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Discussion

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QUESTION, *Professor King*: Is there anything worth our attention in the Canada/U.S. context concerning rulings or decisions on *forum non conveniens* grounds?

ANSWER, *Mr. Ristau*: *Forum non conveniens* is in large part, a judge-created doctrine. All it means is that where a court has subject matter and personal jurisdiction, the defendant may ask the court to relinquish that jurisdiction in favor of another more convenient court.

*Forum non conveniens* is really an *ad hoc* determination, and depends most definitely on the facts of each case. It is on occasion used abusively for the purpose of delay.

I had a personal experience, where I brought suit on behalf of a foreign company in federal court in Houston, Texas, against a major oil company headquartered in Houston, three blocks away from the federal courthouse. The Houston company moved to dismiss on *forum non conveniens* grounds, saying it would be vastly more convenient for them to litigate in London, and that they were perfectly prepared to subject themselves immediately to the jurisdiction of the London court. It was obvious why they moved to get us thrown out of court. In England, as I believe is true in Canada, there are no punitive damages.

QUESTION, *Mr. Edward*: I would be interested in any comments you may have concerning recognition in Canada, of United States judgments in cases where the defendant appeared and litigated.

ANSWER, *Mr. Smith*: There are certain kinds of judgments, such as penal judgments or tax judgments, that the courts will not even consider. There are other judgments which will be able to be opened up if there is any argument as to such things as: Was the defendant properly served? What were the trial proceedings if there was a trial and was there any vice in the proceedings? It is probably fair to say that most any judgment can be attacked on these grounds. But the basic rule is, absent everything else, the courts start off on the presumption that they should honor the foreign judgment.

COMMENT, *Mr. Castel*: There is a very important Supreme Court case that was decided in Canada a couple of months ago with respect to the recognition and enforcement of foreign judgments. The Canadian court has adopted the principle of reciprocity, confirming a decision of the British Columbia Court, which was based on a paper which Professor Kennedy and I had advocated about thirty-five years ago. It actually took thirty-five years to get to the Supreme Court. The problem is very

important because what this decision recognizes is that a default judgment rendered in the United States may now be enforceable in Canada.

In the past, the ordinary rule was that if a party was sued in the United States as a Canadian, and the court exercised jurisdiction on a basis that was not recognized in Canada, which we call the International Basis for Jurisdiction, then the advice given to the Canadian client was to keep quiet, because a default judgment would be rendered, which in turn would not be enforced in Canada. But with this recent decision of the Supreme Court, if a U.S. court, or a French court or a German court, used as a domestic basis for exercising jurisdiction the grounds that Canadian courts use, or that Canadian courts in similar circumstances would exercise jurisdiction over, then this default judgment will be recognized in Canada. This is a very dramatic development, because it opens up all kinds of possibilities.

Another development respects the new draft civil code of Quebec, Bill 125, which was deposited just last month before the National Assembly. This Bill contains provisions on the conflict of laws in the field of jurisdiction, which are extremely extensive. The provisions are extremely extensive because they have adopted as one of the basis for jurisdiction what we call, "conflicts of principle of proximity" or the "most substantial connection." Whether that Bill will be adopted or not remains to be seen.

But with respect to the decision of the Supreme Court of Canada, I see it as a very dramatic development because it really is going to enable litigation in the United States to be recognized much more easily in Canada.

COMMENT, *Mr. Ristau*: We came very close in the 1970s to negotiating a treaty with the United Kingdom on reciprocal enforcement of civil judgments. If we cannot enter into a treaty with the United Kingdom, or with our good neighbors to the North, we are not going to enter into a treaty with anybody regarding reciprocal enforcement of judgments.

The treaty negotiations with the United Kingdom broke down because of the intransigence of the American Plaintiffs Bar, who said they would torpedo the treaty if it was signed and brought before the Senate for its advice and consent, because the treaty would not apply to treble damage judgments in antitrust suits. The British were absolutely livid. They would not recognize that type of a judgment and would not sign the treaty. It fell apart. As long as the Plaintiffs Bar in this country insists on such a provision, there will not be a treaty, in my opinion, with anybody.

It is fair to state that, by and large, U.S. courts are quite hospitable towards the enforcement of foreign judgments, certainly from sister common law jurisdictions, and I would think from Western Europe as well. I also do not think that an American court would enforce a judgment under this provision from the Islamic Republic of Iran, or from Libya or

from any of the other countries that we do not regard as having a civilized system of law or where there are political problems.

There is a recent case on record where the New York State court enforced an English judgment based on a gambling debt. The underlying cause of action would not have been enforced in an original action in New York under New York State Law. It was a default judgment rendered in England against an American gambler who had run up a sizable debt in London, perfectly enforceable in London. In fact, a realistic judge on the panel in New York said, "Come on. Who are you kidding? We have legitimate horse races in this country and greyhound races, and all the states are now enacting lotteries. Who are we kidding that it is against the morals of this country to gamble?"

QUESTION, *Mr. Fried*: Both panels seemed to have focused on cases between private parties, where a foreign government interest is implicated but where the foreign government is not a party or representative. I am curious to hear from both of you, as a government official myself, your observations on the role of that foreign government in representing its interest. In the United States, as you know, Canadians are told by the administration that we have to go directly to court by way of Amicus Curiae. We do not have a similar institution in Canada. What did the United States do in the *Uranium* case to get its interest before the Canadian court?

ANSWER, *Mr. Smith*: As far as I can recall, the United States was not involved in any way, shape or form in the Canadian proceedings in the *Uranium* case. On the other hand, as you know, Canada was involved in the proceedings in the United States and filed Amicus briefs and so on.

It depends on the sensitivity of the matter; it depends on the particular parties and whether they are able to generate enough enthusiasm to get a government into court. I am not sure that, speaking just from my experience, there is any consistent policy for the government to do this, and maybe there should be, because I think that it is rather a matter of hit or miss.

ANSWER, *Mr. Ristau*: In every case in which I have ever found an Amicus brief, the court seems to disregard it and rule the other way. Perhaps I am the only one who was not lucky.

QUESTION, *Mr. Delay*: It is one thing to have a judgment, but sometimes there must be discovery in a foreign state to be able to enforce it. What comment would the speakers offer on post-judgment discovery such as under Civil Rule 69, and what difficulties are commonly encountered?

ANSWER, *Mr. Ristau*: Foreign states are generally not willing to allow much discovery, and certainly not any discovery at a post-judgment hearing. I do not know all of the judgments that have ever been entered into against foreign states in the United States, but I do not know of a

single case where anyone successfully executed a judgment against a foreign state since the enactment of the FSIA.

The fact is, a number of foreign states do honor our judgments voluntarily. I can represent to you that the United States, when it becomes a judgment debtor abroad, quite regularly pays foreign judgments. In fact, in the 1950s the Federal Automatic Payment of Judgments Act was amended to include foreign judgments. The problem that foreign governments have in the enforcement of judgments, including the United States, is under our Domestic Automatic Payment of Judgments Act, the judgment has to be final, before the General Accounting Office will accept a certification to pay it. If an appeal is pending, by definition it is not final and cannot be paid. Yet in most foreign states, as in the United States, the mere fact that you have filed an appeal does not render the lower court's judgment unenforceable unless you file a supersedeas bond. There you run into some problems. I know that India, in a lawsuit in New York a few years ago, had problems with that because they had filed an appeal and refused to file the supersedeas bond. The judgment creditor insisted on executing the judgment. Unfortunately, he reached some funds belonging to the Central Bank of India and he had to let go of them.