Jun 12, 2019

# Enforcing Foreign Orders on the Commercial List

Given the effects of globalization, parties frequently find themselves seeking to have orders issued in foreign jurisdictions recognized and enforced in Ontario.

The mechanism for having a foreign order recognized and enforced in Ontario depends on the nature of the order and the jurisdiction in which it was issued.

Federal and provincial statutes provide special procedures to facilitate and expedite the recognition and enforcement of judgments from certain jurisdictions such as the *Reciprocal Enforcements of Judgments Act (U.K.)* , RSO 1990, c R6 for judgments issued in the United Kingdom.

Absent a specific statutory regime, the recognition and enforcement of foreign orders in Ontario is governed by common law. Traditionally, that required that the order be issued by a court of competent jurisdiction according to Canadian conflict of laws rules, be a final order, and be for a specific or defined sum of money.

Provided that the issuing court had jurisdiction to make the order (either because of the existence of a real and substantial connection between that jurisdiction and the defendant or the subject matter of the dispute), there is no jurisdictional requirement for a Canadian court to recognize and enforce a foreign order. In particular, as the Supreme Court of Canada held in *Chevron Corp. v Yaiguaje, 2015 SCC 42* (in which our firm acted for the successful respondents), the party seeking to have the order recognized and enforced need not demonstrate a real and substantial connection between the subject matter of the dispute or the debtor and Ontario. You can read my comments on the Supreme Court's decision here .

Proceedings to have foreign judgments recognized and enforced in Ontario are subject to the standard two year limitation period in Ontario's *Limitations Act, 2002*, SO 2002, c 24, Sched B. However, the limitation period only

commences once the time to appeal the foreign judgment has expired or, if an appeal is taken, the date of the appeal decision. Read my blog post "*The Limitation Period for the Enforcement of Foreign Judgments in Ontario*" for my comments on this topic.

Historically, Canadian courts were unwilling to recognize and enforce non-monetary and interlocutory orders. That changed to some extent with the release of the Supreme Court of Canada's 2006 decision in *Pro Swing Inc. v Elta Gold Inc.*, 2006 SCC 52, in which the Court held that Canadian courts can recognize and enforce non-monetary judgments provided that they are sufficiently clear and specific and also suggested that interlocutory orders may be recognized and enforced where they meet the underlying objectives of the traditional requirement of finality.

The circumstances in which a Canadian court will recognize and enforce a foreign interlocutory, non-monetary order remain somewhat murky. Courts remain concerned by the potential for making significant orders against a party such as freezing their assets in Ontario before any final determination of the issue in dispute and the consequences if the underlying order is subsequently reversed in the foreign jurisdiction.

On the other hand, given the ease of transferring assets across national and provincial boundaries in the electronic age and the economic interconnectedness that has resulted from globalization, the outright refusal to recognize and enforce interlocutory, non-monetary orders issued abroad risks creating significant loopholes that could allow parties who have engaged in fraud, for example, to operate with impunity and unintentionally undermine the efficacy of the foreign court's order in the jurisdiction in which it was issued.

The issue most frequently arises in the context of attempts to have recognized so-called Worldwide Freezing Orders (as they are referred to in a number of jurisdictions) wherein a foreign court orders a party's assets to be frozen pending determination of the dispute so that the subject of the order cannot dissipate the assets before a final order is made.

Given Toronto's status as Canada's largest city and business hub, these disputes commonly arise here,

where they are typically determined on the Commercial List, a special branch of the Ontario Superior Court of Justice specializing in complex commercial matters. The Commercial List is a preferable venue for these disputes because of its experience with complex commercial cases and working with foreign courts in cross-border or international cases.

Generally, the Court here has avoided recognizing Worldwide Freezing Orders directly. We are aware of only one (unreported) decision in which a Worldwide Freezing Order was recognized by the Court in Ontario directly.

In light of this continuing reticence, a practice has developed of seeking a stand-alone freezing order called a *Mareva* order in Ontario in tandem with or in lieu of the recognition order (see, for example, *East Guardian v. Mazur*, 2014 ONSC 6403 in which Lenczner Slaght successfully deployed such a strategy). The test for a *Mareva* order is similar to the test for freezing orders in many jurisdictions and requires the moving party to show that it has a strong *prima facie* case against the respondent, it would suffer irreparable harm absent the order, the balance of convenience favours making the order, the respondent has assets in the jurisdiction and that there is a risk of the assets being removed from Ontario, or disposed of within Ontario or otherwise put beyond the reach of the Court here.

It remains to be seen whether the Court here will warm to recognizing and enforcing foreign interlocutory orders directly. While a stand-alone *Mareva* order has the same practical effect as an order recognizing a freezing order issued abroad, it requires the moving party to meet a higher test than typically required for a recognition order and, in particular, requires the moving party to show that the respondent has assets in Ontario at risk of being dissipated absent the *Mareva* when the Supreme Court held expressly in *Chevron* that a moving party ought not have to show that the respondent has a real and substantial connection to Ontario to have a foreign judgment recognized and enforced here.

Finally, readers should note that the considerations discussed in this post apply to orders made by courts in foreign jurisdictions and that there is a separate regime for the recognition and enforcement of arbitral awards, in particular

from international commercial arbitrations, which are subject to the provisions set out to Ontario's recently amended *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5. Read our blog post on this update for more details.