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Enforcement of Judgments

Canada
Baker McKenzie

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2019

Law and Practice

Contributed by Baker McKenzie

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Baker McKenzie is a global law firm, with offices in 78 cities worldwide. The Canadian team is based out of the Toronto office, which has 26 lawyers (12 partners and 14 associates). They are fully integrated with their North America litigation and government enforcement practice and other Baker McKenzie litigators located worldwide. Through this structure, the Toronto-based practitioners create and deliver innovative and proactive dispute-related solutions that support their clients' business strategies almost everywhere they have investor, customer and vendor relationships.

The firm is a highly regarded litigation group in Canada with particular expertise in multi-jurisdictional disputes, including all manner of fraud, financial recovery and enforcement related disputes. The Canadian group provides coordinated litigation, arbitration and enforcement services to clients nationally and internationally. To appreciate the depth of the Canadian group's fraud law, enforcement and asset tracing expertise, visit their blog-site at: www.canadianfraudlaw.ca

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1. Identifying Assets in the Jurisdiction

1.1 Options to Identify Another Party's Asset Position

Identifying an opposing party's asset position prior to, during or following a proceeding can be critical to informing a plaintiff's litigation or judgment enforcement strategy. Obtaining a judgment will be of little value if the unsuccessful party has no assets or is unable to satisfy the judgment. Fortunately, a number of measures are available in Canada which can assist in identifying an opposing party's asset position.

Publicly Available Information and Private Investigations

Some limited information which can shed light on an adversary's financial position is publicly available. For example, title searches and land registry searches can reveal the registered owners of real property and whether any encumbrances such as liens, certificates of pending litigation, judgments or mortgages have been registered against the property.

Searches can also be conducted for personal or moveable property, which will indicate whether the personal property of a person or corporate entity is encumbered and subject to the security interests of other creditors.

Litigation searches and insolvency searches can reveal the extent to which an adverse party has been involved in prior or concurrent litigation and/or insolvency proceedings. In the event that the adverse party is or has been involved in litigation or insolvency proceedings, a review of public court filings may reveal useful financial information pertaining to that party.

Licensed private investigators can be engaged to investigate the other party's asset position. In Canada, private investigators are subject to industry regulations as well as provincial and federal laws. Private investigators can garner financial information by carrying out various registry searches (including those noted above), conducting interviews, performing surveillance and other legitimate investigative techniques.

Examinations in Aid of Execution

From a post-judgment perspective, having a full appreciation of the unsuccessful party's asset position will facilitate a well-considered and targeted enforcement strategy. Once judgment is obtained, a successful party can conduct an examination in aid of execution to obtain information concerning the debtor's financial position and his or her ability to satisfy the judgment. The debtor must answer questions under oath about his or her financial affairs, assets, income, liabilities and expenses. The debtor is also obligated to produce relevant financial records, such as financial statements, bank statements, tax returns, payroll information and the

like, all of which can be of assistance in guiding the creditor's enforcement strategy. Examinations in aid of execution are discussed in greater detail in section 2.3 **Costs and Time Taken to Enforce Domestic Judgments** below.

Freezing and Asset Disclosure Orders

There are a number of remedies in Canada that can be of assistance in securing assets prior to judgment. These include Mareva injunctions (which can include an asset disclosure component) and certificates of pending litigation, as well as asset or "specific fund" preservation orders issued under provincial rules of civil procedure.

The Mareva Injunction in Canada

While the law concerning Mareva injunctions has not developed in exactly the same way as in the United Kingdom, this extraordinary form of pre-judgment "freeze order" is available and, in the right circumstances, can be granted with asset disclosure terms having worldwide effect. Dubbed one of "the law's two nuclear weapons", it was confirmed as part of the common law of Canada in a 1985 decision rendered by the Supreme Court of Canada. However, the Supreme Court did not establish a rigid test for the remedy. Rather, it established certain broad parameters without imposing an inflexible prescription. The court summarised the "gist of the Mareva action" as follows: the right to freeze exigible assets within the jurisdiction, regardless of where the defendant resides, where a cause of action between the plaintiff and defendant has been determined which is justiciable before the courts of that jurisdiction and where there is a genuine risk of the disappearance of assets, either inside or outside the jurisdiction.

In recent years, as more Mareva orders have been sought in more varied scenarios, the requirements for a Mareva injunction have been relaxed somewhat. A recent Ontario Superior Court decision held that the risk of dissipation can be inferred in cases where the inference arises from the circumstances of the alleged fraud, taking into context of all of the surrounding circumstances. Such circumstances include evidence suggestive of the defendant's fraudulent activity or a pattern of prior fraudulent conduct. However, the requirement to have evidence of dissipation would not be automatically addressed simply because the plaintiff established a strong prima facie case of fraud. The inference would also be available if a strong prima facie case is established for other causes of action.

The Supreme Court seemed to favour the "strong prima facie case" requirement adopted by the Ontario Court of Appeal a few years earlier, while also noting that the Ontario approach was "somewhat narrower" than the "good arguable case" standard of UK case law. The "balance of convenience" must favour the issuance of the order. This branch of the analysis involves a detailed consideration of the competing interests at play; principally, the plaintiff's interest in avoiding a dry

judgment and the defendant's interest in not having assets detained prior to judgment.

In British Columbia, the courts have adopted a flexible approach, employing a two-step test for the issuance a Mareva injunction, so as to not render the judge “a prisoner of a formula” but to allow courts to do justice as between the parties in any given case. The British Columbia Court of Appeal has also recognised that almost every Mareva injunction is likely to inconvenience the other party in some way and has emphasised that “the overarching consideration in each case is the balance of justice and convenience”.

Mareva injunctions are often sought on an ex parte basis. As with any ex parte relief, it is crucial that full, frank and fair disclosure be made of all material facts, particularly those that tend to support the position of the party against whom the injunction is sought. Such disclosure should include sufficient detail to allow the ex parte judge to determine the correct value of the underlying claim and, accordingly, of the assets to be frozen.

Model Mareva orders have been developed in particular jurisdictions, which serve as a guide when determining the appropriate parameters for this extraordinary relief. In a number of provinces, the ex parte order has a specific shelf life (ten days typically) within which it must be renewed on an inter partes basis.

Certain model Mareva orders include or permit asset disclosure terms. These provisions can be a powerful tool to determine the scope of a defendant's assets. Often there will be a term that requires the defendant to deliver a sworn statement describing the nature, value and location of assets, whether in his own name or not, whether solely or jointly owned. A further term can require the defendant to submit to examinations under oath on the sworn asset statement. Where these terms are granted, refusal to provide the asset information or submit to cross-examination may result in a finding of contempt of court.

As mentioned above, Mareva injunctions can be framed so as to freeze and obtain disclosure of assets both within Canada and on a worldwide basis. In Ontario, a recent decision provided for a worldwide Mareva injunction where the defendant had no assets in the jurisdiction. A key factor in granting the injunction was evidence based on information from Hong Kong lawyers that the Canadian order would assist in securing a freezing order in Hong Kong.

Finally, while Mareva injunctions are typically sought pre-judgment, there is authority for granting a post-judgment Mareva, which can be useful in determining the location of assets and securing the same in circumstances where a judgment debtor may seek to deplete, move or otherwise deal with the assets pending the outcome of an appeal.

Certificates of Pending Litigation (“CPL”)

Where real property is at issue, an order for a CPL may be obtained. A CPL is designed to provide a notice of claim and a warning to the public that the property is subject to a court dispute. It has the practical effect of restraining dealings with the property (eg, sale, financing, mortgaging etc) while the litigation is pending.

As a stand-alone pre-judgment remedy, a CPL can be made on a motion without notice, provided that the originating pleading includes a claim for the CPL with a proper description of the land in question. To obtain an order for a CPL, the moving party must first show that there is a triable issue in respect of the claim to an interest in the land. If this threshold test is met, the court will typically go on to consider a variety of equitable factors, such as whether the land is unique, whether damages would be a satisfactory remedy and whether the interests of the party seeking the CPL could be protected by another form of security.

Orders for the Preservation of Specific Property or Funds

The rules of the court in each Canadian province permit the parties to obtain orders for the preservation of property that is the subject matter of a proceeding. In Ontario, for example, the rules permit the court to make an interim order for the custody or preservation of the property in question or property relevant to an issue in the proceeding. To obtain such an order the moving party must show that:

- the asset constitutes the very subject matter of the dispute;
- there is a serious issue to be tried regarding the plaintiff's claim to the asset; and
- the balance of convenience favours preserving the asset.

Similarly, where the right to a “specific fund” is in question, the court may order the fund to be paid into the court or otherwise secured on such terms as are just. Such orders, however, are rare and will only be issued where the moving party can show that the right claimed is specifically related to the fund in question, that there is a serious issue to be tried and that the balance of convenience favours granting the relief sought.

2. Domestic Judgments

2.1 Types of Domestic Judgments

All judgments are court orders, but all court orders are not necessarily judgments. Judgments dispose of a proceeding on its merits with finality, whereas orders can be interlocutory or interim in nature, with the final determination to follow. Judgments can be granted on default if the proceeding is not defended within the timeframe stipulated in the Rules of the relevant province. In some circumstances, such default judgments can be set aside by the court, provided the

defendant can satisfy certain tests (typically, an explanation for the delay, arguable defence, etc).

Money judgments are the most common form of judgments; however, courts can also grant declaratory relief, permanent injunctive relief and other remedies, whether based in statute or the common law. Non-monetary remedies that can be ordered include specific performance, vesting orders, granting title to assets, a range of insolvency-related orders under the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 and Companies' Creditor Arrangement Act, RSC 1985, c. C-36, and orders ancillary to corporate reorganisations or other transactions, including plans of arrangement.

2.2 Enforcement of Domestic Judgments

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2.3 Costs and Time Taken to Enforce Domestic Judgments

The typical costs involved and length of time it takes to enforce a judgment can vary dramatically. It will largely depend on whether there are any known assets in the jurisdiction and how straightforward (or difficult) it is to obtain those assets.

While the simplest scenario would involve a voluntary payment by the debtor, the most straightforward enforcement scenario involves a debtor who has known, readily available assets (ideally cash) that are held in his or her own name and are not immune from seizure and/or sale. In such a scenario, the costs are correspondingly minimal, with limited legal fees and only modest (in the hundreds of dollars) in court filing fees.

If the creditor does not have knowledge of the extent or location of the debtor's assets, the first step is often to conduct

an examination in aid of execution in order to identify ex-igible assets. Counsel fees will vary for such examinations, depending on the nature of the debtor (examining fraudsters who are not expected to tell the truth will, for example, require more strategic thinking). The examination can also give rise to undertakings by the debtor to produce documents or further information, which, in turn, can give rise to a re-attendance to complete the examination at a later date. Preparing for and completing even the simplest judgment debtor examination can cost between CAD5,000 and CAD7,000.

In Ontario, one examination in aid of execution is allowed in a 12 month period for the same proceeding. If the creditor seeks to re-examine a debtor (as opposed to continuing an existing examination to ask questions arising out of undertakings) within one year, he or she will need an order from the court. Likewise, if the creditor seeks to examine a third party in aid of execution, a court order is required. The timelines and costs will increase where the debtor attempts to avoid or frustrate such examinations or attempts to fraudulently transfer assets to avoid enforcement. Sometimes, in the event of such a fraudulent transfer, fresh legal proceedings arising out of the enforcement efforts will be required (eg, in order to name one or more new defendants who may have received transferred assets from the debtor).

Execution on a judgment itself can be complex. For example, if execution may give rise to a breach of the peace, the sheriff may require the assistance of the police.

At one end of the scale, seizing monies in a known bank account can be relatively swift, straightforward and inexpensive. On the other hand, seizing and selling real or personal property, appointing a receiver, liquidating business assets and securities are generally more complex – and costly – undertakings, depending on the circumstances of the case. Accordingly, the costs associated with such varied steps are themselves quite varied.

If there are no known assets and the creditor cannot reliably learn of the same by way of an examination in aid of execution, creditors will often hire an investigator or an asset tracing firm. For simple investigative techniques involving local debtors, the fees for such services are generally a few thousand dollars. However, more complex enforcement costs can involve significant international investigations of corporate dealings, offshore trusts, etc, and the fees for such services can run into the tens or even hundreds of thousands of dollars. In some cases, the cost of enforcement measures can be recovered from the judgment debtor. *Sociedade-de-Fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited*, 2018 BCCA 145.

2.4 Post-judgment Procedures for Determining Defendants' Assets

As discussed above, a judgment creditor may conduct an examination of the debtor (or, in the case of a corporate judgment debtor, a representative of that debtor) in aid of execution. This is a powerful tool that allows the creditor to question the debtor under oath to obtain information relating to:

- the reason for non-payment or non-performance of the judgment;
- the debtor's income and property;
- the debts owed to and by the debtor;
- the disposal of any property the debtor has made, either before or after the making of the order;
- the debtor's present, past and future means to satisfy the order;
- whether the debtor intends to obey the order or has any reason for not doing so; and
- any other matter pertinent to the enforcement of the order.

The rules also allow for the possible examination of "any person who the court is satisfied may have knowledge" of the debtor's finances. Leave must be obtained to examine a third party and is not granted as of right. The court is more likely to grant leave to examine a third party where the debtor is non-responsive, evasive, has fled the jurisdiction or is deceased.

If a debtor fails to attend a court-ordered examination in aid of execution, or otherwise frustrates such an examination by being uncooperative, unresponsive or deceitful, the debtor may be found liable for civil contempt. The consequences of being found in contempt range from a fine for the payment of money, being ordered to do or refrain from doing an act, payment of costs to the creditor, compliance with any other order the judge may consider necessary, or imprisonment for a set period or until the non-compliance is cured.

2.5 Challenging Enforcement of Domestic Judgments

First and foremost, a party may challenge the enforcement of a domestic judgment by challenging the judgment itself. For example, in Ontario, a party may make a motion to (i) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made or (ii) suspend the operation of an order. The rules also provide for setting aside or varying an order on such terms as are just, including orders made on default (Rules 19.08 and 52.01(3)).

If the default judgment debtor was not properly served with the proceedings, the debtor may challenge the judgment on that basis, provided that the defendant did not participate in the merits of the proceeding or otherwise attorn to the jurisdiction of the court.

In addition, a party can appeal a judgment and, in doing so, will impose an automatic stay of a money judgment in some provinces, such as Ontario. Generally, a judgment creditor cannot successfully pursue enforcement of a domestic judgment until at least the initial appeal rights have been exhausted. However, once a judgment debtor loses an appeal, there is no further automatic stay, nor a further appeal as of right. Rather, appeals to the Supreme Court of Canada are only available with the leave of that court. The judgment debtor appellants facing money judgments must generally post security before the judgment can be appealed.

Enforcement may also be challenged on the basis that the assets being targeted by the judgment creditor are not properly available for execution because they are not considered to be assets of the judgment debtor (eg, they are the assets of a related party or are somehow immune from seizure, etc). Such scenarios tend to be highly fact-specific and are often complex. *Yaiguaje v Chevron Corporation*, 2018 ONCA 472; *Belokon v Kyrgyz Republic*, 2016 ONCA 981, leave to appeal to SCC refused 37460 and 37463 (June 15, 2017).

2.6 Unenforceable Domestic Judgments

Generally, domestic judgments will be enforced, subject to the grounds to challenge enforcement set out in section 2.5 **Challenging Enforcement of Domestic Judgments** above.

2.7 Register of Domestic Judgments

Generally, domestic judgments will be enforced, subject to the grounds to challenge enforcement set out in section 2.5 **Challenging Enforcement of Domestic Judgments** above.

3. Foreign Judgments

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

There are three routes to enforcing foreign judgments in Canada: at common law, under legislation or pursuant to a treaty. Canadian courts will generally enforce a foreign money judgment provided that:

- the court giving judgment is a judicial body or tribunal regularly established and exercising the jurisdiction conferred upon it by the relevant competent authority;
- the court had proper personal and subject matter jurisdiction according to Canadian rules regarding the conflict of laws. Jurisdiction is viewed as properly taken if the court had proper in personam jurisdiction over the defendant, if there is a real and substantial connection between the foreign jurisdiction and the subject matter of the proceeding or if the defendant attorned to, or by contract, agreed to the jurisdiction of the foreign court;
- the foreign judgment is for a debt or a definite sum of money; and

- the judgment is final and conclusive with respect to the rights and liabilities of the parties to it so as to be res judicata in a foreign jurisdiction. Canadian courts may recognise and enforce interlocutory orders as long as they meet the requirement of finality. For an interlocutory order to be recognised and enforced, the foreign court's jurisdiction to vary or set aside the judgment must be exhausted.

In certain cases, a foreign judgment granting non-monetary relief (ie, declaratory or injunctive) will be recognised and enforced in Canada (*Pro Swing Inc. v Elta Gold Inc.*, [2006] 2 SCR 612). Such enforcement is possible where the foreign judgment was rendered by a court of competent jurisdiction, the rendering was final and the nature of the judgment was such that comity required it to be enforced. However, a foreign contempt order is quasi-criminal in nature and, accordingly, may not be enforced.

Certain Canadian provinces have passed reciprocal enforcement of judgment statutes that apply to foreign judgments. However, the scope of such legislation varies from province to province and, in any event, tends to be limited to other Canadian provinces, the UK a few select US states and parts of Australia.

Where a provincial reciprocal enforcement of judgments statute applies to foreign judgments, the judgment may be enforced by registration. However, the provincial legislation does not alter the conflict of laws rules applicable to the recognition of foreign judgments. As a practical matter, this legislation is of limited benefit. Given that Canada's common law test for the enforcement of foreign judgments favours widespread enforcement, while the legislation should be invoked when applicable it is not as consequential as it might otherwise appear. The courts of each province are still required to take a supervisory role to ensure that the foreign judgment is, in fact, enforceable in accordance with applicable Canadian law.

Treaties are a third source of law for the recognition and enforcement of foreign judgments. Canada and the United Kingdom have entered into the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, which is ratified as the Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985, c. C-30. This Treaty has been adopted in the above-referenced Reciprocal Enforcement of Judgments (UK) Act.

Canada is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Therefore, when dealing with recognising and enforcing awards from jurisdictions other than the common law provinces and the United Kingdom, Ontario applies Canadian common law.

Furthermore, the enforcement treaty between Canada and the UK only applies to monetary judgments, leaving recognition of a non-monetary UK judgments to the common law.

Once a judgment is recognised by a Canadian court, meaning that the Canadian court acknowledges that it will treat the foreign judgment as effective and capable of being enforced, enforcement of the foreign judgment may follow in the same manner as a domestic judgement.

3.2 Variations in Approach to Enforcement of Foreign Judgments

As discussed above, the treatment of simple money judgments is the most straightforward for enforcement purposes. Non-monetary judgments may be enforced if comity requires and the Supreme Court's analysis in *Pro Swing*, referenced in **3.1 Legal Issues Concerning Enforcement of Foreign Judgments** above, has been applied by subsequent courts to enforce an order for specific performance, an injunction order, an order establishing a constructive trust, an order for declaratory relief and various orders in the context of insolvency.

3.3 Categories of Foreign Judgments Not Enforced

First and foremost, foreign judgments granted by courts without proper jurisdiction will not be enforced. The foreign court must have had a real and substantial connection with the litigants or the subject matter of the dispute or otherwise had jurisdiction based on one of the "traditional" bases, such as consent/attornment.

Also, the Canadian courts will not recognise or enforce foreign judgments relating to foreign public laws, foreign taxes and penal or quasi-criminal matters.

In addition, as established by the Supreme Court of Canada in *Beals v Saldanha* [2003] 3 SCR 416, the Canadian courts will refuse recognition and enforcement if the foreign judgment:

- was obtained by fraud going to the jurisdiction of the foreign court or new allegations of fraud that were not the subject of prior adjudication (eg, based on material facts not previously discoverable that potentially challenge the evidence put before the foreign court);
- is contrary to Canada's concept of natural justice, in that the foreign court's procedures did not allow for due process in the form of adequate notice and sufficient opportunity to be heard; or
- if it would be contrary to public policy, in that it is contrary to the Canadian concept of justice, which turns on whether a foreign law is contrary to our view of basic morality such that enforcement of the monetary judgment would shock the conscience of a reasonable Canadian.

3.4 Process of Enforcing Foreign Judgments

To recognise and enforce a foreign judgment at common law, the party seeking such redress should commence a proceeding. The originating process must be served personally or by an alternative to personal service on the debtor.

If the judgment debtor is domiciled outside of the province where enforcement is sought, the method of service will depend on whether the debtor is located in a country that is party to the Hague Convention of Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

If the material facts are not in dispute, the foreign judgment may be enforced summarily, based on affidavit evidence demonstrating that the judgment was obtained from a court having proper jurisdiction and that none of the defences to enforcement were established on the facts. If enforcement is resisted on a basis that raises credibility issues or otherwise requires a trial, the court may decline to decide the matter on a summary basis.

3.5 Costs and Time Taken to Enforce Foreign Judgments

If the enforcement of a foreign judgment is unopposed, it should be capable of being enforced quite quickly by way of default proceedings. Foreign defendants tend to have a maximum of 60 days from the service of an originating process to defend the proceeding. Where there is no statutory regime to register the foreign judgment, the length of time taken to enforce a foreign judgment can vary significantly, depending on whether the enforcement proceeding is opposed and, if so, the nature and extent of the defences raised. That said, generally speaking, enforcement proceedings are much more streamlined and efficient than regular lawsuits, since the merits of the dispute are not relitigated before the Canadian courts and, accordingly, the scope of the relevant documents and issues to be resolved is much narrower. If the plaintiff's counsel proceeds efficiently, a straightforward enforcement proceeding that is defended may be brought to court for a dispositive hearing within twelve months. More complex matters, particularly those requiring a trial, will take longer and be subject to the lengthier delays associated with obtaining a trial date from the given province's court system.

The legal fees and disbursements associated with such a proceeding can also vary widely, depending on the complexity of the matter and the specific defences raised. Canadian court filing fees are minimal, for example, the cost to file an application with the Ontario Superior Court is approximately CAN\$200. Disbursements relating to enforcement can vary substantially.

3.6 Challenging Enforcement of Foreign Judgments

The recognition and enforcement of foreign judgments may only be challenged on narrow grounds. Assuming the foreign court had proper jurisdiction over the foreign proceeding and that the judgment granted was final and conclusive on its merits, it cannot be challenged for error of fact or law. Canadian courts will not consider or re-evaluate the merits of the case.

The grounds upon which the enforcement of a foreign judgment can be challenged in Canada are: fraud, a denial of natural justice and on the basis that such enforcement is contrary to Canadian public policy.

As discussed above, if the foreign court assumed jurisdiction as a result of fraud, the Canadian courts will refuse to recognise and enforce the judgment. However, in order for a challenge on the basis of fraud going to the merits of the case to be successful, the fraud must not have been discoverable before the judgment was obtained in the foreign jurisdiction. In other words, where a party detects the fraud in the original jurisdiction, he or she cannot refrain from asserting these concerns. Also, if the defendant chose to not participate in the foreign proceeding, he or she may be barred from challenging enforcement in Canada on the ground that the evidence given in the foreign proceeding was fraudulent and the fraud could not have been discovered by reasonable diligence. It remains possible that a case could present newly discovered evidence of fraud that could not have been discovered had the proceeding that led to the foreign default judgment been defended. However, the fraud defence to the enforcement of foreign default judgments is much more difficult to sustain than if, say, the foreign proceeding was defended and the "reasonable diligence" caveat was, accordingly, more evident. (*Beals v Saldanha*, 2003 SCC 72).

To establish the defence of a denial of natural justice, the debtor must demonstrate that the judgment was obtained in a manner inconsistent with Canadian notions of fundamental justice (*Beals v Saldanha*, 2003 SCC 72). The following safeguards form the Canadian notions of fundamental justice: adequate notice of the claim, an opportunity to defend, judicial independence and ethical rules governing the behaviour of the participants.

The Canadian courts will also refuse to enforce a judgment that is contrary to public policy, but only in exceptional circumstances (*Beals v Saldanha*, 2003 SCC 72). The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada. The traditional public policy defence is directed at the concept of repugnant laws, not repugnant facts.

A party may also resist recognition and enforcement of a foreign judgment if the party seeking redress did not commence the enforcement proceedings or register the foreign judgment within the time limit prescribed by the applicable limitation periods. In Canada, limitation periods are created by statute and vary between provinces. In addition, the limitation period for the enforcement of foreign judgments also varies; the basic limitation periods in Canada usually range from two to six years. In Ontario, the limitation period within which to recognise and enforce a foreign judgment under the Reciprocal Enforcement of Judgments Act, R.S.O. 1990 c. R.5 and the Reciprocal Enforcement of Judgments (UK) Act, R.S.O. 1990, c. R.6 is six years from the date when the judgment was prescribed. Where the foreign judgment was delivered under the common law, the general limitation period of two years applies from the date the foreign judgment was delivered (*Commission de la Construction du Québec v Access Rigging Services Inc.* 2010 ONSC 5897). It is important to obtain advice early on with respect to the applicable limitation period to enforce a foreign judgment.

4. Arbitral Awards

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

Canadian courts readily enforce both domestic and international arbitral awards subject to limited grounds of refusal.

The applicable set of rules to recognise and enforce an arbitral award in Canada depends on whether the award is domestic or foreign. In addition, each province's rules on enforcement vary slightly, so particular attention must be paid to such subtle variations across the country.

Most Canadian provinces are subject to domestic and international arbitration legislation, each of which governs the enforcement of domestic and international arbitral awards, respectively. In common law provinces (all but Quebec, which has a code-based civil law system), an arbitration is international if the arbitration was held outside of Canada, if the parties have their places of business in different countries or if a substantial part of the obligations under the contract were performed outside of Canada. In Quebec, an arbitration is foreign if the seat of the arbitration lies outside Quebec. The recognition and enforcement of foreign arbitral awards is governed by the applicable international arbitration acts adopted by the provinces. Canada has passed the United Nations Foreign Awards Convention Act, RSC, c.16 (2nd Supp.), implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, UNTS 330 at 3 (entered into force on 7 June 1959) (the "New York Convention"). Canada adopted the reservation to limit recognition to arbitral awards that are "commercial". Every province has passed their own foreign enforcement legislation, with the effect that the New York

Convention is implemented with respect to foreign arbitral awards that involve matters of provincial jurisdiction.

Canada has also passed the Commercial Arbitration Act RSC 1985, c. 17 (2nd Supp.), which adopts the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "Model Law"). The provinces have also adopted the Model Law, with Ontario and British Columbia having adopted the Model Law's 2006 amendments.

Canada is a party to and has implemented the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (entered into force on 14 October 1966). ("ICSID").

As described in greater detail below, final awards obtained by tribunals with proper jurisdiction over the arbitral proceeding will be enforced, subject to very narrow defences. For domestic awards, the defences only pertain to awards subject to appeal or set aside proceedings or face a finding of invalidity. The merits may not be revisited. For international awards, the defences are broader and are described in greater detail in section 4.6 **Challenging Enforcement of Arbitral Awards** below.

4.2 Variations in Approach to Enforcement of Arbitral Awards

As discussed in 4.1 **Legal Issues Concerning Enforcement of Arbitral Awards** above, the biggest distinction is between domestic and international awards. However, in both cases the courts give deference to the arbitration tribunal and will enforce the award, subject to limited grounds to refuse recognition and enforcement. In all cases, the enforcing court has no power to deal with the merits of the underlying arbitration.

Generally speaking, and under the domestic Arbitration Act, 1991 S.O. 1991, c. 17, the court "shall" grant judgment enforcing the award made in the province unless:

- the award is not final, and the period to commence an appeal or an application to set the award aside has not passed;
- there is a pending appeal, an application to set aside the award or an application to declare the award invalid; or
- the award has been set aside or the arbitration is the subject of a declaration of invalidity.

As to Ontario, to recognise and enforce an arbitral award from another Canadian province the same test applies, with the added requirement that the subject matter of the award must be capable of being the subject of arbitration under Ontario law. While all Canadian province's courts readily enforce awards from their own or other Canadian provinces, there are differences in the procedures and tests, which need to be considered depending on where enforcement of the

award is sought. However, no court in Canada has the power to revisit the merits of an arbitral award.

Subject to the narrow defences relating to the possible annulment of an ICSID award, very specific domestic laws (eg, state immunity, service) and normal restrictions that would apply to the enforcement of a domestic judgment, awards under ICSID will be recognised as binding and the monetary obligations of the award will be enforceable as if they were a final judgment of a domestic court.

4.3 Categories of Arbitral Awards Not Enforced

Domestic arbitral awards that extend to parties who are not bound by the arbitration agreement and who have not attorned to the jurisdiction of the arbitral tribunal will not be enforced.

Generally, the Canadian courts will not enforce a domestic or international arbitral award if the subject matter of the arbitration is not capable of being settled by arbitration under the applicable laws where enforcement is being sought.

The courts will not recognise or enforce an international arbitral award if such enforcement would be contrary to Canadian public policy.

4.4 Process of Enforcing Arbitral Awards

Under most domestic arbitration acts, a party can simply apply to the court to have its domestic arbitral award enforced. The limitation period to commence enforcement proceedings varies between Canadian provinces, from two to ten years (in Ontario, it is two years). In some other Canadian jurisdictions (eg, British Columbia and Nova Scotia), the process is framed in terms of leave of the court being required to enforce a domestic arbitral award. Regardless, the process is streamlined and is intended to facilitate the enforcement of awards subject only to very narrow caveats. Also, the court's decision on whether to grant or deny an application to enforce a domestic arbitral award can be appealed.

For the enforcement of an international arbitral award, the party must apply to the applicable court. The application must include the original or a copy of the award together with the arbitration agreement, attached as exhibits to an affidavit. Neither the New York Convention nor the Model Law set out limitation periods for the enforcement of a foreign arbitral award. However, pursuant to the New York Convention, each contracting state is required to enforce arbitral awards in accordance with the rules of procedure in the jurisdiction where the party seeks to enforce it. The Supreme Court of Canada has held that the rules of civil procedure of the jurisdiction where enforcement of the foreign arbitral award is sought will apply to those proceedings (*Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19).

The result is that limitation periods for the enforcement of foreign arbitral awards will vary depending on which province is chosen.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The costs and time to enforce domestic or international arbitral awards depend on the case. A straightforward application may take eight to twelve months. However, if the enforcement proceeding is defended on a basis that raises serious issues that could involve a significant inquiry into whether the enforcement could offend public policy (eg, underlying criminality not previously raised before the tribunal), the enforcement proceedings could take much longer. Also, if the party seeking enforcement pursues interlocutory relief (eg, a Mareva injunction to freeze assets) and such steps become subject to set aside proceedings or other challenges, the progress of the enforcement proceeding will be adversely impacted. In addition, jurisdictional issues related to service can also delay proceedings. The court filing costs for applications vary between the provinces but are modest – usually in the range of CAD200.

4.6 Challenging Enforcement of Arbitral Awards

Most provinces have legislation that sets out the limited circumstances in which the enforcement of a domestic arbitral award can be challenged. These limited circumstances include where there is a pending appeal of the award, a pending application to set aside the award or a pending application for a declaration of invalidity. Where the period to appeal, set aside the award or apply for a declaration of invalidity has not elapsed, the court may enforce the award or stay enforcement until the said period has elapsed or until the pending proceeding is finally disposed of.

In addition, the recognition and enforcement of a domestic award can be challenged on the following narrow grounds: (i) absence of notice to the other party, where the award deals with a dispute outside the scope of the arbitration agreement or (ii) where there is a breach of public policy.

International arbitral awards can be challenged under the limited grounds of Article 36(1)(a)(ii) of the UNCITRAL Model Arbitration Law or Article V of the New York Convention, where the party resisting enforcement can prove that:

- a party to the arbitration was under some incapacity or the agreement was not valid under the law of the seat of arbitration where the award was made;
- the party against whom the award was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitra-

tion, or it contains decisions on matters beyond the scope of the submission to arbitration;

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such an agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

In addition, enforcement may be resisted if the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of the state where enforcement is sought; or
- the recognition or enforcement of the award would be contrary to the public policy of the state where enforcement is sought.

The public policy ground to refuse enforcement of a foreign arbitral award has been narrowly construed; it is “to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way ... or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts” (*Schreter v Gamac Inc.*, [1992] 7 OR (3d) 608).

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