October 12, 2015

We (Linda Silberman and Aaron Simowitz) wish to expand on Sophie Nappert's description of this very significant decision from the Supreme Court of Canada. It is, to our knowledge, the most thorough discussion to date of the issue of whether a jurisdictional nexus should be required to recognize and enforce a foreign judgment—certainly more thorough than the decisions to date from U.S. courts. The decision may also affect recognition and enforcement of arbitral awards. We believe that the Court's view that no jurisdictional nexus is required to recognize and enforce a foreign money judgment is wrong. Our recently completed article, forthcoming in N.Y.U. Law Review, explains more fully why. (available here: http://ssrn.com/).

I. The Court's Justification that No Nexus Is Required

Rejecting the requirement that any nexus with the enforcing court, including the presence of assets, is necessary, the Supreme Court of Canada noted that Rule 17.02(m) of the Ontario Rules provides for the existence of a foreign judgment as a basis for "service out" or service *ex juris* on the judgment debtor. Although the Court conceded that the Rules do not confer jurisdiction, the Court found that, in the absence of specific jurisdictional legislation, there is an intention that the Rules govern and that broad jurisdictional bases in actions for recognition and enforcement should be accepted. However, the Court failed to consider the significant burden imposed on the judgment debtor who may have no connection at all to, including a lack of assets in, the Canadian forum. The judgment debtor, who may have available a number of defenses to an original judgment, should not have to go to any place in the world that the judgment creditor chooses to enforce, and where there is little interest by the enforcing forum if there are no assets there or likely to come within the jurisdiction of the enforcing court.

Overlooking the concerns of the judgment debtor, the Court offered several justifications. First, the Court reasoned that judgment debtor holds the keys to its own salvation: "[N]o unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions." (Op. at 55). Fair enough —but as the Chevron situation illustrates better than most, judgment debtors often have valid defenses to the judgment and they must appear in the enforcing court to assert them or lose them. It seems hardly correct to say that "no unfairness" could result from demanding that a judgment debtor with no connection of any kind to Ontario can be haled there from across the world and forced to assert its defenses there—or lose its ability to contest the conversion of a foreign judgment into a Canadian judgment. That the judgment debtor has no connection to the enforcing forum does not mean that the debtor has no reason to be troubled by the existence of an outstanding judgment rendered in that forum. If the judgment debtor chooses

not to defend the enforcement action where it has no assets, the existence of an outstanding judgment there would effectively bar the debtor from ever doing business in that forum for the life of the judgment. The judgment could, in some instances, travel more easily than an arbitral award subject to certain infirmities (like a set aside at the seat) or, say, a judgment from a perhaps compromised Ecuadorian court. Indeed, the Court quite plainly suggested that the Ontario judgment could be subject to registration in other provinces. (Op. at 49). U.S. courts have split on whether a recognition judgment is subject to this sort of registration under the U.S. Constitution's Full Faith and Credit Clause.

Second, the Court reasoned that "comity" outweighs these concerns and that, because recognition and enforcement actions are fundamentally territorial, no other nation could be offended. (Op. at 50). The Court reasoned that remedies can only be had against property within its territory. Perhaps this is a point of departure from the U.S., where a judgment creditor can ask a U.S. court to grant several extraterritorial remedies, such as worldwide discovery of assets or turnover of assets held outside the jurisdiction by parties subject to personal jurisdiction in the enforcing court. But Canada may not even be so different—to the extent that it follows the U.K. approach, many of those same extraterritorial remedies may be available.

Finally, the Court offered an analogy to the Ontario approach to recognition and enforcement of arbitral awards, but the comparison is flawed. Unlike the judgment debtor, the award debtor has consented to the regime of arbitration that can fairly be said to include enforcement of the award, particularly with respect to a New York or Panama Convention award. Even in that context, George Bermann's draft report for the International Academy of Comparative Law on comparative recognition and enforcement of arbitral awards reveals that most nations do, in fact, require some nexus before recognizing and enforcing a foreign arbitral award. Although the Canadian Supreme Court cites a counter-example, it fails to take account of the more general approach worldwide. Canada thus joins the outlier category in the arbitration context, and without highlighting the differences between judgments and arbitrations, merely extends the rule to the recognition and enforcement of judgments. Every U.S. court to date has held that a jurisdictional nexus is required to recognize and enforce an *arbitral award*. Strangely, however, a few courts in the U.S., specifically several New York state courts, have taken the same view as the Canadian Supreme Court in *Chevron* in dispensing with any need for a jurisdictional nexus to recognize and enforce a *foreign money judgment*. As Professor Silberman has previously observed, see Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439, 445 (2012), to the extent that there should by any distinction between recognition of judgments and awards, the approach by the New York state courts seems to have the analysis completely backwards.

II. The Significance of Assets With Respect to Enforcement

Although the Canadian Supreme Court is correct that the presence of assets is not a *necessary* condition for recognition or enforcement of a judgment, the Court goes too far in holding that no basis of jurisdiction whatsoever is necessary for an action to recognize a foreign judgment. Rejecting the argument that a judgment creditor be required to make a showing that the debtor has assets in the jurisdiction in order to bring a recognition or enforcement action, the Court observed that, "[i]f jurisdiction over recognition and enforcement proceedings were dependent upon the presence of assets at the time of the proceedings, this may ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction," and that, "[i]n today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality." (Op. at 56-57). However, that reasoning does not explain why some connection with the enforcing court should not be required when there are no assets in the jurisdiction. A judgment debtor should not be expected to have to raise defenses to a foreign judgment in a far-off forum unconnected to the debtor or its assets. Although the Canadian Supreme Court points to a case in England where "service out" is permitted on the basis of a foreign judgment without more, the English court in that case noted that there was a reasonable possibility that assets would be present in London in the future, thus providing a reason for the English court to proceed.

Assets or some other connection with the forum is generally required under U.S. law. That view is reflected in The Restatement (Third) of Foreign Relations Law: Recognition and Enforcement of Foreign Judgments § 481. Comment *g*explains: "The judgment creditor must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property." The U.S. Supreme Court was careful to preserve the viability of asset-based jurisdiction for post-judgment enforcement actions, even as it eliminated asset-based jurisdiction for actions seeking an adjudication on the merits.*See Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."). The U.S. Restatement (Second) of Conflict of Laws takes a similar position, noting that a debtor "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an *in personam* suit." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971). Those reasons, reflecting concerns similar to ones expressed by the Supreme Court in the *Chevron* case, led not to eliminating all bases of jurisdiction for recognition/enforcement actions but rather to accepting the presence of assets as a legitimate jurisdictional nexus for such actions.

III. Jurisdiction in a Plenary Action Not Identical to Jurisdiction in a Recognition and Enforcement Action

Although wrongly concluding that no jurisdictional nexus at all is required, the Canadian court correctly recognized that the jurisdictional standard for a suit to adjudicate a tort claim need not (and probably should not) be the same as the jurisdictional standard to recognize and enforce a foreign judgment or arbitral award. Chevron argued that the Court's recent reaffirmation of the "real and substantial connection" test in a tort action should inform the Court's approach to a recognition action. The Court would have none of it: "[I]t should be remembered that the specific connecting factors that LeBel J. established in *Van Breda*were designed for and should be confined to the assumption of jurisdiction in tort actions . . . . The connecting factors identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue." (Op. at 91). More specifically, the Canadian Court concluded that the enforcing court need not have any connection *to the underlying dispute that gave rise to the judgment in the first place.* In the Court's words: "[T]he crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. . . . [T]he court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one." (Op. at 42-44).

That issue is now likely to arise in recognition and enforcement actions in the U.S. as the result of restrictions on general jurisdiction imposed by *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Until the U.S. Supreme Court's recent decision in*Daimler*, applications for recognition and enforcement of foreign judgments and arbitral awards were routinely granted (in the absence of assets) on the basis of broad U.S. general jurisdiction—so-called "doing business" jurisdiction. The *Daimler*decision, in the context of U.S. general jurisdiction in actions to adjudicate plenary claims, held that general, all-purpose jurisdiction could only be exerted where a corporation is "at home" —its principal place of business or place of incorporation, barring "exceptional" circumstances. *Id*. at 749. Without much analysis, courts in the U.S. have extended this rule to recognition of arbitral awards, see *Sonera v. Çukurova*, 750 F.3d 221 (2d Cir. 2014) and will likely extend it to judgments as well. And in the absence of assets, U.S. courts that impose a nexus requirement may believe that if the U.S. court would not have had jurisdiction over the debtor sufficient to adjudicate the original claim, recognition and enforcement of foreign judgments and arbitral awards must be denied.

Indeed, that position has been embraced in the current Tentative Draft Restatement of U.S. Foreign Relations Law, stating in a Reporter's Note that claim-specific jurisdiction to recognize and enforce a foreign money judgment will exist only "[i]f the person seeking recognition of the foreign judgment could have brought a separate cause of action under U.S. law arising from the same pattern of conduct," and "if the person whom the recognition decision will bind

engaged in sufficient local conduct related to the claim to establish minimum contacts with and purposeful availment of the forum." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 402 Reporter's Note 3 (April 1, 2014) (Tentative Draft No. 1). One can hope that the *Chevron*decision will encourage the Reporters to consider whether that approach is indeed desirable.

IV. Jurisdiction Over Third Parties in Enforcement Proceedings

Finally, the Court considered whether Chevron Canada, a third party and relative stranger to the dispute, could be subjected to jurisdiction as a named defendant in the recognition action. The Court held that it could because, although Chevron Canada was incorporated in British Columbia and has its principal place of business in Vancouver, it was "carrying on business" in Ontario. Although the Court had expressed some concern about the breadth of "carrying on business" jurisdiction in a tort action, the *Chevron* Court held that "[i]n the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute." (Op. at 92). "[O]ne aspect of the plaintiffs' claim in this case is for enforcement of Chevron's obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation's debt obligation. In this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment to which Chevron Canada is a stranger, but rather, at least arguably, the collection of a debt using shares and assets that are alleged to be available for enforcement purposes." (Op. at 93).

In considering the jurisdictional basis for a recognition/enforcement action with respect to the third party Chevron Canada, the Supreme Court emphasized that there need be no nexus between the contacts in the forum and the underlying dispute giving rise to the foreign judgment. Instead, the Court found that "Chevron Canada had a physical office in Mississauga, Ontario" and that "Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province." (Op. at 86).

U.S. courts have thus far rejected a lesser standard for post-judgment and post-award actions for either debtors, see *Sonera*, 750 F.3d at 223, or third persons, see *Gliklad v. Bank Hapoalim*, 2014 N.Y. Slip Op. 32117[U], 2014 WL 3899209 (Sup.Ct., N.Y. County 2014), and have reflexively applied the *Daimler* rule that such parties must be sued "at home", meaning the place of incorporation or principal place of business. We have urged that a less restrictive standard be used for recognition and enforcement actions as against both debtors and third persons. But if U.S. courts do apply *Daimler*'s rule, designed for tort actions, to recognition and enforcement actions, U.S. courts are likely to turn to claim-specific jurisdiction as a basis to entertain recognition actions against both debtors and third parties. And as the Canadian Supreme Court explained, it makes no sense to view those contacts in connection with the underlying claim. How courts in the U.S. will approach the inquiry of specific jurisdiction,

which requires jurisdictional contacts in the forum "arising out of or related to" the claim, in the context of recognition and enforcement is unclear. In the recent decision, *Gucci Am. Inc. v. Weixing Li*, No. 10 CIV. 4974 RJS, 2015 WL 5707135, at *1 (S.D.N.Y. Sept. 29, 2015), the district court was instructed to consider specific jurisdiction in light of the Second Circuit's ruling that jurisdiction over a third party bank in an action to enforce a subpoena for asset information was insufficient in light of *Daimler* (see *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 129 (2d Cir. 2014)). The court found that specific jurisdiction was satisfied because the third party bank, Bank of China, maintained a correspondent account at a New York bank to conduct secure and efficient wire transfers that were the "but for" cause of plaintiff's document requests.

V. Conclusion

The *Chevron* Court reached the wrong conclusion in holding that no jurisdictional nexus of any kind is required to recognize or enforce a foreign judgment or award. It failed to consider the burdens on judgment and award debtors whereby a debtor can be summoned from anywhere in the world to assert its defenses to recognition and enforcement, or lose them. In so doing, the Court places Canada well outside the mainstream approach to recognition and enforcement of arbitral awards and judgments, aligning itself solely with an approach to judgment enforcement adopted by lower courts in New York that may yet ultimately be rejected.

(Although this post represents solely the views of the authors, we do note that Professor Silberman has had a consulting relationship with Jones Day and Professor Simowitz practiced at Gibson, Dunn & Crutcher until 2011.)