

ARTICLES

CROSSING THE RIVER BY FEELING THE STONES:
RETHINKING THE LAW ON FOREIGN JUDGMENTS

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The common law on the recognition and enforcement of foreign judgments is characterised by immobility in most jurisdictions, but has recently undergone significant development in Canada. The decision of the Supreme Court of Canada in *Beals v. Saldanha* provides a perfect opportunity to evaluate the new directions in which Canada is seeking to take the common law; and to ask whether some of the received authority of the common law is, quite apart from the work being done in Canada, not now due for reconsideration. The submission is that cautious and incremental development of the law on foreign judgments, especially by reference to broad and general principles of the common law, has much to recommend it. An assessment of the state of the common law world is made in an attempt to see where the common law may improve itself from within its own resources, the better to serve the interests of those who obtain, and those who are on the receiving end of, foreign judgments.

I. INTRODUCTION

The *Singapore Year Book of International Law* is a new venture. It is hoped that it will offer, among other things, a forum¹ for conflicts lawyers from various jurisdictions² to cast an eye over selected component parts of their subject, and to ask whether the law is serving the needs of the common law world as well as it should. Perhaps because it shows the common law in a condition of semi-creative tension, the law on the recognition and enforcement of foreign judgments is a good place to start. In England the common law is characterized by a formidable degree of inertia. No significant judicial development can be expected below the level of the House of Lords,³ this perhaps contributed to by a curious perception that statutory development is rather more important.⁴ The common law in Australia does not show much sign of recent growth, but in Canada the Supreme Court has started to make radical departures from the traditional English version of the common

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¹ In the experience of the writer, a *forum conveniens*.

² Including those, like the writer, who have time and again enjoyed the academic and social hospitality of the Dean and Faculty of Law of the National University of Singapore.

³ In *Adams v. Cape Industries plc.* [1990] Ch. 433 (Eng. C.A.), the Court of Appeal was confined to the task of discerning the law on jurisdictional competence, not changing it. In *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443 (Eng. H.L.), the House of Lords considered that it was too late even for it to alter the received common law on fraud as a defence to recognition and enforcement.

⁴ *Owens Bank Ltd. v. Bracco, ibid.* at 489. The oddness is all the more marked when one recalls that judgments from the courts of the United States are enforced at common law or not at all. These must constitute a large part of the class of judgments presented for recognition and enforcement, in England at least.

law. One opportunity for English lawyers is to consider whether any of this new foreign material, judicially road-tested as some of it has been, offers a principled and practical improvement on the law so far established. Another is presented by the burgeoning law on agreements on jurisdiction, and the perception that it may have significance at the end as well as at the beginning of the litigation. The opportunity for the courts of Singapore lies along the same lines: to consider how to develop the commercial common law of a modern state. In one narrow respect, as we shall see, the Singapore Court of Appeal has shown some sympathy with sentiment that the English common law has passed its use-by date. Whether it was wise to do this, and whether it would be wise to go further down the road of judicial reform of the law, is the subject of this paper. The perspective of the enquiry is not particularly Singaporean, but rather is that of a common lawyer looking at the menu of choices now presented by this branch of his subject. The perspective is also more practical than theoretical, on the footing that judicial development of the common law is unlikely to be influenced⁵ by game theory, however much this may have to offer those who do their work outside the courts.⁶ The conclusion will be that the basic instincts and ambitions of the common law are still predominantly sound, but that its approach to the foreign judgments is coming under some pressure. This in turn is leading some courts to move in new directions. There is nothing wrong with this as long as they move thoughtfully, incrementally, pragmatically: crossing the river by feeling the stones.⁷

It is helpful to begin the analysis by stating the questions to be considered. We will first ask which courts should be acknowledged as competent to give judgments which will in principle be recognized; and will then ask which points of objection should be admissible to prevent the recognition or enforcement⁸ of a judgment which issued from a court competent in this sense. But this will in turn raise the question whether the defences to recognition and enforcement are indifferent to the particular ground on which the foreign court was jurisdictionally competent; the question whether the grounds of competence are untouched by developments elsewhere in the laws of civil jurisdiction; and the question whether the acceptance of new bases of jurisdictional competence should entail the development of new defences tailored specifically to them. Put shortly, the big issue is the extent to which the law on the recognition and enforcement of foreign judgments is itself self-contained, and its component parts neatly compartmentalized.⁹ The conclusions will be tentative, but will seek to show that some significant realignment of the material is called for.

⁵ For the better, at any rate.

⁶ The challenging analysis put forward by Dr. M. Whincop, "The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments" (1999) 23 *Melb.U.L.R.* 416 will, therefore, not be discussed here.

⁷ Deng Xiaoping, speaking on China's economic reform programme, is reported to have said that they were "crossing the river by feeling the stones".

⁸ A judgment cannot be enforced unless it is recognized as making the cause of action *res judicata*; the principles of issue estoppel are analogous. From this perspective it will be more accurate to talk in this paper about recognition rather than enforcement. But proceedings before the courts in which these questions arise for decision are most frequently actions brought to enforce a judgment. In this context it would be artificial to speak in terms of recognition rather than enforcement. So this paper uses the term most appropriate to the context; if it is important that one be used rather than the other, the reason is pointed out.

⁹ A singular contribution to the debate was made by Y.L. Tan, "Recognition and Enforcement of Foreign Judgments" (Singapore Conferences on International Business Law VIII: Current Legal Issues in International Commercial Litigation, November 1996) in K.S. Teo., ed. *Current Legal Issues in International Commercial Litigation* (Singapore: Faculty of Law, National University of Singapore, 1997). He argued with considerable force that jurisdictional competence, as traditionally understood or more recently modified, was a wrong-headed foundation for the recognition of judgments. He advocated instead a test of local finality coupled with a broader range of defences, generally based on the justice or not of enforcing the judgment against the defendant. It seems that the courts, and some writers, remain obstinately in error in continuing their labour of refining the law on jurisdictional competence; but are closer Tan's position in seeing any change to the "which judgments?" question as calling for re-examination of the defences allowed to a defendant seeking to resist recognition or enforcement.

II. THE JURISDICTIONAL COMPETENCE OF A FOREIGN COURT

Terminology and tradition must come first. The court in which the trial has taken place will be referred to as the “foreign court”; the court before which it is argued that the trial has made the cause of action a *res judicata*, and by whose order the judgment may be enforced, is the “receiving court”. The common law holds that a judgment from a foreign court should be recognized by the receiving court as making the issue between the parties *res judicata* if the foreign court was one which, in the eye of the receiving court, had “international jurisdiction”, or “jurisdiction in the international sense”. This is constituted by the submission of the defendant to the jurisdiction of the foreign court by appearance or by agreement; or by the presence of the defendant within the territorial jurisdiction of the foreign court. *Quoad ultra*, as one may say, nothing more is required and nothing less will do.

As to submission by appearance, there is at first sight little to be said about the principle of the matter, though there is rather more to say about the detail. If a defendant elects, voluntarily, to appear and to defend in the foreign court, he can hardly complain if the result goes against him and he is held bound by the outcome, though the devil lies in the detail of “voluntarily”.¹⁰ As a defendant who has appeared in the proceedings would manifestly have taken the benefit of a decision in his favour, he cannot be heard to disavow the outcome when it goes against him. The common sense legal principles of *volenti non fit injuria*, of not being allowed to blow hot and cold, and probably others, encapsulate the broad reason why such a defendant should be bound to accept the outcome in the foreign court. Of course, one may question the detail, or pick at the edges of the principle. Suppose the defendant appeared under some form of constraint, or handicap; or sought to contest the jurisdiction of the foreign court;¹¹ or found that the claim was amended by the addition of new causes of action or new parties only after he had entered an appearance.¹² The question whether these are consistent or inconsistent with the plea that he submitted to the jurisdiction of the foreign court is an interesting, and not necessarily a minor, one. But the principle is that those who submit by appearance are bound by their appearance; and its broad effect is clear enough. Our first jurisdictional question will therefore be whether submission by appearance in the foreign court should be as conclusive as it currently is on the recognition of foreign judgments; the answer will be rather short.

The common law also has it that those who submit by contract or agreement to the jurisdiction of a foreign court are bound to accept the outcome just as clearly and certainly as if they had submitted by appearance. The fact that the defendant failed to answer the summons to the foreign court, even though he had contracted to do so, is regarded as irrelevant: his submission to the judgment is just as effective as if he had appeared in the proceedings themselves. Issues may arise as to the scope of the agreement,¹³ or as to its continuing legal effectiveness; and sub-issues may derive from the question whether the receiving court is obliged to follow the view of the foreign court on the scope and effect of the agreement to submit.¹⁴ But the principle is clear enough: submission by agreement is enough to constitute submission to the jurisdiction of the foreign court. Our second jurisdictional question is to ask whether this is quite right, and what it actually means.

The third basis on which the jurisdiction of the adjudicating court may be rested is that the defendant was present within the jurisdiction of the foreign court when the proceedings

¹⁰ Compare *Henry v. Geoprosco International* [1976] Q.B. 726 (Eng. C.A.); *Civil Jurisdiction & Judgments Act 1982* (UK), 1982, s. 33; *WSG Nimbus Pte. Ltd. v. Board of Control for Cricket in Sri Lanka* [2002] 3 Sing.L.R. 603 (Sing. H.C.).

¹¹ See the cases in the previous note.

¹² *Murthy v. Sivajothi* [1999] 1 W.L.R. 467 (Eng. C.A.).

¹³ *S.A. Consortium General de Textiles v. Sun & Sand Agencies Ltd.* [1978] Q.B. 279 (Eng. C.A.).

¹⁴ From England, compare *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, ss. 32, 33 with *Desert Sun Loan Corp. v. Hill* [1996] 2 All E.R. 842 (Eng. C.A.).

were instituted.¹⁵ Where the institution of proceedings depends on the service of the writ, and in deference to the ineradicable popular belief that process is served when, but not unless, the defendant is touched with it, this is known as “tag” jurisdiction. Though there has been some uncertainty whether the rule was formulated in terms of presence or residence within the jurisdiction of the foreign court, and some support for the view that either one or the other will do,¹⁶ the tradition of the common law is to regard this as sufficient and to leave it at that, no matter that the presence of the defendant at the institution of the proceedings was the only connection between the dispute and the foreign court. Here also one may question the details, such as whether the defendant’s physical connection is enough to constitute presence: a significant issue when the defendant is an artificial person whose presence is in some sense a legal fiction. But this will be our third jurisdictional question: should presence of the defendant be a condition sufficient to establish the jurisdiction of the foreign court?

And there is no other basis on which the common law, traditionally at least, recognized the jurisdictional competence of the foreign court. The fourth jurisdictional question to be considered is, therefore, whether there should be further grounds on which the receiving court in a common law jurisdiction should acknowledge as sufficient the connection with the foreign court. Of course, the fact that a judgment will not be recognized in the receiving state, or in any receiving state, does not make it any the less a judgment so far as the foreign court is itself concerned. Indeed, there is much to be said for the view that if a plaintiff wishes to obtain a judgment which will be of effect only within the territory of the foreign court, and if the foreign court is being asked to render a judgment which will have only this territorially-limited effect, the rules of jurisdiction which it operates may be justifiably different. But that is a story for another day.¹⁷ We will proceed to look at the four jurisdictional questions.

III. THE BASES OF ACCEPTABLE INTERNATIONAL JURISDICTION

The aim of this section is to give further thought to some aspects of the common law’s approach to what constitutes international¹⁸ competence on the part of the foreign court. We will start with the most straightforward one.

A. *Submission by Appearance*

What could be more natural than the proposition that, if a defendant voluntarily¹⁹ appears in the foreign proceedings and defends the claim, he will be held to accept the decision of the court if it goes against him? The decision to appear cures all potential objections to the

¹⁵ For this as the material time, see *Adams v. Cape Industries plc.* [1990] Ch. 433, 518 (Eng. C.A.).

¹⁶ In England, at least, presence is sufficient: *Adams v. Cape Industries plc.*, *supra*; and residence will probably suffice as well: *State Bank of India v. Murjani Marketing Group* (27 March 1991) (Eng. C.A.).

¹⁷ Until recently in England, and possibly still elsewhere, originating process could be issued and marked as being “not for service out of the jurisdiction”. Maybe the law should develop the idea that a plaintiff should be able to institute proceedings for a judgment not to be enforced out of the jurisdiction. If this were possible, any application for leave to serve out on a defendant not within the jurisdiction would not obviously require the forum to be the natural one for the trial of the action (as *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (Eng. H.L.) would otherwise require).

¹⁸ That is, competence for the purposes of recognition of judgments. No attention will be directed to the question whether the court was competent as a matter of its own domestic law.

¹⁹ The detailed definition of “voluntary” is not examined here. Of course, if it has a meaning which incorporates too much pretty unwilling appearance, (*cf. Henry v. Geoprosco International* [1976] Q.B. 705 (Eng. C.A.), before this was reversed by *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, s. 33.) the arguments made here will need modification.

jurisdiction of the foreign court,²⁰ and even in those countries which have moved far away from the traditional common law, there is very little questioning the absolute sufficiency of an appearance to establish the jurisdiction of the foreign court. Writing for the majority of the Supreme Court of Canada in *Beals v. Saldanha*,²¹ Major J. put it this way:²²

In light of Canadian rules of conflict of laws, [D] attorned to the jurisdiction of the Florida court when he entered a defence to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment. As such, irrespective of the real and substantial connection analysis, the Florida court would have had jurisdiction over [D] for the purposes of enforcement in Ontario.

Only LeBel J., who dissented in the result, cast any doubt at all:²³

Another example is the common law rule that an appearance solely for the purpose of challenging the jurisdiction was an attornment to its jurisdiction Circumstances such as these may not amount to a real and substantial connection, and in my view they should not continue to be recognized as bases for jurisdiction just because they were under traditional rules.

Even he seems to rest his objection on the proposition that submission by appearance is not sufficient to establish jurisdictional competence when the appearance was made only to challenge the jurisdiction.²⁴ The overwhelming balance, perhaps the totality, of authority is that submission by appearance is enough, at least when that appearance is not limited to the sole purpose of challenging the jurisdiction. Even so, if one accepts that voluntary appearance is a basis for finding submission, does it follow that this submission is to be seen as unconditional,²⁵ and as submission not just to the adjudication but also to the subsequent enforcement of the judgment? It may be contended that the submission is to the foreign court's adjudication, but is not a submission to enforcement of the judgment once given. The point is developed further in relation to submission by agreement.

B. *Submission by Agreement*

Hardly any more authority exists to question the basic proposition that if there is an agreement which nominates the foreign court as one with jurisdiction to adjudicate, a judgment from that court, which falls within the four corners of the agreement, will be entitled to recognition at common law. One explanation for this phenomenon is that the prior agreement is taken to be of the same force and effect as a submission by appearance, which was what the defendant promised to make. For this, two justifications may be proposed. First, it may be said with some force that the defendant cannot be heard to derive advantage from the legal wrong done by his failing to appear in the foreign proceedings. Secondly, but rather less convincingly,²⁶ if equity looks on as done that which ought to be done, it should treat the defendant as though he had submitted by appearance, or prevent the unconscionable results of his claiming a personal or juridical advantage by his breach. Nothing which follows in this section denies the force of the arguments just set out. But there is another, rather less straightforward, way of looking at it, which has its roots in the law on

²⁰ As it does in relation to appearance in domestic proceedings.

²¹ (2004) 234 D.L.R. (4th) 1.

²² *Ibid.* at para. 34.

²³ *Ibid.* at para. 209.

²⁴ Canada lacks legislation corresponding to the *Civil Jurisdiction and Judgments Act* 1982 (UK), 1982, s. 33.

²⁵ But it cannot be completely so: *Murthy v. Sivajothi* [1999] 1 W.L.R. 467 (Eng. C.A.), *supra* note 12, identifies a context in which one has to identify the limits on what a party has submitted to by appearing to the foreign writ, and where the answer is not that if he has submitted he has submitted without limit.

²⁶ For equity does not specifically apply to the recognition and enforcement of foreign judgments.

jurisdiction agreements, and which pays closer attention to the purely contractual aspect of such agreements, asking precisely what the parties have agreed to, it causes rather more in the way of difficulty.

Suppose that the parties made a contract, the validity of which is not impugned, and which provided that the courts of Ruritania were to have exclusive jurisdiction over any disputes arising out of it. There are some more elaborate precedents in the books,²⁷ but very few make specific reference to the enforcement of foreign judgments. Suppose that a judgment is obtained in default of the defendant's appearance before the foreign court, and it is presented to the receiving court. Suppose that the receiving court then enquires into exactly what the defendant had contractually agreed to do. Did his agreement that the courts of Ruritania were to have jurisdiction necessarily mean that the defendant has promised also to abide by any judgment issued by the courts of Ruritania outside the territory of Ruritania? The answer is not obvious; the matter calls for further inspection.

Conflict of laws orthodoxy, as it applies to agreements on jurisdiction, accepts that the interpretation of an agreement on jurisdiction is a matter for the proper law of the contract in which it is contained; and that when it comes to the enforcement of these agreements, a court is likely but it not bound to grant specific enforcement of the agreement.²⁸ A developing jurisprudence in England considers that breach of a jurisdiction agreement may also lead to a damages remedy: at least, this is the view of the English courts in relation to a jurisdiction agreement for the English courts which has been broken by taking proceedings in another court.²⁹ Now cases in which the English courts encounter jurisdiction clauses nominating the English courts, the agreement will usually be governed by English law, and the enthusiasm for specific enforcement reflects the view that where the parties have chosen an English court, the court should do what it may to bolster that choice. It is also well established that where English law is the *lex contractus*, the scope of the agreement on jurisdiction will tend to be given a broad and generous construction, rather than a narrow and restrictive one.³⁰ But when one is dealing with the recognition of a foreign judgment from a prorogated court, the English court *qua* receiving court will usually be dealing with a foreign jurisdiction agreement, and any question as to its construction will be for a *lex contractus* which may not be English law. What if this law is clear that the agreement on jurisdiction does not connote any agreement to the recognition of judgments?

When it comes to the enforcement of judgments, two further questions therefore arise. First, does a jurisdiction agreement for the courts of Ruritania amount to or include an enforceable contractual promise that the defendant will not only accept that jurisdiction, but will accept or acquiesce in the enforcement of the judgment in any jurisdiction and by order of any court from China to Peru? And does it matter if the answer is no? Secondly, does a jurisdiction agreement amount to a promise to pay any sums adjudged due, even without a further judicial order by way of enforcement of the judgment, with the consequence that the foreign judgment debt could, for example, be proved in an insolvency without further ado? And so circumvent some of the restrictions on the enforcement of foreign judgments

²⁷ If one may be forgiven the self-reference, A. Briggs & P. Rees, *Civil Jurisdiction & Judgments* 3rd ed. (London: Lloyds of London, 2002), Appendix VII, examines such a clause.

²⁸ Many cases have said so, but *Donohue v. Armco Inc.* [2002] 1 Lloyd's Rep. 425, [2001] UKHL 64 (Eng. H.L.), a case on enforcement by injunction, is in effect the leading case on enforcement by decree of specific performance.

²⁹ *Union Discount Co. Ltd. v. Zoller* [2002] 1 W.L.R. 1517, [2001] EWCA Civ 1755, (Eng. C.A.); *A/S D/S Svendborg D/S of 1912 v. Akar* [2003] EWHC 797 (Eng. H.C.); and see D. Tan & N. Yeo, "Breaking promises to litigate in a particular forum: are damages an appropriate remedy?" [2003] L.M.C.L.Q. 435; C. H. Tham, "Damages for breach of English jurisdiction clauses: more than meets the eye" [2004] L.M.C.L.Q. 46.

³⁰ *The Pioneer Container* [1994] 2 A.C. 324 (H.K.P.C.), but which is taken to be conclusive as a matter of English law also. In this respect, English law may well be at some distance from those civilian systems which traditionally place greater weight on a defendant's right to defend at home, and which take a more wary view of jurisdiction agreements.

under the law of the receiving court, such as those preventing the enforcement of judgments for multiple damages?³¹

1. *An agreement to abide by the judgment and to not oppose enforcement?*

As to the first of these, that the agreement on jurisdiction is to be read as or as containing a contractual agreement to abide by and not challenge the judgment of the nominated court, there is room for doubt. Though it would involve a question of construction, an agreement that a court has jurisdiction seems most naturally to mean that its jurisdiction to adjudicate will not be put in dispute before that court. But agreeing a court's jurisdiction to adjudicate does not necessarily connote an acceptance of the enforceability of the judgment in courts outside the chosen one. A party may even be willing to agree to the jurisdiction of a court precisely because he has no local assets, believing that a judgment against him will not be easily enforceable. Alternatively, he may not have agreed to enforcement in a country of the plaintiff's choice where (for example) execution may deprive him of the tools of his trade, or even his personal liberty. The simple point is this: to accept that a court shall have jurisdiction is to accept that it is entitled to adjudicate. What happens after that may also be the subject of further contractual agreement, but if this is not expressly dealt with in the jurisdiction agreement, it is necessary to identify the proper legal basis for construing or implying anything about the enforcement of judgments into a simple agreement on jurisdiction. And it is all the more difficult if one considers the defences which may be raised to answer an action brought on the judgment. There is no current doubt that a receiving court in a common law country will allow a defence of fraud to be pleaded (though precisely what is admissible under this head will vary from country to country, as we shall see), and it is certain that defences founded on natural justice and public policy may be raised as well. Does this mean that the agreement on jurisdiction is to be construed as an agreement to accept the enforceability of the judgment in any court, subject to the right to raise such defences as may be available under the law of the receiving court? If it is, it is still hard to see that all this can be implied into a concise and standard form agreement on jurisdiction: neither the officious bystander, nor the regulator of business efficacy, seems likely to say so. Of course, if the parties agree that a judgment from the courts of Ruritania may be enforced in another country, then even if this may not bind the courts of such other country, it will pave the way for an argument that it is a breach of his contractual promise for the defendant to resist enforcement on these jurisdictional grounds, with the possibility of an action for damages for breach of contract if enforcement is resisted. But if the clause adds wording such as that the party concerned, "agrees that a judgment or order of a [Ruritanian] court in a dispute falling within this agreement on jurisdiction is conclusive and binding on [X] and may be enforced against him in the courts of any other jurisdiction"³² there should be little difficulty in concluding that the defendant is contractually obliged to accept the enforceability of the judgment against him. But it bears repetition³³ that if that express contractual agreement is absent, and one asks a precise question which seeks to discern what the defendant has actually bound himself to, the answer may be that he agreed to

³¹ Such as *Protection of Trading Interests Act 1980* (UK), 1980. But there will be limits: it was held in *Government of India v. Taylor* [1955] A.C. 491 (Eng. H.L.) that the exclusionary rule which prevents a court enforcing the penal or revenue laws of another state did also serve to prevent a claim by a foreign government to prove in an insolvency when the debt owed was by way of taxes.

³² See further *supra* note 27 at 629.

³³ Because no-one seems to stop to ask the question. Also see, in the context of waiver of state immunity and the extent to which it operates, *Duff Development Co. Ltd. v. Government of Kelantan* [1924] A.C. 797 (Eng. H.L.); *State Immunity Act 1978* (UK), 1978, s. 13(3); *State Immunity Act* (Cap. 313, 1985 Rev. Ed. Sing.), s. 15(3). I am indebted to Andrew Dickinson for drawing this potential analogy to my attention.

jurisdiction but made no agreement concerning enforcement of the judgment. Why should it be treated as being more than it was?

On the other hand, and in support of a cruder view, Mustill & Boyd assert that where parties have entered into an arbitration agreement, “every submission to arbitration contains an implied promise by each party to abide by the award of the arbitrator, and to perform his award”.³⁴ No authority is cited to vouch for this proposition, which is presumably limited to arbitration agreements governed by English law where English notions of construction and implication are at home. It is far from clear that, even if this were generally true of arbitration agreements, it is correct to regard arbitration and jurisdiction agreements as being fully interchangeable; and doubts are therefore not resolved by this observation.³⁵

2. *An agreement to pay sums adjudicated which may be proved in insolvency without further ado?*

If parties make a contract of sale which provides for the price to be determined by an arbitrator in default of agreement, there is no doubt that when the arbitrator has fixed a price, the contract is valid and binding in those terms.³⁶ Now if the parties make a contract which provides for arbitration of differences, the award of the arbitrator may most commonly be enforced by bringing judicial proceedings to give it the additional force and effect of a judgment which may in turn be enforced as a judicial order.³⁷ The position is similar³⁸ where the parties have agreed to confer exclusive jurisdiction on a foreign court and it has adjudicated. But legal proceedings to obtain judgments based on prior arbitrations or foreign adjudications are not always successful. Is it open to a plaintiff to contend that the award of the arbitrator or the decision of a foreign court where that foreign court was given jurisdiction by the parties’ contract, creates a contractual debt which may be enforced by admission to proof in insolvency without the need to obtain a confirmatory judicial order or *exequatur*? A contractual analysis may suggest that it should.³⁹ Does the fact that the decision on liability to pay has been made in a commercial arbitration, or by a foreign court, make any significant difference? It is no answer to say that a foreign judgment has no effect as such in England, for the present hypothesis does not seek to accord it the effect of a *judgment*, entitled to be enforced by execution, but the status of a contractual debt. So far as is known, no reported case deals with this in the context of foreign judgments.⁴⁰ But the principle does not look a difficult one. It suggests that the law on jurisdiction clauses as this has developed in disputes at the outset of litigation has yet to be fully worked out and applied to the same issues where these arise for consideration after judgment.

3. *Provisional conclusions about submission by agreement and by appearance*

The previous reflections were a partial diversion from the main course of the argument. But they do suggest that the law on foreign judgments may have more to learn from the

³⁴ M. Mustill & S. Boyd, *Commercial Arbitration* 2nd ed. (London: Butterworths, 1989) at 26.

³⁵ See also on this general point, C. H. Tham, “Damages for breach of English jurisdiction clauses: more than meets the eye.” [2004] L.M.C.L.Q. 46.

³⁶ *Foley v. Classique Coaches Ltd.* [1934] 2 K.B. 1 (Eng. C.A.).

³⁷ In England, *Arbitration Act 1996* (UK), 1996, Pt III; in Singapore, *International Arbitration Act* (Cap. 143A, 2002 Rev. Ed. Sing.), Pt III; and generally pursuant to national legislation implementing the New York Convention.

³⁸ Though the legal basis for the application for an order will be different.

³⁹ Though if the debt arises under a foreign penal or revenue law, it will not be admitted to proof: *Government of India v. Taylor* [1955] A.C. 491 (Eng. H.L.).

⁴⁰ The point does not appear to be dealt with in I. Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford: Clarendon Press, 1999).

law on civil jurisdiction, and even from the contractual doctrine of certainty of terms, than is sometimes supposed. One therefore has to ask whether the true reason for regarding submission by agreement as a sufficient reason to enforce a judgment is (a) that it follows as a matter of common law from any agreement to submit, or (b) that it may follow,⁴¹ but only as a matter of construction from the parties' agreement. It is suggested that the current trend of authority in relation to such agreements as they affect civil jurisdiction to adjudicate is to pay primary attention to their construction. To conclude that when parties stipulated for an effect before the courts of country *A* they also made an agreement in respect of the courts of country *B* may be rather too bold for comfort. The argument has not yet been successfully advanced to a court; it may be that a judge worth his or her salt would find a way to deal with its potential awkwardness. Even so, submission by agreement may be more puzzling than is currently acknowledged. At its heart, the traditional learning seems to suppose that the agreement to submit is accompanied, in law if not also in fact, with an agreement to accept the enforceability of the judgment. It is questionable whether this should be accepted; but until the point is taken by a defendant and accepted by a court, it is enough to say that those who choose to submit in advance are bound by the consequences of their choice.

On the other hand, if the point is taken that the legal effect of a submission depends upon the scope of the submission, and it is seen to have some merit, the argument about the scope of submission will apply also to those who submit by appearance, for it may also be said of these defendants that they submitted to the adjudication of the foreign court but frankly did not agree to accept the international enforcement of any judgment given against them. The real foundation for the analysis may be the traditional view⁴² that a foreign judgment is enforceable by reason of the "doctrine of obligation". This is all well and good until one asks exactly what it means. If the obligation is generated by the behaviour of the losing party in submitting, one way or another, to the jurisdiction of the foreign court, any argument which tends to show that he did not so submit, or that his submission was limited in scope, will be reflected in the obligation which arises from it. Of course, if one shifts the goalposts, and retorts that the obligation is not created by the parties or their actions, it is very hard to understand what kind of obligation we are talking about. There is work for someone to do in looking at the nature of the obligation to obey a foreign judgment; in the present context to pursue it further would be too much of a diversion. For now, it is enough to note that the law on submission by appearance and by agreement is not so well thought out that it needs no further thought.

C. Jurisdiction by Presence

If the basis for enforcing a foreign judgment is that there was enough of a connection between the claim and the foreign court to warrant giving its judgment international effect, one has to wonder how the presence, which may be only fleeting, of a defendant is sufficient. It was rejected in the early days of the law's development by the Supreme Court of the Straits Settlements.⁴³ A British merchant resident in Singapore had crossed the straits to Johore, where he had been served with a summons, which he had not answered. Rejecting the argument

⁴¹ And will be problematic when it does not, as it may not.

⁴² Often said to be traced to *Godard v. Grey* (1870) L.R. 6 Q.B. 288 (Eng. Ex. Ct.) and *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155 (Eng. Ex. Ct.), but where it was used to justify the propositions that error by the foreign court was not reviewable, and reciprocity was not a basis for recognition of international jurisdiction. The court did not articulate the theoretical basis for the obligation, preferring instead simply to assert its existence and its sufficiency. In fact, Parke B. had articulated the proposition in *Williams v. Jones* (1845) 13 M.&W. 628, 633, 153 E.R. 262, 265 (Eng. Ex. Ct.) to explain why an action of debt lay on the judgment of a local county court. It does not appear that anyone troubled to enquire as to the theoretical basis of the obligation.

⁴³ *RMS Veerappa Chitty v. MLP Mootappa Chitty* [1894] II S.S.L.R. 12 (Straits Settlements. S.C.).

that the defendant's presence sufficed to give the Johore court international jurisdiction, the Chief Justice observing that were it otherwise, "every merchant who spends a Sunday in Johore renders himself liable to have his business rights and obligations adjudicated upon by a [foreign] judge applying [foreign] law".⁴⁴ The Chief Justice saw the principle in terms of whether the defendant had submitted to the foreign court, and declined to infer submission from the bare fact of a day trip. His reference to the need to find a submission has a strikingly modern ring to it; but perhaps because the case was not widely known, his principled objection to recognition on the basis of presence made no impact on the common law, which came to persuade itself that presence was enough. But such a rule lends itself to use or abuse in several ways, by plaintiffs as well as by defendants. Where liability is alleged to be owed by a corporation, a claimant may find that the proper defendant to his claim is not present within the jurisdiction, and that an entity which is present is not the proper defendant. *Adams v. Cape plc.*⁴⁵ presents the classic illustration of a corporate group organizing its affairs so that the asset-bearing company was not present where the lethal business activity⁴⁶ was carried on and the plaintiff was injured, and that whatever was present within the place where the injury was sustained was not the part of the organization which the plaintiff wishes to sue. But a plaintiff may take advantage of the rule also, and if a defendant is served while only transiently within the jurisdiction, it is clear from this same authority that as far as English law⁴⁷ is concerned, the international jurisdiction of the foreign court is sufficiently established.

It is not only in English law that this proposition finds support. Not even the Supreme Court of Canada has cast serious doubt on it. In *Morguard Investments Ltd. v. De Savoye*⁴⁸, it was expressly accepted that "tag" jurisdiction remained a sufficient establishment of a foreign court's jurisdiction. As LaForest J. put it:

The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments—in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action, or when he submitted to its judgment whether by agreement or attornment. In the first case the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

The majority in *Beals v. Saldanha*⁴⁹ did not express a contrary view. Only LeBel J., whose dissent has already been referred to, saw the need to reconsider the old law:⁵⁰

In some cases, however, the traditional grounds may be more arbitrary and formalistic than they are fair and reasonable. Under traditional rules, for example, jurisdiction could be acquired by serving a defendant who was present within the jurisdiction, even if her presence was only fleeting and was completely unconnected to the action, and in the absence of any other factor supporting jurisdiction ...

Aside from this, there is almost nothing in the case-law to lend support to the view that presence ought to be de-recognised as a basis for international jurisdiction. It seems to be

⁴⁴ For the submission advanced by the plaintiff was not restricted to the enforceability of a judgment in respect of activity carried on in Johore. On a separate and personal note, the writer is, at the time of writing, a British subject resident from time to time in Singapore and who is, when there, rather partial to visiting Johor on a Sunday. It is undeniable that the views of the former Chief Justice have a strikingly comforting aspect.

[1990] Ch. 433 (Eng. C.A.); and see also *Lubbe v. Cape plc.* [2001] 1 W.L.R. 1545 (Eng. H.L.).

⁴⁶ Asbestos production leading to employee death from dust-related diseases.

⁴⁷ And the rest of the common law world.

⁴⁸ [1990] 3 S.C.R. 1077 (S.C.C.). The quotation is from 1103–4.

⁴⁹ (2004) 234 D.L.R. (4th) 1.

⁵⁰ *Ibid.* at para. 209.

irrelevant that if the facts were reversed, the receiving court would not accept that it had, or would on application refrain from exercising, jurisdiction over a defendant. The English courts have noticed the apparent oddness of this, but with a degree of calm which can seem almost complacent.⁵¹ The Canadian courts, which is rather more surprising, risk suggestions of incoherence. In *Morguard*, LaForest J. accepted that “tag” jurisdiction was sufficient to establish the international jurisdiction of the foreign court. In *Beals*, however, the point was not addressed by the majority. Major J. did say that a fleeting connection with a foreign jurisdiction was insufficient to establish jurisdictional competence, but it is clear that he was referring to ephemeral business activity within the jurisdiction of the foreign court, not with fleeting presence for the purpose of personal service.⁵² Yet in *Amchem v. British Columbia Workers’ Compensation Board*,⁵³ Sopinka J. had said, in effect, that if a foreign court failed to observe the standards and requirements of *forum non conveniens*, this would pave much of the way to the grant of an anti-suit injunction to restrain the respondent from proceeding in that foreign court. Taken together, this means that if the foreign court has asserted jurisdiction without regard to the standards of *forum non conveniens*, it would be possible for an applicant to obtain an anti-suit injunction to restrain the proceedings, but if such relief is not granted, the foreign judgment will be recognised as having come from a jurisdictionally competent court. If these propositions sit together, it is only very uncomfortably that they do.

One solution to any problem which is acknowledged to follow from the rule that presence establishes jurisdictional competence may be to merge the basis of jurisdiction by presence into a larger category of jurisdiction by reason of a real and substantial connection, or jurisdiction because the court was the natural forum.⁵⁴ This would have the effect that jurisdiction based on presence would require the defendant to have a specified connection to the court, as well as requiring the court having a specified connection to the claim. Or, to put it another way, the principle of the natural forum, or of a court’s having a real and substantial connection, would be used to narrow, rather than to widen, the jurisdictions recognized as sufficient for competence.⁵⁵ We will return to this below.

D. No Other Basis of Jurisdictional Competence

And according to the traditional common law, that is that. There are no other grounds of jurisdictional competence. So the fact that the defendant has carried on business within the jurisdiction of the foreign court at the time the claim arose, taking advantage of the legal and economic conditions in that country, even when coupled with the fact that the claim arose out of that activity, is apparently irrelevant to the jurisdictional competence of the foreign court. This seems odd. So also does the fact that even though the foreign court would have been recognised as the natural forum for the resolution of the dispute, this is irrelevant to the recognition and enforcement of its judgment in England. It is as if those vivid principles which have revolutionized the jurisdiction of courts in common law countries,⁵⁶ and which have even been used in Canada to rationalize the law on anti-suit injunctions, have no bearing whatever on the receiving court’s assessment of whether a foreign court had international jurisdiction to adjudicate. In this respect, the traditional common law is surely open to sustained question.

⁵¹ See *Adams v. Cape plc.* [1990] Ch. 433 (Eng. C.A.) at 518, where the court observes that arguments which it notes might justify an international convention.

⁵² *Supra* note 49 at para. 32.

⁵³ [1993] 1 S.C.R. 897 (S.C.C.)

⁵⁴ As to which, see further below in the analysis of *Beals v. Saldanha*.

⁵⁵ An argument ventured many years ago by the present writer: A. Briggs, “Which Foreign Judgments should we recognise today?” (1987) 36 I.C.L.Q. 240.

⁵⁶ *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (Eng. H.L.).

But as a matter of Canadian law, it suffices that the foreign court was one which had a real and substantial connection to the dispute. This radical departure from the common law, in *Morguard Investments Ltd. v. De Savoye*, and *Beals v. Saldanha*, has not yet been adopted by any other common law jurisdiction, but then cases on the recognition of foreign judgments do not come along everywhere and every day before a court with authority to strike out along a new path. However, the common law in Australia has not departed from the conservative English model on the jurisdictional competence of a foreign court. The statement of Australian law by Nygh and Davies⁵⁷ is entirely consistent with English law. The only discoverable occasion in recent years on which a court in Australia had cause even to examine the rules on jurisdiction was the decision of the District Court of Queensland in *Martyn v. Graham*,⁵⁸ where the summary in Nygh and Davies was simply adopted as entire and correct. The New Zealand Law Commission⁵⁹ has raised the question, in the context of the law on electronic commerce, whether received common law rules for the recognition of judgments should be altered by legislation in New Zealand, but it is clear from its question that it finds the common law in New Zealand also to be entirely in accordance with the English model. So far as can be discovered, neither Ireland, nor Singapore or Malaysia,⁶⁰ has departed from English law on what is required to establish the jurisdictional competence of a foreign court.

Yet the strength of the criticism from the Supreme Court of Canada, and the inconsistencies which otherwise exist within the law, requires one to reconsider the direction which the law should take. To begin with, one should ask whether the rules on recognition should be widened, following what was done in Canada in *Morguard* and *Beals*. Suppose that the plaintiff has instituted proceedings in a foreign court which of all courts has the closest connection to the facts of and in the dispute,⁶¹ or which may be regarded as the natural forum for the resolution of the dispute. The plaintiff will have sued in the court in which, perhaps, it was most proper for him to sue in, but also in the court in which the interests of justice can best be served. If the defendant has elected not to appear, and judgment has been entered in default of appearance or defence, what good reason is there to withhold recognition from the judgment?

IV. *BEALS v. SALDANHA*

*Beals v. Saldanha*⁶² provides a convenient set of facts upon which to test the arguments. Saldanha, resident in Ontario, purchased a plot of land in Florida for US\$4,000, and a couple of years later, sold it to Beals, resident in Florida, for US\$8,000. There was some confusion as to the actual plot which had been sold,⁶³ with the result that Beals started to build on land which he thought he owned but did not. When the error came to light, and Beals discovered what he had actually been sold, he sued Saldanha for rescission of the contract of sale and for damages.⁶⁴ For reasons which included various misunderstandings

⁵⁷ P. Nygh & M. Davies, *The Conflict of Laws*, 7th ed. (Australia: Butterworths, 2002) at 169.

⁵⁸ [2003] Q.D.C. 447, November 13th 2003 (Qld. D.C.).

⁵⁹ N.Z., Law Commission, *Electronic Commerce Part One: A Guide for the Legal and Business Community*, Report No. 50, October 1998 at Chapter 6.

⁶⁰ Nor any other common law jurisdiction, always excluding the United States.

⁶¹ On the question of exactly what (parties? dispute? facts? any combination of these?) needs to satisfy the real and substantial connection to the foreign court, see LeBel J. in *Beals v. Saldanha*, *infra* at paras. 177 and 182, concluding that one looks for “the totality of the connections between the forum and aspects of the action”.

⁶² (2004) 234 D.L.R. (4th) 1.

⁶³ Saldanha had two plots of land lying adjacent to each other.

⁶⁴ He also sued various local Florida parties, but settled with them (secretly), leaving his grotesque claim to be advanced against Saldanha alone.

of the procedural law of the state of Florida,⁶⁵ Saldanha did not defend the action. The Florida court, on the advice of the jury, gave judgment for Beals for reimbursement of sums paid (US\$14,000), plus loss of profit (US\$56,000). It then trebled this sum to US\$210,000. To this it added punitive damages of US\$50,000; and ordered interest at 12%.⁶⁶ By the time the case reached the Supreme Court of Canada, the judgment debt had grown to US\$750,000.⁶⁷ By a majority of six to three, the Supreme Court of Canada held that the judgment was entitled to be enforced in Canada, dismissing with costs the appeal from the Ontario Court of Appeal.⁶⁸ The outcome beggars belief. No lives were lost. The land was neither dangerous nor defective. There is plenty of other land in Florida, and a rampantly free market on which it could be bought. The defendants were ordered by a court in Florida to pay back the purchase price thirty times over, plus interest at a rate which is staggering when compared to market rates for the time. But disgraceful though the decision was it provides an excellent basis for a review of the past and future of the law on the recognition and enforcement of foreign judgments.

The dissenters⁶⁹ focused on the practical and procedural difficulties faced by Saldanha, and the issues of natural justice and public policy which they touched: these will be looked at below. But there was general agreement that Florida was to be seen as a foreign court of competent jurisdiction: the dispute had a real and substantial connection to Florida, for by owning⁷⁰ and selling land in Florida, Saldanha could not claim to be taken by surprise, or to be affronted, when a Florida court exercised jurisdiction over a dispute concerning the sale of that land. Indeed, if one were to go further and to ask whether Florida was the natural forum for the resolution of the dispute, the answer would also be yes.

So was there any good reason to deny the jurisdictional competence of the Florida court? An affirmative answer can really only be given if the test is intrinsically unsuitable for adoption, or because in its practical operation it places an unfair burden on one of the parties to the litigation. The first suggestion is unsustainable. It is thirty years too late⁷¹ to deny the primacy of the natural forum as the keystone of the common law's rules on jurisdiction and the exercise of jurisdiction, and even if the Canadian preference in this context for a court which has a⁷² real and substantial connection may be slightly less likely to point to "the" right place in which to sue and be sued, it is unlikely to diverge very far from a natural forum test. The connection to the foreign court must be substantial;⁷³ at it appears that it must be satisfied in relation to the foreign court, the subject matter of the action and the parties to it.⁷⁴ There was no real reason to doubt that, however the test was to be worded, the facts of *Beals v. Saldanha* would satisfy it.

More problematic, perhaps, was the dilemma of the informed and conscientious defendant. Saldanha was a relatively uninformed defendant, who had not had legal advice until late in the day,⁷⁵ and whose decision not to defend an action supposed to be trivial was

⁶⁵ For example, that each time the plaintiff was amended, a fresh denial or defence had to be entered, the old one having lapsed.

⁶⁶ At least, this was Binnie J.'s analysis of the matter: at para. 97. It is not clear from para. 246 that LeBel J. altogether agreed; and Major J. did not go into the details of the assessment of damages.

⁶⁷ At a notional conversion rate of C\$4 = US\$3. Binnie J. regarded the result as "Kafka-esque": at para. 88.

⁶⁸ Below: (1998) 42 O.R. (3d) 127 (Ont. Ct. Gen. Div.), (2001) 54 O.R. (3d) 641 (Ont. C.A.).

⁶⁹ Binnie J. (with whom Iacobucci J. agreed), and LeBel J.

⁷⁰ Major J. at para. 33 considered that it was the original purchase by Saldanha of land in Florida, rather than the sale of it to Beals, which exposed Saldanha to the international jurisdiction of the Florida court.

⁷¹ *The Atlantic Star* [1974] A.C. 436 (Eng. H.L.) is where it all began, except for Scots, in whose case the principle is into its second century.

⁷² How many more than one does this suggest may exist in any given case?

⁷³ Major J., at para. 32.

⁷⁴ Major J., at para. 34, but *cf.* LeBel J. at paras. 177 and 182.

⁷⁵ In fact, not till after the judgment in default, at which point his advice was that the judgment could not be enforced in Canada so need not be set aside in Florida. This legal advice, from an Ontario lawyer, is implicitly criticized at various points: Major J. at paras. 10 and 69; Binnie J. at para. 90; and LeBel J. at para. 260 who

not hard to understand. But what of a defendant who, served with a writ and given a tight timetable for appearance, is unable to predict with any confidence whether the foreign court is, or (which is the real test of it) will be held long after the event to have been, the natural forum? Is it fair and reasonable to structure a legal test which may be so hard for reasonable and conscientious people to operate by? Major J. avoided the issue, preferring to hold that the test was fair and appropriate in the instant case, and leaving for decision another day the case where it may not be so clear. The dissenters did not take a very different view, for even LeBel J. would have asked whether it was “fair” to enforce a foreign judgment from a court which had the connection which it did to the dispute, before concluding that there was enough of a real and substantial connection to the dispute. None of this helps a defendant who may wish to know, and quickly, whether he should appear in the foreign proceedings. It is no answer to tell him that if the foreign court has a real and substantial connection to the dispute he would do well to appear before it. This is not the sort of advice one pays for.

The question is therefore whether the defendant’s dilemma furnishes a reason which is sufficient to overcome the attractions of the *Morguard* and *Beals* principle. More directly, the question is whether the defendant’s dilemma will be seen by a judge, faced with an enforcement claim against a local⁷⁶ defendant and judgment debtor, as sufficient to close the door to *Morguard*. Some may suspect that an English judge may approach the point by considering the impact of the law on an English defendant, and may be sympathetic to his dilemma. But the Supreme Court of Canada was prepared to see *Saldanha*, and anyone else who has interacted with the law and society of a foreign country, as undeserving of any such sympathy. One cannot say that a judge simply will not expose a defendant to such a risk. The Supreme Court of Canada just did.

V. JURISDICTIONAL COMPETENCES AND INDIVIDUAL DEFENCES

If *Beals* establishes that the common law can in principle live with the enforcement of judgments from the natural forum, or from a court which had a sufficiently real and substantial connection, it remains to ask whether this should be accompanied by the development of equally new defences to accompany the change in the law of jurisdiction. This depends on how the question in *Beals* was to be framed. Was it “should we accept a new basis of jurisdictional competence, assuming the defences to recognition stay as they are?” Or was it “should we accept a new basis of jurisdictional competence and develop any new defences which should accompany it?” It would be curious to say that one may develop a new basis of jurisdictional recognition without regard to the defences which will condition its application in practice. These defences,⁷⁷ which have remained surprisingly constant, all date from a century ago; but it would be ambitious to claim that they were eternal and universal. The defences were, as a matter of historical fact, developed alongside the traditional rules

said, without apparent irony, that the advice “turned out to be erroneous”. So far as one can tell from the judgments, the criticism is well wide of the mark. The lawyer had, in early 1992, advised that a Florida default judgment was not enforceable in Ontario, and that therefore there was no need for *Saldanha* to apply to the Florida court to have it set aside. As it turned out in 2003, this advice was rendered inaccurate by and only by the decision of the Supreme Court. But it was surely defensible when it was given. The decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 had been handed down only a year earlier; it had been concerned with the recognition of judgments from other Canadian provinces, and had said nothing to indicate whether its principles would apply to judgments from foreign countries. The advice was not inaccurate when it was given, unless one adheres to the quaint fable that Canadian common law had always been as *Beals* declared it in December 2003. Any conflicts lawyer in private practice, reading this, should ask what he or she would have advised *Saldanha* to do in 1992: to go to Florida, submit, and throw away any defensive shield, or just give Florida a wide berth in the future. Those professional indemnity insurance policies really must be kept up to date, particularly in Canada.

⁷⁶ The most likely case for an enforcement claim.

⁷⁷ Apart from fraud, which is discussed separately.

of jurisdiction under the common law. They were not developed in cases where a basis of jurisdictional competence was a real and substantial connection with the foreign court or for a case where the foreign court was the natural forum. What was the correct approach for the Supreme Court of Canada to adopt when considering the defences to recognition open to Saldanha?

What it did was plain enough. Major J. for the majority came close⁷⁸ to ruling out the possibility that new defences to recognition could be created. Binnie J. found that the effect of Florida's rules of procedure in the actual case was such as to produce a lack of natural justice,⁷⁹ which seems to suggest that the traditional defences were applied to the new ground of jurisdiction. But LeBel J. saw the point clearly; and proposed that if a new head of jurisdictional competence was to be devised, new defences, or new versions of old defences, were called for.⁸⁰ In a judgment which may be regarded as the best piece of common law⁸¹ craftsmanship in this area for a very long time, he saw that if one is to alter one part of the law on foreign judgments, one cannot avoid asking whether consequential alteration is called for elsewhere. He thought that it should and, subject to one small point, it is submitted that he was right.

But the effect of the majority judgment is that the new jurisdictional basis for recognition will be applied to produce only the recognition of default judgments. This is because Major J. accepted that the test of real and substantial connection would serve to widen recognition to cases not covered by the existing rules of presence, submission, or appearance. Binnie J. did not explore the issue; LeBel J. would have applied this new rule in substitution for the traditional rules, and would therefore have utilized the real and substantial connection test even where the defendant was present, or had submitted, or had appeared. One would have thought that Major J. would have seen the greatest need to consider the development of defences, as only he reserved the new jurisdictional rule for cases falling outside the traditional rules for recognition. But he was unwilling, at least on the facts of the case, to explore the issue of which defences should be available. By contrast, one might have expected LeBel J. to have accepted that as many cases will simply be transferred from an old jurisdictional rule to a new one, there will be less need to reconsider defences. But he was willing to go further and reconsider all the defences to see how they should be applied, on the express basis that *Morguard* had "greatly expanded"⁸² the category of enforceable judgments. This expansion can only have been by incorporating default judgments into the scheme (the contraction arguably brought about by regarding the traditional grounds as not necessarily sufficient to establish a real and substantial connection is not material to this point); and it is the recognition of default judgments which is therefore real trigger for the review of defences. But as will be seen, the submission advanced here is that the material distinction should not be between default and non-default judgments, but between consenting and unconsenting defendants.

VI. CONSENTING AND UNCONSENTING DEFENDANTS

If a defendant appears in the proceedings, or if the defendant has (on a true construction of his contract) agreed to be sued in a foreign court and has agreed to accept the enforcement of the judgment elsewhere, he has in a very clear sense bound himself to accept and live with the consequences of the litigation of his dispute in the foreign court. In a sense he should

⁷⁸ *Supra* note 62 at para. 42. He also held that none of the existing defences did avail Saldanha.

⁷⁹ On which ground alone he decided the case: not a new defence, but the application (as he saw it) of established principle.

⁸⁰ In some respect echoing a view expressed by Tan (*supra* note 9).

⁸¹ It is one of life's little ironies that LeBel J. was appointed to the Supreme Court of Canada from the courts of Québec, and not from one of the common law provinces.

⁸² *Supra* note 62 at para. 214.

be taken to know, and broadly to accept, what he has let himself in for, for he has taken a decision at the outset to litigate a specific dispute before a particular court.⁸³ The common law takes this view in relation to jurisdiction and agreements on jurisdiction. A defendant seeking to escape from his obligation to litigate in the court he has agreed to, by seeking to resist a stay of English proceedings brought in breach of contract and scrambling to avoid being consigned to the foreign court, will not easily be heard to complain about the quality of substantive or procedural justice available to him from that court. It was never better put than by Yong Pung How J. (as he then was) in *The Asian Plutus*,⁸⁴ when he said that “[i]f parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court, it is difficult to see how either party can in ordinary circumstances complain of the procedure of that court ... by choosing the court they have chosen the procedure”. It is a regrettable fact that some courts have fallen⁸⁵ short of taking so robust and clear-minded a view of the matter, and have been heard to utilize “yes, but ...” reasoning. But the forthright view of the Chief Justice of Singapore works equally well when a defendant complains about the enforcement of a foreign judgment. If the defendant has agreed, or has done the equivalent of agreeing, to the jurisdiction of the foreign court, the receiving court should be distinctly slow to admit evidence of failures⁸⁶ and shortcomings alleged to reduce the status of the judgment to one not entitled to recognition. It should be slow to construct general defences which will be easy to access; it should tell the defendant that he is estopped by his contract or his conduct, as the case may be, from seeking to oppose recognition of the judgment. But if the defendant neither agreed in advance to, nor appeared before, the foreign court,⁸⁷ recognition of the foreign judgment will proceed on some basis other than his consent to the particular proceedings: the justificatory basis of his informed consent (actual or deemed) to the proceedings taking place in that court will be absent.

To some extent, the analysis of the English Court of Appeal in *Adams v. Cape Industries plc.*⁸⁸ goes against this. Its justification for retaining presence as a basis of international jurisdictional competence was that if a defendant is present within the territory of the foreign court, he is taking the benefit of the local environment, and if summoned to court, must take the rough with the smooth,⁸⁹ as though his presence is akin to a submission to the jurisdiction of the foreign court. This is unconvincing,⁹⁰ except in the context of a judicial need to prop up a rule the court felt unable to depart from. It may explain why the defendant cannot complain that the foreign court had no business summoning him. It does not explain why this has any necessary ramification outside the territory of the foreign court. Certainly it cannot be said that it is akin to an agreement with the plaintiff to accept litigation in the foreign court. For this reason it seems to lie on the unconsenting side of the line. Of course, if the defendant acknowledges service and enters an appearance,⁹¹ he becomes a consenting

⁸³ This is a Big Point in the context of the present submission.

⁸⁴ [1990] 2 M.L.J. 449 (Sing. H.C.). See also *British Aerospace plc. v. Dee Howard Corp.* [1993] 1 Lloyd's Rep. 369 (Eng. H.C.).

⁸⁵ No citation of authority will be helpful, as there may always be several factors in play which give colour to the argument that proceedings should be heard in the local court despite the agreement to proceed elsewhere.

⁸⁶ Including a “failure” to spot that the plaintiff was a crook.

⁸⁷ That is to say, appeared for a purpose other than solely to contest the jurisdiction of the court.

⁸⁸ [1990] Ch. 433, (Eng. C.A.).

⁸⁹ *Ibid.* at 519. There was also some rather feudal observation about his owing temporary allegiance to the sovereign, and that being another reason why the competence of the foreign court should be recognized. This does sound a little odd, even in England. In a modern republic one hopes that such medieval nonsense would not be given a hearing. No doubt when in Rome, one does as Romans do, and that includes going to court when summoned. But it is quite another matter to say that this bespeaks choice, consent, or voluntariness on the part of the defendant; and quite different from saying that it establishes a nexus of agreement between the parties if one does not answer the summons.

⁹⁰ It was the very argument rejected by the Supreme Court of the Straits Settlements in *RMS Veerappa Chitty v. MLP Mootappa Chitty* [1894] II S.S.L.R. 12 (*supra* note 43).

⁹¹ Or who takes such other step as local law requires.

defendant, and crosses the line. Until he does, and all the while he refuses to acknowledge the summons, he is manifestly unconsenting to the jurisdiction of the court over him as defendant to the claim instituted by the plaintiff.

If the defendant is nevertheless to be bound by the judgment, it is for some other reason than his being *volens* as to the risks of litigation. So should the defences to recognition available to the defendant who agreed to be bound to litigation in the foreign court be identical to those which may be taken by a defendant who never did? Put in those terms, the answer must be negative. There is much to debate in defining the extent of the differences, but the defences available to the two classes of defendant cannot in principle be completely congruent. If one takes the cases on stays of proceedings seriously, and applies their logic here, it is obvious that the admissible defences for an unconsenting defendant must be more in number or wider in scope, or both. The two classes of defendant are not *in pari materia*. The traditional common law does not acknowledge this, but it should, whether or not it accepts the principle in *Morguard* and *Beals*.

VII. DEFENCES AND THE UNCONSENTING DEFENDANT

If we suppose that a judgment should be enforced because of a real and substantial connection between the dispute and the foreign court, there is no reason to withhold any of the defences currently admissible to defendants generally. The question is what further concession, if any, we should make to balance the fact that though there was a strong connection to the court, the defendant did not consent to litigate there. Four possibilities might be (1) a broader defence of natural justice, (2) a broader defence of public policy, (3) a requirement of clean hands or good faith, (4) a greater willingness to review the evidence and reasoning used by the foreign court. We then need to ask whether the defendant whose jurisdictional liability was his presence within the territorial jurisdiction of the foreign court should be treated any differently; and the submission is that he should not be. And while we are about it, it may be appropriate to stop referring to these defendants as being "in default". It may have a technical meaning which is precisely applicable to the facts, but it has connotations of wrongdoing or of wrongly not doing; and this may inhibit the proper evaluation of the defences which should be provided for. The foreign court may well regard the absent defendant as being in default: it is that court's summons, and it is its law which establishes whether there is default. But from the point of view of the receiving court the merits of appearance or non-appearance before the foreign court are different. Inexcusable absence, where the defendant consented to the jurisdiction but then went back on his word, is blameworthy and fully deserves to be called default. But excusable absence, where the defendant did not agree to attend court, or did not represent that he would, is different in quality. It is not obviously blameworthy, and it does not place the defendant in the same poor light. It is default only in a technical sense. If the available defences do depend on some rough assessment of who may be in the right and who in the wrong, this seems to be a distinction which has a good claim to respect. We will therefore proceed to explore the proposition that there is a basic distinction to be drawn between consenting and unconsenting defendants.

As to (1), the justification for allowing an unconsenting defendant a broader or more ample defence of natural justice would be that a complaint by the defendant that did not have a fair opportunity to defend himself should be generally inadmissible from the defendant who contracted to defend himself in that court or who volunteered to appear in the proceedings, but admissible with more generosity of interpretation where he did not submit to the jurisdiction of the court. In the former cases he agreed to be there, or was there, to guard his legitimate interests; but if he was not and cannot be criticized for it the law should be more solicitous. This reflects a basic truth already well established in the law of stays of proceedings: a defendant will not be heard to complain of shortcomings in the law or practice of a court when he had contracted to litigate in that court and the factor complained

of could or should have been foreseen by him at the date of the contract. But if he made no such agreement, he will be permitted to lead evidence to show the court why it would be unfair to consign him to the foreign forum for an adjudication of his rights and liabilities. It is perfectly true that there is a distinction between (on the one hand) a prediction by an applicant that he will not get proper justice from a foreign court, and (on the other) an assertion by a defendant that he did not get justice for a particular demonstrable reason, but the principle is still the same even if the latter submission, being more concrete, may be easier to put to a judge. In any event, the test applied by Major J. in *Beals*, that as long as the foreign court applied “minimum standards of fairness”,⁹² there is nothing to complain about seems well short of the mark when applied to the unconsenting defendant. As to (2), however, it is more difficult to see how the operation of public policy—a matter which is not defined by what the parties did or thought, but is instead a matter of pure law in the receiving court—could be affected by whether the defendant agreed to participate in the foreign proceedings.

As to point (3), which was proposed by LeBel J.,⁹³ a requirement of clean hands or good faith, especially when the defendant is not in court, has much to commend it. In the final analysis it is futile to tell a judge that he or she must reach a conclusion which is offensive to justice as he or she sees it. The primary judge in *Beals* had applied what he called, in wonderfully unpretentious language, a “judicial sniff test” in an attempt to widen the scope of public policy far enough to refuse enforcement of the Florida judgment. But what passes muster in the rough and tumble of a court of first instance risks being seen as being beneath the dignity of a court of final appeal. The majority in Supreme Court of Canada therefore eschewed the notion altogether, but LeBel J. preferred to reformulate it as a requirement to come to court with clean hands and to act in good faith. This does capture the essence of what was to some minds objectionable about enforcing the judgment in *Beals*.

And it is critically important to remember this. Whether by means of a sniff test, or the examination of the judgment-creditor’s hands and conscience, all the receiving court is doing is determining whether the judgment may be enforced within its territorial jurisdiction. It is obviously not sitting on appeal from the foreign court, or purporting to reverse the judgment of the foreign court. It is not seeking to prevent the enforcement of that judgment within the territory of the foreign court or anywhere else. There is, some may like to think, no particular need for embarrassment if a court tells a plaintiff that he may enforce his judgment anywhere he pleases, but if he wants to do so by means of a local judicial order, it must come within touching distance of local standards of propriety. Only a trickster would suggest that this will disparage, still less will make a pretence of knowing better than, the foreign court. That would put the focus in quite the wrong place. Instead, it insists on the equal application of laws to all those who seek relief from a local court, not excluding those cases in which the local court sits as receiving court. Requirements of good faith and clean hands apply in principle to all. It ought to go without saying that, whenever enforcement within the territory of the receiving court requires a judicial order from the receiving court, that court is entitled to prefer and entitled to apply its own standards of propriety. It would be an extraordinary proposition to argue that a plaintiff may excuse or justify his operating to a lower standard of good faith or procedural propriety, or may subject a defendant to a lower and therefore unequal degree of protection, by the stratagem of taking proceedings first in a court where the playing field is not level, and then inviting a receiving court to find that the foreign court had done “minimum justice”, hinting at the meretricious and menacing point that if the receiving court goes farther than this it is

⁹² *Supra* note 62 at para. 60.

⁹³ *Supra* note 62 at para. 218. It is hard to tell whether this is a rule of Canadian equity, or an adaptation of a civilian rule that rights may not be exercised abusively or in bad faith.

offending the requirements of comity by disrespecting the foreign court.⁹⁴ True, it may be unhelpful to regard this as a matter of public policy. It is preferable to be open about it, and to acknowledge the right of a receiving court to review before approving a judgment which, however one chooses to convey it, risks leaving a fish-like smell in the nostrils and a nasty taste in the mouth.

VIII. FRAUD

A similar approach should be taken to point (4), the defence of fraud. It has been the tradition of the common law, distinct in this respect from civilian systems,⁹⁵ to undertake no general review of the reasoning of the foreign court. No-one could rationally assert that this should remain the law, for otherwise our law would provide for the relitigation, rather than the recognition, of foreign judgments. But where the jurisdiction of a foreign court is recognized on a basis which does not connote the agreement or consent of the defendant to that exercise of jurisdiction, there is reason to reconsider the limits of the defence of fraud. The common law's principal tool for reviewing the merits of the claim is the proposition that the foreign judgment was procured by fraud.⁹⁶ Now it is fair to say that the tide of modern opinion is rather more hostile than it used to be to the proposition that the receiving court, confronted by a defendant who alleges that the foreign judgment was procured by fraud, may investigate the merits of the plea and hence the merits of the objection. In part this may proceed from the uncertain but probably rather wide scope of fraud, which is not restricted to beguiling and deceiving the foreign court, but extends to attenuated forms of malpractice or misbehaviour.⁹⁷ Though in England the principle is still accepted and understood to mean that the receiving court may be invited to look again at evidence which was placed before and rejected by the foreign court, or look at evidence which could perfectly well have been placed before the foreign court but which never was,⁹⁸ there is still sniping from those who consider this to show disrespect to the foreign court presumed to be incompetent to detect and suppress fraud practiced in its face.⁹⁹ In Australia, a difference of opinion between primary judges, unresolved by any appellate

⁹⁴ The point has been made by the European Court of Human Rights in *Pellegrini v. Italy* (2002) 35 E.H.R.R. 2 (E.Ct.H.R.). An Italian wife found her marriage annulled by a medieval and secretive process operated by a tribunal of the Vatican City (technically a state, but one which does not subscribe to mundane concerns like the securing of human rights) to which her husband had made application. The question arose whether the Italian courts were permitted to recognise this curial order, and to do so without regard to her right, enshrined in Article 6 of the European Convention to which the Italian Republic was a party, to be accorded a fair hearing. The European Court of Human Rights ruled that the Italian court was obliged to apply the standards of Article 6 to its decision whether to make the recognition order applied for, and could not shelter behind the proposition that the Vatican tribunal was the court of a foreign state, entitled to behave unjustly and without regard to human rights if it felt like it. If Article 6 of the European Convention imposes that standard of review on a receiving court in Europe, it is inconceivable that the common law will do less, and will be incapable of allowing its own standards of propriety and equality of treatment to be applied, to like effect (*cf.* Lord Bingham of Cornhill in *Lubbe v. Cape plc.* [2001] 1 W.L.R 1545 (Eng. H.L.), or that it will allow a constitutional guarantee of equality before the law (*cf.* *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 12) to be circumvented by the shabby device of first suing before a tribunal which does not take these matters seriously.

⁹⁵ At least (for example, with French law) for the purpose of ascertaining that the decision of the foreign court was sufficiently reasoned, and that it applied the correct choice of law rule.

⁹⁶ At least when there is prima facie evidence that the foreign court was taken in by fraud on the plaintiff's part. This will allow the threshold standard to vary in accordance with the quality of the foreign court.

⁹⁷ *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335 (Eng. C.A.).

⁹⁸ A line of appellate authority from *Abouloff v. Oppenheimer* (1882) 10 Q.B.D. 295 (Eng. C.A.) to *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443 (Eng. H.L.) establishes the point.

⁹⁹ *House of Spring Gardens v. Waite* [1990] 1 Q.B. 335 (Eng. C.A.); *Owens Bank Ltd. v. Etoile Commerciale S.A.* [1995] 1 W.L.R. 44 (St. Vincent. P.C.). The ground on which the objection is usually rested is that an abuse of process is committed by the party seeking to rely on evidence of fraud.

tribunal, leaves it unclear whether a party opposing recognition by pleading fraud may recycle old evidence.¹⁰⁰ By contrast, the Singapore Court of Appeal has committed itself to the view that old evidence is not admissible and that the English approach is wrong;¹⁰¹ and the provincial Courts of Appeal in Ontario¹⁰² and British Columbia¹⁰³ agree. In an extremely instructive review of the law in these and other countries of the common law,¹⁰⁴ Mr Garnett concludes that the while overall state of the common law is unsettled, fraud is “the defence that refuses to die”. This did not prevent the Supreme Court of Canada in *Beals v. Saldanha* making another attempt on its life. Major J. approved the views of the provincial Courts of Appeal, that fresh evidence was required before the defence of fraud was admissible, but went further when he required that “the ‘new and material facts’ discussed in [*Jacobs v. Beaver Silver Cobalt Mining Co.*] must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence”¹⁰⁵ Can he have been serious? The Supreme Court was considering the limited question whether a foreign judgment may be enforced by judicial order within the territory of the receiving state Ontario. It was not sitting on appeal from the foreign court whose judgment may be enforced, so far as Canadian law is concerned, in any country of the world without Canadian encouragement or impediment. It had placed before it prima facie evidence of fraud, the evidence of which was not before the foreign court because the defendant was not before the foreign court; and this evidence was not in fact in the defendant’s grasp because he was not there to obtain it. If the defendant is nevertheless to be blamed for negligence in failing to unearth the evidence which tends to show fraud, the Canadian court will be taking the side of the fraudster against his negligent opponent. All the instincts of a common lawyer, never mind conscience, should rebel against such depravity. In a contest between the careless and the corrupt, the decent money is on the careless. One assumes that the Supreme Court has not uttered its last word on this point.

However that may be, the manner in which the fraud defence operates could justifiably differ as between (on the one hand) the defendant who agreed in advance to the jurisdiction of the foreign court, or who appeared at the trial, and (on the other) the defendant who was merely present when proceedings were instituted or who was sued in a court which had a real and substantial connection to the dispute but before which he did not appear. Such a differentiation may reflect divergent standards as to whether evidence needs to be not previously discoverable, or need only be newly discovered, or may be second-hand. An approach which regards the defence of fraud as available or not but without paying attention to the jurisdictional basis on which the judgment is to be recognised against the defendant to begin with, does not seem to reflect the material differences in moral balance between categories of defendant. Some should be allowed their chance; others should be taken to have forfeited it. An indiscriminating approach to the defence of fraud falls far

¹⁰⁰ *Keele v. Findley* (1990) 21 N.S.W.L.R. 444 (N.S.W.S.C.): new evidence required; *Close v. Arnot* (21 November 1997) (N.S.W.S.C.): old evidence admissible; *Yoon v. Song* [2000] N.S.W.S.C 1147 (N.S.W.S.C.): old evidence admissible; *De Santis v. Russo* (2001) 27 Fam.L.R. 414 (Qld. S.C.): old evidence admissible. The Queensland Court of Appeal reversed the decision below without reference to this point: [2001] QCA 457, October 26th 2001 (Qld. C.A.).

¹⁰¹ *Hong Pian Tee v. Les Placements Germain Gauthier Inc.* [2002] 2 Sing.L.R. 81 (Sing. C.A.), though it not clear that all the relevant authority was placed before the Court. The decision departs from the earlier and traditional view expressed in *Ralli v. Anguilla* [1915–23] XV S.S.L.R. 33 (Straits Settlements. C.A.), and is noted by D. Tan, “Enforcement of Foreign Judgments: should fraud unravel all?” (2002) 6 Sing.J.I.C.L. 1043.

¹⁰² *Jacobs v. Beaver Silver Cobalt Mining Co.* (1908) 17 O.L.R. 496 (Ont. C.A.).

¹⁰³ *Roglass Consultants Inc. v. Kennedy, Lock* (1984) 65 B.C.L.R. 393 (BC. C.A.).

¹⁰⁴ R. Garnett, “Fraud and Foreign Judgments: The Defence That Refuses to Die” (2002) 1(2) Journal of International Commercial Law 1.

¹⁰⁵ *Supra* note 62 at para. 50. The extent to which LeBel J. shared this view at paras. 233–234 is uncertain. Binnie J.’s conclusion that there was a want of natural justice meant that he did not deal with the defence of fraud.

short of the ideal. In *Beals* it should surely have permitted the blamelessly absent and unconsenting defendant to allege and seek to establish fraud by the plaintiffs; it should not have debarred him from making the plea by reason of any lack of diligence, and (in the present submission) it should not have debarred him even if the evidence was not new. But more generally, it should have led to the conclusion that whilst one might take a stringent view against the defendant who chose, or who chose to participate before, the foreign court, it is inappropriate to expose the defendant who is legitimately absent to the same lack of sympathy. He should still be given a fair opportunity to be heard.

IX. CONCLUSIONS

The common law on the recognition and enforcement of foreign judgments was designed and constructed, predominantly, in the England of a century ago. Most English jurisprudence since then has contented itself with confirming the continuing validity of old truths. This has encouraged some courts in some countries outside England to be suspicious of the cultural assumptions in which these foundations lie: this is just as it should be. If, as Hartley says, “the past is a foreign country, they do things differently there”,¹⁰⁶ Victorian England is, when seen from Canberra, Ottawa, or Singapore, doubly foreign. But it has also led some courts in some countries outside England to suppose that this legal heritage must be fundamentally at odds with modern values: this is not quite so sensible. Those who cleave to this sceptical view increasingly proclaim that foreign courts and foreign judgments are to be treated as the equivalent of local ones, and that a foreign judgment should be regarded as having the same conclusiveness, the same likelihood of being correct, and the same immunity from challenge as a local judgment does. It is submitted that this *bien-pensant* cast of mind is based more on sentiment and optimism than on reason and analysis. The price which is paid for giving spurious equality of treatment to local and foreign judgments is paid by those individuals who seek relief from a local court in its adjudicating and receiving functions. These are the ones exposed to inequality of treatment. Though there may be no bright line which marks the transition from comity to political correctness, some cases plainly cross it. In the present submission, *Beals v. Saldanha* lies far to the wrong side of it, and how it got there teaches a lesson which needs to be learned. Saldanha was sued in a Florida court, which operated under rules of procedure which were not intrinsically unfair¹⁰⁷ but which had a remarkable potential for allowing local plaintiffs and their lawyers to wrongfoot unwary foreigners. He was faced with a choice between paying a fortune¹⁰⁸ to defend a case which appeared trivial and which was, so far as one can tell, far from obviously meritorious, or going down by default and steering clear of Florida in the future. He chose the latter, as well he might. In reviewing his legitimate expectations and deserved liabilities, LeBel J. referred to the “increased vulnerability of Canadian residents to nuisance lawsuits in other countries”.¹⁰⁹ As well he might. Political correctness can be a self-indulgent luxury for a court; for Saldanha it was a catastrophe of someone else’s making. Had he agreed to the jurisdiction of the Florida courts in advance; had he appeared voluntarily in the proceedings,

¹⁰⁶ L.P. Hartley, *The Go-Between* (Hamish Hamilton, 1953).

¹⁰⁷ Weird, though, much like the local rules for casting and recording electoral votes.

¹⁰⁸ Not liable to be compensated in costs if they won.

¹⁰⁹ *Supra* note 62 at para. 251, citing J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Canada: Butterworths, 2002). It is not just Canadian residents who find themselves on the receiving end of claims, launched in industrial quantities, and which seek to transfer wealth from outside the United States to inside the United States by launching claims in “disputes” which seem preposterous to the point of fantasy (the recent example of claims alleging loss and damage against Lloyd’s of London as insurer of ships involved in the slave trade is just the latest in this miserable line). It is a feature of modern life scarcely more edifying than e-mail scams promising vast riches to anyone who will help the sender gain access to and share out large piles of unclaimed money, if only the invitee will send details of his bank account by return.

he would have had no-one to blame for his downfall but himself. But this he did not do. The connection to Florida and to adjudication in its courts was, in a fundamental sense, involuntary; and whether based on presence, or on a real and substantial connection to Florida, or on the footing that Florida was the natural forum for the litigation, it remained a connection which did not have Saldanha's consent. The burden of this paper is that the Supreme Court of Canada was right to do as it did in widening the grounds of acceptable international jurisdictional competence. But at the same time, it should have asked how the defences allowed by Canadian common law needed to respond to this change. Jurisdiction and defence are, in this corner of the law, indissociable. It cannot be right to make radical changes to one while supposing that this has no impact on the other. The recognition of foreign judgments is a machine. It is not a box of unconnected bits and pieces.

The decision to decree recognition or enforcement of a foreign judgment is, in the end, a decision by a receiving court to give its seal of approval to the foreign order. When taking that decision, judicial comity should not be allowed to become the enemy of justice. The interests of all may be better served if we recognise that not all defendants to foreign proceedings are *in pari materia*, and that a principled discrimination between those who can and cannot be said to have brought it on themselves is now long overdue. The common law's unarticulated and unquestioned traditional assumptions, that all bases of jurisdictional competence are equal or equivalent, and that all defences to recognition and enforcement are indifferent to the jurisdictional basis for recognition or enforcement, have prevailed for too long. The judgment of the Supreme Court of Canada in *Beals v. Saldanha* means that we now have something to help us to develop the law by measured steps, and with a greater sensitivity to where we need to get to. It provides the opportunity for us to borrow some of the common law's fundamental, *transferable*, principles about the sanctity and consequences of agreements on jurisdiction, reflects the importance of a distinction between cases of agreement and no agreement, and reminds us that agreements are there to be construed. It allows us to apply these principles in a context where they may rationalize the law. It allows the common law to develop its common sense that where the defendant has only himself to blame for being sued in the foreign court he will not be heard to blame anyone else for his predicament. But it also allows us to deal differently with the defendant who is not in that position and who should not be taken to have forfeited the full and equal protection of the law of the receiving state. Such incremental, intuitive, coherent, development is what the common law does best, and is how the common law conflict of laws works best. There is nothing to be said for plunging ahead with a Great Leap Forward, eyes fixed on the illusion of a far horizon. The common law is at its brilliant best when it proceeds cautiously and pragmatically: when it crosses the river by feeling the stones. And this is what it should now be doing in relation to the law on recognition and enforcement of foreign judgments.