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## Foreign Judgments at Common Law: Rethinking the Enforcement Rules

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*England and Canada have adopted divergent approaches to the enforcement of foreign civil and commercial judgments. An English court will only enforce a foreign judgment where the defendant submitted to the jurisdiction of the foreign court, or was present in the foreign jurisdiction when served with process. This position, while protecting domestic defendants, is outdated and does little to further the objectives underpinning judgment enforcement. Canadian courts, by contrast, have been far more liberal than their English counterparts, enforcing foreign judgments in cases where there is a "real and substantial connection" between the dispute and the judgment forum. While this approach fully advances the objectives of judgment enforcement, it leaves Canadian defendants exposed to the perils and uncertainties of international litigation*

*An alternative to either of these positions would be to adopt a variant of the "real and substantial connection" test to govern the issue of foreign judgment recognition at common law. Under this framework, questions of how fair it is to require a domestic defendant to litigate in a foreign forum would be encapsulated within the jurisdictional inquiry itself. The judgment court would only be perceived as jurisdictionally competent (and its judgment therefore enforceable) when, considering the totality of the circumstances and the additional burdens imposed by international litigation, it is fair and reasonable to expect the defendant to litigate the claim in the foreign jurisdiction. This test underscores the fact that enforceability concerns are not the same domestically as they are internationally, and that a test which is to promote the freer movement of judgments must also encompass minimum fairness safeguards*

*L'Angleterre et le Canada ont adopté des méthodes différentes pour ce qui est de l'exécution des jugements des tribunaux civils et commerciaux étrangers. Un tribunal anglais exécutera une décision étrangère uniquement si la partie défenderesse s'en est remise à la compétence du tribunal étranger ou était présent sur le territoire étranger lorsque les procédures lui ont été signifiées. Quoique cette position protège les parties défenderesses anglaises, elle est désuète et ne permet pas de poursuivre les objectifs sous-jacents à l'exécution des décisions des tribunaux. Les tribunaux canadiens, par contre, sont beaucoup plus libéraux que leurs homologues britanniques et autorisent l'exécution de jugements étrangers dans les cas où il existe un « lien réel et substantiel » entre l'objet de l'action et le ressort du jugement. Même si cette façon de faire s'inscrit tout à fait dans les objectifs de l'exécution des jugements, elle laisse les défendeurs canadiens à la merci des dangers et des incertitudes des litiges internationaux.*

*Une troisième possibilité serait l'adoption d'une variante du critère de « lien réel et substantiel » pour trancher la question de la reconnaissance des jugements étrangers en common law. Dans ce cadre d'action, les questions visant à déterminer s'il est équitable d'exiger qu'une partie défenderesse nationale se défende devant un tribunal étranger seraient enchaînées dans l'examen même de la compétence. Le tribunal devant lequel l'instance serait instruite ne serait considéré comme ayant compétence (et, par conséquent, son jugement ne serait exécutable) que si, compte tenu de l'ensemble des circonstances et des fardeaux additionnels imposés par le litige international, il était juste et raisonnable de s'attendre à ce que la partie défenderesse fasse valoir ses arguments dans le ressort étranger. Ce critère fait ressortir le fait que les questions relatives au caractère exécutoire ne sont pas les mêmes à l'intérieur d'un pays qu'en droit international, et qu'une formule visant à favoriser la libéralisation de l'exécution des jugements doit aussi comporter des normes destinées à assurer un minimum d'équité.*

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*Introduction*

The extent of the recognition to be afforded in one country to judgments pronounced by the courts of another country is one of the most baffling and delicate problems which arise in Private International Law.

– H.C. Gutteridge, *Reciprocity in Regard to Foreign Judgments* (1932)

This comment, made nearly three-quarters of a century ago by a Cambridge law professor, remains as true today as it was then. England and Canada have adopted disparate approaches to the enforcement of foreign civil and commercial judgments. English courts have developed common law rules governing the enforceability of foreign judgments which reveal a guarded approach to judgments from outside the jurisdiction. In particular, an English court will only enforce a foreign judgment where the defendant submitted to the jurisdiction of the foreign court, or was present in the foreign jurisdiction when served with an originating process. Canadian courts, by contrast, have exhibited a far more liberal outlook than their English counterparts, enforcing foreign judgments in cases where there is

a “real and substantial connection” between the dispute and the judgment forum. Such positions can be said to represent rather extreme points on the spectrum of possible rules for the enforcement of foreign judgments. It may be that a preferable common law enforcement regime lies somewhere between these poles. To ascertain where on such a continuum this judgment enforcement framework may lie requires exploring the deficiencies in the rules, the objectives served by enforcing foreign judgments, the relevant policy considerations in this area of private international law, and possible alternative tests.

### *I. Structure and Methodology*

This article commences with an analysis of the relevant goals and objectives of judgment enforcement. The existing grounds for enforcement in England and Canada are subsequently described and critiqued. A nuanced “real and substantial connection” test, a variant of that currently used in Canada, is suggested as a possible model to govern the enforcement of foreign judgments in both jurisdictions, though its limitations are acknowledged. The defences to enforcement are then examined, with the conclusion that they should be revised to better safeguard the legitimate interests of domestic defendants.

This article focuses on the common law rules for the recognition and enforcement<sup>1</sup> of civil and commercial foreign judgments operating *in personam*. In England, the common law rules tend to be overlooked – at least in the academic commentary – in what appears to be a patchwork of overlapping enforcement mechanisms, including the Brussels I Regulation<sup>2</sup> and several recognition statutes.<sup>3</sup> That is not to say, however, that the common law is insignificant. First, the recognition statutes in England replicate in large part the common law; thus, the common law retains importance for the purposes of statutory interpretation. Second, the various statutes governing the enforcement of foreign judgments are of limited geographical application and the judgments of many foreign jurisdictions are not within their scope. In particular, English common law principles continue to govern judgments from the Americas, Africa,

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1. Though enforcement and recognition have slightly different connotations (the former generally refers to the enforcement of a monetary sum; the latter pertains to the recognition of a judgment as *res judicata* between the parties), the terms – as they often are – will be used interchangeably throughout this article.

2. Council Regulation (EC) No. 44/2001 of 22 December 2000.

3. See, in particular, the *Administration of Justice Act, 1920* (U.K.), 10 & 11 Geo. V., c. 81 and the *Foreign Judgments (Reciprocal Enforcement) Act, 1933* (U.K.), 23 & 24 Geo. V., c. 13.

Asia and large parts of Eastern Europe and the Middle East.<sup>4</sup> In Canada, recognition statutes also exist, but are primarily important in the inter-provincial context. The common law rules remain highly relevant with respect to the enforcement of foreign judgments in Canada.<sup>5</sup>

A final note: while a world-wide judgments convention, bilateral treaty initiatives, or legislative solutions offer themselves up as interesting alternative means of enforcing foreign judgments, their respective merits and drawbacks are beyond the scope of this article and have not been canvassed in any detail.

## II. *Why Do Countries Recognize Foreign Judgments?*

Von Mehren and Trautman suggest that the ultimate justification for enforcing judgments of foreign states is that "if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."<sup>6</sup> In short, it simply makes sense in our modern global village to enforce judgments issued by foreign courts.

More specifically, judgment enforcement advances the mutual interests of economically and commercially interdependent states. Yntema explains:

In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflicts rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce.<sup>7</sup>

Law and economics theories have been used to illustrate why countries should enforce foreign judgments. It is thought that the free movement of goods, services, capital and persons must necessarily be accompanied

4. A. Reed, "A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?" (2003) 25 *Loy. L. A. Intl. & Comp. L. Rev.* 243 at 264.

5. The particular formulation of common law enforcement rules adopted in Canada also has implications for the domestic jurisdiction scene. See *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) (laying down eight non-exhaustive factors to be considered by a court in determining whether it possesses jurisdiction over an out-of-province defendant under the "real and substantial" connection test).

6. A.T. von Mehren & D.T. Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968) 81 *Harv. L. Rev.* 1601 at 1603.

7. H.E. Yntema, "The Objectives of Private International Law" (1957) 35 *Can. Bar Rev.* 721 at 741. Though his comments were specifically directed at choice of law, they remain equally relevant to judgment enforcement.

by the free movement of judgments.<sup>8</sup> According to this view, just as tariffs and other similar restrictions are contrary to the best interests of the global trading community, so too are limitations on the free movement of judgments. In order to best facilitate international trade and commerce, judgments must essentially "operate as a form of international currency."<sup>9</sup> The critical importance of the free movement of judgments in international commerce and trade has been recognized by the European Union in its adoption of the Brussels Regulation. Under this regime, Member States expressly acknowledge their collective interest in the free movement of judgments which is considered "necessary for the sound operation of the internal market."<sup>10</sup>

Political concerns also factor into the question of why countries enforce foreign judgments. Specifically, countries choose to enforce foreign judgments to demonstrate their respect for foreign processes of adjudication, and thereby promote a stable international community of nations. Article 16 of the Recitals to the Brussels Regulation, for instance, makes it clear that the free flow of judgments is reinforced by "mutual trust in the administration of justice in the Community."<sup>11</sup> Outside a multilateral convention, that trust of foreign legal systems is embodied in a country's rules on the recognition and enforcement of foreign judgments.

Administration of justice issues also tend to figure prominently in the analysis of why countries enforce foreign judgments. From a basic institutional efficiency point of view, it is highly inconvenient to re-litigate a dispute when it has already been fairly adjudicated by a foreign court of competent jurisdiction. To permit a retrial under such circumstances would encourage a wasteful multiplicity of litigation and a squandering of judicial resources. Moreover, it is unfair to require a judgment creditor to re-litigate a dispute in a domestic forum once he or she has already successfully brought the claim abroad. Particularly when a judgment creditor has brought an action in an entirely appropriate foreign forum, it is difficult to justify why the judgment debtor should be permitted a "second kick at the can" in domestic proceedings.<sup>12</sup>

8. Brand argues that "in today's world ... exchanges occur even where legal rights are not easily enforced. At the same time, however, the lack of a system of rights enforcement or any limitation on enforcement raises transaction costs related to those exchanges. The higher costs of operating in such an environment result in higher prices necessary to maintain the same profit margin, thus causing a reduction in the number of exchanges that will occur. *The failure to enforce legal rights, including those reduced to judgment in other jurisdictions, thus represents a significant trade barrier* (emphasis added)." R.A. Brand, "Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law" in J.S. Bhandari et al., eds., *Economic Dimensions in International Law* (New York: Cambridge University Press, 1997) at 613.

9. J. Hill, *Law Relating to International Commercial Disputes*, 2nd ed. (London 1998) at 337.

10. Brussels I Regulation, *supra* note 2, Recital 1.

11. Brussels I Regulation, *supra* note 2, Recital 16.

12. Or conversely, why the unsuccessful plaintiff in the foreign proceedings should be able to re-litigate the claim in a domestic forum.

### III. *The Common Law Rules: Overview*

#### 1. *England*

At common law, a judgment is considered *prima facie* enforceable if it satisfies the following criteria: a) the judgment is for a fixed sum<sup>13</sup>; b) the judgment is final<sup>14</sup>; c) the judgment would not amount to the enforcement of foreign public law.<sup>15</sup> The more problematic aspect of judgment enforcement stems from the requirement that the foreign court must possess jurisdiction over the defendant according to English rules of private international law.<sup>16</sup> It is now well-established that an English court regards a foreign court as jurisdictionally competent either where the defendant was present in the territory at the time of service of the originating process, or where the defendant submitted to the jurisdiction<sup>17</sup> of the foreign court. Apart from "presence" and "submission," it is thought that no other basis of jurisdiction will suffice to render a foreign court competent in the international sense, such that its judgment will be enforced in England.<sup>18</sup>

13. *Beatty v. Beatty*, [1924] 1 K.B. 807 (C.A.) ("No doubt a judgment to be final must be for a sum certain. But a sum is sufficiently certain for that purpose if it can be ascertained by a simple arithmetical process.").

14. For a judgment to be considered final, it must be final and unalterable in the court that pronounced it. A judgment may be regarded as final even if it is subject to appeal. See *Colt Industries v. Sarlie* (No. 2), [1966] 1 W.L.R. 1287. If an appeal is pending, the court called upon to enforce the judgment may exercise its discretion to grant a stay of the enforcement proceedings pending the appeal.

15. See e.g. *United States v. Inkley*, [1989] Q.B. 255 (C.A.) (where the English court would not enforce a Florida judgment where the purpose was the execution of a penal process). However, the foreign judgment will be denied enforcement only if it falls directly within the area of revenue, penal or other public laws strictly construed.

16. *Sirdar Gurdial Singh v. The Rajah of Faridkote*, [1874] A.C. 670 (P.C.).

17. Briggs asserts that agreement by submission is "more puzzling than is currently acknowledged" and questions whether it follows that because a defendant has agreed to the adjudicatory jurisdiction of a certain court, the defendant necessarily agreed to accept the international enforcement of any judgment rendered against him. See A. Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 Singapore Y.B.I.L. 1 at 9 [Briggs, "Crossing the River"].

18. Bases of jurisdiction not regarded as sufficient to found jurisdiction for enforcement purposes include: presence of the defendant in the foreign jurisdiction at the time the cause of action arose; nationality, domicile; possession of property in the foreign jurisdiction; assumption of jurisdiction by the foreign court based on the equivalent of England's service out rules.

## 2. Canada

Prior to 1990, the rules for the recognition and enforcement of foreign judgments in common law Canada<sup>19</sup> closely paralleled those of England. As a pre-requisite to recognition, the enforcing province must have regarded the foreign court as jurisdictionally competent, either because the defendant was present in the territory or the defendant submitted to the jurisdiction of the foreign court. At that time, all jurisdictions external to the provincial forum, domestic or international, were regarded as equally foreign. This meant that for the purposes of private international law, a judgment from Alberta was considered "foreign" to an Ontario court in the same way that a Polish or Kenyan judgment would be.

In 1990, the case of *Morguard Investments Ltd. v. De Savoye*<sup>20</sup> fundamentally altered the landscape of judgment enforcement in Canada. The Supreme Court of Canada, in what has been hailed as "the most important [Canadian] decision on the conflict of laws,"<sup>21</sup> held that a default judgment from Alberta was enforceable against a defendant in British Columbia, even though the defendant had neither consented to the jurisdiction of the Alberta courts, nor was he served with process there. La Forest J., writing for a unanimous court, reasoned that "[i]f it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment."<sup>22</sup> Otherwise stated:

[T]he courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.<sup>23</sup>

19. The rules governing the enforcement of foreign judgments in Québec, codified in Book Ten of the Civil Code, S.Q. 1991, c. 64, differ significantly from those described in this article. For a discussion of the Québec rules, see G. Saumier, "The Recognition of Foreign Judgments in Québec – The Mirror Crack'd?" (2002) 81 Can. Bar Rev. 677; J. Goodman & J. Talpis, "*Beals v. Saldanha* and the Enforcement of Foreign Judgments in Canada" (2004) 40 Can. Bus. L. J. 227 at 238-244. Note also that two provinces, New Brunswick and Saskatchewan, have legislation governing the enforcement of foreign judgments that preserves the English common law rules: *Foreign Judgments Act*, R.S.N.B. 1973, c. F-19; *Foreign Judgments Act*, R.S.S. 1987, c. F-18. It would appear that the discussion of both the English and the Canadian rules is particularly instructive in these provinces, as they have yet to confront the challenge of modernizing their foreign judgment enforcement regimes.

20. [1990] 3 S.C.R. 1077 [*Morguard*].

21. See J. Ziegel, "Introduction, Symposium: Recognition of Extraprovincial and Foreign Judgments: The Implications of *Morguard Investments Ltd. v. De Savoye*" (1993) 22 Can. Bus. L. J. 1 at 2. Blom comments that "no other system of private international law has experienced a judicial re-invention of its foundations that was so rapid." J. Blom, "Reform of Private International Law by Judges: Canada as a Case Study" in J. Fawcett, ed., *Reform & Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford: Oxford University Press, 2002) at 31.

22. *Morguard*, supra note 20 at 1094.

23. *Morguard*, supra note 20 at 1102.



A court properly or appropriately assumes jurisdiction where there is a sufficiently close nexus – or in the language of *Morguard*, a “real and substantial connection” – between the dispute and the provincial forum.<sup>24</sup> In *Beals v. Saldanha*,<sup>25</sup> the Supreme Court confirmed that the real and substantial connection test was intended to replace the traditional indicia of jurisdiction (presence and submission) in determining the jurisdictional competence of the foreign court.<sup>26</sup>

The Supreme Court of Canada expressed concern in *Morguard* about the way that Canadian provinces had unquestioningly transposed the English rules, which had been designed to deal with “truly foreign” judgments, to judgments rendered by sister provinces. La Forest J. correctly remarked that these rules were particularly ill-suited to a federal state and “fl[ew] in the face of the obvious intention of the Constitution to create a single country.”<sup>27</sup> *Morguard* clearly mandated a change in the rules of private international law as between sister provinces.<sup>28</sup> What was less clear was whether *Morguard* actually intended to alter the approach of Canadian courts to the recognition and enforcement of “truly foreign” judgments. Shortly after the *Morguard* decision was handed down, lower courts seized on La Forest J.’s dicta about the need to facilitate and

24. Until *Beals v. Saldanha*, [2003] S.C.J. No. 77, it was unclear whether *Morguard* and its progeny required a real and substantial connection between the defendant and the forum, or the subject-matter of the dispute and the forum. In *Beals*, it was clarified at para. 23 that “[a] substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.” The case did not shed much light on the types of connections that would suffice to support jurisdiction. In *Hunt v. T & N plc.*, [1993] 4 S.C.R. 289 at 326 [*Hunt*], the Supreme Court of Canada eschewed a rigid test which focused on “a mechanical counting of contacts or connections” and preferred that the jurisdictional inquiry be guided by broad requirements of order and fairness. Critics argue that the real and substantial connection jurisdictional test suffers at the outset from inherent uncertainty and unpredictability, both of which are significantly magnified on an international scale.

25. [2003] S.C.J. No. 77, [2003] 3 S.C.R. 416 [*Beals* cited to S.C.J.].

26. It is open to interpretation whether the Supreme Court intended to replace the traditional bases of jurisdiction with the “real and substantial” test. Major J. stated at para. 37 that “[a] real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties.” This would strongly suggest that the real and substantial connection test has now subsumed the traditional grounds of jurisdiction. However, Major J. proceeded to state, “[a]lthough such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.” Pitel argues that “the first two sentences of this quotation look like an unwelcome attempt to collapse everything down to the real and substantial connection test, with the traditional bases reduced to factors” but maintains that “without clearer language, the court should not be understood to have eliminated some or all of the traditional bases for jurisdiction.” S. Pitel, “Enforcement of Foreign Judgments: Where *Morguard* Stands After *Beals*” (2004) 40 Can. Bus. L. J. 189 at 202-03.

27. *Morguard*, *supra* note 20 at 1079.

28. In *Hunt*, *supra* note 24 at 324 the Supreme Court of Canada placed this new approach on a constitutional footing and confirmed that the *Morguard* rules are “constitutional imperatives.”

accommodate the flow of wealth across state lines, and began applying the real and substantial connection test to foreign judgments (in particular, to judgments from the United States and England). The Supreme Court of Canada recently declared in *Beals* that this was the correct interpretation of the *Morguard* decision and that the real and substantial connection test does indeed apply to truly foreign judgments.

#### IV. Defences to Enforcement

Since the common law rules for the recognition and enforcement of foreign judgments operate in tandem with various defences – public policy, natural justice and fraud – it is imperative to consider the rules in conjunction with the defences in order to gain an accurate picture of judgment enforcement.

##### 1. Public Policy

In both England and Canada, a judgment will not be recognized or enforced domestically where to do so would be contrary to the forum's conception of basic morality. Justice Cardozo's eloquent articulation of the public policy defence bears repeating:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home ... The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>29</sup>

The defence of public policy has been interpreted narrowly and has only been successfully invoked under quite exceptional circumstances.<sup>30</sup> In *Beals*, Major J. for the majority expressed concern about ascribing a wide meaning to public policy:

29. *Loucks v. Standard Oil Co. of New York*, 22 N.Y. 99 at 111 (1918). Though the judgment is an American one, the same view of public policy is taken in England and Canada.

30. See, for instance, *Vervaeke v. Smith*, [1983] 1 A.C. 145 (H.L.) (House of Lords refusing to recognize a Belgian decree of nullity invalidating a sham marriage based on the same reasons that it had declined to invalidate the marriage at first instance, namely that the parties had used the marriage as a vehicle for conferring British nationality on the alien partner to save her from deportation after conviction for a criminal offence.); *Re Macartney*, [1921] 1 Ch. 522 (English court denying enforcement of a Maltese judgment awarding a mother perpetual maintenance on behalf of an illegitimate child against the estate of the deceased putative father. The court was of the view that it was counter to public policy to enforce an affiliation order that was not limited to minority.); *Israel Discount Bank v. Hadjipateras*, [1984] 1 W.L.R. 137 (C.A.) (Court of Appeal suggesting that it might be contrary to English public policy to enforce a judgment that was based on a contract which had been procured as a result of undue influence. Note, however, that this case has been criticized on the basis that it must be the recognition or enforcement that is contrary to public policy, and not the underlying contract upon which the enforcement proceeding is based.).

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have narrow application.<sup>31</sup>

Arguably the most important decision with respect to public policy in the commercial context is *SA Consortium General Textiles v. Sun & Sand Agencies* where Lord Denning emphasized:

[There is] nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considered to be in accord with the public policy in the United States and many of the great countries of the Commonwealth.<sup>32</sup>

The question of whether foreign punitive damages awards should be enforced domestically is the subject of much debate and will likely remain fertile ground for discussion given concerns over large punitive awards characteristic of certain jurisdictions, notably the United States.

## 2. *Natural Justice*

A foreign judgment will not be enforced in England or Canada if its enforcement would result in the denial of natural justice to the defendant. In *Adams v. Cape Industries*,<sup>33</sup> the English Court of Appeal held that natural justice was not confined to its two traditional requirements – “notice” and “opportunity to be heard” – but extended to situations involving procedural defects leading to a “breach of the English court’s views of substantial justice.”<sup>34</sup> The Court of Appeal in *Adams* saw the method of assessment of damages by a federal district court judge in Texas as a violation of natural justice, since it involved the judge arriving at a lump sum award (on suggestion of plaintiff’s counsel) to be distributed in amounts which were not based on proof of injuries suffered by any of the individual plaintiffs.

The Supreme Court of Canada in *Beals* followed the *Adams* approach to natural justice, noting that a party seeking to impugn a foreign judgment must prove that the foreign proceedings were contrary to Canadian notions

31. *Beals*, *supra* note 25 at para. 75.

32. [1978] Q.B. 279 at 300. Canada has followed this decision, such that high punitive damages awards *per se* do not violate public policy.

33. [1990] Ch. 433 (C.A.) [*Adams*].

34. *Ibid.* at 564. The idea of “substantial justice” was first referred to in this context in *Pemberton v. Hughes*, [1899] 1 Ch. 781 at 790 (C.A.), where Lord Lindley observed, “[i]f a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice.”

of "fundamental justice"<sup>35</sup> or "minimum Canadian standards of fairness."<sup>36</sup> It appears that both jurisdictions are purporting to take a broader view of natural justice than that traditionally expounded in the jurisprudence.<sup>37</sup> The limits of the defence of natural justice will need to be explored in future case law for its contours to be known.

### 3. *Fraud*

While the defences of public policy and natural justice are treated in a similar manner in Canada and England, the defence of fraud is approached quite differently. In the leading English case on fraud in foreign judgments, *Abouloff v. Oppenheimer*,<sup>38</sup> Lord Coleridge C.J. and Brett L.J. held that whether a foreign court had been deliberately misled was not, and never could be, an issue upon which the foreign court could pass judgment. Thus, to re-open the judgment in subsequent English enforcement proceedings was not to revisit the merits of a judgment pronounced by a foreign court. Consequently, a foreign judgment may be impeached in an English enforcement proceeding in the absence of newly discovered evidence and in circumstances where the fraud could have been, and was, alleged in the foreign proceedings. In *Syal v. Heyward*,<sup>39</sup> for instance, the Court of Appeal held that it was irrelevant that the unsuccessful party in the foreign proceedings deliberately refrained from raising the fraud defence in the original trial, even though all the material facts were known to him at the time. This view, as controversial as it has proven,<sup>40</sup> has been confirmed repeatedly in the case law.<sup>41</sup>

Canada's approach to the fraud defence is considerably less liberal than that of the English courts. Canadian courts will allow evidence of fraud to be adduced before the enforcing court only in circumstances where such evidence could not have been previously discovered and brought

35. *Beals*, *supra* note 25 at para. 59.

36. *Beals*, *supra* note 25 at para. 63.

37. It is open to debate whether the majority in *Beals* actually applied a broader view of natural justice. Although the majority said that the requirements of natural justice were not confined to notice and opportunity to be heard, its analysis of the Florida proceedings was in essence limited to these two elements. See *Beals*, *supra* at para. 69: "I am of the opinion that the appellants were fully informed about the Florida action. They were advised of the case to meet and were granted a fair opportunity to do so."

38. (1882) 10 Q.B.D. 295 (C.A.) [*Abouloff*].

39. [1948] 2 K.B. 443 (C.A.).

40. See discussion below.

41. See *Vadala v. Lawes* (1890), 25 Q.B.D. 310 (C.A.) (evidence presented to the English court to establish the fraud claim was the same as that rejected by the foreign court); *Jet Holdings Inc. v. Patel*, [1990] 1 Q.B. 335 (C.A.) (Court of Appeal emphasized that a foreign court's views on whether a fraud had been committed against the court were neither conclusive nor relevant); *Owens Bank v. Bracco*, [1992] 2 A.C. 443 (H.L.) [*Owens Bank*] (House of Lords affirmed the common law rule set out in *Abouloff*, although it expressed some reservations about its continued application).

to the attention of the foreign court through the exercise of reasonable diligence. In *Beals*, the Supreme Court of Canada indicated that this view appropriately balanced the need to guard against fraudulently procured judgments with the need to preserve finality in judgments.

#### V. Problems With The Common Law Enforcement Rules

##### 1. *The Common Law Rules in England: 19<sup>th</sup> Century Rules, 21<sup>st</sup> Century Problems*

The common law rules for the recognition and enforcement of foreign judgments in England have remained virtually unchanged since the 19<sup>th</sup> century. It is no wonder that the rules have been described as "outmoded,"<sup>42</sup> "antediluvian,"<sup>43</sup> and "parochial."<sup>44</sup> One commentator has remarked that "[t]he point recognized in *Morguard* is that what was appropriate for nineteenth century England is not appropriate for late twentieth century interprovincial Canadian judgments. But it is obvious that it is not appropriate for contemporary England either."<sup>45</sup> While the current rules boast the advantages of certainty and predictability for the English defendant, they are hostile to most of the purported goals of judgment recognition discussed above: facilitating commercial trade, promoting political goodwill and international order, preserving institutional resources by avoiding re-litigation of disputes, and ensuring fairness to both parties to the litigation.

In addition to running counter to the objectives of judgment enforcement, the rules are not consistent with other aspects of English private international law. Any astute student of the conflict of laws will recognize the incongruity between the jurisdictional rules related to the assertion of *in personam* jurisdiction and those for the recognition and enforcement of foreign judgments. This may be because the jurisdictional rules have historically been analyzed quite independently of the rules on the enforcement of judgments. Briggs observes that "conflicts lawyers have grown up to see these as two separate and distinct branches of the law, with little in common but much between them: the 'in between part' being the rules on choice of law."<sup>46</sup> The obvious peril of separating rules on

42. J. Swan & V. Black, "New Rules for the Enforcement of Foreign Judgments: *Morguard* Investments Ltd. v. De Savoye" (1991) 12 Advocates' Q. 489 at 494.

43. Reed, *supra* note 4 at 271.

44. *Morguard*, *supra* note 20 at 1098.

45. J. Harris, "Recognition of Foreign Judgments at Common Law – The Anti-Suit Injunction Link" (1997) 17 O.J.L.S. 477 at 482.

46. A. Briggs, "Which Foreign Judgments Should We Recognise Today?" (1987) 36 I.C.L.Q. 240 at 240 [Briggs, "Which Foreign Judgments"].

jurisdiction and enforcement is that "legal thought develops independently in one branch, though the two branches are inherently collinear."<sup>47</sup>

At an intuitive level, it appears anomalous that an English court would assume jurisdiction over a defendant not present in the territory under its service *ex juris* rules where, for instance, a tort was committed in England, but that an English court would not enforce a judgment issued by a foreign state when that foreign state asserted jurisdiction on an identical basis.<sup>48</sup> Why, in other words, should there be a marked distinction between two categories of jurisdiction: one for the assumption of *in personam* jurisdiction by English courts, and the other for recognizing and enforcing foreign judgments? When an English court claims jurisdiction over a defendant not present in the country under its long-arm jurisdictional rules embodied in Civil Procedure Rule 6.20,<sup>49</sup> it does so because there exists a requisite minimal connection which makes it justifiable and fair for an English court to adjudicate the dispute. When a foreign court proceeds according to similar principles, is it not equally fair that English courts regard that foreign tribunal as jurisdictionally competent for the purposes of judgment enforcement? In the words of one author, "if we recognize a particular basis as sufficient for an English court to take jurisdiction, one might conclude that a foreign court's judgment given in circumstances where we would have thought ourselves jurisdictionally competent ought to be recognized here."<sup>50</sup>

Another element of the misalignment between the *in personam* jurisdiction rules and those for the recognition of foreign judgments stems from the fact that the former are conditioned by the doctrine of *forum non conveniens*, such that jurisdiction will not be assumed by an English court where there is clearly a more appropriate forum somewhere else. The *forum non conveniens* principle is designed to guard, *inter alia*, against the potentially unfair and arbitrary consequences that may arise from a defendant's temporary presence within a territory. When an English court possesses jurisdiction *simpliciter* solely by virtue of the defendant's transitory presence within the jurisdiction, it is likely to decline to exercise this jurisdiction under the principle of *forum non conveniens*. In the judgment enforcement inquiry, however, presence of the defendant in the territory is one of the two traditional jurisdictional bases upon

47. Reed, *supra* note 4 at 252.

48. This should not be taken as suggesting a strict reciprocity of jurisdiction approach – i.e., Country A should recognize the judgment of Country B where Country B assumed jurisdiction on a basis which Country A claims for itself. See generally *Morguard*, rejecting an approach which premises enforcement on reciprocity of jurisdiction.

49. Allowing service of process on absent defendants.

50. Harris, *supra* note 45 at 478.

which judgments are enforced. The enforcing court is not empowered to examine the nature of the defendant's presence in the territory and the foreign judgment is *prima facie* enforceable. This is true notwithstanding the fact that the English court would have declined to exercise jurisdiction over the dispute under similar conditions.<sup>51</sup> In the words of one English commentator:

It is as though those vivid principles [of *forum non conveniens*] which have revolutionized the jurisdiction of courts in common law countries ... have no bearing whatever on the receiving court's assessment of whether a foreign court had international jurisdiction to adjudicate. In this respect, the traditional common law is surely open to sustained question.<sup>52</sup>

Another problematic aspect of England's recognition practices concerns the chasm that exists between the strict common law rules, on the one hand, and the considerably more liberal Brussels Regulation rules, on the other. The Brussels Regulation, which applies to Member States of the European Union, is a highly structured regime which predicates its almost automatic enforcement rules on common and well-defined jurisdictional grounds. This fundamental dichotomy between the enforcement of judgments at common law and under the Brussels Regulation is a significant one for litigants in international disputes. In particular, it provides a clear incentive for forum shopping. A claimant is encouraged to initiate proceedings in the courts of a Member State, so that recognition will follow inexorably in England. This is tactically preferable to pursuing a dispute in what may be a more appropriate non-EU forum and assuming the consequent risk of non-enforcement.

Moreover, the degree of respect accorded to judgments of Member States compared with that accorded to judgments of non-Member States at common law is unjustifiable. Although the Brussels Regulation provides a detailed legal framework, specifically designed to ensure that justice is

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51. See C.W. Fassberg, "Rule and Reason in the Common Law of Foreign Judgments" 12 (1999) Can. J. L. & Juris 193 at 198-99 ("...it is sufficient for the enforcement of a foreign judgment that the defendant was present in the country issuing the judgment only fleetingly on the day on which he was summoned to court, even though that country had no connection to either of the parties or to the event producing litigation. But it is not sufficient that the cause of action arose in the foreign country which was also the plaintiff's country of residence. These two situations are odd enough in themselves. They are even odder when it is remembered that English courts, the courts which formulated these rules, would decline jurisdiction in the first case - where the foreign judgment would be enforced - and would take jurisdiction in the second - where the foreign judgment would not be enforced."). See also P. North & J.J. Fawcett, eds., *Cheshire and North, Private International Law*, 13<sup>th</sup> ed. (London: Butterworths, 1999), 409 ("an analogy based on the jurisdiction of the English courts is not particularly convincing, since the rules are operated in conjunction with a discretion to stay the proceedings and that exercise is likely to be an issue when jurisdiction is founded on mere presence").

52. See Briggs, "Crossing the River," *supra* note 17 at 11.

properly handed out by Member States, this does not mean that countries outside the regime are not similarly capable of dispensing justice. One author comments in this regard, "since we can hardly assume that all non-contracting States are incapable of handing out justice, the disparity in recognition appears unsatisfactory."<sup>53</sup>

Frustration with the common law enforcement rules is further exacerbated by the English courts' generous approach to the fraud defence, which is said to drive "a coach and horses through the policy favouring conclusiveness of foreign judgments and finality of litigation."<sup>54</sup> Collier notes that the fraud rule is "universally condemned" by academics<sup>55</sup> and lacks a real foundation:

The Court of Appeal applied [the fraud rule] once more in *Owens Bank Ltd. v. Bracco* in 1991, but gave no convincing reason for it; indeed it found part of the reasoning in *Abouloff* quite unconvincing. Now the House of Lords has in that case unfortunately refused to get rid of *Abouloff*, so an unjustifiable and chauvinistic rule continues to disfigure the law.<sup>56</sup>

The inadequacy of the *Abouloff* rule, a rule which vests courts with a broad power to revisit disputes on their merits, is also evidenced by the fact that English courts often seek to circumvent the strictures (or, more accurately, lack thereof) of the rule. In particular, courts have attempted to evade the fraud rule both by distinguishing it<sup>57</sup> and by using the court's inherent power to prevent misuse of its process.<sup>58</sup>

England's restrictive enforcement rules, coupled with its overly broad interpretation of the fraud defence, do little to promote the goals which lie at the heart of judgment enforcement. The rules interfere with international commercial transactions, engender a wasteful multiplicity of litigation, punish litigants who choose to pursue their remedy in an entirely appropriate forum, and imply distrust or suspicion of foreign legal systems. The common law enforcement rules were conceived in an era where

53. Harris, *supra* note 45 at 482.

54. Reed, *supra* note 43 at 290.

55. But see A. Briggs, "Foreign Judgments: More Surprises" (1992) 108 L.Q.R. 549, where he posits that the result in *Owens Bank* was "entirely satisfactory."

56. J.G. Collier, "Fraud Still Unravels Foreign Judgments" (1992) 51 C.L.J. 441 at 442 (citations omitted).

57. See *House of Spring Gardens Ltd. v. Waite*, [1991] 1 Q.B. 241 (C.A.). The fact that the issue of fraud had already been litigated in Ireland in a second action (separate from the primary litigation upon which the judgment was based) estopped the defendants from alleging at the enforcement stage that the prior English judgment had been fraudulently obtained.

58. See *Owens Bank v. Étoile Commerciale*, [1995] 1 W.L.R. 44 (P.C.), where the Privy Council struck out a bank's attempt to plead fraud as an abuse of process because it had already been pleaded in a French court.



they may have been quite suitable to the conditions of the day – where, for instance, travel was difficult, nation states operated as completely independent, sovereign units, and trade was primarily domestic rather than international. The world has changed a great deal since nineteenth-century England. Commerce and litigation are now transnational phenomena, and we accurately speak of a global trading community. Litigants can and should be expected to travel to the most appropriate forum for the resolution of their dispute, provided that fairness concerns are adequately addressed. As a general rule, foreign legal systems are capable of dispensing justice and warrant respect and deference. Indeed, “in the twenty-first century the number of countries in which litigation may ‘belong’ but in whose courts the quality of the judicial process would make us uneasy is small.”<sup>59</sup> England’s common law rules, in short, are hopelessly anachronistic and wholly out-of-step with modern commercial, economic and political realities.

## 2. *The Common Law Rules in Canada: Too Far, Too Fast*

Canadian courts should be commended for modifying the common law rules to better integrate jurisdiction and enforcement, such that the two are regarded as flip sides of the same coin. The question at the jurisdiction stage of the inquiry is identical to that at the enforcement stage: does the court have a sufficiently real and substantial connection with the subject-matter of the dispute to justify the assumption of jurisdiction? If the answer is “yes,” then the jurisdictional competence of the court has been established.

In *Morguard* and *Beals*, the rules for the enforcement of foreign judgments were examined under a distinctively commercial light. In the oft-quoted words of La Forest J. in *Morguard*:

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.<sup>60</sup>

In *Beals*, the Supreme Court restructured the common law rules relating to truly foreign judgments with a view to promoting international business relations, facilitating cross-border transactions and assisting foreign

<sup>59</sup> Reed, *supra* note 4 at 272, quoting J.D. McLean & K.W. Patchett, *The Recognition and Enforcement of Judgments and Orders and the Service of Process Within the Commonwealth*, art. 263 (London: Commonwealth Secretariat, 1978).

<sup>60</sup> *Morguard*, *supra* note 20 at 1098.

judgment creditors to obtain an effective remedy against defendants resident in Canada. The new rules reflect the needs of modern commerce and fully advance the various objectives of judgment enforcement.

However, in their fervour to modernize private international law, Canadian courts may have overshot the mark. Just as the Canadian courts “unthinkingly”<sup>61</sup> transposed the English rules for the enforcement of truly foreign judgments to those issued by Canadian sister provinces, so too the majority in *Beals* may have unthinkingly extended the *Morguard* real and substantial connection test for the enforcement of domestic judgments to judgments issued by foreign courts. In *Beals*, Major J. admitted that the enforcement of foreign judgments could raise “different issues”<sup>62</sup> and “different considerations”<sup>63</sup> than the enforcement of domestic judgments, drawing on the dicta of La Forest J. in *Morguard* indicating that greater caution should be exercised in relation to “truly foreign” judgments. Nonetheless, Major J. proceeded to broaden the *Morguard* test, unequivocally and without qualification, to judgments issued by foreign countries.<sup>64</sup> He concluded that there was “no principled reason” why foreign judgments should not be treated in the same way as judgments issued by sister provinces, provided of course that the court assumed jurisdiction on the basis of a real and substantial connection with the dispute.<sup>65</sup> Major J. extended the *Morguard* test to international judgments in the name of comity, specifically reasoning that “the need to accommodate the flow of wealth, skills and people across state lines is as much an imperative internationally as it is interprovincially.”<sup>66</sup>

With respect, the Supreme Court’s uncritical extension of the *Morguard* rules to the international context fails to appreciate that domestic enforcement imperatives differ appreciably from international ones. LeBel J., in his powerful dissenting opinion in *Beals*, underscored

61. *Morguard*, *supra* note 20 at 1095.

62. *Beals*, *supra* note 25 at para. 26.

63. *Beals*, *supra* note 25 at para. 28.

64. Note the comment of von Mehren and Trautman, *supra* note 6 at 1607 that “we cannot automatically derive solutions for international practice from decisions respecting recognition of judgments of sister states.” This is exactly what appears to have been done in *Beals*.

65. *Beals*, *supra* note 25 at para. 19. To his credit, Major J. does say at para. [30] that “any unfairness that may arise as a result of the broadened application of [the real and substantial connection] test [should] be taken into account.” However, the majority judgment, unlike that of the dissent, does not explore how an application of the *Morguard* test to international judgments could result in unfairness, and the ways that this could be remedied. See *Parsons v. McDonald’s Restaurants of Canada*, [2004] O.J. No. 83 at para. 37 (“The reasoning of the majority of the Supreme Court of Canada in *Beals* is not explicit on the nature of any modifications that may be required in applying *Morguard* internationally.”).

66. *Beals*, *supra* note 25 at para. 26. Major J. appears not to acknowledge La Forest J.’s statement in *Morguard*, *supra* note 20 at 1098 that “[t]he considerations underlying the rules of comity apply with much greater force between the units of a federal state...” (emphasis added).

the fact that "the considerations informing the application of the test to foreign-country judgments are not identical to those that shape conflict rules within Canada."<sup>67</sup> Indeed, it must be recalled that in *Morguard*, La Forest J. grounded his analysis in uniquely Canadian realities. Although he spoke of international comity, the decision was principally underpinned by federalism concerns and the inappropriateness of a disjointed enforcement regime between provinces. The tenor of La Forest J.'s reasoning indicated that it was simply illogical to treat the constituent units of a federation – a concept which implies social, economic and political integration – as foreign jurisdictions for the purposes of judgment enforcement. This federalism stream of reasoning permeating the *Morguard* decision obviously has no application in the international judgment enforcement arena.

The Court in *Morguard* also made reference to the fact that concerns about the quality of justice in the inter-provincial sphere could have "no real foundation" and that "fair process is not an issue within the Canadian federation."<sup>68</sup> We cannot make the same presumptions in the international context. To date, most of the foreign judgments that Canadian courts have been called upon to enforce using the *Morguard* analysis have been issued by American and English courts. If "foreign" is conceived in terms of these jurisdictions (and possibly a few others) the extension of *Morguard* principles to foreign judgments would likely cause little trepidation. However, at the risk of pointing out the obvious, foreign means foreign – the test, in theory, would apply equally and indiscriminately to judgments from the U.S., Ghana, Uzbekistan, Romania and Burkina Faso. Ivankovich argues in this respect:

Canadian courts are unable to make the same assumptions about procedural and substantive fairness and the quality of justice in the international context that they are able to make domestically. Post-*Morguard*, the issue has received only cursory attention to date because the international judgments for which recognition was sought were from the United States and the United Kingdom, jurisdictions with legal systems similar to Canada's ... If *Morguard*'s recognition rule continues to be extended to international judgments, the day will soon come when Canadian courts will have to address fairness issues arising out of judgments rendered by courts with systems of justice substantially

67 *Beals*, *supra* note 25 at para. 166.

68 *Morguard*, *supra* note 20 at pp. 1100, 1103.

different from that prevailing in the local forum.<sup>69</sup>

The expanded *Morguard* test does nothing – besides assert that the old common law defences continue to apply – to address the critical difference in fairness concerns between the domestic and international context.

Aside from the issue of how fair the foreign legal system may be, the real and substantial connection test ignores the question of how fair it is to require a Canadian defendant to litigate in a foreign forum.<sup>70</sup> Presumably the extended *Morguard* test operates thus: if certain facts amount to a real and substantial connection with Country A, they must also amount to an equally real and substantial connection with Country B or Country C. If we say, then, that ownership of property in New York grounds New York courts' jurisdiction under the real and substantial connection test, logic dictates that ownership of property in Nepal will similarly support Nepalese courts' jurisdiction. Once a real and substantial connection with either New York or Nepal has been made out, a Canadian defendant is expected to defend his claim in the foreign jurisdiction – irrespective of where that jurisdiction is, how difficult it is to access, and how unfamiliar the legal terrain may be – or risk the possibility that an enforceable default judgment will be issued against him.

The status of the law post-*Beals* is that essentially no protection is provided to domestic defendants.<sup>71</sup> This was likely the unintended effect

69. I.F. Ivankovich, "Enforcing U.S. Judgments in Canada: 'Things Are Looking Up!'" (1995) 15 N.W. J. Intl. L. & Bus. 491 at 518. Similarly, Finkle, Coakeley and Barrington observe that the extension of *Morguard* principles "may be appropriate, and even practical, insofar as American judgments are concerned, because they emanate from a legal system which is similar to our own. However, Canadian judges will eventually face more difficult decisions when asked to recognize judgments from other foreign states where principles of justice, court procedures and judicial protections are less similar to ours." See S. Coakeley, P. Finkle & L. Barrington, "*Morguard Investments Ltd.*: Emerging International Implications" (1992) 15 Dal. L. J. 629 at 640.

70. It might be argued that fairness to the defendant is encapsulated within the real and substantial connection inquiry. Under this view, where the foreign court properly assumed jurisdiction under *Morguard* principles, how can we say that it is not fair for the defendant to be required to litigate there? Indeed, the purpose of adopting the real and substantial connection test over the previous jurisdictional bases (submission and presence) was to ensure that the assumption of jurisdiction over the defendant was fair by reference to a minimum number of connections with the issuing forum. Any issue of unfairness or hardship arising from individual circumstances can be addressed by invoking the foreign court's mechanisms to provide relief (e.g., claiming, where applicable, that the foreign court is not the *forum conveniens*).

71. See, for instance, LeBel J.'s comment in *Beals*, *supra* note 25 at para. 132, "[t]he implication of the position of the majority is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how meritless the claim or how small the amount of damages in issue ... on pain of potentially devastating consequences from which Canadian courts will be virtually powerless to protect them." The sentiment is also echoed by Walker who states, "[t]herefore, it seems that it is now incumbent on defendants to participate in any foreign proceedings commenced against them to protect their rights regardless of the apparent size or merits of the claim." J. Walker, "*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002) 5 Can. Intl. Law. 28 at 29 [Walker, "Striking the Comity Balance"].

of extending internationally principles that were specifically contemplated for the domestic enforcement context. In *Morguard*, La Forest J. distinctly emphasized the expansion of jurisdictional rules in accordance with the principles of order and fairness that necessarily underlie a modern system of private international law. The real and substantial connection test was simply the means used by La Forest J. to arrive at a result which comported with these twin principles. It is doubtful whether La Forest J. had in mind requiring a Canadian defendant to defend an action in a foreign, unfamiliar forum simply because of the possible existence of a real and substantial connection, without regard to the defendant's ability to access that legal system, the difficulty and burden of litigating there, and the potential merits of the claim against him.

The facts of *Beals* perfectly illustrate the injustice that can be wreaked by broadened enforcement rules that are not specifically calibrated to respond to fairness issues arising from international litigation. In that case, a nuisance action turned into a nightmare for two Canadian couples when a Florida default judgment was held to be enforceable in an Ontario court. The case involved a dispute over a piece of property in Florida originally worth \$8000 (U.S.) which the American plaintiffs alleged was sold to them by way of misrepresentation. The Ontario defendants took certain steps to defend the claim, which the trial judge in Ontario clearly considered to be of dubious merit, but ultimately allowed a \$260,000 (U.S.) judgment against them to be issued in default. The defendants took no action to set aside the Florida judgment. The plaintiffs instituted enforcement proceedings in Ontario, and by the time the action came to trial, the judgment was worth about \$800,000 (Cdn.), accounting for interest and the exchange rate.<sup>72</sup> The Supreme Court of Canada held that the defendants had brought themselves within the jurisdictional embrace of the foreign court by entering into a cross-border transaction, and were therefore expected to defend the action in the United States. This is despite the fact that the defendants calculated that it was not in their commercial interest to travel to Florida, hire foreign counsel, and actively participate in foreign legal proceedings in respect of property whose value was thought to be a mere \$8000.<sup>73</sup> Thus, the *Beals* case raises a scenario where the foreign court was a reasonable place for the defendant to be sued, but the defendant nevertheless acted reasonably

72. Nearly 95% of the award was for punitive damages and for lost profits in a business venture that appears to have come to a standstill for reasons unrelated to the alleged misrepresentation.

73. Walker queries, "How, it might be wondered, would defendants who prudently determine that the unrecoverable expense of defending an unmeritorious claim would be greater than any reasonable award know that they must police the foreign proceedings themselves to avoid an unjustifiable and highly disproportionate award?" Walker, "Striking the Comity Balance," *supra* note 71 at 29.

in not defending the action there. The *Morguard/Beals* rules do not at present provide any mechanism for addressing this troublesome issue.

Another problematic feature of the common law rules stems from the way that the Supreme Court unilaterally liberalized the Canadian enforcement regime. It appears that the success of the Court's gambit, measured in terms of economic benefit to Canada, is contingent upon other countries taking notice of Canada's readiness to enforce foreign judgments and responding in turn by eliminating barriers to the recognition of Canadian judgments.<sup>74</sup> However, "many countries with which Canada has significant trade relationships remain ... less willing to enforce Canadian judgments than post-*Morguard* Canada is to enforce theirs."<sup>75</sup> The *Morguard/Beals* regime thus places Canadian litigants at a comparative disadvantage in international disputes. Where a Canadian defendant is faced with circumstances which could arguably constitute a real and substantial connection with the foreign forum, the defendant is compelled to defend the action abroad. Conversely, where a Canadian plaintiff obtains a remedy in an entirely appropriate forum, there is a distinct possibility that it will not be enforced by a foreign court unless the judgment forum assumed jurisdiction under one of the two traditional grounds.

Canada's recognition rules are even more generous than those of the United States, for example, which is widely perceived as exceptionally accommodating of foreign judgments. In the U.S., jurisdiction is only properly assumed by a foreign court where it had "minimum contacts" with the defendant.<sup>76</sup> The minimum contacts test is more stringent than Canada's real and substantial connection test because it requires evidence that the defendant purposely availed himself of the benefits of the forum state by acting in a way that would have some impact within the forum state.<sup>77</sup> The real and substantial connection test, by contrast, only requires a connection between the forum and the subject matter of the dispute more broadly.

Walker warns that in enlarging the scope of the real and substantial connection test, Canadian courts may be exceeding the demands of international comity. She asserts that "[t]he requirements of comity may continue to be those endorsed ... in *Morguard*, but the circumstances in

74. V. Black, "Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention" (2000) 38 Osgoode Hall L. J. 237 at 250.

75. *Ibid.*

76. *International Shoe v. Washington*, 326 U.S. 310 (1945) [*International Shoe*]; *Ackermann v. Levine*, 788 F. 2d 830 (2d. Cir. 1986) (applying *International Shoe* principles to foreign judgments).

77. C.C. Chao & C.S. Neuhoﬀ, "Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective" (2001-2002) 29 Pepperdine L. Rev. 147 at 156.

which the balance must be struck have changed.”<sup>78</sup> Another Canadian conflicts scholar makes similar observations:

On the international plane, however, it is asking a great deal to expect the other nations of the world to enforce any Canadian default judgment so long as the Canadian court has the minimum connection with the litigation that Canadian law requires for the assertion of jurisdiction to be constitutionally acceptable. By the same token, it is asking a lot of Canadian courts to expect them to recognize default judgments from anywhere else in the world so long as the foreign court had the same minimum connection with the litigation that a Canadian court would need to have for its jurisdiction to be constitutionally valid. *It is simply unrealistic to assume that the demands of comity, of order and fairness, are the same across international boundaries as they are within our federation...*(emphasis added).<sup>79</sup>

Comity, according to this view, does not require that borders be thrown open to foreign judgments, without reference to the legitimate interests of Canadian defendants.

## VI. *Alternative Common Law Tests for Enforcement*

### 1. *Introduction*

It is clear that the enforcement regimes in England and in Canada both reveal significant, albeit different, weaknesses. While the common law rules in England are not sufficiently receptive to foreign judgments, the rules in Canada may in fact be too receptive to judgments from abroad. The appropriate common law solution, therefore, may be to find a “middle ground,” one which furthers the objectives of judgment recognition while adequately addressing issues of fairness to the parties.

To determine where this middle ground should lie, it is essential to identify the relevant principles which should guide the formulation of an appropriate common law enforcement test. In isolating these principles, one should bear in mind the deficiencies in each set of common law rules, the goals of judgment enforcement, and the general objectives served by the rules of private international law. Ideally, a common law enforcement scheme should:

- i) reveal a link between jurisdiction and enforcement;
- ii) be guided by requirements of fairness to both plaintiff and defendant;
- iii) promote, insofar as practicable, the objectives served by judgment enforcement;

78. Walker, “Striking the Comity Balance,” *supra* note 71 at 30. See also J. Walker, “The Great Canadian Comity Experiment Continues” (2004) 120 L.Q.R. 365 [Walker, “Comity Experiment”].

79. J. Blom, “The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World” (1997) 28 Can. Bus. L. J. 373 at 392.

- iv) boast the virtues of simplicity and ease of application;
- v) maintain an appropriate balance between certainty and flexibility;
- vi) discourage selection of forum based on enforceability of the final judgment;
- vii) recognize the unique problems posed by the enforcement of truly foreign judgments.

The goal is to formulate a test which complies to the fullest extent possible with all of these principles, without sacrificing one at the expense of the other.<sup>80</sup>

## 2. *The Possible Tests*

### a. *Natural Forum Test*

It has been suggested by Briggs that an appropriate enforcement test in England should depend upon whether the plaintiff can establish that the foreign court was the "natural forum" for the prosecution of the action. The natural forum is the one which has the most real and substantial connections with the action, such that it is the appropriate forum for the resolution of the dispute. The attractiveness of this test clearly lies in the alignment of *forum non conveniens* principles with the rules for the enforcement of judgments, thereby recognizing the correlation between jurisdiction and enforcement. Moreover, the natural forum test promotes the commercial, political and administrative efficiency objectives of judgment enforcement to a far greater extent than the current common law rules. Under the proposed test, a greater number of judgments would be enforceable and judgment creditors would not encounter significant enforcement obstacles in England, provided that the judgment was issued in the natural forum.

However, the proposed test is subject to criticism on the basis that the concept of a natural forum to which litigation necessarily belongs may be an undesirable concept in itself. An international dispute is likely to have relevant connections to various countries, and it is often arbitrary to pick one jurisdiction as the natural forum. In other words, this test restricts the plaintiff's choice of forum to what the enforcing court perceives to be the natural forum, even though there may be real and substantial connections

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80. Options not considered as viable possibilities for common law enforcement rules include: those currently in place in England and Canada; allowing a full review of the foreign judgment on grounds of law and fact; not enforcing any foreign judgments; enforcing all foreign judgments; adopting a reciprocity requirement; enforcing judgments only where the foreign court assumed jurisdiction on a basis which the enforcing court recognizes for itself, and adopting a special test for individual consumer litigation. On the latter test, see J. Ziegel, "Enforcement of Foreign Judgments in Canada, Unelevel Playing Fields, and *Beals v. Saldanha*: A Consumer Perspective" (2003) 38 Can. Bus. L.J. 294.



with other fora. In addition, the natural forum test is not a particularly certain and predictable one unless all factors clearly point to one forum. However, one commentator suggests that despite its vagueness, "[the concept] has proved far from unworkable."<sup>81</sup>

The more problematic element of the natural forum test relates to how fairness concerns are addressed, if at all, under this test. As indicated, Briggs' proposed test involves ascertaining which jurisdiction is the natural forum for the resolution of a dispute; if the judgment was issued in that forum, then it should be enforced in England. However, the *forum non conveniens* analysis in England is in fact a two-stage inquiry, which focuses partly on the natural forum, and partly on the plaintiff's legitimate personal or juridical advantage that would be lost in having to litigate in that most appropriate forum.<sup>82</sup> It is possible under *Spiliada* principles for an English court to conclude that a foreign jurisdiction is the natural forum, but nonetheless refuse to stay an action on the basis that the plaintiff is entitled not to be deprived of the advantages of litigating in England.<sup>83</sup> Thus, the following anomalous situation could result: Country A is determined to be the natural forum. Country B, in which the litigation is initiated and which uses rules similar to England, concludes that although Country A is indeed the natural forum, it will not stay its action so as to allow the plaintiff his legitimate personal or juridical advantage. Country B issues a judgment in favour of the plaintiff, which the plaintiff subsequently seeks to enforce in England. Under Briggs' natural forum test, it appears that the judgment would not be enforceable because Country A, not Country B, was the forum with the most real and substantial connections to the dispute. As is apparent, the second phase of the *Spiliada* inquiry, which is specifically designed to deal with fairness concerns for the plaintiff, does not translate well into the natural forum enforcement test.

It is equally unclear how considerations of fairness to the defendant are dealt with under the natural forum test. Where the natural forum is a distant and unfamiliar jurisdiction, is a defendant automatically expected to defend there, simply on the basis that it is the so-called natural forum? If this is the case, Briggs' natural forum test would be quite similar to the

81. Harris, *supra* note 45 at 493.

82. *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.) [*Spiliada*]. The Canadian Supreme Court has approved of the general thrust of *Spiliada*, although refusing to specifically adopt a two-stage approach to *forum non conveniens*. See *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*, [1993] 1 S.C.R. 897 [*Amchem*].

83. See *Lubbe and others v. Cape plc.*, [2000] 4 All E.R. 268 (H.L.); *Connelly v. RTZ Corp. plc.*, [1996] Q.B. 361 (C.A.).

real and substantial connection test put forth in *Morguard* and *Beals*,<sup>84</sup> Consider the following hypothetical:

Suppose a woman who immigrated to Vancouver from Taiwan five years ago, to take up a new life after the failure of her business in Taipei, is now sued in Taipei for a large sum that the plaintiff says she still owes him out of the old business. She does not defend. The alleged creditor gets judgment by default and sues on it in British Columbia. The defendant says she had a good defence but is just getting a new business off the ground in Vancouver and could not afford to defend the action in Taiwan. Everything related to the claim is connected with Taiwan, so there can be no doubt about the real and substantial connection with that jurisdiction. Does that mean the judgment should be enforced, irrespective of perceived hardship to the defendant? None of the reported cases mentioned involved a defendant who ... lacked the means to defend the foreign lawsuit, much less a default judgment from a distant foreign court and ... an unfamiliar foreign legal system.<sup>85</sup>

It is clear that Taiwan is the natural forum for the resolution of this dispute. Does this mean, though, that there should be no consideration of factors such as difficulty to the defendant in litigating abroad and the likelihood that the claim will succeed on the merits?<sup>86</sup> Under the natural forum test, as under *Morgard/Beals* principles, the defendant in the aforementioned example would be expected to defend the foreign action or face the consequences of an enforceable default judgment. The main weakness in the natural forum test, like that of the Canadian real and substantial connection test, lies in the fact that it does not provide adequate mechanisms to ensure that fairness concerns arising from the cross-border nature of a dispute are satisfactorily addressed.

#### b. *Anti-suit Injunction Test*

Some commentators<sup>87</sup> have suggested that the test for the recognition of foreign judgments should be akin to that for restraining proceedings abroad. If the enforcing court would not have restrained the foreign proceedings by way of anti-suit injunction, that court should enforce the resultant judgment, subject to any defences. In *Société Nationale Industrielle Aerospatiale*

84. The difference obviously being that the latter remains a broader test because simply a real and substantial connection suffices (the alternate forum does not have to be the one with the most real and substantial connections to the dispute).

85. Blom, "Foreign Judgments," *supra* note 79 at 386.

86. Briggs would likely argue that, to the extent that these are relevant considerations, they should be argued before the foreign court in a *forum non conveniens* (or similar) proceeding. He states, "[m]ore important is to pause to consider whether such solicitude for the defendant is really the issue which should dominate our thoughts." Briggs, "Which Foreign Judgments?", *supra* note 46 at 225.

87. See especially, Harris, *supra* note 45, and Reed, *supra* note 4.

v. *Lee Kui Jak*<sup>88</sup> the Privy Council established the current English legal framework governing the availability of anti-suit injunctions to restrain proceedings in a foreign court. An anti-suit injunction is available to restrain foreign proceedings which are oppressive or vexatious where the English court possesses *in personam* jurisdiction over the plaintiff to be enjoined and where England is the natural forum for the resolution of the dispute. In deciding whether to grant the injunction, the English court must consider not only the injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also the injustice to the plaintiff if he is not permitted to proceed in his choice forum.

Under the anti-suit injunction enforcement test, there is a presumption that the foreign judgment is enforceable: the judgment debtor will seek to displace this presumption by demonstrating that an English court would have granted an anti-suit injunction to restrain the foreign proceedings. It is thought that the advantage of this sort of test is that it presents a high hurdle for a judgment debtor to overcome and thus will better promote the free movement of judgments.<sup>89</sup>

The main problem with this test lies in its complexity when abstractly superimposed on the English enforcement regime. It is inappropriate for an enforcing court to determine retroactively, and with the benefit of hindsight, whether another English court would have issued a discretionary remedy – the anti-suit injunction – at an earlier, interlocutory stage in the proceedings. The anti-suit injunction is designed to prevent a plaintiff from continuing proceedings against a defendant in circumstances which amount to wrongful conduct or which would lead to unjust consequences. This is assessed at the time the action is proceeding in the foreign court. It is highly artificial at the post-trial stage to inquire into what an English court would have done at an earlier stage in those proceedings and with more circumscribed knowledge, had that court been presented with an application by the defendant to restrain foreign proceedings. This is particularly so in light of the fact that in the majority of these cases, the defendant will not have appeared at all in the original proceedings (*i.e.*, the judgment will have been given in default).

Furthermore, it is unclear how certain of the pre-requisites to the grant of an anti-suit injunction apply in the enforcement context. Consider, for instance, the following situation. A California court issues a judgment, having assumed jurisdiction based on the defendant's temporary presence

88. [1987] 1 A.C. 871 [SNI]. The Supreme Court of Canada in *Amchem*, *supra* note 82 also agreed with the approach of the English Court of Appeal to anti-suit injunctions in *SNI*, albeit with some minor modifications.

89. Reed, *supra* note 4 at 278

in the territory. Japan was, in the eyes of the English court, the natural forum for the trial of the action. Enforcement is sought in England in respect of assets located there. England has no other connection with the dispute (*i.e.*, it is not the natural forum; it does not possess *in personam* jurisdiction over the plaintiff). Under the natural forum test described above, the judgment would not be enforced in England since the defendant's presence within the territory would not suffice to render California the natural forum. However, it appears that under the proposed anti-suit injunction test, enforcement would automatically be granted because England, neither possessing *in personam* jurisdiction over the plaintiff, nor being the natural forum, would have been incapable of issuing an anti-suit injunction under these circumstances. In cases where an English court would not have granted an anti-suit injunction, the test mandates that the judgment be enforced. It is irrelevant, under the anti-suit injunction enforcement test, that the action proceeded in an entirely inappropriate forum.

If a claimant commences an action abroad which is oppressive and vexatious and England is the natural forum, such that England would be competent to grant an anti-suit injunction, this may preclude enforcement of the foreign judgment. If, on the other hand, a claimant initiates an action abroad which is equally vexatious and oppressive, but England is not the natural forum, English courts would be required to enforce that judgment, subject to any defences. Under this analysis, the enforcement inquiry is not properly grounded. The relevant question should be whether jurisdiction is appropriately assumed in both cases, and not whether England happens to possess *in personam* jurisdiction over the plaintiff to be enjoined and be the natural forum for the resolution of the dispute. The test lacks a principled and coherent foundation, premised on the integration of jurisdiction and enforcement.<sup>90</sup>

### c. *A Nuanced Morguard Test*

LeBel J. in his dissenting opinion in *Beals* proposes that a variant of the real and substantial connection test govern the question of whether a foreign court should be regarded as jurisdictionally competent to issue a

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90. Harris, *supra* note 45 at 478 argues that it is necessary to integrate the law on the enforcement of foreign judgments more closely into the conflict of laws, but not necessarily into the jurisdictional analysis.

judgment.<sup>91</sup> Essentially, LeBel J. supports the continued application of the real and substantial connection test developed in *Morguard* and its progeny, but tailors its application in the international context to better reflect the unique issues raised by the enforcement of truly foreign judgments. The test would subsume into the jurisdictional inquiry the question of whether it is fair to require a defendant to litigate in a foreign forum. The judgment court will only be perceived as jurisdictionally competent when, considering the totality of the circumstances and the additional burdens imposed by international litigation, it is fair and reasonable to expect the defendant to litigate the claim in the foreign jurisdiction. LeBel J. notes that among the factors affecting the onerousness of defending in a foreign forum are the difficulty and expense of travelling there and the juridical disadvantage that the defendant may face as a result of differences between legal systems.<sup>92</sup>

LeBel J.'s recasting of the *Morguard* test may represent the aforementioned "middle path" which accords due weight to international judgments without sacrificing the interests of domestic defendants. The test recognizes that enforceability concerns are not the same domestically as they are internationally, and that a test which is to promote the freer movement of judgments must also exhibit minimum fairness safeguards. Of the various tests described above and the current existing regimes, this nuanced *Morguard* test best addresses fairness issues which arise in international litigation. This approach results in a generous enforcement regime, thereby promoting the objectives served by judgment enforcement generally, but does so in a principled and rational manner. The test is also relatively easy to apply: the court must simply ask itself whether

91. The modified test is best explained in LeBel J.'s words in *Beals*, *supra* note 25 at paras. 182-83, "The test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum. It does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he personally has no link at all to that jurisdiction. ... [W]hen a court is asked to recognize and enforce a foreign judgment, and questions whether the originating court's jurisdiction was properly restrained, it should inquire into the connections between the forum and all aspects of the action, on the one hand, and the hardship that litigation in the foreign forum would impose on the defendant, on the other. *The question is how real and how substantial a connection has to be to support the conclusion that the originating court was a reasonable place for the action to be heard. The answer is that the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate* (emphasis added)."

92. *Beals*, *supra* note 25 at para. 176.

the foreign court had a sufficiently real and substantial connection to the dispute such that it was fair to expect a defendant to litigate there.

That is not to say, however, that the test is without its limitations. Foremost among these is the open-textured and discretionary nature of the judgment enforcement inquiry. One commentator notes:

Decisions will turn, not so much on the X court's legitimate jurisdiction, as on the perceived justice or otherwise of holding a particular judgment of the X court binding on matters of the judgment debtor. If predictability is something to matters in this context, such a broadening of the issue is not necessarily to be welcomed.<sup>93</sup>

At least under the traditional English rules – outmoded as they may be – both parties “know where they stand” in terms of whether a final judgment will be enforceable. The necessary implications of the nuanced *Morguard* analysis, or any other sort of discretionary, fairness-based, or substantial connections test, are two-fold. First, the successful plaintiff cannot know whether a judgment will be enforceable until he actually seeks to enforce it. It will be the enforcing court that determines whether the defendant acted reasonably in not seeking to defend a foreign default judgment, and thereby whether the judgment ought to be enforced. Second, the prospective defendant is placed in the unenviable position of having to predict whether a final judgment will be enforceable, based both on objective connections (locus of tort, business activity in foreign jurisdiction, etc.), as well as subjective considerations (personal finances, difficulty/hardship in travelling, etc.). The defendant seeking advice on whether to defend the foreign action will be told, in all but the clearest of cases, that it would be preferable for him to defend, and thereby submit to the jurisdiction of the foreign court, rather than run the risk of an enforceable default judgment.

It should be pointed out that these limitations are not unique to LeBel J.'s recalibrated *Morguard* test. The nuanced *Morguard* test is likely only marginally more uncertain than, for example, the current *Morguard* test or a proposed natural forum or anti-suit injunction test. If there is to be a move away from rigid common law rules of private international law – as has occurred with jurisdiction and choice of law – this will inevitably require sacrificing some degree of predictability. The uncertainty engendered by a new type of test (both for plaintiff and defendant) may be the necessary price to pay for a common law regime which is acutely responsive to the

93. Blom, “Foreign Judgments,” *supra* note 79 at p. 378. See also Reed, *supra* note 4 at 276 (“The difficulty ... is in leaving ‘order and fairness’ to a solipsistic, case-by-case evaluation. It smacks of *ad-hocery*.”).

order and fairness issues central to the enforcement of "truly foreign" judgments.<sup>94</sup>

Though perhaps obvious from the foregoing analysis, one final point should be explicitly made: the fact that an entirely appropriate common law enforcement model remains elusive suggests that this is an area that may be in need of legislative reform. A carefully drafted statute can fill in the blanks where a broad judicial rule cannot. It can clearly identify and define the circumstances where a foreign judgment will be enforceable (e.g., where the tort was committed in the foreign jurisdiction, where the defendant carries on business activity in the foreign jurisdiction, etc.), allowing both parties to organize their affairs accordingly. In addition to enumerating the circumstances in which a foreign court will be perceived as jurisdictionally competent, legislation can contain provisions for exceptional cases (such as *Beals*, for instance), where the interests of justice may militate against enforcing a judgment. Thus, although this article has focused on how the common law can best be ameliorated, it is quite possible that the solution lies not in improving, but in abandoning the common law.<sup>95</sup>

### VII. *Revisiting the Defences*

In both England and Canada, the defences currently occupy a very limited role in the enforcement regime. One commentator notes that "the success rate of defendants relying on the common law defences is very low generally and virtually negligible in the Canadian context."<sup>96</sup> A restrictive test for the defences may be appropriate where, as in England, the jurisdiction test is a difficult threshold for a plaintiff seeking recognition to satisfy. In such circumstances, where the defendant has either consented to the jurisdiction of the foreign court or is present in the foreign territory, the potential for unfairness is minimal. It is significantly magnified, however, where the jurisdictional inquiry is broadened, such as in *Morguard* and *Beals*. In such cases, the defences should be tailored to better complement a liberal enforcement regime. Speaking specifically of the Canadian context, Castel and Walker comment:

94. See Goodman & Talpis, *supra* note 19 at 229 ("Of course, added flexibility may also lead to difficulty in anticipating the results of the court's enquiry in any given fact situation, but, as in so many other areas of the law, a degree of uncertainty may be seen as an appropriate trade-off for enhanced flexibility.").

95. See Walker, "Comity Experiment," *supra* note 78 at 369 ("...statutory reform even in the form of the most rudimentary safeguards ... would provide welcome assistance under the circumstances"). See, as an example of statutory initiative, the uniform statute for the enforcement of foreign judgments adopted by the Uniform Law Conference of Canada in 2003, available at <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e1>>.

96. E. Edinger, "*Morguard v De Savoye*: Subsequent Developments" (1993) 22 Can. Bus. L. J. 29 at 41.

[It would seem necessary] to revise the defences ... so as to protect persons ... who have been sued in foreign courts from particular kinds of unfairness that can arise in cross-border litigation, and so as to prevent abuse from occurring as a result of liberal rules for the enforcement of judgments.<sup>97</sup>

In short, modified defences are a necessary corollary of liberalized enforcement rules.

The relevant question is how can the defences be revised to provide additional safeguards to defendants who may be unfairly "caught" by broadened enforcement rules, while ensuring that the exceptions do not swallow the rule whole? The *Beals* case suggests a couple of ways that the defences can be re-cast in order to provide meaningful protection for domestic defendants. First, the actual defences themselves, particularly the defence of natural justice, can be interpreted in a more purposive and flexible manner. The three dissenting judges in *Beals* held that the Florida default judgment violated natural justice because the Canadian defendants had not been duly apprised of the nature and extent of the financial jeopardy that they faced in the foreign proceedings. According to this view, to satisfy natural justice requirements, a court must inquire into whether the defendants in a particular proceeding were sufficiently informed of the case to meet to allow them the opportunity to reasonably determine whether or not to participate in the foreign action.<sup>98</sup>

As discussed, England and Canada have adopted different approaches to the fraud defence. Canada's position appears to strike a reasonable balance between what can be considered two equally unpalatable alternatives: admitting any and all evidence that a foreign court was deliberately misled (whether or not such evidence was presented to the foreign court), or refusing to admit any evidence of fraud, unless such fraud consisted of the foreign court having been misled into assuming jurisdiction. As a general proposition, the fraud defence should be construed quite narrowly, but with some flexibility to allow effective protection for domestic defendants. Default judgments emanating from foreign legal

97. J.G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2002) at 14-27. See also Briggs, "Crossing the River," *supra* note 17 at 14-15 ("It would be curious to say that one may develop a new basis of jurisdictional recognition without regard to the defences which will condition its application in practice. These defences, which have remained surprisingly constant, all date from a century ago ... The defences were, as a matter of historical fact, developed alongside the traditional rules of jurisdiction under the common law. They were not developed in cases where a basis of jurisdictional competence was a real and substantial connection ..."). But see S. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stands After *Beals*," (2004) 40 Can. Bus. L. J. 189 at 214 ("Expanding the situations in which our courts will recognize foreign judgments does not necessarily require a parallel expansion of the defences.").

98. *Beals*, *supra* note 25 at para. 91.



regimes, however, must be approached with additional caution. It may be, as suggested by LeBel J. in *Beals*, that a broader fraud test should apply in cases where the defendant's decision not to participate in the proceedings giving rise to a foreign default judgment was a demonstrably reasonable one.<sup>99</sup> Although the Canadian position on fraud represents a sensible compromise between the competing interests of fairness and finality, the rule should be relaxed as necessary to respond to dangers arising from the enforcement of foreign default judgments.

It has been suggested that the final defence, public policy, should be interpreted in a manner which renders unenforceable, in whole or in part, substantial punitive damages awards. Although courts have held that it is not counter to public policy to enforce an award for punitive damages, it is arguably contrary to public policy to enforce awards that are grossly disproportionate to the defendant's behaviour or awards which are made without reference to the defendant's moral blameworthiness. Not only does precedent exist for such an approach, but the practice of reviewing excessive damages awards and enforcing foreign awards only to the extent that similar or comparable damages would have been awarded by the enforcing court appears to be consistent with accepted international standards of comity.<sup>100</sup> For instance, Section 33 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters<sup>101</sup> provides that a court called upon to enforce an award of non-compensatory damages may limit enforcement to a lesser amount if the award is "grossly excessive." In addition, several countries, notably Germany and Japan, have used the public policy defence to refuse enforcement of exorbitant punitive damages awards from foreign jurisdictions.<sup>102</sup>

Not all commentators support using the public policy exception to limit the enforcement of foreign punitive awards. Blom, for example, hopes that courts will resist the temptation to invoke the public policy defence to deal with the issue of large punitive damages. In his view, problems

99. LeBel J. asserts in *Beals*, *supra* note 25 at para. 234, "If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts ... [A] more generous version of the fraud defence ought to be available, as required, to address the dangers of abuse associated with the loosening of the jurisdiction test to admit a broad category of formerly unenforceable default judgments."

100. Walker, "Striking the Comity Balance," *supra* note 71 at 33.

101. Special Commission of the Hague Conference on Private International Law, adopted in October 1999, revised June 2001. Available at <[www.hcch.net/e/conventions/draft36e.html](http://www.hcch.net/e/conventions/draft36e.html)>.

102. R. A. Brand, "Punitive Damages and the Recognition of Judgments" (1996) 43 *Netherlands Int'l L. Rev.* 143 at 163-68.

arising from the enforcement of disproportionate punitive damages awards do not raise questions of fundamental morality, which is intended to be the touchstone of the public policy defence.<sup>103</sup> LeBel J. in *Beals* agreed that the public policy defence should not be expanded simply to address concerns stemming from excessive punitive awards:

[T]he better approach is to continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*. In other words, the defence should continue to be ... 'directed at the concept of repugnant *laws*, not repugnant *facts*.'<sup>104</sup>

According to LeBel J., the doctrine of public policy has long been aimed at condemning a foreign jurisdiction's law. To expand the rule to situations where there is nothing inherently offensive about the foreign law, but where the objection lies in the way the law was applied, could undermine norms of international cooperation and respect.<sup>105</sup>

An alternative solution, one which may allay the concerns of critics who are circumspect about attributing a broader meaning to the public policy doctrine, would be to create a residual defence to address concerns arising from judgments which are not caught by any of the traditional defences. The defence would preclude recognition of a foreign judgment in circumstances where the enforcement of the judgment would shock the conscience of the public and cast a negative light on the justice system.<sup>106</sup> In the final analysis, Briggs convincingly argues, there is "no particular need for embarrassment if a court tells a plaintiff that he may enforce his judgment anywhere he pleases, but if he wants to do so by means of a local judicial order, it must come within touching distance of local standards of propriety."<sup>107</sup> He elaborates:

103. J. Blom, *supra* note 79 at 400.

104. *Beals*, *supra* note 25 at para. 221.

105. *Beals*, *supra* note 25 at para. 221. He acknowledges, however, that where foreign laws violate the basic tenets of fundamental justice (e.g., where punitive damages are awarded absent fault or morally blameworthy behaviour on the part of the defendant), courts should have the discretion to deny or limit enforcement of the judgment.

106. This is the test used by LeBel J. in *Beals*, and is explained by the trial judge in *Beals* (1998) 42 O.R. (3d) 127. "It may be that a corollary of the public policy, which was set out in *Morguard*, and the broadening of the recognition rules for foreign judgments, is that Canadian courts will, of necessity, have to develop some sort of judicial sniff test in considering foreign judgments. In cases where fraud does not reach the level required for the defence of fraud, but is nevertheless egregious and where other matters do not engage either the traditional public policy of lack of natural justice defences, but are nevertheless egregious, the totality of circumstances may argue against enforcement."

107. Briggs, "Crossing the River," *supra* note 17 at 18.

It would be an extraordinary proposition to argue that a plaintiff may excuse or justify his operating at a lower standard of good faith or procedural propriety, or may subject the defendant to a lower and therefore unequal degree of protection, by the stratagem of taking proceedings first in a court where the playing field is not level, and then inviting a receiving court to find that the foreign court had done 'minimum justice', hinting at the meretricious and menacing point that if the receiving court goes farther than this it is offending the requirements of comity by disrespecting the foreign court. True, it may be unhelpful to regard this as a matter of public policy. It is preferable to be open about it, and to acknowledge the right of the receiving court to review before approving a judgment which, however one chooses to convey it, risks leaving a fish-like smell in the nostrils and a nasty taste in the mouth.<sup>108</sup>

### Conclusion

In both England and Canada, the common law rules on the recognition and enforcement of foreign judgments are in serious need of reconsideration. The English approach, while offering considerable protection to domestic defendants, is outdated and does little to promote the objectives underpinning judgment enforcement. The Canadian position, by contrast, fully advances such objectives, but leaves Canadian defendants virtually unprotected from the landmines of international litigation. A potential solution would be to adopt a variant of the *Morguard* real and substantial connection test, such that questions of how fair it is to require a domestic defendant to litigate in a foreign forum are incorporated into the jurisdictional analysis itself. The modified *Morguard* test would be customized to respond to the specific fairness concerns raised in international litigation. This would be a far more liberal paradigm than that which currently exists in England. It would also represent a tailored version of the rules that apply at present in Canada. Defences to enforcement, which are interpreted in a flexible and purposive manner, would accompany this enforcement framework.

Unfortunately, the Supreme Court of Canada missed an excellent opportunity in *Beals* to reassess the *Morguard* rules in an international light. Only time will tell whether the real and substantial connection test which applies inter-provincially will cause problems when put into operation internationally. *Beals* itself suggests that the test can cause noteworthy problems, even in a relatively familiar legal jurisdiction such as Florida.

English courts, unencumbered by recent precedent, can consider the various possibilities afresh before embarking on the challenge of reformulating the common law rules. The Canadian experience provides

108. Briggs, "Crossing the River," *supra* note 17 at 19.

an ideal “opportunity for English lawyers ... to consider whether any of this new foreign material, judicially road-tested as some of it has been, offers a principled and practical improvement on the law so far established.”<sup>109</sup> However, in re-evaluating the common law rules, English courts would be wise to heed the warning of LeBel J. in *Beals*: “[i]n our enthusiasm to advance beyond the parochialism of the past, we must be careful not to overshoot this goal.”<sup>110</sup>

What is known at present is that there is a pressing need for reform of the common law enforcement rules on both sides of the Atlantic. What is not known is when this will occur, or what shape it will take.

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109. Briggs, “Crossing the River,” *supra* note 17 at 1.

110. *Beals*, *supra* note 25 at para. 173.

