Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant?

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This article is concerned with the theory and practice of the recognition and enforcement of foreign judgments at common law and the application of the relevant principles in New Zealand. The author's thesis is that a modern concept of comity, properly understood and applied, has continuing relevance in this area. However, comity should not be based on the traditional common law doctrine of reciprocity of interest but on the contemporary need to take account of the increasing interdependency of international commerce in the internet age. The Canadian and United States courts have tended to exhibit a more perceptive analysis of these issues than English and other Commonwealth courts. If the matter is approached in this way then a New Zealand court ought to be reluctant to second-guess judgments of a foreign court and to broaden the scope of the recognised defences at common law, except in the most egregious of circumstances. This article will explore the extent to which such an approach has been followed in practice in New Zealand.

*Barrister Auckland. I wish to express my thanks to the two anonymous referees, who have reinforced to me the fact that legal issues, in this area especially, are never as straightforward as one might first think.

I Introduction

This article explores a long-standing legal dichotomy in private international law. To what extent should a court in one jurisdiction accord comparatively uncritical recognition and consequent enforcement[1] to a judgment of a foreign court even in circumstances where the foreign judgment may exhibit features which to the enforcing court appear troublesome or even manifestly unjust? The courts in many common law jurisdictions, including New Zealand, have often struggled to develop a coherent theoretical basis in this area. This area of private international law is the subject of an ongoing academic (and judicial) debate as to its theoretical underpinnings.

The concept of comity has been of enduring significance to this debate. While comity, in the traditional common law sense of promoting or expecting reciprocity of treatment from foreign courts, is now a somewhat outmoded approach, the concept itself refuses to die a natural death and is still frequently encountered in the decided cases. This article therefore initially discusses and analyses various theoretical and academic approaches to the legal concept of comity and goes on to show how these have been applied in this area in New Zealand and in other common law jurisdictions.

The author's thesis is that a judicial approach which accords significant deference to the judgments of foreign courts in the context of local recognition and enforcement in fact accords with modern conceptions of comity and the proper role of the common law in promoting these principles. In a time of increasing globalisation and obligations arising from the interdependency of international commerce in the internet age, an orderly system of private international law can only function adequately if litigants are treated as being bound by the judgments of foreign courts having jurisdiction over them. This should be the case, if not invariably, then save only in the most exceptional of circumstances. This article contends that a modern concept of international comity reflecting such an approach should be properly understood and applied. If this is done then the correct application of the existing defences to recognition and enforcement based on the categories of fraud, absence of natural justice and public policy considerations ought to provide adequate protection to litigants who may be subject to the judgment of a foreign court.

The reason why this article focuses on the recognition and enforcement of foreign judgments at common law and not on statutory regimes in this

1 It should be noted at the outset that the concepts of recognition and enforcement, when applied to foreign judgments, are separate and distinct and that while all foreign judgments need first to be recognised before being enforced at common law by the local court, the converse is not the case. For a discussion of these two concepts, see Lord Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) vol 1 at [14-002].

area, particularly the reciprocal enforcement of judgments legislation applicable in New Zealand and other Commonwealth jurisdictions, is that different considerations arguably apply in the case of an enforcement regime which has a statutory underpinning. Where the legislature has seen fit to accord an avenue of recognition to judgments of a foreign court embodying the concept of reciprocity then such an approach may be thought to give rise to a presumption that the foreign jurisdiction in question has been accorded this status on the basis that the judgments of its qualifying courts are considered to be appropriate candidates for enforcement by the local court. The question then arises as to what extent the common law should adopt a different approach to the recognition and enforcement of foreign judgments. The answer is bound up with the correct analysis of the court's role at common law, as referred to above.

The theoretical analysis in this article tends to draw upon support from United States and Canadian case law. However this article does not purport to be a comprehensive comparative study of New Zealand and North American approaches to this issue. Rather the case law from other jurisdictions is included with the object of illustrating how the approach contended for here might be applied in New Zealand and other Commonwealth jurisdictions.

II The Various Enforcement Regimes Applicable to Foreign Judgments

It is useful at the outset to refer to the various regimes applicable to the enforcement of foreign judgments in New Zealand, both as a means of defining the scope of this article and in order to see how the subject has been dealt with by legislation in differing ways. In contrast to the common law procedures which are dealt with in this article, there are statutory regimes which operate in different areas of New Zealand law.[2]

As is well known, in the case of some 27 foreign countries, the New Zealand reciprocal enforcement legislation, which is contained in the Reciprocal Enforcement of Judgments Act 1934, provides for the enforceability in New Zealand of judgments of the qualifying courts of those

2 For a general discussion of the applicable principles in New Zealand relating to enforcement of foreign judgments at common law see David Goddard *Conflict of Laws: Jurisdiction and Foreign Judgments* (Laws of New Zealand, Butterworths, Wellington, 1996–2009) at [62]–[78]; David Goddard and Campbell McLachlan *Private International Law — litigating in the trans-Tasman context and beyond* (New Zealand Law Society, Wellington, August 2012) at [5.1]–[5.2].

countries on a reciprocal basis.[3] The 1934 Act had statutory predecessors in 1922 and 1882.[4]

The New Zealand reciprocal enforcement legislation mirrors similar statutes in other Commonwealth jurisdictions. These include the Foreign Judgments (Reciprocal Enforcement) Act 1933 in England, the Foreign Judgments Act 1991 (Cth) in Australia and corresponding legislation in the various Australian states.

The relationship between the reciprocal enforcement legislation and the common law approach to the enforcement of foreign judgments has been considered in various authorities. In these cases, the courts have considered that the legislation did not fundamentally change the approach adopted by the common law and that this approach was not based on concepts of comity and reciprocity but on the fact that the local litigant had assumed an obligation to be bound by the foreign judgment.[5] However, as will be discussed later, such formulations of the traditional English approach to the concept of comity need, in this writer's view, to be modified in the light of modern conditions and contemporary judicial views on this issue.

There is an alternative statutory regime available in the case of judgments from courts in Commonwealth countries. Judgments for a sum of money may be enforceable in New Zealand by filing the judgment with the High Court and requesting execution.[6]

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3 The following 27 countries or jurisdictions are at present included within the New Zealand reciprocal enforcement of judgments regime: Australia, Bechuanaland (now Botswana), Belgium, Cameroon, Ceylon (now Sri Lanka), Corsica, England, Fiji, France, Gilbert & Ellice Islands (now Kiribati & Tuvalu), Hong Kong, India, Malaya (now Malaysia), Nigeria, Norfolk Island, Northern Ireland, Pakistan, Papua New Guinea, Sarawak, Singapore, Solomon Islands, Sri Lanka, Swaziland, Tonga, Scotland, Wales and Western Samoa (now Samoa).

4 For a discussion of the application of the 1934 Act see *Svirskis v Gibson* [1977] 2 NZLR 4 (CA). There was a limited regime for enforcement of overseas judgments in the Administration of Justice Act 1922, which was repealed by the 1934 Act. Section 4 of the 1922 Act allowed for the reciprocal enforcement of judgments of superior courts "in any part of His Majesty's dominions outside New Zealand". For examples of the application of the 1922 Act see *Redhead v Redhead and Crothers* [1926] NZLR 131 (SC); *Taylor v Begg* [1932] NZLR 286 (SC). Prior to the 1922 Act similar provisions were found in the Supreme Court Act 1882.

5 See, for example, *Société Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828 (QB); *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819 (SC); *Gordon Pacific Developments Ltd v Conlon* [1993] 3 NZLR 760 (HC). See also Lord Collins, above n 1, at [14-014].

6 Judicature Act 1908, s 56. This procedure may be useful in cases where the foreign court issuing the judgment is not a superior court, as is required by the reciprocal enforcement legislation (except in certain cases coming within s 3A of the 1934 Act, as inserted by amendment in 1992). It should be noted that the s 56 procedure cannot be used in cases

There are various other areas in New Zealand in which foreign judgments or decisions can be the subject of local enforcement. For example, New Zealand's Closer Economic Relations Agreement (CER) with Australia has been implemented in the Reciprocal Enforcement of Judgments Amendment Act 1992[7] and more recently in the Trans-Tasman Proceedings Act 2010.[8]

In the context of cross-border insolvency, there are provisions which enable the New Zealand courts to render aid and assistance to foreign courts. This can be done in relation to both foreign bankruptcy and liquidation proceedings.[9]

International arbitration awards may also be enforced in New Zealand, which is a State Party to the New York Convention 1958.[10] There are defences to enforcement set out in arts 34 and 36 of the First Schedule to the Arbitration Act 1996. These include defences based on breach of public policy and absence of natural justice.[11] The New Zealand courts have held that these provisions give rise to exceptions to enforcement which are to be construed narrowly and only applied where there are serious grounds for the court to intervene in the enforcement process relating to international arbitral awards.[12] It is noteworthy in the context of enforcement of such awards that the New Zealand courts have adopted a non-interventionist approach to this

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where the 1934 Act applies: see s 13 of that Act. For an early example of the application of the s 56 procedure see *Platt v Siegel* [1918] GLR 70.

7 See David Goddard "The Reciprocal Enforcement of Judgments Amendment Act 1992: A Half Step Towards CER" [1992] NZ L Rev 180.

8 See Goddard and McLachlan, above n 2; High Court Rules 2008, rr 28.1–28.12. Section 79(1) of the 2010 Act provides that: "Enforcement in Australia of a registered New Zealand judgment is not affected by the operation of any rule of private international law (other than any rule in this Part) in operation in Australia." Under r 32 of the High Court Rules 2008 foreign freezing orders may also be the subject of enforcement through the High Court. See, for example, *Yos v Heng* HC Wellington CIV-2009-485-2346, 1 December 2009, concerning enforcement in New Zealand of a freezing order made by the Federal Magistrates Court of Australia.

9 See the Insolvency Act 1967, s 135, now superseded by the Insolvency (Cross Border) Act 2006, s 8; Companies Act 1993, s 342; *Gavigan v Australasian Memory Pty Ltd* (1997) 8 NZCLC 261,449 (HC); *Turners & Growers Exporters Ltd v The ship "Cornelis Verolme"* [1977] 2 NZLR 110 (HC); *Re Grose* HC Christchurch B 404/92, 21 September 1992; *Re Beadle* HC Auckland B 116/80, 1 September 1980; *Williams v Simpson* [2010] NZHC 1786, [2011] 2 NZLR 380.

10 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (signed 10 June 1958, entered into force 7 June 1959).

11 See Arbitration Act 1996, sch 1, arts 36(b)(ii) and 36(3)(a),(b).

12 See, for example, *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA) and *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359. In the *Hi-Gene* case leave to appeal was refused by the Supreme Court: see *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZSC 132, on the basis that the refusal of the

issue, which mirrors the common law approach to the enforcement of foreign judgments contended for in this article.

In relation to the topic of mutual assistance in criminal matters, orders of a foreign court restraining a person from dealing with assets in New Zealand pending the determination of the substantive foreign proceedings may be the subject of local enforcement by the New Zealand courts. There has been recent New Zealand litigation at senior appellate level in this area.[13]

Finally, this article does not deal with the issue of enforcement of foreign judgments granting relief within the equitable jurisdiction of the local court (such as a foreign judgment appointing a receiver or administrator, for example, or granting non-monetary relief of various kinds). Courts of equity have long reserved a jurisdiction to act *in personam* against a defendant in such cases without first requiring that the foreign judgment be recognised by the local court.[14]

III The Theoretical Basis for the Enforcement of Foreign Judgments at Common Law

A *The old English authorities*

It is fair to say that the common law judges have exhibited an enduring fascination with the concept of comity as a theoretical tool in this area.

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arbitrators to grant an adjournment was not in its context so serious as to require the non-enforcement of the award.

13 See the Mutual Assistance in Criminal Matters Act 1992; *Solicitor-General v Bujak* [2008] NZCA 334, [2009] 1 NZLR 185; upheld by the Supreme Court in *Bujak v The Solicitor-General* [2009] NZSC 42, [2009] 3 NZLR 179. In an English case based on similar English legislation the House of Lords rejected a defence by the respondent that enforcement in England of a United States confiscation order breached her human rights under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 211 (opened for signature 4 November 1950, entered into force 3 September 1953). See also *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 1 WLR 2241.

14 See *Houlditch v Marquess of Donegal* (1834) 2 Cl & F 470 at 477, 6 ER 1232 at 1234–1235; *Schemmer v Property Resources Ltd* [1974] 3 WLR 406 (Ch) 409; *White v Verkouille* [1990] 2 Qd R 191. For a discussion of this subject see RW White "Enforcement of Foreign Judgments in Equity" (1980–1982) 9 Syd L R 630; Kim Pham "Enforcement of Non-Monetary Foreign Judgments in Australia" (2008) 30 Syd L R 663. It is interesting however, for the purposes of the argument in this article, that McPherson J in *White v Verkouille* observed that the basis for this jurisdiction was that historically the Court of Chancery had recognised "a special responsibility for protecting the rights of foreign merchants" (at 194).

However, judicial approaches and insights in relation to this concept have varied considerably over the past 300 years.

From a historical perspective, it is instructive to note that the early English decisions on the enforcement of foreign judgments at common law, going back to the 18th century, had their theoretical basis in the doctrine of comity, albeit a more traditional view of the concept.[15] In the early case of *Roach v Garvan*, for example, Lord Chancellor Hardwicke considered the validity of a foreign marriage settlement and held that the "law of nations" required it to be regarded as conclusive.[16]

In the later case of *Wright v Simpson*, the property of an American loyalist had been confiscated during the American War of Independence and there was an issue as to whether certain bonds should be delivered up.[17] Lord Chancellor Eldon held that the applicable principles of natural law required the English Court to give credit to the decisions of the competent United States Court.

In another early case, *Alves v Bunbury*, the English Court considered the enforceability of the judgment of a court in the colony of St Vincent and held that comity required it to be enforced provided that the judgment had been validly pronounced.[18] However, the Court held that this was not the position in that case as there was insufficient evidence that the judgment had been properly authenticated under seal. Lord Ellenborough CJ observed that the "comitas gentium" required the courts of different countries to recognise and enforce each other's judgments.

Over the course of the 19th century these theoretical foundations based on comity gave way to the principle that the foreign court had, by its adjudication, created a binding legal obligation on the part of the judgment debtor to pay the sum in the foreign judgment.[19] These earlier cases were referred to by Widgery J in *Société Cooperative Sidmetal*, in which the Court noted that the duty of a defendant to observe the foreign judgment was one which arose independently of the doctrine of comity and was based on a duty resting on a defendant to observe the foreign decree.[20]

Therefore, by the middle of the 19th century, the English authorities had moved from a recognition and enforcement theory based on traditional

15 See Lord Collins, above n 1, vol 1 at [14-007].

16 *Roach v Garvan* (1748) 1 Ves Sen 157 at 159, 27 ER 954 at 955.

17 *Wright v Simpson* (1802) 6 Ves Jun 714 at 730, 31 ER 1272 at 1280.

18 *Alves v Bunbury* (1814) 4 Camp 28 at 28, 171 ER 10 at 10.

19 See, for example, *Russell v Smyth* (1842) 9 M & W 810, 152 ER 343; *Williams v Jones* (1845) 13 M & W 628, 153 ER 262; *Schibsby v Westenholz* (1870) LR 6 QB 155.

20 *Société Cooperative Sidmetal v Titan International Ltd*, above n 5, at 837. See, to similar effect, the observations of the English Court of Appeal in *Adams v Cape Industries Plc* [1990] 1 Ch 433 at 513.

notions of comity to one based on a theory of obligation. However, as I shall seek to show, that may not be the last word on the subject.

B *United States academic writing on the subject*

United States authorities in the area of private international law placed emphasis on the concept of comity from an early stage.[21] United States academic commentators also endeavoured to explore the theoretical basis for the concept of comity with reference to earlier writings such as those of the eminent 17th-century Dutch jurist Ulrik Huber (1636–1694).[22]

Huber had emphasised three basic principles, or axioms, of international law. The first was the principle of territorial sovereignty under which the laws of a sovereign state were of binding effect only within the state's territorial limits. The second held that persons within the boundaries of a sovereign state, either permanently or temporarily, were subject to the authority of that state. The third axiom was that the courts of a sovereign state would accord recognition to the laws and decrees of other sovereign jurisdictions on the basis of comity, though not absolutely but within certain limits. Huber described these limits in the context of comity in terms of the foreign law or decree not being permitted to operate to the detriment of the sovereignty of the local forum or of the rights of its citizens. However, exactly what Huber meant by his third axiom, and its nature and scope, has led to a scholarly debate, particularly in the United States, which shows little sign of abating up to the present day.[23]

Early United States writers in this area, such as Joseph Story, drew upon the earlier work of continental jurists such as Huber in formulating their

21 See *The Bank of Augusta v Earle* 38 US 519 (1839) at 520, in which the Supreme Court of the United States held that it was a rule of comity among nations that a corporation incorporated in one country could bring suit in another and that this rule applied with equal force as between the separate states of the Union.

22 For a discussion of Huber's work on the conflict of laws see Ernest G Lorenzen "Huber's De Conflictu Legum" (1919) 13 Ill L Rev 375.

23 For discussions of Huber's theories and their influence in the United States see Hessel E Yntema "The Comity Doctrine" (1966–1967) 65 Mich L Rev 9; Joel R Paul "Comity in International Law" (1991) 32 Harv Int'l L J 1; Joel R Paul "The Transformation of International Comity" (2008) 71(3) LCP 19; N Jansen Calamita "Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings" (2006) 27 U Pa J Int Econ L 601; Donald Earl Childress III "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010–2011) 44 U C Davis L Rev 11. The influence of Huber's writing in England is discussed in DJ Llewelyn Davies "The Influence of Huber's *De Conflictu Legum* on English Private International Law" (1937) 18 BYBIL 49 at 49.

views.[24] Story recognised in particular the necessity for Huber's third axiom as a means of balancing the interests of the local court and sovereign against their foreign counterparts. He observed that while the first two maxims were essentially indisputable, the third was derived from a universal right on the part of each nation:[25]

> to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws, and to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and polity.

Given that both Huber and Story expressed theoretical qualifications as to when a court should recognise foreign decrees on the basis of comity, the obvious issue which arises is how the scope of those reservations should be expressed and defined. This is an issue with which the commentators have struggled to grapple. Donald Childress, in a recent article on the subject, considered that comity was of such general application that it ought to be applied as a matter of usage and convenience.[26]

In relation to the writings of Story, Childress noted similar difficulties, observing that there was a presumption that a foreign sovereign would accept the concept of comity unless it was "repugnant to its policy, or prejudicial to its interests".[27] However, as Childress discussed in his article, the definition and scope of these exceptions remained uncertain.

In 1895 the US Supreme Court formulated a principle of comity in relation to foreign judgments in *Hilton v Guyot*, in which Justice Gray observed in a famous passage in the judgment, consistently with Joseph Story's writing on the conflict of laws:[28]

> "Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, 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

24 See Joseph Story *Commentaries on the Conflict of Laws* (Little, Brown, and Company, Boston, 1883) and the discussion in Childress, above n 23, at 23–27; Kurt H Nadelmann "Joseph Story's Contribution to American Conflicts Law: A Comment" (1961) 5 Am J Legal Hist 230 at 231–233.

25 Story, above n 24, at 31.

26 Childress, above n 23, at 28.

27 At 29.

28 *Hilton v Guyot* 159 US 113 (1895) at 163–164. For a critique of this case see Louisa B Childs "Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law" (2006) 38 NYU J Intl L & Politics 221.

> international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

Subsequent American authorities have recognised *Hilton* as the seminal United States case on enforcement of foreign judgments. Those later cases have also emphasised that the grounding principle is the need to accord respect to foreign laws and judgments as far as possible and to the extent that it is consistent with the constitutional obligations of the United States to its citizens.

For example, in *Tahan v Hodgson* the United States Court of Appeals for the DC Circuit, in the course of enforcing a judgment of a court in Israel, observed that international commerce required businessmen to accord recognition and respect to relevant foreign laws in countries in which they were doing business.[29] Similarly, the United States courts should recognise foreign judgments except where these are inconsistent with fundamental concepts of justice and fair dealing under United States law. More recently, in *In Sik Choi v Hyung Soo Kim; Nancy Soo Lee; and Golden Plastics*, the United States Court of Appeals for the Third Circuit emphasised that the concept of comity required the Court to respect the law of a foreign sovereign to the greatest extent possible under the circumstances.[30] The concept of comity should therefore be employed to achieve this outcome.

In his 2008 article, Joel Paul sought to identify possible boundaries for the application of considerations of comity.[31] He noted recent decisions of the United States Supreme Court, particularly in relation to the extra-territorial application of United States anti-trust laws. In these cases the United States Supreme Court had eventually come to the view that United States statutes should, so far as possible, be construed in a manner which is consistent with the principle of comity in order not to give offence to foreign sovereigns.[32] For example, in the *Empagran* case Justice Kennedy, for the majority, expressed the view that this approach would serve to ensure that "the potentially conflicting laws of different nationals work together in harmony".[33]

These trends in United States case law illustrate, not only that the concept of comity is alive and well in United States jurisprudence, but also that the US Supreme Court is exhibiting an awareness of the requirements

29 *Tahan v Hodgson* 662 F 2d 862 (DC Cir 1981) at 868.

30 *In Sik Choi v Hyung Soo Kim; Nancy Soo Lee; and Golden Plastics* 50 F 3d 244 (3rd Cir 1995) at 252.

31 Paul, above n 23, at 35–37.

32 See, for example, *Hartford Fire Insurance Co v California* 509 US 764 (1993); *F Hoffmann-La Roche, Ltd v Empagran, SA* 542 US 155 (2004).

33 *F Hoffmann-La Roche, Ltd v Empagran, SA*, above n 32, at 164–165.

of international commerce. The Court has been prepared to recognise that the commercial imperatives of international commerce and investment in themselves provide a reason for more robust recognition of foreign decrees and judgments. Commentators such as Joel Paul recognise this tendency while implicitly expressing some reservations about its theoretical justification. As Paul puts it, the effect of these cases appears to be that comity as a theoretical construct is being transformed from respect to a foreign sovereign to respect for international market forces.[34] Academic opinions of this nature necessarily invoke value judgements on issues such as the desirability of globalisation from a political perspective. Nevertheless, there is no doubt that recent United States case law lends support to the thesis propounded in this article.

For present purposes, it is significant to note that even though the United States courts have been willing to support the long arm jurisdiction of certain United States statutes, particularly in the anti-trust area, the Supreme Court has nevertheless been willing to express a theoretical basis for the recognition of foreign decrees and judgments. This approach has taken into account contemporary developments in international commerce and investment.

However, as the United States case law illustrates, there are limits to the extent to which the United States courts will recognise foreign judgments, particularly where these have the effect of infringing upon protections contained within the United States Constitution. For example, in *Tahan v Hodgson*, the Court noted that the foreign judgment in question must not be "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought".[35] Similarly, in *Laker Airways Ltd v Sabena Belgian World Airlines*, the Court of Appeals for the DC Circuit noted: "[A] state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests."[36] These limits are often encountered where the issue of constitutional protection of freedom of speech is concerned.[37] They particularly arise from time to time in relation to the enforcement by the United States courts of English and other common law judgments in defamation cases.[38]

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34 Paul, above n 23, at 37.

35 *Tahan v Hodgson*, above n 29, at 864.

36 *Laker Airways v Sabena Belgian World Airlines* 731 F.2d 909 (DC Cir 1984) at 931.

37 As in the "internet blocking" case of *Yahoo! Inc v La Ligue Contre Le Racisme et l'Antisemitisme* 169 F Supp 2d 1181 (ND Cal 2001); reversed on appeal 433 F 3d 1199 (9th Cir 2006), concerning whether the internet service provider Yahoo! should be required to exclude its French subscribers from accessing websites dealing with the sale of Nazi memorabilia, so as to comply with French laws dealing with that issue.

38 See, for example, *Bachchan v India Abroad Publications, Inc* 154 Misc 2d 228, 585 N Y S 2d 661 (Sup Ct 1992).

While the United States cases are decided against the backdrop of very different constitutional and legal provisions, they nevertheless illustrate that the United States appellate courts are comparatively forward-thinking in this area. In particular, various recent authorities illustrate that the United States courts are prepared to recognise the concept of comity as a basis for the recognition and enforcement of foreign judgments and to develop modern concepts of comity related to the needs of a global marketplace in the internet age.

C *English academic writing on the subject*

In English authorities and academic commentary, the subject of comity has revealed a divergence, if not a yawning chasm, between some of the theoretical discussion and the way in which English and Commonwealth courts have in fact approached the subject. However, the most recent edition of *Dicey, Morris and Collins* sets out a comparatively conciliatory view of comity.[39] As the authors have noted, common law courts have exhibited an increasing tendency to resort to comity, not as an explanatory principle in the area of conflict of laws, but rather more as an analytical tool.[40] English academic scholarship over the past 30 years has accordingly shown an increasing recognition of the fact that the concept of comity appears to play a significant role in judicial decision-making in this area, even if the theoretical basis for this is not particularly clear.

Lord Collins, writing extra-judicially in 2000, was one of the first English commentators to identify the gulf between theory and practice in English and Commonwealth law in this area.[41] He began by noting that contemporary English academic and textbook commentary had often been disparaging of the role of comity in the private international law area. However, as he went on to observe, the academic commentary did not reflect the reality that many decisions of common law courts over the past 30 years had in fact

39 Lord Collins, above n 1, at [1-008]–[1-014].

40 At [1-009]. For examples of English articles which take a similarly supportive view of the role of comity in this area see Adrian Briggs "Which Foreign Judgments Should We Recognise Today?" (1987) 36 ICLQ 240; Jonathan Harris "Recognition of Foreign Judgments at Common Law — The Anti-Suit Injunction Link" (1997) 17 OJLS 477; H L Ho "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 ICLQ 443.

41 Lord Collins "Comity in Modern Private International Law" in James Fawcett (ed) *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, Oxford, 2000) at 89.

actively cited and endorsed the concept of comity.[42] Lord Collins then went on to analyse various English decisions in terms of considerations of comity, particularly in areas such as anti-suit injunctions, extra-territorial application of legislation and co-operation between courts. He concluded that comity as a concept warranted further study rather than being summarily dismissed as an irrelevance.[43]

In a ground-breaking essay published in 2012, Adrian Briggs has sought to apply considerable theoretical rigour to the concept of comity in private international law, including in relation to the recognition and enforcement of foreign judgments at common law.[44] He began by noting the general scepticism expressed by the English writers and commentators concerning the role of comity in private international law.[45] In contrast to this, he observed that comity still played a significant role in common law judicial decision-making in this area and was hardly ever regarded by judges as being irrelevant.[46] Briggs went on in his essay to analyse the English approach to the role of comity in relation to enforcement of foreign judgments. In the course of this analysis, he noted the traditional objections in this area, including that the concept of comity was lacking in definition and clarity and had lesser explanatory power than the doctrine of obligation.[47]

He went on to address each of these objections in his essay and concluded by reducing the doctrine of comity and its application to 12 basic propositions. In the context of enforcement of foreign judgments the first five of these propositions are of primary significance. Briggs expressed these in terms of general propositions. The first three of these five propositions, in summary, were that the courts should respect foreign law operating within the foreign State's territorial jurisdiction; that the courts should respect foreign decrees applying within the foreign court's territorial jurisdiction; and that the courts should not interfere in foreign judicial proceedings. Fourthly, the courts

42 At 95. These observations by Lord Collins bring to mind the tenets of American legal realism, including that the essence of the law is to be discerned not by considering what the law ought to be from a moralist's perspective but by actually observing what it is that judges and courts do in practice. As Oliver Wendell Holmes Jr, from whom the American legal realists drew much doctrinal inspiration, famously observed: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"; Mark DeWolfe Howe (ed) *Oliver Wendell Holmes Jr: The Common Law* (Little Brown, Boston, 1963) at 5.

43 Lord Collins, above n 41, at 110.

44 Adrian Briggs *The Principle of Comity in Private International Law* (Collected Courses of the Hague Academy of International Law 354, Martinus Nijhoff Publishers, Boston, 2012) at 65.

45 At 80–82.

46 At 86–87.

47 At 148.

should interpret the laws of their own jurisdiction to achieve these outcomes; and fifthly, the courts should exercise their jurisdictional powers to promote these principles.[48]

The twelfth and final proposition is of particular significance in the present context and merits being quoted in full. Briggs expressed this as follows:[49]

> [T]he doctrine of comity …
> (12) does not, or cannot, in the final analysis, prevent a court over-riding the restrictions of the doctrine of comity where it finds that it has been so directed by its sovereign (whether on grounds of public policy, or human rights, or otherwise howsoever).

This twelfth proposition demonstrates remarkable theoretical affinity with the contemporary approach of the United States Supreme Court as discussed earlier.[50] In other words, the principles of comity are not absolute in this context where there are overriding constitutional or policy grounds which militate against their application.

These reservations also assist in addressing the difficult (if not intractable) issue of how judgments from untrustworthy (or even corrupt or politically influenced) foreign courts should be received in common law jurisdictions. Briggs accepts (as appears to this writer to be inevitably correct) that in some instances "it would be a lie to pretend that the result of the foreign judicial process is fit to be received into the legal order of the receiving State".[51] These cases form necessary and appropriate exceptions to the general principles of recognition on the basis of comity.

However, it is clear from the discussion in Briggs' essay and from the comparatively egregious examples of unsatisfactory foreign judgments to which he refers, that the caveats contained in the twelfth proposition he advances should only apply in relatively exceptional cases. For example, the fact that a foreign judgment emanates from a Civil or Islamic legal system which may apply very different pre-trial and trial procedures in civil cases (often of an inquisitorial nature in which processes such as discovery, interrogatories and cross-examination of opposing witnesses at trial are of minimal or no significance) should not in itself be a factor which ought to cause principles of comity to have lesser significance.[52]

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48 At 181–182.

49 At 182.

50 See part III B.

51 Briggs, above n 44, at 151.

52 For an interesting discussion by the English Court of Appeal on the operation of public policy factors in the context of recognition of a Pakistani *talaq* divorce decree see

In the New Zealand context, judgments from civil law jurisdictions have periodically been enforced in the High Court by way of summary judgment. This has been the case in relation to judgments from Germany, for example.[53] Although exceptions may arise in genuinely anomalous and difficult cases,[54] these should be restricted in their scope as far as possible.

D *More recent English and Commonwealth case law*

The English and Commonwealth case law over the past 25 years is variable in its treatment of the concept of comity in this area.

In 1984, in *British Airways Board v Laker Airways Ltd* the English Court of Appeal considered the Court's jurisdiction to grant an injunction in restraint of foreign proceedings in the United States courts. The Court noted that despite significant differences between United States and English civil procedure an approach based on comity would be applied by the English courts, which in turn involved "good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards".[55]

In 1989, in *Felixstowe Dock & Railway Co v United States Lines Inc*, the English Court of Queen's Bench considered whether a restraining order made by the United States Bankruptcy Court over a shipping company which operated in England should be recognised by the English courts. The Court noted that there were limits to a comity-based approach in cases such as this where there was a fundamental divergence from accepted English bankruptcy practice, which was opposed to the removal of English assets of a bankrupt overseas company so as to put them outside the English courts'

Qureshi v Qureshi [1971] 2 WLR 518 (Prob). The English courts, in cases preceding the formation of the European Union, traditionally took a liberal approach to the recognition and enforcement of civil law judgments at common law. In *Jacobson v Frachon* (1927) 138 LT 386 (CA), the Court of Appeal in England was prepared to enforce a French judgment even though objections had been taken to procedural aspects, such as the adjudicative role of a court-appointed expert. Similarly, in *Scarpetta v Lowenfeld* (1911) 27 TLR 509 (KB), the Court of King's Bench in England enforced an Italian judgment even though under Italian civil procedure in force at that time neither party could be called as a witness in the case. In the case of European Union member states these issues are now addressed through the operation of Council Regulation (EC) 44/2001, [2001] O.J. L12 (Brussels I Regulation). See Lord Collins, above n 1, at [14-014] and [14R-97]–[14R-264].

53 See *Jordan v Vorwerk* HC Napier CIV-2003-441-723, 22 August 2006.

54 Briggs, above n 44, at 151 cites some examples referring to a "dark cloud of suspicion" over judgments from jurisdictions such as North Korea, Kyrgyzstan, Russia or the Ukraine.

55 *British Airways Board v Laker Airways Ltd* [1984] 1 QB 142 (CA) at 185–186.

control. Hirst J observed that while co-operation between the English and the United States courts was always a matter of importance in principle, the applicable provisions of English law and the factual circumstances were relevant to determining the nature and extent of that co-operation.[56]

By 1990 there were indications that the English courts were coming to recognise that the theory of the enforcement of a foreign judgment based on the creation of obligation doctrine might not be sufficiently explanatory of the issue. In *Adams v Cape Industries PLC*, the English Court of Appeal considered the enforceability in England of a judgment entered in Texas in the United States against an English company which had South African subsidiaries and which carried on asbestos mining in South Africa.[57] The Court noted that the recognition of foreign judgments in England necessarily depended to some extent on notions of comity and that even the concept of enforcing a foreign judgment based on a theory of obligation binding on the defendant involved recognition to some extent of the concept of comity.[58] However, as the Court observed, this was not comity in terms of the traditional reciprocity of enforcement basis but was rather founded on the notion that a system of international law would function more effectively if some foreign judgments could be directly enforced in a jurisdiction where the defendant or its assets were located. Although the English Court of Appeal recognised that there were difficulties in clearly defining the kinds of judgment which fell within this principle, in the final event the Court held that the defendants were able successfully to challenge the competence of the Texan Court by showing that they had not been present in the United States. The Court of Appeal also held that the quantum of the Texan default judgment had been calculated in a manner which was contrary to the requirements of substantive justice under English law.

In 1993, in *Barclays Bank plc v Homan*, the question arose whether an injunction should be issued to restrain New York Chapter 11 trustees of an English company from challenging a payment as amounting to a preference under United States bankruptcy law.[59] The injunction was refused on the grounds that there was sufficient connection with the United States to allow the administrators to bring the proceedings in the United States courts. As Hoffmann J noted, in the Chancery Division, comity was an important but not overriding consideration and could be outweighed in circumstances where British national interests needed to be protected or where there was a violation of the accepted principles of international law.

56 *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] 1 QB 360 (QB) at 376.

57 *Adams v Cape Industries Plc*, above n 20.

58 At 552.

59 *Barclays Bank plc v Homan* [1993] BCLC 680 (Ch) at 688.

In *Airbus Industrie GIE v Patel*, proceedings had been issued in Texas against various parties alleged to be responsible for an aircraft accident which had occurred at Bangalore in India.[60] The case concerned an application for an injunction to restrain the Texas proceeding. The injunction was declined at first instance, was allowed by the Court of Appeal and was in turn refused in the House of Lords. Although the House of Lords accepted that the proceedings in Texas could be oppressive (particularly having regard to the fact that at that time Texas did not have a doctrine of *forum non conveniens*) their Lordships did not consider that an injunction should be issued. Lord Goff of Chieveley noted that this was the first occasion on which the English courts had been required to determine the bounds of comity in the context of anti-suit injunctions. The correct judicial approach required giving due recognition to the importance of comity, subject to preserving the Court's power to intervene where the interests of justice so required.[61]

The thrust of the English cases tends to support the propositions contended for by Adrian Briggs as discussed above.[62] This is that considerations of comity (adapted in accordance with modern conceptions of the term) remain relevant to the recognition of foreign judgments at common law and in general should be applied unless the foreign judgment contradicts fundamental principles relied on by the recognising court.

It is interesting to compare this approach with judicial attitudes in Australia and New Zealand. The reception of the doctrine of comity by the courts in Australia and New Zealand, it is fair to say, has been somewhat less enthusiastic. In New Zealand, during the 19th century, foreign judgments, particularly from England and the Australian states prior to federation, were enforced periodically but without any clear legal rationale being expressed for this.[63] In 1993, in *Gordon Pacific Developments Pty Ltd v Conlon*, the

60 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL).

61 At 140. For an example of another English decision invoking the concept of comity see *R Bow Street Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL), in which Lord Hope of Craighead, at 234, was willing, for reasons of comity, to extend the common law principles of conspiracy to commit an offence so as to further the objectives of an international convention.

62 See part III C above.

63 See, for example, *The New Zealand Banking Corp Ltd v Reynolds* [1871] Mac 965 (SC) (a call upon contributories to the share capital of a company being wound up by a court in England was equivalent to a foreign judgment and was enforceable against a contributory in New Zealand); *Gardner v Gardner* (1897) 15 NZLR 739 (SC) (a marriage entered into in New Zealand was the subject of a decree of divorce issued by a superior court in California, which was recognised by the New Zealand court as constituting a valid dissolution of the marriage); *Wallace v Bastings* (1900) 18 NZLR 639 (SC) (where the plaintiff had obtained a default judgment in the state of Victoria, Australia over a defendant who was resident and domiciled in New Zealand as at the

High Court considered whether any general principle of comity operated in the context of the reciprocal enforcement of judgments legislation.[64] Henry J considered the English authorities on the concept of comity but held that there was "no general principle of comity of nations which could avail the plaintiff in any event".[65]

In Australia, the courts have also tended to be relatively sceptical of the concept of comity, even though Australian academic commentary has been supportive of it in some cases. As Professor Mary Keyes notes, the concept of comity has led the High Court of Australia to observe that anti-suit injunctions should only be granted with caution.[66] In practice the Australian courts have not been enamoured of the concept of comity.[67] The Federal Court of Australia recently gave the concept short shrift.[68] As Briggs observes, the Australian court might have seen fit to subject the concept of comity to more rigorous theoretical analysis having regard, for example, to the extensive United States jurisprudence on the subject.[69]

However, on at least two comparatively recent occasions the High Court of Australia has had occasion to discuss United States approaches to the concept of comity. *CSR Ltd v Cigna Insurance Australia Ltd* concerned proceedings by an Australian company in the United States seeking indemnity from its insurers in respect of asbestos-related liability.[70] The insurers issued proceedings in the New South Wales courts in support of their decision to decline liability and also sought anti-suit injunctions in respect of the United States proceedings. At first instance an anti-suit injunction was granted and

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date of the judgment, the court in Victoria had no jurisdiction over the defendant and the judgment could not be enforced in New Zealand).

64 *Gordon Pacific Pty Ltd v Conlon* [1993] 3 NZLR 760 (HC).

65 At 765. The concept of comity has been the subject of more detailed discussion by the New Zealand Court of Appeal in *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) and will be discussed later in this article (see the text below at part IV C).

66 Mary Keyes *Jurisdiction in International Litigation* (The Federation Press, New South Wales, 2005) at 192.

67 See, for example, *Crick v Hennessy* [1973] WAR 74 (WASC), concerning the registration of an English default judgment under the Western Australian reciprocal enforcement statute. Burt J noted that the default judgment was one which was liable to be set aside and which therefore fell outside the categories of judgment which were registrable in Western Australia. The judge observed that "no new category can be established by the use of the doctrine of comity, or by the use of the idea of reciprocity" (at 76).

68 *Habib v Commonwealth of Australia* (2010) 183 FCR 62, in which Perram J observed at [37]: "No doubt comity between nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament." For discussion see Briggs, above n 44, at 77–78.

69 Briggs, above n 44, at 78.

70 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

a stay of the Australian proceedings was refused. This decision was upheld by the Court of Appeal of New South Wales. A majority of the High Court of Australia reversed the decisions of the lower courts on the basis that the Australian proceedings were vexatious and oppressive and had been issued in order to prevent the plaintiffs obtaining remedies in the United States which they could not obtain in Australia. Furthermore, Australia was not the appropriate forum in which the claims should be heard.

The majority discussed the United States approach to the concept of comity in the context of anti-suit injunctions, observing that anti-suit injunctions might undoubtedly be perceived by the foreign court as amounting to a breach of comity.[71] While the High Court therefore accepted that the jurisdiction to issue an anti-suit injunction was one which required caution in its exercise, the majority held that this was an appropriate case for the anti-suit injunction to issue in respect of the Australian proceedings.

In *Lipohar v The Queen* the High Court of Australia considered the application of the doctrine of comity in relation to a criminal proceeding.[72] In that case an offence of conspiracy to defraud had been tried in South Australia although the elements of the fraud had occurred outside the state. A majority of the High Court considered the United States approach to comity as formulated by Joseph Story. The Court noted that in the Australian constitutional context, federation between the states effectively removed any scope for the application of the doctrine of comity on an inter-state basis.[73] These considerations arising between the constituent states of a federal system are of course not applicable to a unitary jurisdiction such as New Zealand or the United Kingdom.[74]

It can be seen from the above analysis that although the Australian courts have not generally been disposed to allow considerations of comity to influence the outcome of the decided cases, the High Court of Australia has been prepared at least to take the United States approach to this issue into account in its reasoning. However, this comparatively conservative

71 At 395–396.

72 *Lipohar v The Queen* [1999] HCA 65, (2000) CLR 485.

73 At [102]. However, the convictions of the appellants were upheld as the offence was held on the facts to have had a sufficient connection with South Australia. See also *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491, in which the plaintiff, who had been injured in a car accident in New Caledonia, sought to sue the French car manufacturer in New South Wales for alleged negligent design and manufacture of his rental car. The Court noted at [105] that a substantial and bona fide connection was required with New South Wales and that the "reason was ultimately based upon notions of comity, reciprocity and mutual respect between different legal jurisdictions". However, the action was allowed to proceed in New South Wales as it had not been shown to be a clearly inappropriate forum.

74 As the Scottish Court made clear in *Clements v HM Advocate* 1991 JC 62.

approach to the concept is to be contrasted with the decisions in another Commonwealth federal jurisdiction, that of Canada, to which I now turn.

E *Canadian cases on the role of comity in the enforcement of foreign judgments*

In terms of Commonwealth approaches, the Canadian courts are distinctive in having been willing to analyse the issue of enforcement of foreign judgments at common law in terms of the concept of comity. This may be due, in no small measure, to the fact that many of the foreign judgments which have come before the Canadian courts for consideration have originated from courts in their near neighbour (and largest trading partner), the United States. The Supreme Court of Canada, in particular, has been instrumental in pioneering a modern concept of comity in terms of applying the rules of private international law to the circumstances of modern international trade and commerce.[75]

To begin with the Supreme Court's 1990 decision in *Morguard Investments Ltd v De Savoye*, this case concerned a claim for the shortfall following mortgage foreclosure action brought by the respondent mortgagee in the province of Alberta.[76] The appellant mortgagor had left Alberta to reside in the province of British Columbia and service was effected on him in British Columbia in accordance with the Alberta procedural rules allowing for service outside that province. The mortgagee then obtained judgment by default in Alberta for the mortgage shortfall and sought to have that judgment recognised and enforced against the mortgagor in British Columbia. The Supreme Court noted that the traditional English rules as to jurisdiction did not apply in this case as the appellant had been resident out of Alberta and had not appeared or submitted to the jurisdiction of the court in Alberta. However, the Court went on to consider the Canadian constitutional provisions governing the rights and powers of the provinces and the fact that there was a real and substantial connection between the loss claimed and the

75 See, for example, *Zingre v The Queen* [1981] 2 SCR 392 in which the Supreme Court recognised that "[i]t is upon this comity of nations that international legal assistance rests" (at 401); *Spencer v The Queen* [1985] 2 SCR 278 in which the Supreme Court stated that "[i]n this context, international comity dictates that Canadian courts should not lightly disregard the Bahamanian [banking secrecy] provisions by requiring the appellant in this case to testify" (at 283).

76 *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077. For a discussion of this case and its subsequent influence on Canadian law see Joost Blom "The Enforcement of Foreign Judgments: *Morguard* goes Forth into the World" (1997) 28 Can Bus L J 373.

province of Alberta. These factors meant that the Alberta judgment should be recognised and enforced in British Columbia and the Court so held.

La Forest J, delivering the judgment of the Court, noted that the modern concept of comity was not solely based on respect for a foreign jurisdiction but on the desirability of promoting the orderly development of principles of private international law in this area. The Court's observations on this point are remarkably consistent with the propositions formulated by Adrian Briggs.[77] The Court went on to state, in an important passage in its judgment:[78]

> 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.

Similarly, in its 1994 decision in *Tolofson v Jensen*, the Supreme Court of Canada stated that where order conflicted with justice in this context, order must prevail as it was a precondition of doing justice in these cases.[79] In other decisions, the Canadian Supreme Court has taken a similar view of the primacy of order over fairness in individual cases.[80]

In the important case of *Beals v Saldanha*,[81] the Supreme Court of Canada considered the role of comity in the context of an application to enforce a Florida judgment in Ontario. The Court observed that the approach in *Morguard* should apply both to inter-provincial judgments and to recognition of international judgments and that the test of real and substantial connection should apply to the enforcement and recognition of foreign judgments.[82] The Court held that "the reality of international commerce and the movement of people" were relevant factors in this area.[83]

The above analysis has sought to show that the dicta in cases from the United States and Canada tend to reveal a greater depth of doctrinal analysis than the corresponding English cases in this area. The Canadian

77 At 1095. See the discussion in part III C above.

78 At 1098.

79 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1058.

80 See *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* 2001 SCC 90, [2001] 3 SCR 907; *Hunt v T&N PLC* [1993] 4 SCR 289; *Spar Aerospace Ltd v American Mobile Satellite Corp* 2002 SCC 78, [2002] 4 SCR 205.

81 *Beals v Saldanha* 2003 SCC 72, [2003] 3 SCR 416. Discussed further below at part IV B.

82 At 437, per Major J.

83 At 437 per Major J.

cases, in particular, subject the concept of comity to more rigorous analysis in the context of the requirements of international trade and commerce and constitute a more reasoned basis for the courts' jurisdiction to recognise and enforce foreign judgments at common law.

The North American decisions emphasise the need for principles of comity, in the contemporary sense, to transcend the interests of individual litigants where those litigants have become subject to the jurisdiction of a foreign sovereign. In other words, order is generally a more compelling consideration in the case of individual litigants than fairness.

Such an approach is consistent with the theme of this article, which is that common law courts should adhere to a more consistently rigorous doctrine of enforcement of foreign judgments in the absence of egregious, extenuating circumstances. However, where the interests of individual litigants are threatened by extreme unfairness or injustice, then the available grounds of defence at common law, which will be discussed below with particular reference to the decided New Zealand cases, can be invoked to redress such situations.

IV Substantive Defences to Actions for the Enforcement and Recognition of Foreign Judgments

A *Unenforceability of foreign judgments obtained by fraud*

The first, and most significant, of the three recognised substantive defences to enforcement is where the foreign judgment is obtained by the litigant perpetrating a fraud upon the foreign court (or, less commonly, where the foreign court itself has been responsible for perpetrating the fraud). A defence of this kind is found in both the common law[84] and in reciprocal enforcement legislation.[85] Fraud is used here in the wider civil sense of vitiating conduct rather than conduct which is necessarily dishonest or deceptive in itself.

84 This area affords a remarkable snapshot of the universality of common law principles in common law jurisdictions. By way of illustration, the accepted common law defences, such as fraud, to enforcement of foreign judgments in terms of English conflict of laws doctrine have been adopted in jurisdictions as diverse as India (*Popat Virji v Damodar Jairam* (1934) 36 BOMLR 844); Jersey (*Showlag v Mansour* [1991] JLR 367); Malawi (*Heyns v Demetriou*, High Court of Malawi, 10 September 2001); Bermuda (*Muhl v Ardra Insurance Co Ltd* [1997] Bda LR 36); and Barbados (*Reid v Reid*, Caribbean Court of Justice, Appellate Jurisdiction, BB Civil Appeal No 2 of 2002, 24 November 2008).

85 Reciprocal Enforcement of Judgments Act 1934, s 6(1)(d).

The seminal English authority on the issue of fraud is *Abouloff v Oppenheimer & Co* in which the English Court upheld the validity of a defence of fraud advanced by a litigant who was the subject of a foreign judgment of a District Court in the Empire of Russia.[86] In that case the plaintiff had succeeded in securing the foreign judgment by making a fraudulent representation to the Russian Court that she did not possess certain goods, the return of which had been claimed by the plaintiff in the Russian proceedings. The English Court held that whenever a foreign judgment had been obtained by fraud it could not be relied upon. Furthermore, the allegation of fraud need not be based on facts or evidence discovered following the foreign judgment and could be raised even if the defendant had not contested the foreign judgment on the merits.[87]

The principle in *Abouloff* has given rise to continuing controversy in that the local court ought, on the one hand, to treat a foreign judgment as being valid in fact and law, whereas on the other hand the fraud defence effectively allows the enforcing court to revisit the merits of the foreign judgment, even on an ex post facto basis. Academic commentary has sought to reconcile these principles by pointing to the fact that the foreign judgment is only being impeached by the local court and not in its court of origin, though in reality that may be a distinction without a difference.[88] Despite these theoretical objections, these principles have been well established, although subsequent English decisions have discussed the logical difficulties involved in the proposition.[89] Nevertheless, courts in various common law jurisdictions have upheld the fraud defence in these terms in relation to the enforcement of foreign judgments.

This has been the case in Australia[90] (though not uncontroversially)

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86 *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295.

87 At 304 per Baggallay LJ.

88 See the discussion in Lord Collins, above n 1, at [14-139]. It should not be overlooked that domestic litigants seeking a rehearing (in jurisdictions where the procedural rules allow for such an application) are generally barred from adducing evidence which, with the exercise of reasonable diligence, could have been adduced at the original hearing (see, for example, *Ladd v Marshall* [1954] 1 WLR 1489 (CA)). In principle, it is not easy to see why a party should be accorded more latitude than this in revisiting the merits of a foreign judgment in order to air a defence of fraud.

89 See, for example, *Jet Holdings Inc v Patel* [1990] 1 QB 335 (CA).

90 *XPlore Technologies Corp of America v Tough Corp Pty Ltd* [2008] NSWSC 1267. For contrasting Australian approaches to this issue see *Keele v Findley* (1990) 21 NSWLR 444; *Yoon v Song* [2000] NSWSC 1147, (2000) 158 FLR 295. For a discussion of the conflicting Australian cases in this area see Justice CR Einstein and Alexander Phipps "Trends in International Commercial Litigation Part I — The Present State of Foreign Judgment Enforcement Law" (2004) 9 Unif L Rev 815; Goddard and McLachlan, above n 2, at [5.2(g)].

and in Canada.[91] In the *Beals* case, the Supreme Court of Canada drew attention to the need for change in this area, noting that private international law should be developed to reflect the reality of modern commerce.[92] The majority of the Supreme Court in *Beals* considered the defence of fraud and rejected it on the facts, noting that no evidence had been adduced to demonstrate that the Florida jury had been misled in any material respect in the course of reaching its verdict. The majority of the Court was unwilling to reopen the merits of the Florida judgment despite various extenuating circumstances.

This has been the subject of discussion by academic commentators. As Pribetic has noted (somewhat unsympathetically) and from a viewpoint with which the present writer does not concur, the Court deliberately chose to subjugate any unfairness to the defendant in that case to the need to observe international comity.[93]

In New Zealand, the courts have consistently held that the accepted common law defences of fraud, absence of natural justice and breach of public policy are applicable in this area.[94] A review of the decided New Zealand cases shows that applications for recognition and enforcement of foreign judgments in New Zealand are not infrequently rejected on jurisdictional grounds.[95] However, the substantive defences to recognition

91 *Four Embarcadero Center Venture v Kalen* (1988) 65 OR (2d) 551; *Beals v Saldanha*, above n 81.

92 *Beals v Saldanha*, above n 81, at [28].

93 Antonin Pribetic " 'Strangers in a Strange Land' — Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario" (2004) 13 J Transnational Law & Policy 347 at 373.

94 See *Svirskis v Gibson*, above n 4; *Reeves v OneWorld Challenge LLC*, above n 65, at [36]–[40].

95 See, for example, *Exporttrade Corp v Irie Blue New Zealand Ltd* HC Auckland CIV-2008-404-7130, 11 March 2011 (Florida judgment not enforceable in New Zealand at common law as the defendant was not resident in Florida and had not submitted to the jurisdiction of the Florida court); *Elmar Hertzog und Partner Management Consultants GmbH v Perlich* HC Whangarei CIV-2011-488-185, 23 September 2011 (judgment of a German court not enforced on the grounds of lack of jurisdiction given a conflict of German expert evidence at the summary judgment stage and doubt as to whether the defendant had in fact submitted to the correct court jurisdiction within the German federal system); *Hangzhou Shengzhe Trade Co Ltd v He* [2012] NZHC 3536 (judgment from Hangzhou, China not enforceable in New Zealand at common law as substituted service on the defendant in China after he became a resident of New Zealand did not comply with the New Zealand conflict of laws rules and a defence of breach of natural justice was also available); *Gordhan v Kerdemelidis* [2013] NZHC 566 (Nevada judgment not enforceable in New Zealand at common law as the defendant had not submitted to the jurisdiction of the foreign court); *Korea Resolution and Collections Corp v Lee* [2013] NZHC 985 (judgment of court in Korea not enforced at common

and enforcement also feature from time to time, as the following discussion will seek to show.

Beginning with the fraud defence, this has been advanced in various New Zealand cases. The 1991 decision of *SHC v O'Brien* concerned an application to enforce judgments entered against the defendant Dr O'Brien in both of the States of Virginia and Massachusetts in the United States.[96] The defendant made allegations of fraud arising out of the mode of service of the proceedings in the United States and some ancillary matters. Master Williams QC (as he then was) began by noting the availability in New Zealand of the three common law defences and considered whether the defence of fraud applied in the present case. He reviewed the various English authorities, including the *Abouloff* case, in the context of the alleged deficiencies in service and went on to discuss the provisions of the applicable Virginian long-arm statute relating to service on absent defendants.[97] He noted that the New Zealand courts insisted on personal service where possible and took the view that SHC had not satisfied the Court that effecting service through the provisions of the Virginian statute accorded with New Zealand notions of substantive justice. There were also various unsatisfactory actions on the part of SHC's attorney.

In terms of the elements of the fraud defence the Court was content to follow the *Abouloff* principles, noting that the case came within the scope of that principle and it could therefore revisit the issue of fraud.[98] These matters gave rise to a finding by the Court that SHC had failed to satisfy the Court to the summary judgment standard that the United States judgment was unable to be impeached for fraud. There was also an issue as to whether or not the Virginian judgment had become time-barred in New Zealand under the Limitation Act 1950. Accordingly summary judgment was refused.

The fraud defence has been further considered in subsequent New Zealand cases. In *Pickett v Pulman*, Mr Pickett had obtained a final judgment against Mr Pulman from a court in the State of Michigan in the United States.[99] He sought to enforce that judgment at common law against Mr Pulman in New Zealand by way of summary judgment.[100] After considering

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law as the defendant was a New Zealand resident and substituted service on her in Korea did not satisfy the New Zealand conflict of laws rules on jurisdiction, there was no submission to jurisdiction on the part of the defendant and in addition a defence of breach of natural justice was available).

96 *SHC v O'Brien* (1991) 3 PRNZ 1 (HC). This decision has been noted in RJ Paterson "Conflict of Laws" [1992] NZ Recent Law Rev 368 at 380–381.

97 *Abouloff v Oppenheimer & Co*, above n 86.

98 *SHC v O'Brien*, above n 96, at 22.

99 *Pickett (T/A Pickett Racing) v Pulman* HC Auckland CIV-2003-404-5263, 11 June 2004.

100 The New Zealand courts have held that summary judgment is available on an application to enforce a foreign judgment at common law: see *Inada v Wilson Neill Ltd* (1993) 7

and dismissing an argument based on lack of jurisdiction, the Court then went on to consider whether the Michigan judgment offended against New Zealand perceptions of natural and substantive justice. Mr Pulman pointed to various alleged deficiencies in the United States procedure. These were evaluated by the judge and dismissed by him. The New Zealand Court was therefore prepared to enforce the Michigan judgment by way of summary judgment.

In the subsequent 2006 case of *Jordan v Vorwerk*, the High Court at Napier considered the enforceability at common law of the judgment of a German court in Stuttgart, Germany.[101] The defendant opposed enforcement of the judgment on the grounds of fraud though this was not fraud on the part of the German court. The complaint related to allegedly fraudulent conduct on the part of another person, which the defendant claimed was threatening and intimidatory of his critical trial witness. The Court considered the factual circumstances and found as a fact that the person accused of acting improperly was never an agent or representative of the plaintiff but had only acted as a broker in obtaining the plaintiff's investment. Accordingly the Court held that the plaintiff was not personally involved in any of the allegedly questionable acts. The defence of fraud was accordingly rejected and summary judgment was entered against the defendant allowing for enforcement of the German judgment.

Pawson v Claridge was a case in 2010 in which a defence of fraud was successful at the summary judgment stage.[102] The plaintiff applied by way of summary judgment to enforce a judgment of the United States Federal Court. The United States judgment arose from a copyright dispute over arrangements for the writing of a book. Proceedings had been issued in the United States Court alleging infringement of copyright in the United States and other causes of action. Judgment by default was entered by the United States Court and this became the subject of the application for enforcement in New Zealand at common law. The Court began by analysing the issue of jurisdiction in terms of the relevant New Zealand conflict of laws rules. It expressed doubts as to whether the defendant had in fact submitted to the

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PRNZ 246 (HC). However, if a party seeks to enforce a foreign judgment by way of summary judgment proceedings this has the important practical consequence that the party applying bears the onus of proof of establishing to the standard applicable to summary judgment applications that the foreign judgment ought to be enforced. Once the plaintiff has established its case the onus then shifts to the defendant to make out an arguable positive defence, which in the present context might be fraud, breach of natural justice or breach of public policy. See the discussion of this point by the New Zealand Court of Appeal in *Reeves v OneWorld Challenge LLC*, above n 65, at [70]–[76].

101 *Jordan v Vorwerk*, above n 53.

102 *Pawson v Claridge* HC Auckland CIV-2009-404-4367, 25 June 2010.

jurisdiction of the United States Court given that the defendant had filed a motion which might be construed as being a protest to jurisdiction rather than an acceptance of the United States jurisdiction. However, this issue was not determinative of the application for summary judgment given the Court's subsequent conclusions in relation to the fraud defence.

The Court then went on to consider the defence of fraud. It was prepared to follow the authority of *Abouloff* while noting some difficulties with that case. However, the Court considered that the defence of fraud in an enforcement proceeding at common law was essentially identical to the corresponding defence under the reciprocal enforcement legislation and that allegations of fraud needed to be supported by adequate particularisation and proper pleadings.[103] Looking at the factual circumstances, the Court noted that the plaintiff's affidavit evidence contained some fundamental inconsistencies and there was reason to suppose that the United States judgment had been fraudulently obtained. Accordingly the plaintiff's application for summary judgment was declined.

These cases show that the New Zealand courts will be prepared to examine allegations of fraud closely so as to ensure that they have been properly substantiated in terms of the accepted legal requirements. Although the defence is not likely to succeed as a matter of course, there have been New Zealand cases, as referred to above, where the factual circumstances have been sufficient to uphold the defence, particularly in the context of the evidential limitations of a summary judgment proceeding.

As for the debate on the merits of the *Abouloff* principle, suffice it to say from the present writer's perspective that it has little to commend it apart from historical precedent. It is effectively an application of the old maxim *communis error facit ius*, which is hardly a sturdy foundation for the laws of the 21st century.[104] From the perspective of the thesis advocated here, allowing the domestic court excessive latitude to impugn a foreign judgment on the ground of fraud when such an allegation could or should have been advanced in the foreign proceedings does not sit easily with the principles discussed in this article. The words of Lord Ellenborough CJ are as apposite now as they were almost 200 years ago:[105]

> It has been sometimes said *communis error facit jus* but I say *communis opinio* is evidence of what the law is; not where it is an opinion merely

103 See *Vanhoy v Howick Engineering Ltd* HC Auckland CIV-2004-404-4428, 23 August 2005.

104 The maxim can be translated as "often repeated error eventually constitutes the law". This maxim was described (with some justification) by Grier J in *Pease v Peck* 59 US 595 (1856) at 597 as being "dangerous in its application".

105 *Isherwood v Oldknow* (1815) 3 M & S 382 at 396.

> speculative and theoretical, floating on the minds of persons, but where it has been made the groundwork and substratum of practice … .

B *Unenforceability of foreign judgments affected by a breach of natural justice*

The second ground of defence in relation to enforcement of foreign judgments concerns a foreign judgment obtained in proceedings which have involved a breach of natural justice.[106] The concept of breach of natural justice should be distinguished from factual or legal error in the foreign judgment, which is not in itself a ground for reopening the basis for that judgment.[107]

The best known contemporary English case in which an allegation by the defendant of breach of natural justice was successful is the *Adams* case.[108] There it was held that the Texan judge had not followed the correct procedure under the applicable Texan procedural rules for assessing damages. The judge had not held a hearing and had not properly assessed the evidence as to damages. The English Court of Appeal observed that, on the evidence, the United States judge had not complied with the procedural rules of his own jurisdiction and his assessment of the quantum of the default judgment in question was therefore fatally flawed.[109]

A recent Australian example of a successful defence to enforcement of a foreign judgment based on an arguable breach of natural justice is *XPlore Technologies Corporation of America v Tough Corp Pty Ltd.*[110] This was a particularly glaring fact situation where service on the defendant had in fact occurred after the time for filing a defence in the foreign proceeding had expired.

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106 See Lord Collins, above n 1, at [14-163]–[14-169].

107 See, for example, *Jacobson v Frachon*, above n 52.

108 *Adams v Cape Industries Plc*, above n 20.

109 At 568.

110 *XPlore Technologies Corp of America v Tough Corp Pty Ltd*, above n 90. That case concerned a default judgment in Texas which the plaintiff sought to enforce in the Supreme Court of New South Wales. The defendant opposed the enforcement on the basis of a breach of natural justice in that the proceedings had been served on the defendant in Australia on 17 April 2008. This was after the time allowed for filing a defence had expired (this date in fact being 14 April 2008), which was prior to the date on which the proceedings had actually been served on the defendant. Under these circumstances the New South Wales Court had little hesitation in holding that the rules of natural justice had been breached as the defendant had not been given an adequate opportunity to defend the proceedings. Accordingly enforcement of the Texan judgment was stayed pending determination of a substantive appeal in Texas.

The defence of natural justice was also carefully considered by the Supreme Court of Canada in *Beals*.[111] The natural justice argument in *Beals* was described by the majority as involving proof on the civil standard (that is, on the balance of probabilities) that the proceedings giving rise to the foreign judgment were contrary to Canadian notions of fundamental justice.[112] In that case the defendants argued on appeal that although they had been served with the Florida proceeding they had not been given adequate notice so as to enable them properly to investigate their financial exposure in the Florida action. The majority of the Court was unsympathetic to the defendants on this issue and held that they had been obliged to inform themselves as to the extent of their financial jeopardy in Florida. The majority therefore dismissed the appeal against enforcement of the Florida judgment, holding that the defendants only had themselves to blame for not ascertaining the relevant provisions of Florida law applicable to their situation and that to hold otherwise would unnecessarily complicate international commercial transactions.[113]

The defence of breach of natural justice has been raised periodically before the New Zealand courts.[114] In *Ross v Ross*, the New Zealand Court of Appeal considered an application for summary judgment to enforce a judgment of the Supreme Court of New York against the appellant.[115] Summary judgment was granted in the High Court by the Associate Judge and the matter proceeded on appeal. The Court of Appeal considered defences based on breach of public policy and breach of the principles of natural justice. The public policy defence was advanced on the basis that the United States judgment originated from a maintenance order and that it was contrary to public policy to enforce maintenance decisions from another jurisdiction. The Court of Appeal rejected that argument, holding that the New York judgment was a money judgment and was enforceable even though it arose from a failure by the appellant to adhere to a maintenance order in New York. The Court of Appeal held that, to the contrary, it was desirable in a family law context for the Court to enforce debt obligations from foreign jurisdictions arising from non-payment of maintenance.

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111 *Beals v Saldanha*, above n 81.

112 At 448.

113 At 451 per Major J.

114 See, for example, *Hada v Neal* [2005] NZFLR 567 (HC) (inadequate notice of a hearing in Colorado at which the foreign judgment was obtained gave rise to an arguable defence of breach of natural justice in a summary judgment proceeding). See also *Hangzhou Shengzhe Trade Co Ltd v He*, above n 95, and *Korea Resolution and Collections Corp v Lee*, above n 95. For a general discussion of the natural justice defence see Goddard and McLachlan, above n 2, at [5.2(i)].

115 *Ross v Ross* [2010] NZCA 447.

The appellant also advanced a defence of breach of the requirements of natural justice based on the fact that the respondent had sought to issue proceedings in New York even though she was resident in New Zealand and the appellant did not have adequate notice of the hearings. Somewhat unsurprisingly, the New Zealand Court of Appeal completely rejected this argument, especially having regard to the fact that the appellant had deliberately elected not to participate in the New York proceedings. Accordingly the appeal against the grant of summary judgment by the High Court was dismissed.

These cases on the natural justice defence illustrate that common law courts will generally be inclined to extend considerable deference to the procedural rulings of foreign courts unless it can be clearly shown that significant injustice or unfairness has occurred, so that enforcement of the foreign judgment should be refused. Thus, with the exception of compelling circumstances, such as where the time for defending had expired before service of the proceedings (as in the *XPlore Technologies* case) or where there was demonstrable material non-compliance by the foreign court with its own procedural rules (as in the *Adams* case), the defence has generally been unsuccessful.

The judicial approach to this defence therefore accords with the contention of this article, which is that modern notions of comity serve to mandate the enforcement of foreign judgments unless egregious circumstances are present.

C *Unenforceability of foreign judgments which are contrary to public policy*

The third recognised defence to foreign judgments at common law is based on failure to observe the principles of public policy.[116]

There have been very few cases in which this defence has been successfully invoked. In one case under the English reciprocal enforcement statute, involving similar principles to the common law defence of violation of public policy, the English Court of Appeal held that where the respondent had not been made aware that proceedings brought against him in the courts of the Netherlands had been reactivated, then the respondent had not received a fair trial as required by art 6 of the 1968 Brussels Convention.[117]

116 See Lord Collins, above n 1, at [14-153]–[14-161].

117 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1262 UNTS 153 (signed 27 September 1968, entered into force 1 February 1973) (as set out in the Civil Jurisdiction and Judgments Act 1982 (UK), sch 1), which has now been substantially replaced by Council Regulation (EC) 44/2001, [2001] O.J. L12 (Brussels I Regulation) as of 1 March 2002. Article 27(1) of the 1968

There had accordingly been a breach of the requirements of public policy.[118]

In the recent Australian case of *Jenton Overseas Investment Pte Ltd v Townsing*, the Supreme Court of Victoria considered a challenge to the enforcement of a Singapore judgment on the grounds of public policy.[119] The objection was based on certain procedural arguments which it was contended served to invalidate the Singaporian judgment. The Victorian Court held that a defence based on public policy could only rarely be invoked, observing that public policy was an inherently volatile concept and that an Australian court should be slow to invoke objections based on that ground in respect of a foreign judgment.[120]

The defence could therefore only succeed in exceptional cases, which did not include the circumstances in that case. On the standard to be attained the Court observed that enforcement "must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs".[121] There have been other Australian cases in which the public policy defence has similarly been rejected.[122]

The Canadian Courts have adopted a similarly cautious approach to the defence of public policy. In the *Beals* case, the appellants contended that there had been a breach of public policy where Florida law had allowed for a grossly excessive award of damages for loss of profits without the need to demonstrate a causal connection between the wrongful acts in question and the resulting damages and that such an award would shock the conscience of the reasonable Canadian.[123] However, the majority of the Supreme Court of Canada held that a defence based on public policy could not lightly be invoked and was not available in that case, observing that even though the Florida jury award was very large by Canadian standards that did not give

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Convention provided: "A judgment shall not be recognized: (1) If such recognition is contrary to public policy in the State in which recognition is sought."

118 See *Maronier v Larmer* [2002] EWCA Civ 774, [2002] 3 WLR 1060.

119 *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470, (2008) 21 VR 241.

120 At 246.

121 At 247.

122 See, for example, *Stern v National Australia Bank* [1999] FCA 1421 (objection to enforcement of a California judgment on the basis of an alleged breach of s 52 of the Trade Practices Act 1974 (Cth) rejected); *De Santis v Russo* [2000] QSC 65, (2001) 27 Fam LR 414 (foreign judgment did not offend the essential principles of justice and morality so that its registration should be set aside); *Norsemeter Holdings AS v Boele (No 1)* [2002] NSWSC 370 (a party who had failed to comply with the procedures in the foreign forum on account of the default of his legal counsel was nevertheless bound by the Court's judgment).

123 *Beals v Saldanha*, above n 81, at 452.

rise to a defence based on public policy grounds where the award had been given in full compliance with Florida law.[124]

Another Canadian case of interest is a decision of the Ontario Court of Appeal in *Oakwell Engineering Ltd v Enernorth Industries Inc.*[125] In that case the appellant sought to challenge a Singapore judgment on the basis that the Singapore legal system was allegedly corrupt. The Ontario Court of Appeal dismissed the appeal holding that the process in the Singapore courts had been fair to both parties. Enforcement of the Singapore judgment was therefore allowed.

There have been several New Zealand cases in which a public policy defence has been advanced in the context of opposition to the enforcement of foreign judgments at common law. In *Reeves v OneWorld Challenge LLC* the New Zealand Court of Appeal considered the enforcement in New Zealand of a judgment of a United States Federal Court in Seattle, Washington State.[126] This judgment arose out of confidentiality obligations attaching to confidential information on yacht designs for the Team New Zealand challenge for the 2003 America's Cup in Auckland. The United States court had granted OneWorld a judgment against Mr Reeves, who opposed the application for enforcement of this judgment in New Zealand on the basis that OneWorld had itself misappropriated the design information from Team New Zealand in the first place. In the High Court, summary judgment was granted in terms of the United States judgment and this decision was challenged by Mr Reeves on appeal. In the Court below, arguments based on natural justice and breach of public policy had been pursued. However, in the Court of Appeal only the public policy point was taken by the appellant.

The public policy defence was based on whether or not the confidentiality obligation should be enforced under New Zealand law. The majority of the Court of Appeal noted that the public policy exception was a narrow one and that even if there were issues concerning the enforceability of the confidentiality agreement under New Zealand law, raising these issues in New Zealand would amount to re-examining the merits of the United States judgments. It would also run contrary to the public policy interest in

124 At 453. In other Canadian decisions the courts have not been fazed when faced with enforcement of large United States damages awards. See, for example, *Clarke v Lo Bianco* (1991) 84 DLR (4th) 244 at 252–253 (SC); *United States of America v Ivey* (1995) 26 OR (3d) 533 at 553–554 (CtJ (Gen Div)); *Dexia Credit Local v Rogan* [2008] BCSC 1406.

125 (2006) 81 OR (3d) 288, reversing the decision of the Supreme Court of Ontario reported at (2005) 76 OR (3d) 528.

126 *Reeves v OneWorld Challenge LLC*, above n 65. For a general discussion of the public policy defence in the New Zealand context see Goddard and McLachlan, above n 2, at [5.2(h)].

securing finality of litigation. In the summary judgment context there was also insufficient evidence from Mr Reeves to establish an arguable defence to enforcement of the United States judgments. Accordingly the majority of the Court held that OneWorld was entitled to rely on the United States judgments it had obtained and upheld the grant of summary judgment in the High Court.

William Young J (dissenting) contended that Mr Reeves had advanced adequate affidavit evidence in favour of his position and that it was arguable that OneWorld had knowingly breached confidentiality obligations in obtaining the confidential copyright material from Team New Zealand. He was prepared to uphold a defence of public policy based on the perceived iniquity of OneWorld in breaching its own confidentiality obligations.

A public policy defence was advanced in the analogous context of a reciprocal enforcement case based on a judgment of the High Court of Hong Kong.[127] In that case Questnet had obtained a default judgment against Mr Lane in the High Court of Hong Kong and Mr Lane applied to the High Court of New Zealand to set aside its registration. The defendant had chosen not to appear in the Hong Kong proceedings or instruct counsel but had instead written to the Court, so that the High Court held that he was responsible for his predicament. There were other procedural objections advanced which had been dismissed by the judge at first instance. The Court of Appeal considered these matters and agreed with the High Court that there had been no breach of natural justice or of the principles of public policy. The appeal was accordingly dismissed.

Again, the decided cases on this ground of defence, both in New Zealand and in other common law jurisdictions, illustrate that it will very rarely be successful. The courts will incline towards deference to the foreign tribunal even where there is evidence that the defendant's lack of compliance with the foreign court's procedure was not the result of the defendant's own wilful default.[128] The cases on this ground of defence are therefore also supportive of the tenor of this article and show that deference to the terms of the foreign

127 *Lane v Questnet Ltd* [2010] NZCA 578, [2010] NZAR 210. See also, to similar effect: *Banque Indosuez v Bourgogne* HC Auckland M 662/89, 12 January 1990; *Bank of Kiribati Ltd v Harrison* (1990) 3 PRNZ 111; *Bolton v Marine Services Ltd* [1996] 2 NZLR 15 (CA) (commented upon in Laurette Barnard "Enforcement of Foreign Judgments" [1996] NZLJ 227); *Purdie v Mikkelsen* HC Auckland CIV-2008-404-36, 6 July 2009 (a judgment of the Dallas County Court in Texas held not to be impeachable on public policy grounds); *United Finance Ltd v Cooper* HC Auckland CIV-2009-404-004918, 23 December 2010 (California judgment not contrary to public policy, although summary judgment was declined on the basis that the debt had subsequently been satisfied in a convoluted fashion).

128 As in *Norsemeter Holdings AS v Boele (No 1)*, above n 122.

judgment will outweigh the interests of individual litigants except in the most compelling of circumstances.

D *Further defences to enforcement of foreign judgments — are they the same or different?*

Before leaving the topic of the common law defences to the enforcement of foreign judgments, it is useful to give some consideration to the issue of whether the three existing common law categories discussed above are exhaustive or not. Again the Canadian superior courts have considered this issue in some recent decisions.

Beginning with the leading case of *Beals*,[129] the Supreme Court of Canada noted that the three existing defences were the most common defences which might arise but were not exhaustive in their scope. As Major J noted, in delivering the judgment of the majority of the Supreme Court, unusual future situations might require the creation of new defences but "the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences".[130]

A possible fourth ground of defence, described as the loss of a meaningful opportunity to be heard, has been advanced in Canada in the context of a proceeding to enforce the judgment of an Illinois state court granting substantial damages and a permanent injunction against the defendants.[131] The case concerned the operations of cross-border telemarketing sales of Canadian and foreign lottery tickets to United States consumers at a significant mark-up above the cost price of the tickets. The United States Government had brought proceedings in both Illinois and Ontario and had obtained significant relief in the Illinois Court. The defendants argued that their resources had been devoted to contesting ex parte orders obtained in the Canadian proceedings and that they did not have access to essential documents and computer records. All of this had served to impede the effectiveness of their defence of the United States proceeding.

The matter came before Belobaba J in the Superior Court of Justice of Ontario. The Court considered whether a defence of loss of a meaningful opportunity to be heard was in fact available. It noted that the defence differed from the accepted category of a defence based on natural justice and required the party relying on it to point to significant procedural unfairness

129 *Beals v Saldanha*, above n 81.

130 At 442.

131 *United States of America v Yemec* (2009) 97 OR (3d) 409 (Ont Sup Ct).

in the conduct of the litigation.[132] At first instance the Court held that this defence was arguable in principle.

This approach was rejected on appeal by the Court of Appeal of Ontario.[133] The Court of Appeal held that there was no fourth defence of lack of a meaningful opportunity to be heard which ought to be added to the three accepted grounds of defence.[134] Furthermore, on the facts of the case, the Court of Appeal observed that the defendants had enjoyed a full, fair and meaningful opportunity to defend the claim in the United States. They had instructed a Chicago lawyer to whom they had paid a substantial retainer. The proceedings had been fully defended through various pre-trial steps and the defendants had been given adequate access to all the required documents. Accordingly, even if there was a fourth ground of defence available, such a defence had not been made out in that case. The appeal was therefore allowed and the Court of Appeal ordered that the United States judgment could be enforced in Ontario.

The above cases are of interest in that they illustrate that the Canadian appellate courts have not been willing to extend the existing categories of defence at common law to the enforcement of foreign judgments.

V Summary and Conclusions

This article has sought to demonstrate that the theory underlying the enforcement of foreign judgments at common law has moved from one based on international comity in the traditional sense of reciprocity of interest to a more prosaic view of the need to enforce debt obligations binding on a defendant. More recently there has been some pushing back against this position in favour of a contemporary view of comity tailored to address the needs of an increasingly globalised society operating in an age of borderless, internet commerce. Such a theory has been perceived by many common law judges in different jurisdictions as mandating a deferential approach to foreign courts and laws save in the most egregious or compelling of circumstances.

The Canadian approach of including, in addition to the traditional tests of jurisdiction, a "real and substantial connection" with the country or state in which loss is suffered is useful not only in jurisdictional terms. It also serves to minimise injustice to either party in terms of the modern concept

132 At 457.

133 *United States of America v Yemec* (2010) 100 OR (3d) 321 (Ont CA).

134 At [26]. In reaching this conclusion the Court of Appeal followed its earlier decision in *King v Drabinsky* (2008) 91 OR (3d) 616, which had also rejected this fourth ground of defence.

of comity contended for in this article. If the foreign state undoubtedly had jurisdiction over the dispute in terms of its tangible connection to the fact situation then that is arguably all the more reason for the parties to defer to that state's particular laws and procedures and the decisions of its judicial system.

In relation to the accepted common law defences of fraud, breach of natural justice and incompatibility with principles of public policy, the common law courts have been understandably reluctant to extend their scope. The *Abouloff* principle apparently remains the law in New Zealand at this time.[135] However, it embodies a somewhat parochial, 19th-century outlook on the world and its days may eventually prove to be numbered in the 21st century. If domestic litigants seeking a rehearing or a new trial are prevented from raising issues which ought to have been raised at the original hearing then it is difficult in principle to see why a party to a foreign proceeding should be allowed more latitude than this.

The decided cases show, consistently with the theme of this article, that the existing common law defences in this area of the law are narrow in scope and are sparingly applied, save where there have been extenuating circumstances such as failure to effect actual and provable service of the foreign proceedings on a defendant or serious defects in the foreign court's observance of its own procedural rules. The courts will also be astute to ensure that the foreign court has in fact properly asserted jurisdiction over the defendant, particularly where the defendant is not resident in the foreign jurisdiction and the foreign proceedings have been served by way of substituted service or where the court papers have not actually come to the attention of the party to be served. Perhaps above all else, the decided cases in this area demonstrate that the common law continues to display two of its greatest and perhaps least appreciated strengths, namely resilience and adaptability.

It is appropriate to end with the words of Justice Cardozo, quoted recently by the New Zealand Court of Appeal:[136]

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.

135 See the discussion of the *Abouloff* principle, above part IV A.

136 *Loucks v Standard Oil Co of New York* 224 NY 99 (1918) at 11, cited by the New Zealand Court of Appeal in *Reeves v OneWorld Chellenge LLC*, above n 65, at [56].