Reciprocal Enforcement of Judgments between Germany and Ontario: Analysis and Authorities

(With Application to Other Canadian Common-Law Provinces and Territories)

by

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

* A *Referendar* is a German trainee lawyer receiving practical training in judicial and other legal work having completed at least five years of formal legal studies at university and having passed the first of two state examinations for admission to the legal profession (as a judge, lawyer, state attorney, etc.).

Assessor is the title (or classification) assigned in the German legal education system to a new entrant into the administrative grade of the civil service, having completed at least five years of fulltime legal studies at university and having passed the second of two state examinations required for admission to the legal profession).

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I. Introduction

Globalization has resulted in the increasing frequency of cross border litigation. A common issue that arises in cross border cases is the enforcement of foreign judgments. Many conventions and laws, as well as case law, exist regarding this issue and it is imperative that those seeking enforcement of a foreign judgment be aware of these. In Germany, for example, a foreign judgment will only be enforced if the foreign judgment originated in a court with a reciprocating jurisdiction. In other words, it must be a court that enforces German judgments.

The purpose of this essay is to summarize the reciprocal arrangements for enforcing judgments between Ontario and Germany. The principles guiding these reciprocal arrangements are to be found within the German Code of Civil Procedure and the Ontario common law regarding enforcement of foreign judgments. The analysis and conclusions presented are, in general, applicable to all other Canadian provinces and territories except the Province of Quebec.

II. Recognition and Enforcement of foreign Judgments in Ontario

The main requirement for recognizing and enforcing a foreign judgment in Ontario is the acquisition of recognition by an Ontario court In order to achieve recognition, the plaintiff must first establish that foreign title exists. Thereafter, he or she could apply for a Canadian title and then execute enforcement. Different types of recognition for foreign judgments apply to civil and commercial judgments, support (maintenance) claims and judgments, judgements *in rem* and arbitral awards.

1. Recognition and enforcement of civil and commercial law judgments:

a. Existence of a foreign judgment *in personam*:

Since the earliest days of the province's history, Ontario has enforced *in personam* judgments from the courts of foreign states.[1] Under the common law, Ontario regards as "foreign" the judgments of either a foreign state or another Canadian province. The same legal principles in Ontario case law apply to both foreign states and other provinces when dealing with foreign recognition and enforcement.

[1] Dicey and Morris on the conflict of laws, 12th ed., vol. 1, chapter 14, "Foreign judgments", 1993, s. 455.

Pursuant to the common law, Ontario courts recognize and enforce the judgments of Germany and other non-treaty foreign states, whereas judgments from other Canadian provinces, the United Kingdom and France may be registered according to statute or treaty. In accordance with common law, a foreign judgment, though actionable in Ontario, cannot be enforced in that province without commencing a fresh legal proceeding. However, a fresh action can be so brought under expeditious and, generally inexpensive, summary procedure rules as to preclude the defendant from any further defence.

b. Jurisdiction of the German Court:

In Ontario, a number of preconditions must be met in order for a foreign court to be recognized as having jurisdiction. They are either (1), (2) or (3), as follows:

(1) At the time of commencement of the foreign proceeding, the defendant was residing or was present in the foreign state in question (in accordance with traditional jurisdictional grounds of presence). If the defendant is a corporation, the jurisdiction derives from the conduct of business.[2]

(2) The defendant submitted to the jurisdiction of the foreign court by express agreement (e.g. by stipulation of jurisdiction) or by appearing before the foreign court (traditional jurisdictional grounds of consent); **OR**

(3) A real and substantial connection exists between the foreign jurisdiction and the action or damages suffered (new jurisdictional ground of relationship), as decided by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*[3]

c. The "real and substantial connection" test:

In order for a foreign judgment to be enforced in Ontario, a real and substantial connection between the foreign jurisdiction (*i.e.*, the original adjudicating jurisdiction) and the action or damages suffered must exist. In *Morguard, supra*, the "real and substantial connection" test for the recognition and enforcement of interprovincial judgments was adopted. *Morguard* did not decide whether that test applied to foreign judgments. However, some courts have extended the

[2] Davidson v. Sharpe, [1920] S.C.R. 72; 52 D.L.R. 186.

[3] (1990) 3 S.C.R. 1077, note 3.

applicability of *Morguard* to judgments rendered outside of Canada.[4]

The question of whether the "real and substantial connection" test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments was decided affirmatively by the Supreme Court of Canada in *Beals v. Saldanha*.[5] Furthermore, in *Morguard,*[6] the Supreme Court of Canada stated that this "real and substantial connection" should be used as the principal means of identifying foreign judgments deserving recognition and enforcement. Justice La Forest explicitly held that the same reasoning and principles apply to the recognition and enforcement of judgments by courts in other countries.[7]

In *Morguard*, the Supreme Court emphasized two central ideas:

(1) The need for increased comity in recognizing foreign judgments; AND

(2) The need to make it easier for the plaintiff to sue in his or her own jurisdiction.

In *Hunt v. T&N plc.*, Justice La Forest further explained the *Morguard* ruling. With regard to the need for increased comity in recognizing foreign judgments, he stated:

In my view, the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.[8]

With regard to the need to make it easier for the plaintiff to sue in his own jurisdiction, Justice LaForest asked:

Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of

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[4] Moses v. Shore Boat Builders Ltd. (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal refused, [1994] 1 S.C.R. xi; United States of America v. Ivey (1996), 30 O.R. (3d) 370 (C.A.); Old North State Brewing Co. v. Newlands Services Inc., [1999] 4 W.W.R. 573 (B.C.C.A.)

[5] Beals v. Saldanha (2003) 3 S.C.R. 416.

[6] Morguard, supra. at note 3.

[7] Ibid. at 1096-1097. For example, La Forest J. cited with approval A.T. Von Mehren and D.T. Trautman, "Recognition of foreign adjudications: a survey and a suggested approach." (1968) 81 Harv. L. Rev. 1601 at 1603:

[T]he ultimate justification for according some degree of recognition is that if in our highly complex and interrelated work each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."Insurance Corp. v. Vanstome et al. 88 D.L.R. (4th) at 488.

[8] Hunt v. T &N plc., [1993] 4 S.C.R. 289 at 321-322, per LaForest, J.

connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?[9]

How may a "real and substantial connection" be defined? An exact definition has not been established, but Justice La Forest stated in *Hunt v. T&N plc,* that "*The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these*."[10]

Although the "real and substantial connection" is decided on a case-by-case basis, there are some criteria that establish a basis for the test. They are as follows:

(1) Location of Tort**:** when a substantial portion of the alleged tort caused by a foreign defendant arises in the plaintiff's jurisdiction (as when a foreign manufacturer negligently manufactures a product which is used or consumed in another jurisdiction).[11]

(2) Place Where Cause of Action Arose: the place where the cause of action (the fact or combination of facts which gave rise to the right of action) arose.[12]

(3) Place of Residence of Parties to the Action: the location of the respective residences of the parties.[13]

(4) Place of Conduct of Business: whether the defendant conducted business or had other dealings in the plaintiff's jurisdiction.[14]

In contrast to the practice of three preceding centuries of Anglo-Canadian jurisprudence, a jurisdiction of a foreign court may be asserted if at the time the cause of action arose:

(1) there was a real and substantial connection; AND

(2) the defendant was present in the foreign jurisdiction; OR

(3) the defendant was not present, but was a remote and yet directly causative influence leading to the incurring of damages by the plaintiff.

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[9] Morguard, supra. at 1103.

[10] Hunt, supra at 325.

[11] Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393 (approved by La Forest, J. in Morguard, supra. at note 1105-1107).

[12] Moses v. Shore Boat Builders Ltd. (1993), 106 D.L.R. (4th) 654 (B.C.C.A.). Leave to appeal to Supreme Court of Canada refused (1993). 109 D.L.R. (4th) vii.

[13] Ibid.

[14] Ibid.

c. The Muscutt Test

In the *Muscutt* quintet[15], the Ontario Court of Appeal laid down eight factors to be used to determine whether there was a real and substantial connection sufficient to support the assumption of jurisdiction:

1. The connection between the forum and plaintiff's claim;
2. The connection between the forum and defendant;
3. Unfairness to the defendant in assuming jurisdiction;
4. Unfairness to the plaintiff in not assuming jurisdiction;
5. The involvement of other parties to the suit;
6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. Whether the case is interprovincial or international in nature; and
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

This test has been subject to extensive criticism due to its complexity and lack of predictability. The Court of Appeal reformulated this test in *Van Breda v. Village Resorts Limited*.[16] It is now applied, as follows[17]:

1. The court should determine whether the claim falls under rule 17.02 (excepting subrules (h) and (o)) of the *Rules of Civil Procedure* to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of the connections identified in rule 17.02 (excepting subrules (h) and (o)) is determined the defendant bears the burden of showing a real and substantial connection does not exist. If one of those connections is not determined, the burden falls on the plaintiff to demonstrate that, in the particular circumstances of the case, the real and substantial connection test is met.

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[15] Muscatt v. Courcelles (2002), 60 O.R. (3d) 20 (C.A.), Leufkens v. Alba Tours International Inc. (2002), 60 O.R. (3d) 84 (C.A.); Lemmex v. Bernhard (2002), 60 O.R. (3d) 54 (C.A.); Sinclair v. Cracker Barrel Old Country Store Inc. (2002), 60 O.R. (3d) 76 (C.A.); Gajraj v. DeBernardo (2002), 60 O.R. (3d) 68 (C.A.).

[16] Van Breda v. Village Ressorts Limited, 2010 ONCA 84.

[17] Van Breda v. Village Ressorts Limited, 2010 ONCA 84 at paragraph 109.

2. At the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and between Ontario and the Defendant.

3. The remaining considerations should not be treated as independent factors having more or less equal weight when determining whether there is a real and substantial connection but as general legal principles that bear upon the analysis.

4. Consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strengths of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the *forum of necessity*[18] exception (also called *forum of last resort*).

5. Consideration of jurisdiction *simpliciter* (= test applied to determine if Ontario courts have jurisdiction) and the real and substantial connection test should not anticipate, incorporate or replicate consideration of the matters that pertain to a *forum non conveniens* test (= test applied to determine the appropriate forum).

6. The involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under *forum non conveniens*.

7. The willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis is an overreaching principle that disciplines the exercise of jurisdiction against extra-provincial defendants. This principle provides perspective and is intended to prevent a judicial tendency to overreach in assuming jurisdiction when the plaintiff is an Ontario resident. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against an extra-provincial defendant.

8. Whether the case is interprovincial or international in nature, and whether comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere are relevant considerations - not as independent factors having more or less equal weight with the others, but as general principles of private international law that bear upon the interpretation and application of the real and substantial connection test - should be taken into account.

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[18] This doctrine allows the forum to take jurisdiction in cases despite the absence of a real and substantial connection where there is no other forum in which the plaintiff could reasonably seek relief.

9. The factors to be considered for jurisdiction *simpliciter* are different and distinct from those to be considered for *forum non conveniens*. The *forum non conveniens* factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction *simpliciter* has been established.
10. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

e. Refusal to recognize or enforce a foreign judgment in Ontario

In rare circumstances, Ontario courts will refuse to recognize or enforce a foreign judgment and will not examine the case on its merits due to error of fact or of law.[19] The basic principle that stems from this is the "doctrine of obligation" which states that the defendant's obligation to pay exists whenever a foreign court ascertains that the payment could be enforced in Canada. Beyond this principle, the doctrine concludes that the obligation for payment implies the debtor's acceptance of obligation to pay the amount.[20] Therefore, the question of whether the enforcement would be possible the other way around is not applicable to an Ontario Court because it will enforce the judgment. The acceptance of the debt is assumed and there is no need for another review.

A foreign judgment can only be attacked or refused on the following grounds:

(1) **Fraud:** In *Beals*, the Supreme Court of Canada ruled that while a foreign judgment which has been obtained by fraud will not be recognized or enforced in Ontario, an allegation by the defendant of fraud must be supported by fresh evidence or evidence which was not before the foreign court.[21]

(2) **Judgment Contrary to Public Policy**: Generally, this is only applicable to cases of extreme departure from normal moral values to an extent which would shock the conscience of the Ontario court in enforcing the judgment. This ground for refusal is rarely invoked.[22]

(3) **Judgment Contrary to Natural Justice**: As long as the defendant was given an

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[19] Eg. See Barnard's Banking Co. Ltd. V. Reynolds (1875), 36 U.C.Q.B. 256 at 273-274.

[20] Russell v. Smyth (1842) 9 M. & W. 810 (819).

[21] Beals, supra.

[22] Castel, supra at 172; cf. Chesire and North, supra at 128-137; Dicey and Morris, supra at 511-514.

opportunity to present his or her case, Ontario courts will not generallyconsider the foreign court proceeding to be contrary to principles of natural justice. Such matters which Ontario courts have generally not recognized as contrary to natural justice include:[23]

- arguments concerning issues of natural justice which were before a foreign court;
- different rules of the foreign court concerning admissibility or inadmissibility of evidence;
- mere procedural irregularities; and
- lack, under Ontario law, of sufficient personal notice to the defendant of the original foreign proceeding, if such notice is sufficient and lawful in the foreign jurisdiction. Logically, however, in the interest of natural justice, some practical minimum must be placed upon service of notice.[24]

f. Necessary Preconditions for Enforcement of Foreign Judgments

aa. Judgment must be final and conclusive:

The doctrine of *res judicata* applies to the Ontario courts and as such, the judgment of the foreign court must be final and conclusive. Finality and conclusiveness of a foreign judgment are *presumed* by Canadian courts unless the defendant pleads the contrary.[25] It does not matter that the judgment may be subject to appeal in a higher court or that an appeal is pending, unless a stay of execution pending the appeal has been granted by the foreign appeal court.[26]

bb. Judgment must be for a definite sum of money or a non-monetary judgment:

If costs or a non-monetary judgment is awarded, then the judgment must be for a definite sum of money, including a final order for costs.

Foreign judgements are mainly in foreign currency. If the judgment is to be enforced in

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[23] Castel, supra at 287-288; Cheshire and North, supra at 348-387; Dicey and Morris, supra at 514-518.

[24] In an early leading case, for example, substituted service upon a defendant -- who had never been on the island of Tobago nor submitted to the courts there -- effected by nailing a copy of the writ to a Tobago courthouse door in conformity with the laws of Tobago -- was not recognized when enforcement of the judgment in England was attempted.

[25] Smith v. Smith, [1923] 2 D.L.R. 896 (Sask. C.A.).; Smith v. Smith, [1955] 1 D.L.R. 229 (B.C.S.C.).

[26] Castel, supra at 283-284, 290-292; Cheshire and North, supra at 368-377; Dicey and Morris, supra at 409-503.

Ontario, then it shall be stated in the currency of Canada. In Ontario and British Columbia, the amount to be paid is based on the currency conversion rate of the day preceding the date stipulated for payment.

In *Pro Swing v. Elate Golf Inc*., the enforcement of a non monetary judgement was approved by the Supreme Court of Canada in 2006.[27] The court based its decision on the important social and economic forces that shape commercial and other kinds of relationships and stated that, for non- monetary judgments, the *Morguard* Principles must apply as well. Restriction on the recognition and enforcement of foreign non-monetary judgements should relate to finality and clarity. The court stated that:

Finality demands that a foreign judgement establish an obligation that is complete and defined. The obligations need not to be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step: orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in the need of future elaboration.

Clarity which is closely related to finality requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of judicial apparatus in the enforcing jurisdiction. Clarity means that someone unfamiliar with the case must be able to ascertain what is required to meet the terms in the order.

Therefore, an application for enforcement of a foreign judgment will only be dismissed whenever the judgment is not final or not clear. However, it should be noted that the court left open the possibility that in prospective cases other reasons for a dismissal may arise.

cc. Judgment must not be for taxes or penalties:

Ontario courts do not have the jurisdiction to consider a foreign judgment which aims to enforce the revenue or penal laws of a foreign country. "Penalty," in this sense, means a sum payable to the foreign state, not money payable to a private plaintiff. In the latter case, an award of punitive or exemplary damages is not penal.[28] The explanation was provided by Lord Denning, M.R., in *A.-G of New Zealand v. Ortiz* (1984), when he stated:

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[27] Pro Swing v. Elta Golf Inc. 2006 SCC No. 52

[28] Castel, supra, p. 290; Cheshire and North, supra, pp. 381-384; Dicey and Morris, supra, pp. 462-463.

Applied to our present problem the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.[29]

It should be noted, however, that in Ontario, neither civil nor contempt orders,[30] nor restitution compensation payments arising, for example, out of environmental pollution or spills[31] charges are penal.

2. Support (Maintenance) claims and judgements:

If the German judgment is a support (maintenance) claim, it can be recognized and enforced by most Canadian courts through the Auslandsunterhaltsgesetz (AUG). An English translation of Section 1 Abs. 2 states that the reciprocity provisions apply *to a state, which has a statute similar to it, if the meaning of the reciprocity provision of that statute has been authenticated, if the Ministry of Justice has ascertained it and announced it in the Bundesgesetzblatt.*

3. Judgments *in rem*:

Judgments *in rem* deal with interest in movable or immovable property. A foreign judgment *in rem* is recognized and enforced in Canada when the immovable and/or movable property, at the time of the commencement of the proceeding, is located in the state where the judgement is handed down. Once this is the case, the same preconditions as for *judgment in personam* are applicable.

4. Arbitral Awards

Arbitral awards are recognized and enforced either under:

1. The New York United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; or

2. The UNCITRAL pilot law.

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[29] A.-G. of New Zealand v. Ortiz, [1984] 1 A.C. 1 at 21 (C.A.).

[30] Pro Swing, supra at 106.

[31] United States of America v. Ivey (1995), 26 O.R. 533 (C.A.).

The enforcement of arbitral wards is subject to the federal state machinery in Canada and, as for other legal systems in Canada, the principle of enumeration prevails. Paragraph 91 of the *Constitution Act* grants exclusive legislative power to the Federal Government whereas paragraph 92 grants legislative powers to the provinces and counties. However, although there is no legislation that provides for the regulation of arbitral awards, they are enforced by the legislation of the provinces.[32] In general, the legislative power of the provinces and counties is derived from paragraph 92(13), under "Property and Civil Rights in the Province" and paragraph 92(14), under "The Administration of Justice in Province."

a. New York United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

This convention was enacted between Canada and Germany on August 8th, 1986 and is only applicable to international trade disputes. Canada made use of its right by Art 1 Sub 3 of the convention which states that any international trade disputes will be determined in accordance with Canadian law. An adequate recognition and enforcement requires that the application be filed with a certified copy of the arbitral award and a certified copy of the arbitration clause. If these documents are not in English or French then a certified translation is also necessary. The court does not review any decisions made by arbitration and the recognition and enforcement can only be refused for reasons found in Art 5 of the convention.

b. UNCITRAL- pilot law

In 1986, Canada passed the UNCITRAL pilot law for international commercial arbitration. In that same year, the resolution was accepted by the provinces. The federal *Commercial Arbitration Act*[33] is applicable to domestic and international commercial arbitration. It is limited to maritime claims and to claims in which the Crown or a federal company or a Canadian ministry is involved as a party.

In contrast to the federal law, the provincial and territorial law requires an international arbitration proceeding. Such a proceeding requires:

1. that the parties be domiciled in different countries;

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[32] Paul J. Davidson, "International Commercial Arbitration Law in Canada" (1991), 12 Northwestern Journal of International Law & Business 97 at 99.

[33] Paul J. Davidson, "International Commercial Arbitration Law in Canada" (1991), 12 Northwestern Journal of International Law & Business 97 at 99.

2. a stipulation of jurisdiction in a case in which the arbitral proceeding is taking place in a country other than that of the either of the parties' places of residence; OR
3. that the place of the arbitration, which differs from the domiciles, has a real and substantial connection to the subject matter of the action, or the parties have agreed on such connection.[34]

In special consideration of international commercial arbitration,[35] Art 35ff contain simplified recognition and enforcement provisions whereby the regulations are akin to those of the UN Convention (1958). Therefore, the implementation of the federal requirements has varied widely. In some provinces the pilot law was modified while in others it remained the same. The *Commercial Arbitration Act of British Columbia*, for example, contains additional regulations regarding connections between previous dispute-resolution or discretionary decisions of the arbitrator. In addition, the arbitrator may use mediation, conciliation or other procedures, such as, an order for costs.

In Ontario, the pilot law has been implemented in accordance with the Commercial Arbitration Act with minimal changes to the text. Arbitral proceedings can become extremely complex and we recommend that a local lawyer with the specialized skills and knowledge be retained so as to prevent a delayed proceeding or even the preclusion of a proceeding due to delay.

III. Enforcement Procedure in Ontario – a Brief Outline

In order to enforce a German (or other foreign) judgment in Ontario, the plaintiff must first serve a statement of claim (also called a writ of summons) upon the defendant and subsequently file it with the court. If the defendant fails to respond within the prescribed time, the plaintiff may request that the registrar of the court:

1. note the defendant in default under R. 19 of the Ontario *Rules of Civil Procedure* (hereinafter "the *Rules*"); OR
2. sign a judgment against the defendant in respect of a claim for debt.

Although the plaintiff is not required to hire a lawyer for this process, it is recommended that a foreign plaintiff do so because the laws of Ontario differ substantially from those of other countries. Before completing a retainer, the fees of the lawyer and securities for the court costs should be clarified.

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[34] Art. 1, sec. 3 of Pilot law.

[35] The Commercial Arbitration Act, R.S.C. 1985, c. 17 (2. supp.)

If the defendant neglects to register an intention to defend against the claim, the plaintiff can apply for a default judgment and thereby receive an enforceable judgment without a trial.

If the defendant acknowledges service and gives notice of intention to defend, the plaintiff may then apply for a summary judgment under R. 20 of the *Rules* on the grounds that there is no genuine issue for trial and that the defendant has no defence to the claim. A notice of motion and an affidavit would then be served and filed and, at least two days before the hearing, a factum containing a concise statement of the law and facts without argument would be served and filed.

Unless the defendant satisfies the court that there is an issue in dispute which merits a trial (i.e., that the judgment was obtained by fraud and that fresh evidence in that regard, or evidence which was not before the foreign court, will be submitted), the court will normally render a judgment in favour of the plaintiff.

The proceedings upon such an action are generally legal formalities because most of the contentious issues have been adjudicated in Ontario, particularly in recent years.[36] The action for enforcement may claim the amount of the foreign judgment in the currency in which it was rendered, together with such enforcement costs as may be awarded.[37] The Ontario court has jurisdiction to grant an interlocutory injunction to prevent a defendant within or absent from the jurisdiction from removing assets from Ontario.[38]

IV. Conclusion

The enforcement of foreign judgements is simplified by the *Morguard* and the *Pro Swing Inc*. decisions of the Supreme Court of Canada. Civil and commercial judgements are now enforced: (i) if the preconditions for the enforcement are met, (ii) if there is a real and substantial connection, and (iii) if there are no good grounds upon which to deny the judgment. The Ontario courts do not review the reasons underlying a foreign judgement and, as a result, such judgements are usually enforced. A foreign plaintiff should seriously consider retaining a

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[36] Eg, Amopharm Inc. v. Harris Computer Corp. (1992), 93 D.L.R. (4th) 524 (C.A.); Arrowmaster Inc. v. Unique Forming Ltd. (1993), 29 C.P.C. (3d) 65 (Gen. Div.); Days Inns of America v. Khimani (1992), 11 C.P.C. 74 (Gen. Div.); De Gaetani v. Carpenteri (1989), 38 C.P.C. (2d) 306 (Ont. Master); Fabrelle Wallcoverings v. N.A. Decorative Prod. (1992), 6 C.P.C. (3d) 170 (Gen. Div.); First American Bank v. Garay (1994), 36 C.P.C. (3d) 319 (Gen. Div.); Manistique Papers Inc. v. Rothco Sales Ltd. (1997), 14 C.P.C. (4th) 291 (Gen. Div.); Pan American World Airways Inc. v. Varghese (1984), 45 O.R. 645 (Ont. H.C.J.); Leave to appeal to the Ontario Court of Appeal refused (1985), 49 O.R. (2d) 608; United States of America v. Ivey (1995), 26 O.R. 533 (Gen. Div.);Appeal to Court of Appeal dismissed (1996), 30 O.R. 370.

[37] Ontario Courts of Justice Act, R.S.O. 1990, Chap. C.43, s. 121.

[38] Castel, supra, pp. 151-152, 293-294.

local lawyer with the requisite specialized skill and knowledge in order to process any judgement because the laws of the home jurisdiction will inevitably differ from the laws of Ontario.

Authorities

Case Law

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