THE ENFORCEMENT OF FOREIGN ARBITRATION AWARDS AND JUDGMENTS IN CANADA

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The Impact of Canada's Federal System on the Recognition and Enforcement of Foreign Arbitration Awards and Judgments

Canada is a federal state with legislative power distributed by the constitution between the federal government in Ottawa and the provinces. In a nutshell, the federal government has legislative authority over national and international trade and commerce, intellectual property, navigation and shipping, aeronautics, communications and undertakings of a national and international scope, amongst other things The provincial governments have responsibility over property rights and undertakings of a local concern.

As a result of its federal structure, there is no single procedure whereby a foreign arbitration award or judgment (we will refer to both simply as a "judgment" or "judgments") may be recognized and enforced on a national basis. However, most maritime cases are litigated before the Federal Court, which is a national trial court and court of appeal that hears legal disputes arising in the federal domain, including civil and commercial suits in federally regulated areas. The Federal Court's jurisdiction extends across the country.

While the Rules of the Federal Court contains provisions for the recognition of foreign awards and judgments, as a general rule that court will only have the jurisdiction to enforce a foreign judgment in those instances where the underlying subject matter falls within the federal government's constitutionally assigned authority. Otherwise, enforcement of foreign judgments must be sought before a provincial superior court.

Each of the Canadian provinces have mechanisms for the enforcement of foreign judgments and with the exception of Quebec, all have reciprocal registration arrangements such that a judgment recognized in one province it can be automatically registered in the others.

A party seeking the enforcement of a foreign judgment before the Federal Court may do so by filing an application, which normally proceeds *ex parte* on the basis of a written record only, with any one of the Court's eighteen offices across the country. Given its national jurisdiction, an order of the Federal Court enforcing a foreign judgment may be executed anywhere in the country. The convenience of the Federal Court system of enforcement cannot be underestimated. For example, we recently applied in Montreal for the enforcement of an arbitration award rendered against the Government of Ghana in Switzerland ordering it to pay demurrage in connection with the carriage of a shipment of rice. We were successful in executing the judgment recognizing and enforcing that award by seizing shares owned by the Ghanaian government in a publicly traded Canadian mining company whose head office and transfer agent were both located in Whitehorse,

Yukon, three thousand miles away from Montreal. A modern day gold rush for our client!

In those instances where the Federal Court does not have jurisdiction, a judgment will normally be brought for enforcement in the province where the defendant has its domicile or where its assets are located. Where the defendant's assets are located in more than one province, it may be necessary to enforce the judgment in multiple jurisdictions.

In most Canadian jurisdictions a party seeking the enforcement of a foreign judgment is entitled to seek certain pre-hearing, interim measures of relief designed to preserve the status quo pending an ultimate adjudication of the case. The remedies include mareva injunctions (or its Quebec equivalent, the seizure before judgment), Anton Piller injunctions and security for costs.

The Criteria for the Recognition of Foreign Judgments in Canada

While Canadian courts will generally take a mechanistic approach to the recognition of foreign judgments and not go behind the judgment to assess its reasoning or intentions, the following threshold requirements must nonetheless be met before a Canadian court will recognize and enforce a foreign judgment:

1. The foreign court must have had competence according to the principles of private international law. In this regard, Canadian courts will apply the broad

"substantial connection test" and will be satisfied that a foreign court had jurisdiction where there was a real and substantial connection between the foreign jurisdiction and the defendant or the proceedings. The test in Quebec is slightly different. In Quebec, a foreign court will be treated as having jurisdiction if any one of the following conditions are met; the defendant was domiciled in the foreign jurisdiction; the defendant carried on business in the foreign jurisdiction; prejudice was suffered in the foreign jurisdiction; contractual obligations were to be performed in the foreign jurisdiction; the parties, by agreement, submitted their dispute to the foreign jurisdiction, or; the defendant attorned to the foreign jurisdiction.

2. The judgment must be for an ascertainable and definite sum of money. However, money judgments that are on account of taxes and penal fines will not be enforced by a Canadian court. It should be noted that in Quebec, judgments ordering specific performance and permanent injunctions are also enforceable

3. The judgment must be final and definitive, that is to say, it cannot be susceptible, pursuant to the procedural law

> of the originating jurisdiction, to being re-opened or rescinded by the court that rendered it. In the common law provinces of Canada, a foreign judgment will still be considered final even if there is a possibility of an appeal to another court in the foreign jurisdiction. However, where foreign appeal proceedings are ongoing, the Canadian court will likely order that the enforcement proceedings be stayed pending the disposition of that appeal. In Quebec, a pending appeal would render the foreign judgment unenforceable as it would not be considered final.

Defenses to the Enforcement of Foreign Judgments

There is a strong presumption in favor of the foreign jurisdiction and the recognition and enforcement of foreign judgments. The grounds for challenging foreign judgment have little to do with the merits of that judgment and focus instead on whether the litigation process was properly invoked and conducted and the rules of natural justice were respected. For example, errors of law made by the foreign court will not affect or prevent the enforceability of the foreign judgment in Canada.

Once a Canadian court is satisfied that the threshold criteria set out above have been met, a foreign judgment may only be impeached on the following limited grounds:

1. There was a failure of natural justice in the proceedings resulting in the judgment. This is a defense that is rarely applied in Canada. In this regard, so long as the defendant was given the opportunity to fully present his case, a procedural irregularity or the use of evidence that would not ordinarily have been admissible before a Canadian court will not be treated as a denial of natural justice. The party attacking the foreign judgment must instead demonstrate that there was a fundamental flaw – such as bias, lack of or inadequate notice or the denial of the right to be heard – in the foreign proceedings, not an easy burden to discharge.

2. Sovereign Immunity. The ***State Immunity Act***, S.C. 1980-81, c.95 enshrines the basic principle that a foreign state - defined as including a sovereign or other head of state, a government of a foreign state or a political subdivision thereof, a department or agency of a foreign state or a political subdivision of the foreign state - is immune from the jurisdiction of Canadian courts. One significant exception to the notion of state immunity is commercial activity, which embraces transactions of a commercial character.

3. The foreign judgment was procured by fraud, whether on the part of the foreign court or the party seeking its enforcement. In order to constitute grounds for refusing recognition of a foreign judgment, fraud on the part of the court must have been of such a nature as to have deprived the defendant of his right to a full and fair hearing. Examples of fraud on the part of one of the parties includes perjury and the tendering of false or manufactured evidence in the foreign proceedings.

4. The foreign decision is inconsistent with Canadian public policy or the public policy of the province in which enforcement is sought. This defense is rarely applied given that the party invoking it has the burden of demonstrating that the foreign judgment violates a fundamental principle of justice or good morals in the forum in which enforcement is sought. Recent decisions of the Ontario Court of Appeal in ***Beals v Saldhana***, (2001) Carswell 2286 (CA); ***Society of Lloyds v Meinzer*** (2001), 55 O.R. (3d) 688 have affirmed that the principle of international comity mandates a narrow application of the public policy defense.

The Procedure for the Recognition and Enforcement of Foreign Judgments before the Federal Court

As most maritime claims are litigated before the Federal Court, a brief word about that court's procedure for the recognition and enforcement of foreign judgments is in order. The process is a relatively simple one. As mentioned above, applications are generally dealt with on an *ex parte* basis, usually without a hearing. They require the production of an exemplified or certified copy of the judgment, together with a copy of the submission to arbitration where enforcement of an award is sought. The application must be supported by an affidavit attesting to:

1. The fact that the judgment has not been satisfied;
2. Whether the defendant appeared in the original proceeding;
3. The applicant's address for service in Canada;
4. The defendant's name and address;
5. Whether interest has accrued on the judgment and the rate of interest;
6. Exchange rate information;
7. The fact that the applicant knows of no impediment to the judgment's recognition or enforcement; and
8. The fact that the judgment is final.

Recent Developments

As mentioned above, Canadian courts tend to take a strict or "mechanistic" approach to the recognition of foreign judgments and awards set down by the English High Court in ***Norsk Hydro ASA v State Property Fund of Ukraine***, (2002) EWHC 2120. Consistent with this approach Canadian courts have only enforced judgments against the party or parties named therein. Two recent Canadian cases have dealt with situations where a creditor attempted to enforce an arbitration award against a party who was not the named debtor in the award where the named debtor and the party against whom enforcement was sought appeared to be one and the same.

In ***TMR Energy Ltd. v State Property Fund of Ukraine***, (2005) FCA 28, TMR had obtained an arbitration award in Stockholm for an amount of US $40 million arising out of the State Property Fund's failure to honor the terms of a joint venture agreement related to the operation of an oil refinery on the Black Sea. TMR was unable to obtain payment of the award and in January of 2003 it moved to register and enforce the award before the Federal Court. In its application, TMR described the State Property Fund as "an organ of the State of Ukraine."

TMR's application for the registration and enforcement of the award was granted by a Prothonotary of the Federal Court. Armed with this judgment, TMR proceeded to seize an Antonov cargo aircraft which had landed at an airport in Goose Bay, Newfoundland in June of 2003. Although operated by a Ukrainian state company named Antonov ASTC

under the Soviet era legal regime of "full economic management," the aircraft in fact belonged to and was registered in the name of the State of Ukraine.

Following the seizure of the aircraft, the State of Ukraine, the State Property Fund and Antonov brought applications to have the registration of the award struck out and the seizure lifted. Acting on behalf of the State Property fund, we attacked the award on the twin grounds that the Federal Court did not have jurisdiction over the subject matter of the dispute and that the award, having been rendered against the State Property Fund, could not be enforced against the State of Ukraine, especially since TMR had never advised the Federal Court that it intended to enforce the award against the State of Ukraine, with all the state immunity consequences that arose from that course of action.

The issue of whether the Federal Court could look at the facts underlying the award was heard in first instance by a Prothonotary of that court who held that the court was entitled to make determinations as to the identity of the real judgment debtor under a foreign arbitration award. While acknowledging that the mechanistic approach was to be followed in most instances, the Prothonotary held that it should not govern when it came to determining this specific issue:

> "Considering, therefore, the Award as recognized in the Registration Order on the same basis as a judgment, I find the true identity of the defendant – or eventual judgment

> debtor – is an issue that can be addressed in the course of enforcement or execution proceedings."

In the upshot, the Prothonotary held that the State Property Fund and the State of Ukraine were one and the same and that the award could be enforced against the State even though it was not the debtor under the award.

On appeal, Mr. Justice Martineau of the Federal Court overturned the Prothonotary's decision and struck out the registration of the award. Amongst other things, Justice Martineau held that TMR was obliged, when applying for the registration of the award, to advise the court that it intended to enforce it against a party who was not named as a debtor. TMR's appeal of Justice Martineau's decision was dismissed by the Federal Court of Appeal which held that TMR should have informed the court in its application for the recognition of the award that it intended to enforce the award against a party that was not the judgment debtor, especially where that party was a foreign sovereign, given the immunity considerations that were involved.

TMR's application for leave to appeal to the Supreme Court of Canada was granted. However, the parties settled before the case prior to the hearing, thus leaving the question of whether a court has the ability to go behind the award to determine who the real judgment debtor is up in the air.

The British Columbia Supreme Court was seized with a similar issue in the case of ***Pan Liberty Navigation Co. Ltd. v World Link (H.K.) Resources Ltd.***, (2005)BCCA 206. In that case the plaintiff had obtained an arbitration award in London against a charterer in virtue of a charter party that provided for London arbitration and the application of English law. The Plaintiff instituted proceedings in British Columbia to enforce the award against the charterer and various other corporate entities related to it who were not named in the underlying award. The Plaintiff argued that the charterer and the other corporate entities were one and the same and that their separate corporate existence was a sham that the court ought to overlook.

The British Columbia Court of Appeal, while acknowledging the Prothonotary's decision in the ***TMR*** case, preferred to adopt the mechanistic approach to the registration and enforcement of foreign arbitration awards and held that it was for the arbitrator, as opposed to it, to determine whether the other corporate entities were defaulting charterers. The Court of Appeal held that it agreed with the approach taken in the ***Norsk Hydro*** case and held that when enforcing foreign arbitration awards the enforcing court is neither obliged nor entitled to go behind the award.