni v. Ali*, *Pro Swing*, and *Miller v. Gianne*.

E. The View from the England Supreme Court: Back to Basics?

1. *Rubin v. Eurofinance* [2012] UKSC 46
 - a. The Supreme Court invited written submissions from parties to proceedings in Gibraltar who were involved in analogous proceedings. This invitation has been overstated to give the impression that arguments were sought from various offshore jurisdictions for the purpose of ensuring orthodoxy across the common law jurisdictions.
 - b. The issue was whether the English courts would recognise and enforce a foreign non-money Judgment of the US Bankruptcy Court and set aside transactions which had occurred in England when the defendants did not appear in the foreign proceedings.
 - c. The majority of the Court expressly rejected (outside of family law) the “real and substantial connection” test adopted in Canada.
 - d. The majority of the Court went on to confirm that there should NOT be a more liberal enforcement regime in the bankruptcy/insolvency “avoidance” context.
 - e. The majority of the Court expressly held that *Cambridge Gas* was wrongly decided. There was no basis for an *in personam* jurisdiction over the Cayman Islands and Isle of Man companies by the American courts and there was no jurisdiction for that court to make *in rem* orders in respect of property located abroad.
 - f. The majority of the Court made clear that there should be no introduction of judge-made law extending the recognition and enforcement of foreign judgments.

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F. Canada Goes One Step Further?

1. *Chevron Corp. v. Yaiguaje* 2015 SCC 42
 - a. The Ecuadoran court of appeal affirmed a U.S. \$9.51 billion judgment against Texaco's corporate successor Chevron, for environmental damages. Chevron holds no assets in Ecuador. The plaintiffs commenced an action for recognition and enforcement of the Ecuadoran judgment in the Ontario Superior Court of Justice.
 - b. The plaintiffs, without the need for leave from the Court, served Chevron at its head office in California, and a subsidiary, Chevron Canada, at its place of business in Ontario. Service was effected in accordance with Ontario rules of civil procedure. Both defendants sought orders setting aside service and declarations that the Canadian court had no jurisdiction.
 - c. Chevron Canada was a stranger to the Ecuadoran proceedings.
 - d. The motions judge, the Ontario Court of Appeal and the Supreme Court of Canada all found that an Ontario court has jurisdiction to adjudicate a recognition and enforcement action that also named Chevron Canada as a defendant.
 - e. Chevron contended there had to be "a real and substantial connection" between the dispute or the defendant and the enforcing jurisdiction. The Supreme Court of Canada held the only prerequisite was that the foreign court had "a real and substantial connection" with the litigants or the subject matter of the dispute. Jurisdiction of the Ontario court to recognize and enforce flowed from the act of service of a claim based on a foreign judgment.
 - f. The court held that recognition and enforcement proceedings do not require any connection between the dispute and the Canadian court, for the following reasons:
 - i. The purpose is merely one of facilitation: to assist in enforcing an already adjudicated obligation;
 - ii. The facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement;
 - iii. The enforcing court's judgment has no coercive force outside its jurisdiction – it applies only to local assets;
 - iv. Constitutional concerns that might emerge in conflict of laws cases, do not arise in recognition and enforcement proceedings.
 - g. It does not necessarily follow that the enforcing court will exercise its jurisdiction to enforce a foreign judgment.. The defendant is entitled to argue in a summary judgment motion that the Canadian court should not exercise its jurisdiction to enforce the foreign judgment because:
 - i. It would not be an appropriate use of judicial resources;
 - ii. *Forum non conveniens*; or
 - iii. There is a defence to recognition and enforcement: fraud, denial of natural justice or public policy.
 - h. A finding of jurisdiction to enforce does nothing more than afford the plaintiffs the opportunity to seek recognition of and enforcement of the Ecuadoran claim. The Supreme Court of Canada made no finding about defences available to recognition or enforcement of the Chevron judgment., nor did it say anything to prejudice future arguments about whether Chevron Canada was a proper judgment debtor to the Ecuadoran judgment, or whether its assets could be available to satisfy Chevron's debt.

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- i. The Chevron court held that Canadian courts, “like many others” have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. It referred to cases in England, Ireland and the U.S.A. which have found the presence of assets in the enforcing jurisdiction is not a pre-requisite to recognition and enforcement of a foreign judgment.
- j. The Chevron Court did not consider *Rubin* which does not appear among the list of cases cited.
- k. The Chevron court asserted that it was motivated to provide clear rules to allow parties to predict with confidence whether a court will assume jurisdiction to avoid needless and wasteful jurisdictional enquiries: “Facilitating comity and reciprocity, two of the backbones of private international law, calls for assistance, not barriers.”

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Practice Areas & Industries

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Bar Admission

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Languages

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Education

- University College,
University of Toronto,
Bachelor of Arts (with High
Distinctions), 1993
- Faculty of Law, University of
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Nicholas Holland is a partner in the law firm of McDermott Will & Emery UK LLP, based in its London office and is a litigator. He focuses his practice on contentious trusts and estates. He acts for trustees, protectors and beneficiaries, primarily in disputes involving offshore trusts. He has played a key role in litigation in the Cayman Islands, Jersey, Guernsey, the Isle of Man, British Virgin Islands, Singapore, Switzerland, Canada and the United States.

Nick was previously Head of Contentious Trusts and Estates and Head of Banking Litigation and his team was recently awarded the STEP Private Client Team of the Year for Contentious Trust and Estates Team of the Year (2012-2013). Nick is recognised as a leading lawyer in both *Chambers* and *Legal 500* which lately noted that he is "bright, affable and very good with clients" and that he is "one of the very best contentious trusts lawyers in London."

Representative Experience

- Advising North American class proceedings lawyers in connection with claims against a Bermudan trustee arising from a failed charitable giving tax scheme
- Advising the distributor of aircraft engines in connection with an arbitration in Singapore
- Advising trustees in connection with varied litigation arising from invalid instruments of retirement and appointment of new trustees
- Advises various SME purchasers of Interest Rate Derivative products in connection with proceedings against the financial institutions selling the products
- Advising a Guernsey trustee in English proceedings arising from the failure of Kaupthing Bank
- Advised a Sudanese family in connection with potential claims against a Jersey trustee
- Advised a Cayman trustee in connection with an investigation that the trust property was being used to bribe the former Libyan Sovereign Wealth Fund resulting in proceedings in England and Switzerland
- Advised the executors of the Estate of an assassinated Liberian president in connection with assets held in BCCI in the Cayman Islands
- Advised a former Prime Minister in connection with varied litigation arising from his relationship with German-Canadian businessman, Karlheinz Schreiber
- Advised Transocean and its captive insurer in connection with proceedings arising from the destruction of the Deepwater Horizon rig

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Practice Areas

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Called to the Bar

- Ontario (1988)

Education

- University of Ottawa
LL.B. 1986
- University of Western Ontario
M.A. 1979
- University of Exeter
B.A. (Hons) 1978

Latest Publications

- The Lord Chief Justice's Report 2015
- Successful Settlements

John O'Sullivan is a self-employed barrister based in Toronto, Canada. A substantial portion of his practice is devoted to contentious trusts and estates advice and court advocacy. He represents clients based not only in Canada, but also in the U.S., the U.K. and the Middle East.

A native of London, England, O'Sullivan was called to the Bar of Ontario in 1988.

He is a frequent speaker and writer in the area of civil advocacy and contentious estate matters.

He is co-author of the Canada chapter in the UK publication International Trust Laws (Jordan Publishing 2014), a contributor to Key Developments in Estates and Trusts Law in Ontario (Canada Law Book), and a regular contributor to the Canadian legal magazine SLAW (<http://www.slw.ca/>).

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