LITIGATING CROSS-BORDER DISPUTES:

Essential Considerations

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Agenda

1. U.S. / Canadian Trade Introduction
2. Enforcement of Foreign Judgments in Canada
   - Injunctive Relief;
   - Arbitral Awards
3. Whether to Sue in U.S. or Canada
4. Obtaining Evidence in Canada
   - Letters Rogatory
Whether to Litigate/Arbitrate in the U.S. or Canada? And Why?

- Historically it has been very difficult to enforce U.S. (foreign) judgments and arbitral awards in Canada.
- This has all changed radically within the last 14 years or so as a result of key Supreme Court of Canada Decisions.
- In turn, the answers to the questions “where to litigate and why?” Have changed dramatically.
U.S. / Canadian Trade:
Unparalleled Worldwide

- Largest trade relationship in the world
- Well over $2 billion dollars per day!
- The NAFTA Effect: 2-way trade has nearly doubled since its inception, reaching $602.5 billion in 2008
- One of the world’s largest bilateral investment relationships
Trade and Commerce = Litigation

- Inevitably increased commerce and trade leads to increased Litigation!

- How has the legal establishment reacted?
Canadian Courts Respond: The Importance of Comity

- Canadian Provincial and Federal Courts have become more flexible and liberal in enforcing foreign Judgments.

- The principal of “Comity” has taken on new importance.
'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Comity: “Canadian Style”

- [The doctrine of comity] must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility.

Canadian Law of Foreign Enforcement
Pre-Morguard

Enforcing foreign Judgments in Canada used to practically depend on:

✓ The Canadian Defendant being present in the foreign jurisdiction at the time of the action; or

✓ The Canadian Defendant attorning to the foreign jurisdiction voluntarily
Canadian Law of Foreign Enforcement

Pre-Morguard

Effects on Advice of U.S. Counsel to their clients:

1. Sue in the U.S. and hope to prove:
   a) presence in the jurisdiction; or
   b) attornment to the jurisdiction

2. Litigate in Canada
Canadian Law of Foreign Enforcement
Pre-Morguard

Constitutional Differences:

- U.S. - “Full Faith and Credit”
  Constitutionally entrenched

- Canada – judge made law followed by
  non-constitutional statutory intervention
**Morguard v. De Savoye: Opening the Canadian Frontier**

- **General Principal**: Canadian courts should enforce “foreign” judgments where:
  - the foreign court has exercised its jurisdiction legitimately;
  - the foreign court has exercised *due and fair process*; and
  - the foreign judgment is “final”
Morguard v. De Savoye: Opening the Canadian Frontier

- The “Real and Substantial Connection Test” (RSC)
  - There must be a **Real and Substantial Connection** between the jurisdiction and the defendant *or* the subject matter of the action.
Morguard v. De Savoye: Real and Substantial Connection Test

Indices of RSC include:

- defendant’s presence in jurisdiction
- contract formed in jurisdiction
- contract breached in jurisdiction
- damages incurred in jurisdiction
- events in dispute occurred in jurisdiction
- choice of law clause in contract naming jurisdiction
- property in dispute located in jurisdiction
Requirements for Enforcement: Judgment must be “Final”

- To be enforceable in Canada a U.S. Judgment must be “final”
Requirements for Enforcement:
Judgment must be “Final”

- A Judgment under Appeal is considered “final”
- but...the enforcement action may be stayed pending the Appeal.
Enforcement of U.S. Judgments: Defences

Four main Defences:

1. Lack of Jurisdiction
2. Fraud
3. Public Policy
4. Natural Justice
**Enforcement of U.S. Judgments: Defences**

1. Lack of Jurisdiction

   - Test: Real and Substantial Connection
   - Too late for arguments that Canadian Jurisdiction would be preferable
Enforcement of U.S. Judgments: Defences

2. The Judgment was obtained by Fraud

• Test: Is there newly discovered proof of fraud which was *not* before the U.S. Court?

Enforcement of U.S. Judgments: Defences

3. To Enforce the Judgment would offend Canadian Public Policy

• Largely Impotent Defence in light of similarities in legal systems cross-border
Enforcement of U.S. Judgments: Defences

4. The Judgment was obtained in contravention of Natural Justice

- Test: Failure to provide substantive due process
Enforcement of U.S. Judgments: Defences

• What is not a defence?

  • The Judgment involved an error of law or fact.......it was wrong!
Assessing the Impact of Morguard

- Interprovincial Effect
  - Judicially created “full faith and credit”
Assessing the Impact of Morguard

- International/USA Impact
  - All Canadian Provinces have applied *Morguard* liberally *vis a vis* U.S. Judgments
  - Has he “Comity Pendulum” swung too far toward Recognition?
Assessing the Impact of Morguard


  • $8,000 USD Florida Claim becomes $260,000 USD Florida Judgment

  • $260,000 USD Florida Judgment becomes $800,000 CAD Ontario Judgment after exchange and interest
Historic Approach Re Enforcement of Foreign Injunctive Orders

- Historically non-monetary/injunctive orders have not been capable of enforcement in Canada.

- Such judgments might render the matters dealt with res judicata in Canada.

- Traditionally Cross-border injunctive relief required:
  - A Canadian action claiming injunction;
  - An interlocutory motion for injunctive relief in the Canadian jurisdiction.
Historic Approach Re Enforcement of Foreign Injunctive Orders

- Historically non-monetary/injunctive orders were *not* capable of enforcement in Canada

  • ....foreign injunctive Orders were said to offend the traditional rules that required judgments to be:

    - for a *fixed and ascertained sum* and
    - to be *final and conclusive*. 
Historic Approach Re Enforcement of Foreign Injunctive Orders

Public Policy Reasons for these Rules:

- Judgments for money owed are:
  - Simple
  - Clear
  - Conclusive
  - Unambiguous
  - Unlikely to require knowledge of complex factual background matrix

- Judgments for Injunctive relief are often just the opposite of the above
Liberalization of Foreign Monetary Judgment Enforcement in Canada

- *Morguard v. De Savoye (SCC)* liberalized Enforcement of Judgments in Canada
  
  • Real and Substantial Connection Test – for establishing Legitimate Jurisdiction
  
  • Limited Defences to Enforcement
Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

Since Morguard:

- Traditional barriers to enforcement of Non-Monetary Relief have been scrutinized by Canadian Courts
  
  
Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

- *Uniforet Pate Port-Cartier Inc. v. Zerotech*

“Following the principles established in Morguard and subsequent authorities, I conclude that, even assuming the common law rule that a judgment be for a sum certain before it could be enforce, the rule has been abrogated. To paraphrase La Forest J. in Morguard, it would be a serious error to give effect to such a rule when the obvious intention of the Canadian Constitution is to create a single country. There is no principled reason why judgments other than monetary judgments should not be recognized and enforced”
Effect of Liberalized Enforcement in Context of Non-Monetary/Injunctive Orders

The Court Will Examine:

- traditional barriers to enforcement of foreign non-monetary orders
- public policy considerations founding traditional barriers to enforcement
Pro Swing Inc. v. Elta Golf Inc  
at the Supreme Court

Pro Swing Inc. v. Elta Golf Inc

- At trial, Ohio Injunctive Order found to be enforceable in Ontario
  - *Morguard, Hunt, Beals* etc. principles apply to non-monetary judgments
  - Injunctive Order in this case final and conclusive

- On Appeal, Ohio Injunctive Order found *Not* to be Enforceable in Ontario:
  - Ambiguous in respect of material matters
Impacts of Liberalized Enforcement of Foreign Injunctive Relief In Canada

- Impact on U.S. interests:
  
  • Improved access to Injunctive Relief Against Canadian Interests
    
    - Convenience
    - Less Expensive Access
    - Legal Comfort level/Home field advantage
Impacts of Liberalized Enforcement of Foreign Injunctive Relief In Canada

- Impact on Canadian interests:
  
  • Canadian interests would find themselves more and more fighting legal battles:
    
    – In foreign locales
    – Using foreign lawyers who employ different legal principles
    – At higher costs
    – Less convenience
Are International Arbitral Awards Enforceable in Canada?

- Yes
- pursuant to Statute or at Common Law
What You Need to Know To Enforce Your Arbitral Award

When applying to enforce an arbitral award you must supply the Court with the following:

- the duly authenticated original arbitral award or a duly certified copy;
- the original arbitration agreement or a duly certified copy;
- if the arbitral award is not made in an official language of Canada (English or French) a duly certified translation must be provided;
What You Need to Know To Enforce Your Arbitral Award

- The award will be *unenforceable* if the court finds that:

  - the subject matter of the dispute is not capable of settlement under the laws of the Canadian jurisdiction, or;

  - contrary to public policy

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What You Need to Know To Enforce Your Arbitral Award

If a party opposes recognition and enforcement of an arbitral award it may be subject to an Order Requiring it to post security for costs.
Can Evidence Be Obtained in Canada For Use in Arbitral Proceedings?

- Yes
- Evidence Given Voluntarily
- Evidence to be Obtained by Court Order
Whether to Sue in Canada or U.S.A.?

- Factors Favoring Commencement in the U.S.:

  1. Formal Jurisdictional Considerations:

     a. The Legitimate Jurisdiction hurdle has been set very low for enforcement of U.S. Judgments in Canada
     b. Forum selection contractual clause favoring U.S. jur.
     c. Choice of law contractual clause favoring U.S. jur.
Whether to Sue in Canada or U.S.A.?

Factors Favoring Commencement in the U.S.:

2. Defences to the enforcement of U.S. judgments in Canada are very restricted.

3. Strategic and cost-benefit advantages:
   a. Greater possibility of default
   b. The “lawyer negligence” effect
   c. Increased costs to Canadian party of litigating – effect on settlement position
   d. Greater right to discovery: depositing witnesses before trial
Whether to Sue in Canada or U.S.A.?

Factors Favoring Commencement in the U.S.:

4. Territorial advantages in U.S.A. – typically not available in Canadian Jurisdictions:
   
   a. Treble damages
   b. Civil jury damages
   c. Punitive damages
   d. Substantive law advantages
Whether to Sue in Canada or U.S.A.?

- Factors Favoring Commencement in Canada:

  1. Where “Real and Substantial Connection” to the U.S. Jurisdiction in question is in doubt

  2. Formal Jurisdictional Considerations:
      a. The availability of enforcement of a Canadian Judgment in the particular U.S. jurisdiction
      b. Forum selection contractual clause favoring Can.
      c. Choice of law contractual clause favoring Can.
Whether to Sue in Canada or U.S.A.?

- Factors Favoring Commencement in Canada:
  3. Less Expensive litigation
  4. Legal Costs to the winner!
  5. Comfort Level with counsel in both jurisdictions and desire to eliminate any duplication in proceedings
Practical Advice Re Enforcement of U.S. Judgments in Canada

- For U.S. Counsel seeking to obtain and enforce a U.S. Judgment in Canada
  - Contact a Canadian lawyer practicing in the area
  - local legal nuances
  - pre-Canadian suit options such as judgment debtor examinations
Practical Advice Re Enforcement of U.S. Judgments in Canada

➤ Process by Which U.S. Judgment is enforced in Canada

➤ **Action** is commenced “on the judgment”

➤ **Summary Judgment Motion** is brought as quickly as possible
Practical Advice Re Enforcement of U.S. Judgments in Canada

➤ Summary Judgment Hurdles

1. “Genuine Issues for trial”
   a. Credibility in issue
   b. Judgment involves:
      “weighing evidence”
      “finding of facts”
Practical Advice Re Enforcement of U.S. Judgments in Canada

Options where Summary Judgment *Not* Available:

1. Trial of an Issue;
2. Speedy Trial List;
3. Regular Litigation to Trial
Practical Advice Re Enforcement of U.S. Judgments in Canada

For U.S. Counsel advising Canadian Concerns which have been sued in the U.S.

✓ Defend, Defend, Defend!
Letters Rogatory

Letters Rogatory (defn):

a request from a domestic Court to a foreign Court for something requiring cooperation
“Comity” and Obtaining Evidence in Canada

- International Legal Assistance Between Courts rests on the Principle of “Comity”

- Principle of International Comity

“Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

Comity: Enforcing Letters Rogatory

- Courts give assistance to each other across borders not as a matter of obligation, but rather out of mutual respect and deference.

- A foreign request is given full force and effect unless:
  - contrary to public policy
  - Prejudicial to sovereignty
  - Prejudicial to citizens
Issuing Letters Rogatory In United States

✓ Addressed “To the Appropriate Authority In Canada”

✓ Who you wish to examine and why

✓ Clearly state evidence sought

✓ relevance
Issuing Letters Rogatory In United States

- Required:
  - that evidence not obtainable in United States
  - Under seal
  - signed by a Judge
Issuing Letters Rogatory In United States

- Canadian Court wants to know all evidence before U.S. Court when Letters Issued

*W.R. Grace Co. v. Brookfield Development Corp.*[1995]
O.J. No. 1483 (Gen. Div.).
How do you Obtain Evidence In Canada?

➢ First Things First

✓ Contact Canadian Counsel prior to pleading (if possible)

✓ Determine what you need

✓ Be careful of fishing expedition

✓ Obtain letters of request from your Court be specific as to:
  ▪ who is examined, why and for what
6 Factors Court Will Consider in Exercising Discretion

1) Evidence sought is relevant

2) Evidence sought necessary

3) Evidence is not otherwise obtainable

4) Order sought not contrary to Public Policy

5) Documents sought identified with reasonable specificity

6) Order not unduly burdensome
(1) Evidence Sought is Relevant

- Evidence must be Probative of Issues in the Action


- Must establish how and why it is relevant (*Giamo v. Canada Trust* [1998] CarswellOnt 3911)

- Judge stating the evidence is relevant in the Letters Rogatory is not sufficient
(2) Evidence Sought Is Necessary for Trial and Will be Used at Trial, if Admissible

- This factor is *no longer relevant* in Letters Rogatory seeking a discovery for Pre-Trial or Investigatory Proceedings
(3) Evidence Sought Is Otherwise Unobtainable

- Must Establish that Evidence Sought is *Otherwise Unobtainable*

- Exhausted *All Options* available

- that Letters Rogatory is a *last resort*
(4) **Contrary to Public Policy**


- Blocking Statutes in Canada


(5) **Documents Sought are Identified with Reasonable Specificity**

- Can identify by class or topic
- terms and conditions can be placed by the Canadian Judge Ordering Letters Rogatory
(6) Not Unduly Burdensome

- Order sought *not unduly burdensome*, with attention paid to what relevant witnesses required to do and produce were the action tried in Canada

- Guidance from Rule 31.10 of the Ontario Rules of Civil Procedure

- Just because it’s not done in Canada does not mean it can’t be done
If you Get It Wrong Can you Go Back?

- RE Friction Division Products, Inc. and E.I. Dupont de Nemours & Co. Inc. et al. (No.2) (1986) 546 O.R. (2d)
  - Res judicata
  - Issue estoppel
  - Abuse of process
If you Get It Wrong Can you Go Back?

- The Ontario Court of Appeal held that Letters Rogatory could be re-submitted by U.S. Court to conform with requirements

  “if he was trying to take another bite at the apple, it was from a different apple.”

  RE Friction Division Products, Inc. and E.I. Dupont de Nemours & Co. Inc. et al. (No.2) (1986) 546 O.R. (2d)
Thank You!

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