ARTICLE

ENFORCEMENT OF NON-MONETARY JUDGMENTS IN COMMON LAW JURISDICTIONS: IS THE TIME RIPE?

King Fung Tsang[*] *and Tsz Wai Wong*[**]

I. INTRODUCTION

It has been fifteen years since Canada decided to change the long-standing common law rule against the enforcement of foreign non-monetary judgments ("NMJs").[1] In *Pro Swing v. Elta Golf Inc.*

* SJD (Georgetown), LLM, JD (Columbia), Associate Professor, The Chinese University of Hong Kong

** LLM candidate, University of Cambridge

1. *See* Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612 (Can.).

("*Pro Swing*"), the Canadian Supreme Court announced that the time was ripe to start enforcing foreign NMJs given our ever-globalized world.[2] At that time, this was seen as a breakthrough not only in Canada, but also in common law jurisdictions.[3] After all these years, although the world has certainly become more globalized, only one additional common law jurisdiction, Jersey, has joined Canada in formally adopting this more progressive approach.[4] It is fair to ask the question: Is the time *really* ripe for foreign NMJs to be enforced in replacement of the traditional common law rule? Or even more pessimistically, will the time ever be ripe? On the other hand, there are some recent positive developments. In particular, the new HCCH 2019 Judgments Convention promulgated by the Hague Conference on Private International Law ("the Hague Judgments Convention") prescribes the enforcement of NMJs by including NMJs in the general definition of "judgments."[5] This means that signatories of the Hague Judgments Convention will enforce not only the monetary judgments but also the NMJs of other signatories.[6]

This Article makes three contributions. First, the authors surveyed the judicial approaches of three major common law jurisdictions, Canada, the United States and England, regarding the enforcement of foreign NMJs. The Article covers not only the extent to which these NMJs are enforced, but also the bases and challenges of such enforcement. Second, the authors examine why the enforcement of NMJs has yet to receive a wider acceptance among the common law jurisdictions. And third, based on this analysis, the authors then suggest a roadmap as to how NMJs can be enforced like monetary judgments in the future.

Part II of the Article discusses the judicial development in Canada on the enforcement of NMJs. It begins with analyzing *Pro Swing*, arguably the most important decision in common law

2. *Id.* para. 64, 87.

3. *See* CHESHIRE, NORTH & FAWCETT PRIVATE INTERNATIONAL LAW 552 (Paul Torremans et al. eds., 15th ed. 2017); TREVOR C. HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW 443 (2009).

4. *See* Brunei Investment Agency & Bandone Sdn. Bhd. v. Fidelis Nominees Ltd. (2008) JRC 152 (Jersey).

5. *See* Hague Conference on Private International Law [HCCH], Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, art. 3 (July 2, 2019) [hereinafter Hague Convention].

6. *See id.* art. 1.

jurisdictions on the enforcement of NMJs. An examination of subsequent cases then reveals how lower courts interpret and apply the test set out in *Pro Swing*. Part III contrasts the progressive movement in Canada with England which adopts the traditional and prohibitive rule against the enforcement of NMJs ("the traditional rule"). Part IV looks at the broad and inconsistent practices of the United States, which highlight the ever-confusing status of the enforcement of NMJs. Having compared the approaches of the three common law jurisdictions, the Article concludes in Part V that the enforcement of NMJs shows no more practical problems than the enforcement of monetary judgments, and suggests that the issue of non-enforcement lies in finding motivation for common law jurisdictions to change the status quo. Part VI suggests that the motivation will likely come in the form of the major economic powers, for example, the United States, United Kingdom and the European Union, joining the Hague Judgments Convention, even though the enforcement of NMJs may not be the biggest reason of countries joining the Convention in the first place.

II. CANADA – PROGRESSIVE APPROACH

A. Pro Swing: Rulings and Comments

Pro Swing, a United States manufacturer and seller of golf clubs, and also an owner of the "Trident" trademark in the United States, filed a complaint in the United States District Court in Ohio against Elta, a company based in Ontario, Canada, for the alleged breach of the Trident trademark.[7] Both parties agreed to a consent decree, endorsed by the Ohio court, in which Elta undertook not to infringe the Trident trademark and to deliver any infringing items to Pro Swing.[8] The Ohio court later discovered Elta's violation of the terms of the consent decree and issued a contempt order against Elta.[9]

Pro Swing later filed in the Ontario Superior Court of Justice a motion for the recognition and enforcement of the Ohio court consent decree and contempt order ("the orders").[10] The Ontario

7. *Pro Swing*, 2006 SCC 52, para. 2.
8. *Id.*
9. *Id.* para. 3.
10. *Id.* para. 5.

Superior Court judge noted that the orders overlap to a certain extent and contain seven elements. Of the seven elements listed, only (4) and (5) concern monetary remedies, while the other five concern non-monetary reliefs. The elements listed by the court are as follows:

> 1) an injunction prohibiting Elta Golf from purchasing, marketing, selling, or using gold clubs or components bearing Pro Swing's trademark or any confusingly similar variations of it (contained in consent decree and contempt order);
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> 2) an order that Elta golf surrender and deliver all infringing clubs and/or components in its possession, along with any advertising, packaging, promotional, or other materials, to counsel for Pro Swing (contained in consent decree and contempt order);
>
> 3) an order for an accounting of all infringing golf clubs and/or components sold since the consent decree (contained in contempt order only);
>
> 4) an order for compensatory damages based on profits derived through sales of infringing goods since the consent decree (contained in contempt order only);
>
> 5) an order for costs and attorney's fees against Elta (contained in contempt order only);
>
> 6) an order that Elta provide the names of and contact information for the suppliers and purchasers of infringing goods and to pay the costs of a corrective mailing (contained in contempt order only); and
>
> 7) an order that Elta recall all counterfeit and infringing goods (contained in contempt order only).[11]

Elta objected to the motion for recognition and enforcement with two defenses.[12] First, the non-monetary reliefs contained in the orders issued by the Ohio court in United States should not be enforceable in Canada due to the traditional rule against the enforcement of NMJs.[13] Second, the contempt order should be

11. *Id.* para. 4.
12. *Id.* para. 5.
13. *Id.*

excluded from recognition and enforcement because it was quasi-criminal in nature.[14]

Prior to *Pro Swing*, Canadian courts followed the traditional rule.[15] At first instance, the Superior Court judge acknowledged the applicability of the long-standing traditional rule, which states that only monetary judgments for a definite sum of money are enforceable. [16] However, she argued that the latest Canadian jurisprudence relaxed the traditional rule and declared the orders valid and enforceable in Ontario.[17]

The Court of Appeal of Ontario held that the "time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments."[18] However, the Court of Appeal found that the orders were not sufficiently certain in the terms, especially those on the scope of extraterritorial application of the orders. [19] When interpreting the orders, the Court of Appeal was not sure whether the orders intended to restrain Elta globally, or just within the jurisdiction of the United States District Court.[20] Further, instead of seeking enforcement of the Ohio consent order, the Court of Appeal noted that Pro Swing could take action in Ontario based on the violation of the settlement agreement, or on the infringement of its trademarks, where the rights extend to Canada on the doctrine of *res judicata*.[21] Pro Swing appealed to the Canadian Supreme Court.[22]

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14. *Id.* The second defence that Elta put forward relates to the characterisation of a contempt order and attracts discussion that is not specific to non-monetary judgments. Hence, this Article does not intend to investigate the second defence in full details.

15. *Id.* paras. 9-10; JANET WALKER & JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS, 14.6 (6th ed. 2005).

16. *Pro Swing*, 2006 SCC 52, para. 6.

17. *Id.*; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1098 (Can.).

18. *See* Pro Swing Inc. v. Elta Golf Inc., [2004] O.J. No. 2801 (Can. Ont. C.A.) (QL), [2004] 71 O.R. 3d, 566, para. 9 (Can. Ont. C.A.).

19. *Id.* para. 11.

20. *Id.*

21. *Id.* para. 12. Doctrine of *res judicata* refers to the common law doctrine stipulating that once a dispute is litigated and decided by a court of justice, the consequent decision is considered final and the underlying dispute cannot be relitigated again. In other words, the Court of Appeal suggested that Pro Swing could initiate fresh proceedings in Ontario to invite the Canadian court only to determine the issue of damages as appropriate while accepting the judgment by the Ohio District Court as *res judicata* on the issue of liability. *Id.*

22. *Pro Swing*, 2006 SCC 52.

The Canadian Supreme Court unanimously held that the traditional rule should be re-examined and foreign NMJs could be enforced in principle. [23] However, the dissenting judgment disagreed with the detailed formulation of the test as well as its application to the NMJ in this particular case.[24] First, writing for the majority, Judge Deschamps stated in the beginning of the judgment that:

> Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalisation of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The case for adapting the common law rule that prevents the enforcement of foreign non-monetary judgments is compelling. But such changes must be made cautiously.[25]

This paragraph set the tone for the rest of the majority judgment. The court clearly highlighted the driving forces on the two ends of the spectrum: sovereignty and comity. This is the ever-present balance a court has to make in private international law.[26] In this context, the Canadian Supreme Court went with the comity which is in turn based on the facilitation of international commercial transactions over sovereignty.

Given this pro-enforcement attitude, Judge Deschamps went on to lay down the following test based on comity:

> [T]he judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable

23. *Id.* paras. 64, 87.
24. *Id.* paras.117, 120-21.
25. *Id.* para. 1.
26. *See* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L REV. 360, 392 (1918) ("According to the Dutch writers such recognition and enforcement rested… upon comity and would be declined when the interests of the forum or of its subjects would be impaired thereby.").

> orders can be exercised by Canadian courts when deciding whether or not to enforce one.[27]

The test can be broken down into three basic requirements. The first and second requirements are competent jurisdiction and finality, as expressed in the quote above.[28] The third requirement, stated later in the majority judgment, is that it is not a penal order.[29] If these basic requirements are satisfied, it would still need to be subject to the test of comity and the inherent discretion of the courts in granting equitable orders.[30]

Compared with the traditional test for enforcing foreign monetary judgments, both tests require competent jurisdiction of the rendering court, finality, and non-penal nature of the foreign judgment. [31] However, the newly formulated test has two additional limbs. First, the new test requires that Canadian litigants in local proceedings are treated equally as litigants in foreign proceedings. Apart from ensuring non-discriminatory treatment of private litigants, this can also be seen as a condition imposed to balance Canadian national interests against opening the door too wide for comity. Second, the Supreme Court made sure to leave a backdoor by providing for a discretion for Canadian courts to reject the enforcement of NMJs. Fine-tuning this broad discretion, Judge Deschamps further provided some key factors for Canadian courts to consider when assessing the exercise of the discretion, namely, clarity and specificity of the foreign NMJs, scope of the NMJs, judicial economy of Canada, foreseeability of the obligations contained in the NMJs, and interests of third parties. [32] Judge Deschamps emphasized that this was a non-exhaustive list and served no more than an illustrative purpose.[33]

Despite the unanimous agreement for the enforcement of foreign NMJs in principle, by a four-to-three split, the Supreme

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27. *Pro Swing*, 2006 SCC 52, para. 31.
28. *Id*.
29. *Id.* para. 34; Walker, *supra* note 15, § 8.3.
30. *Pro Swing*, 2006 SCC 52, para. 31
31. The traditional test only allows enforcement of judgments that are "(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive." LORD COLLINS OF MAPESBURY, DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 14R-020 (15th ed., Vol. 1, SWEET & MAXWELL 2012); Walker, *supra* note 15.
32. *Pro Swing*, 2006 SCC 52, para. 30.
33. *Id.* para. 27.

Court of Canada ruled that the orders in this particular case could not be enforced. Putting aside the discussions on whether the contempt order was penal in nature, there were four reasons behind the majority's refusal of enforcement of the orders.

The first reason was that judicial economy did not swing in favor of Pro Swing and enforcement would potentially harm the integrity of the justice system of Canada.[34] The majority argued that judicial economy was one of the many considerations that the Canadian courts must consider.[35] Hence, courts must consider alternate means to achieve the particular outcome that the party was requesting, and determine whether the proceedings in hand were the least burdensome on Canada's judicial system.[36] In this case, the majority ruled that Pro Swing should have considered letters of rogatory to seek assistance of the Canadian courts instead of enforcement proceedings, as the latter was not the least burdensome means in Canada.[37] Further, the majority suggested that one must consider whether the matter merits the involvement of the Canadian court.[38] If the subject matter's value was insignificant, it would not warrant the spending of Canadian judicial resources.[39] In this case, since the facts that the consent agreement was concluded on the basis of that only three golf clubs and two golf club heads were purchased upon investigation, and that Elta did not participate in the proceedings due to "financial circumstances," the majority worried that the enforcement of the orders would eventually only find Elta insolvent.[40] In other words, without concrete evidence suggesting that the subject matter was higher in value than the judicial costs involved, the spending of Canadian judicial resources would not be justified. It is difficult to argue against the consideration of judicial economy. However, the

34. *Id.* para. 40.
35. *Id.*
36. *Id.* para. 46.
37. In this case, Pro Swing was trying to enforce the orders with the purpose of allowing the Ohio court to determine the damage award because the amount would differ depending on whether the Ohio orders would take effect in Ontario. The Supreme Court suggested that letters of rogatory were a better means because the purpose of enforcing the orders in Ontario was to obtain evidence, which letters or rogatory were usually used to do. Letters of rogatory would require no Canadian court supervision and incur less judicial costs; *Id.* para. 44.
38. *Id.* para. 46.
39. *Id.*
40. *Id.*

argument for finding Elta to be potentially insolvent is difficult to follow. The value of the subject matter in a set of proceedings should attach little weight to the financial positions of the parties. Finding Elta to have only sold five golf clubs and golf club heads did not represent that the sale of those five products was the main source of income for Elta. Further, the fact that Elta did not participate in the Canadian proceedings due to "financial circumstances" was just Elta's one-sided statement. Other than a statement, no more objective evidence was produced to indicate the financial position of Elta.

The second reason concerned familiarity with foreign law.[41] Judge Deschamps stated that an interpretation of a foreign order in light of Canadian law might be different from an interpretation under the foreign law. [42] Judge Deschamps argued that the contempt order rendered in the United States was civil and thus remedial under US law. [43] However, should the Ohio contempt order be recognized in Canada, it would become a quasi-criminal order and would expose the defendant to imprisonment, which was not intended by the Ohio contempt order originally.[44] From this, Judge Deschamps warned that "differences in laws might trigger different obligations."[45] Hence, the Canadian courts should only enforce orders based on laws that the Canadian courts were familiar with so as to prevent interpreting foreign orders differently than intended in the original jurisdiction. [46] This approach could also ensure that the Canadian litigants would not be exposed to unforeseen obligations due to differences in laws and interpretations of the foreign orders.[47]

The authors disagree with the reasoning of Judge Deschamps in this respect. The fact that the Supreme Court was fully aware and certain of the civil and remedial nature of the contempt order showed the Supreme Court's familiarity with laws of the United States. [48] Such familiarity should sufficiently direct the Supreme Court from recognizing the contempt order as a quasi-criminal

41. *Id.* para. 49.
42. *Id.*
43. *Id.* para. 50.
44. *Id.*
45. *Id.* para. 51.
46. *Id.*
47. *Id.*
48. *Id.* para. 50.

order and to allow enforcement of the contempt order in a civil and remedial manner. This poses the question of how familiar a court must be with foreign laws to enforce a foreign order.

The third reason was that the intended territorial scope of the injunctive reliefs in the orders was uncertain for lack of explicit terms.[49] To start with, the Supreme Court stated that an internet transaction should not be able to transform a United States trademark protection into a worldwide one.[50] In other words, United States trademark protection should have no extraterritorial effect in Canada in principle.[51] This was regarded as the issue of extraterritoriality.[52] However, given that it was a consent decree and a contempt order (based on the violation of the consent decree) demanding enforcement in Canada, the question in this case should be directed to whether Elta could, by consent, have agreed to such an extension, which was a matter of interpretation.[53]Judge Deschamps acknowledged the fact that Elta must have agreed to the extraterritorial application of the specific order of surrendering the infringing inventory when he agreed to surrender the infringing golf clubs in Ontario to Pro Swing's counsel in Ohio.[54] However, Judge Deschamps disagreed that such consent applied to both orders in general.[55] The court took issue at the Ohio orders that it did not state expressly whether it would apply beyond the borders of the United States to Canada.[56] Much of the language was clouded in general terms.[57] The Supreme Court saw no explicit terms in the orders indicating that only profits generated in the United States were subject to accounting. The act of voluntarily extending the reach of the United States trademark protection to Canada by the Supreme Court would just "offend the principle of territoriality."[58] Hence, the majority was of the view

49. *Id.* para. 62.
50. *Id.* para. 56.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* para. 55
55. *Id.* para. 56.
56. *Id.*
57. *Id.* para. 57 (such as "to make an accounting to Pro Swing of all golf clubs . . . it has sold which bear the TRIDENT or RIDENT marks . . . since the entry of the Consent Decree . . . [and to] include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components . . . ").
58. *Id.*

that the orders should not be interpreted as applying outside the borders of the United States. This argument is difficult to follow. There was no evidence or legal argument suggesting that the consent to the extraterritorial application of one specific order was severable from the other orders. It must be emphasized that it was not one order that Elta consented to, but an entire settlement agreement. The fact that the majority found Elta's consent to the extraterritorial application of one order should naturally extend to the entire agreement, unless further evidence or the terms of the consent decree suggested the otherwise.

The fourth reason was that, as a matter of public policy, enforcement of the orders would potentially offend the third parties' quasi-constitutional rights of protection of personal information.[59] The majority stated that the quasi-constitutional nature of the protection of personal information has been recognized by the Canadian courts on different occasions.[60] In this case, the contempt order required Elta to provide the names of and contact information for the suppliers and purchasers of infringing goods. [61] The majority worried that the provision of such information would contravene the quasi-constitutional rights of personal information rights of the third parties.[62] In other words, without evidence suggesting that the information to be disclosed was not covered by the quasi-constitutional rights of personal information protection, or that the rights of the third parties were not infringed, the public policy defense remained valid.[63]

Based on the above four reasons, the majority ruled that the orders should not be granted comity as the balancing exercise did not swing in Pro Swing's favor. Thus, the court opened the door, but thought this case should not pass.[64]

Pro Swing is the first, albeit clumsy, step in breaking off from the traditional rule. The dissenting judgment disagreed with the majority on every front.

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59. *Id.* para. 60.

60. *Id.*; H.J. Heinz Co. of Canada Ltd. v. Canada (Att'y Gen.) [2006] 1 S.C.R. 441 (Can.).; Lavigne v. Canada (Office of the Comm'r of Official Languages), [2002] 2 S.C.R. 773 (Can.).; Dagg v. Canada (Minister of Finance*)* [1997] 2 S.C.R. 403 (Can.).

61. *Pro Swing*, 2006 SCC 52, para. 4.

62. *Id.* para. 60.

63. *Id.*

64. *Id.* para. 62.

Firstly, with regard to the issues of judicial economy and integrity of the Canadian justice system, Chief Justice McLachlin, writing the dissenting judgment, warned that the factor of judicial economy should not be over-emphasized.[65] She observed that Canadian courts had taken an active approach in imposing orders requiring supervision when necessary and had yet to impose an undue burden on the Canadian legal system.[66] Further, during the proceedings, Elta never suggested that accounting or production would pose difficulties.[67] Hence, Chief Justice McLachlin argued that a court should not jump to the conclusion that an order was not enforceable based on "the hypothetical possibility of the need for future court supervision."[68] In other words, one should look at the facts to determine whether there was a real prospect of requiring court supervision that would outweigh the benefits of enforcement.

Secondly, Chief Justice McLachlin agreed that a court had to have sufficient familiarity with foreign laws to determine whether the contempt order was civil or criminal, and believed that such familiarity existed here.[69] She argued that one had to look at the substance of the contempt order and the purposes it sought to achieve under foreign laws to ascertain any elements of penalty.[70] In this case, She ruled that there was nothing penal in the contempt order as the terms of the order were "designed to reinforce the civil consent decree and to provide Pro Swing with restitution for Elta's violations" under the laws of the United States.[71] In conclusion, contrasting with the reasoning of Judge Deschamps, the familiarity with the laws of the United States actually guided Chief Justice McLachlin to rule that the contempt order was civil in the eyes of Canadian laws.[72] By refraining from characterizing the contempt order as penal, Chief Justice McLachlin also prevented Elta from being subject to imprisonment, an unforeseen obligation to Elta.[73]

65. *Id.* para. 99.
66. *Id.*; Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 72-74 (Can.).
67. *See Pro Swing*, 2006 SCC 52, para. 114.
68. *Id.*
69. *Id.* para. 108.
70. *Id.*
71. *Id.* para. 109.
72. *Id.*
73. *Id.*

From this conclusion, Chief Justice McLachlin illustrated how familiarity with the foreign laws could resolve the differences in legal systems and arrive at a fair outcome by subjecting the defendant to obligations intended by the foreign orders and dismissing any unforeseen obligations.

Thirdly, responding to the issue of clarity and specificity of the terms on the territorial scope of the orders, Chief Justice McLachlin criticized the majority's ruling for having too high a standard.[74] First, there were no explicit limits on the territory in which the orders applied and nothing to suggest that such limits were ever contemplated. [75] Second, Elta was operating an Ontario-based website, therefore, any orders addressed to Elta could be "regarded as pre-supposing extraterritorial application." [76] And third, since the terms of the orders required Elta to surrender offending inventory, Chief Justice McLachlin argued that these terms only made sense if the injunction was meant to apply outside the borders of the United States.[77] She criticized Justice Deschamps for being contradictory when the majority judgement acknowledged the extraterritoriality of the order requiring Elta to surrender inventory but declined to infer the same extraterritoriality in the orders enjoining Elta from purchasing and selling the infringing goods. [78] Further, Chief Justice McLachlin regarded the majority judgment as imposing "an artificially high standard" by asking for "explicit terms making the settlement agreement a worldwide undertaking" as Chief Justice McLachlin argued that a plain reading of the orders already made its extraterritoriality sufficiently clear.[79] This reveals a difference in approaches in interpretation as the majority judgment took a literal approach while the dissenting judgment took a contextual one.

Lastly, addressing the issues of public policy and personal information protection rights of third parties, Chief Justice McLachlin questioned whether the personal information collected by private organizations, such as Elta in this case, was afforded

74. *Id.* para. 117.
75. *Id.* para. 116.
76. *Id.*
77. *Id.*
78. *Id.* paras. 55-56, 117.
79. *Id.* para. 117.

such quasi-constitutional protection.[80] Further, given that this issue was not raised during the proceedings, Chief Justice McLachlin regarded it inappropriate to rule on this issue in this case.[81] Finally, she argued that the orders could be severed if one found that certain portions of the orders could not be enforced for public policy reasons.[82] Hence, it was argued that the issue of public policy should not be dispositive of the case.[83]

Since the dissenting judgment disagreed with the majority judgment on all four grounds with valid arguments, it is evident that the majority judgment failed to provide a convincing argument that the application of the test was consistent with the purpose of the test, which, as stated in the first paragraph of the majority judgment, was to serve the society by providing prompt reactions and effective remedies in modern-day transactions. The conflicting interpretations of both the test and the facts might eventually render the departure from the traditional rule nothing but a bounced check.

Putting these conflicts between the majority and dissent aside, the authors believe that the real problem of the majority judgment comes from a lack of understanding of the benefits of enforcement of foreign NMJs. Other than a few "slogans" on modern-day commercial transactions and globalization in the first paragraph, the majority failed to give detailed reasoning as to the motivation behind the departure from the traditional rule and the purposes of the new rule.[84] For example, to what extent will the enforcement of NMJs incentivize foreign merchants to trade with the Canadians?[85] Elaboration on the economic benefits will be in line with the comity argument.[86] Alternatively, will this rule encourage other jurisdictions to follow suit and return the favor by enforcing Canadian NMJs? This is in line with the reciprocity argument.[87] Finally, it may also be argued that the new rule will in any case save the costs of both the private litigants and valuable public resources

80. *Id.* para. 120.
81. *Id.* para. 121.
82. *Id.*
83. *Id.*
84. *Pro Swing, 2006 SCC 52,* para. 1.
85. Fredrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. OF COMPAR. L. 4 (1988).
86. *Id.* at 7-8.
87. *Id.*

of the Canadian judicial system from the evil of re-litigation. This is the *res judicata* argument—that there should be an end of litigation.[88]

Instead, the Supreme Court of Canada only cited three materials that addressed none of the arguments above to support the departure from the traditional rule.[89] First, the court cited an introductory comment by the Uniform Law Conference of Canada, that "with the increasing mobility of the population and the emergence of policies favoring the free flow of goods and services throughout Canada, this gap [between monetary judgments and NMJs] in the law has become highly inconvenient."[90] With all due respect, this comment was originally directed toward an interprovincial level, instead of an international one.[91] Elevating an interprovincial reasoning to an international level suggests that issues of constitutional law, sovereignty of Canada as a whole nation and her national interests were simply overlooked. In any event, this quote spoke no more than what Justice Deschamps wrote in the first paragraph of the majority judgment.[92]

Second, the Supreme Court cited a report by the British Columbia Law Institute, in which the report cited the case of *Morguard Investments Ltd v. De Savoye* to illustrate the existing deficiencies in Canadian Private International Law: "It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province." [93] Once again, the report was directed toward interprovincial enforcement. Further, while it is not in dispute that evasion of obligations creates unfairness,[94] there are alternative methods to avoid such unfairness. For example, as some English scholars suggest, even under the traditional rule, the plaintiff can apply for summary judgment with a new cause of action at the

88. *Id.* at 3.

89. *Pro Swing*, 2006 SCC 52, para. 81-84. The rationale for a change to the traditional rule was provided by the dissenting judgment, while such rationale was approved by the majority: "I have read the Chief Justice [McLachlin]'s reasons, and I agree that there is a compelling rationale for a change in the common law requirement." *Id.* para. 16.

90. *Id.* para. 81.

91. *Id.*

92. *Pro Swing,* 2006 SCC 52, para. 1.

93. *Id.* para. 82; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1098 (Can.); BRITISH COLUMBIA LAW INSTITUTE, REPORT ON THE ENFORCEMENT OF NON-MONEY JUDGMENTS FROM OUTSIDE THE PROVINCE 18 (1999).

94. *Morguard,* [1990] 3 S.C.R. 1077, 1102-03.

place where the defendant resides, then on the basis of *res judicata*, she can utilize the foreign NMJ to cut the proceedings short without having to enforce the NMJ.[95] It is unclear why enforcement is the preferred method and both the report and the case of *Morguard* fails to address this issue. Lastly, the Supreme Court cited the Civil Code of Quebec to illustrate that Quebec did not distinguish between money judgments and NMJs, so that the traditional rule should be changed too.[96] Quebec, as a province of Canada, affords little weight in persuading all of Canada to follow Quebec's practices. Further, the fact that Quebec has made no distinction between monetary judgments and NMJs provides almost no reasoning as to why Canada should follow suit. Numerous scholarly materials were cited in the majority judgment to guide how the change to the traditional rule should be conducted. For example, Professor Vaughan Black argued for an incremental and cautious approach. However, the three materials above simply provided no basis as to why the traditional rule should be altered in the first place.[97]

Comity, reciprocity, and *res judicata* are the usual suspects in enforcing foreign judgments in general, and one would expect the court to address these reasonings beyond citing slogans on interprovincial enforcement. On the flip side, it has long been said that "hard cases make bad law." Nonetheless, the court hardly even cited one case that showed any injustice in the traditional rule. It is thus safe to say that the Canadian case for changing the traditional rule was based on some shaky grounds.

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95. However, if the non-money judgment of the foreign court is entitled to recognition as *res judicata*, the fact that it cannot be enforced as a debt may be of limited practical significance, for if proceedings which have to be brought on the original cause of action can be cut short by showing the issues of substance to be *res judicata*, with only the question of remedy left for the original decision of the English court, the technical unenforceability of the foreign judgment is merely a detail.

DICEY, MORRIS & COLLINS, *supra* note 31, at 673 n.74; *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 494, ¶6.219(1st ed., Oxford Univ. Press 2014).

96. *Pro Swing,* 2006 SCC 52, para. 83.

97. *Id.* paras. 16-20; *See* Vaughan Black, *Enforcement of Foreign Non-money Judgments: Pro Swing v. Elta*, 42 CAN. BUS. L.J. 81, 81-83 (2005); Jeff Berryman, *Cross-Border Enforcement of Mareva Injunctions in Canada,* 30 ADVOC. Q. 413, 413 (2005); Adrian Briggs, *Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments* 8 SING. Y.B. INT'L L. 1, 1 (2004); Jeffrey Talpis & Joy Goodman, *A Comity of Errors*, 14 L. TIMES 1, 7 (2003); Janet Walker, *Beals v. Saldanha: Striking the Comity Balance Anew* 5 CAN. INT'L LAWYER 28, 28 (2002).

On the other hand, the costs or risks of the new rule were more obvious and predictable. The majority clearly foresaw *some* problems with enforcing NMJs, such as higher administrative costs and potential breach of public policies of Canada, though depth of the problems was uncertain given that at the time of the judgment there was no precedent on the enforcement of foreign NMJs in common law jurisdictions.[98] This thus makes the majority taking some very tentative steps, such as leaving open a wide backdoor named discretion, to shut down the floodgates just in case. While the majority might be commended for bravery to dive into the murky water, one must still ask: What for?

In the end, *Pro Swing* will be best known as a case that failed to quantify the benefits brought by the enforcement of foreign NMJs and this is particularly so when there is no reciprocity from other countries or jurisdictions.[99] Thus, from the position as a sovereign, there is no guarantee that the national interests of Canada would be furthered by the enforcement of foreign NMJs. On the other hand, the Supreme Court should have examined the commercial benefits to support the change to the traditional rule, in other words, to examine how giving effect to the Ohio orders would facilitate commercial transactions with the United States and potentially the rest of the world. From the time of Huber, facilitating commercial benefits is the driving force behind private international law rules, but the Supreme Court seemed to have overlooked such commercial interests.[100] In this case, Elta avoided accountability for unfair commercial practices by selling the infringing golf clubs to the United States through its website in Ontario, Canada.[101] Such commercial practice was also regarded by the Supreme Court to be unfair.[102] If the Supreme Court really cared about modern day commercial transactions as said in the first paragraph of the judgment, it should have no hesitation in catching such unfair commercial practices to provide "prompt

98. *Pro Swing,* 2006 SCC 52, para. 40.

99 . The majority judgment refused enforcement of the contempt orders; and immediately noted that the United States were unlikely to enforce such orders either. There would be no reciprocal treatment from the United States even if Canada had enforced the contempt orders. *Id.* para. 39.

100. Lorenzen, *supra* note 26, at 375.

101. *Pro Swing,* 2006 SCC 52, para. 67.

102. *Id.* para. 33.

reactions and effective remedies."[103] Instead, in considering judicial economy and the integrity of the Canadian justice system, the Supreme Court simply stated that Pro Swing could have relitigated in Canada, which would defeat all the purposes of enforcement and incur much higher costs to both the Canadian judiciary and the private parties.[104] Alternatively, as the Supreme Court suggested, Pro Swing could have obtained evidence in Ontario with letters of rogatory so as to allow the Ohio District court to grant a monetary judgment and avoid duplication of enforcement proceedings in Ohio and Ontario.[105] However, this path fails to provide effective remedies to Pro Swing because the damages would be minimal in amount when the settlement agreement only concerned three golf clubs and two golf club heads.[106] It also goes without saying that prohibitory injunctions are usually the only effective remedy that private parties seek in infringement of intellectual property claims.[107] Accordingly, the Supreme Court was making a reform for the sake of reform when it was not clear that the measure would promote either the national interests of Canada or the commercial interests of the private parties, which arguably are also of national interest.

On the face of it, *Pro Swing* is a breakthrough in common law jurisdictions; but our closer analysis reveals its inherently weak foundation. At the time of the judgment, this did not appear to bode well for the enforcement of foreign NMJs in Canada. One would expect lower courts to struggle with such a broad and elusive test.[108] In the following section, subsequent Canadian cases on enforcement of foreign NMJs are examined to survey lower courts' responses to the ruling in *Pro Swing*.

103. *Id.* para. 1.
104. *Id.* para. 40.
105. *Id.* para. 45.
106. *Id.* para. 46.
107. *See* Int'l Assoc. for the Protection of Intellectual Property [AIPPI], *Resolution on HCCH Judgments Project, Summary Report and Explanatory Paper*, AIPPI General Secretariat, Twenty-Second Session Recognition and Enforcement of Foreign Judgments, Hague Conference on Private International Law [HCCH], No. 3 (May 2019), at 129.
108. *See* Stephen G. Pitel, *Enforcement of Mon-monetary Judgments in Canada (and Beyond)*, 3 J. OF PRIV. INT'L L. 241, 260 (2007).

1. Subsequent Canadian Cases After *Pro Swing* [109]

Table 1. Survey regarding Canadian cases on enforcement of foreign NMJs

No.	Case Name	Success?	Subject Matter	Origin of Judgment
1.	*McClintock (Conservator of) v. McGriskin*	Yes	Constructive Trust and Permanent Prohibitory injunction	US
2.	*The United States of America et al. v. Yemec et al*	Yes	Permanent Prohibitory Injunction	US
3.	*Blizzard Entertainment, Inc v Simpson*	Yes	Permanent Prohibitory Injunction	US
4.	*Van Damme v. Gelber*	Yes	Specific Performance	US
5.	*PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resource Corp.*	Yes	Mandatory Injunction and Account for Profits	Singapore
6.	*Bienstock v Adenyo Inc.,*	Yes	Constructive Trust	US
7.	*Oesterlund v. Pursglove*	Yes	Freezing Order	US

109. *See* McClintock (Conservator of) v. McGriskin, [2010] O.N.S.C. 5511 (Can.); USA et al. v. Yemec et al., [2010] O.A.C. 270 (Can.); Blizzard Entertainment, Inc. v Simpson, [2012] O.N.S.C. 3807 (Can.); Van Damme v. Gelber, [2012] O.N.S.C. 5394 (Can.); PT ATPK Resources TBK (Indonesia) v. Diversified Energy & Resource Corp., [2013] O.N.S.C. 4339 (Can.); Bienstock v. Adenyo Inc., [2014] O.N.S.C. (Can.); Oesterlund v. Pursglove, [2014] O.N.S.C. 2313 (Can.); Fédération des producteurs acéricoles du Québec v. S.K. Export Inc., [2015] N.B.Q.B 115 (Can.); Law Society of Upper Canada v. Kivisto, [2016] O.N.L.S.T.H. 181 (Can.); Specialist Hygiene Solutions Ltd. v. Marsh, [2017] Q.B.G. 379 (Can.); Dish Network L.L.C. v. Shava IPTV Network LLC, [2018] O.N.S.C. 4076 (Can.); Zashko Entertainment Inc. v. Touchgate Global Inc., [2018] O.N.S.C. 3245 (Can.); Dead End Survival LLC v. Marhasin, [2019] O.N.S.C.. 2922 (Can.); Cao v. Chen, [2020] B.C.S.C. 804 (Can.); Pelletier (Agents of) v. Pelletier, [2020] A.B.Q.B. 984 (Can.); Lanfer v. Eilers, [2021] B.C.C.A 1333 (Can.).

8.	*Fédération des producteurs acéricoles du Québec v. S.K. Export Inc*	No	Interim Prohibitory Order	Canada
9.	*Law Society of Upper Canada v Kivisto*	Yes	Disbarment Order	US
10.	*Specialist Hygiene Solutions Ltd. v. Marsh*	No	Party's Undertakings in a Consent Order	UK
11.	*Dish Network L.L.C. v Shava IPTV Network LLC*	Yes	Permanent Prohibitory Injunction	US
12.	*Zashko Entertainment Inc. v. Touchgate Global Inc.*	Yes	Permanent Prohibitory and Mandatory Injunctions	US
13.	*Dead End Survival LLC v Marhasin*	Yes	Permanent Prohibitory Injunction	US
14.	*Cao v Chen*	Partly	Order dismissing spousal support - enforced; Child custody and support orders - not enforced	China
15.	*Pelletier (Agents of) v. Pelletier*	Yes	Freezing Order	Cayman Islands
16.	*Lanfer v Eilers*	Yes	Specific Performance ordering transfer of property in British Columbia	Germany
TOTAL: 16 cases (13 successful; 2 unsuccessful; 1 partially successful)				

Table 2. Statistics regarding Essential Components considered in Canadian judgments

Essential Components Listed in *Pro Swing*	Number of Cases Considered (Total: 16 Cases)	Percentage of Cases Considered
Competent Jurisdiction	15	93.75%
Finality	9	56.25%
Not Penal in Nature	1	6.25%
Integrity of the Justice System	8	50%
Familiarity with Foreign Law	7	43.75%
Clarity and Specificity	9	56.25%
Extraterritoriality	4	25%
Public Policy	12	75%
Absence of Frauds	6	37.5%

Based on Table 1, it is clear that lower courts in Canada across different states, most notably Ontario, have embraced enforcement of foreign NMJs. Among the sixteen relevant cases, thirteen were successful and only two cases were unsuccessful.[110] Thus, one can safely draw the inference from the overwhelming trend in Table 1 that Canadian courts in general take a liberal and progressive approach toward the enforcement of foreign NMJs. However, given the clumsy first step in *Pro Swing*, such an overwhelming trend in the enforcement of foreign NMJs is puzzling.

This Article argues that the solutions to the puzzle in hand are threefold. First, that Canadian courts do not require all the "essential components," including both factors raised in the judgments of *Pro Swing*, when determining whether to exercise discretion. From Table 2, it is clear that most of the Canadian cases did consider the component of competent jurisdiction (93.75 percent). This is not surprising because it is a factor common to all

110. Although the small sample size of the Canadian cases in Table 1 constitutes in no sense any comprehensive or conclusive understanding of the status quo of Canadian courts' enforcement of foreign NMJs.

enforcement cases, irrespective to the nature of the foreign judgments. For the other two basic requirements, finality and non-penal nature, they share a lower percentage, especially the latter (56.25 and 6.25 percent respectively). This is not especially intriguing either because the subject matters of the cases might have pre-empted such issues. For example, a civil and permanent prohibitory injunction would not call for concerns of finality nor their penal nature.[111] However, the remaining figures are worthy of further discussion. In *Pro Swing*, Judge Deschamps discussed alternate methods of enforcement and the risks of wasting judicial costs, but only 50 percent of the cases actually considered the component of integrity of the justice system.[112] Judge Deschamps also warned about the danger of exposing Canadian litigants to unforeseen obligations due to unfamiliarity with foreign laws, but only 43.75 percent of cases managed to consider such dangers.[113] Judge Deschamps also made an express statement that the United States trademarks protection should not be able to reach into Canadian soil simply because of the nature of an internet sale, but the danger of over-extending foreign laws into a worldwide undertaking only attracted 25 percent of the cases to consider.[114] The heated disagreement between the majority and dissenting judgments with regard to the standard for clarity and specificity only prompted 56.25 percent of the cases to consider.[115] Lastly, to end on a relatively high note, 75 percent of the cases considered the defense of public policy. Overall, despite the disagreement between the majority and dissenting judgments with regard to all four grounds considered in *Pro Swing*, judging by the statistics in Table 2, the lower courts apparently have underestimated the importance that the Supreme Court of Canada has attached to those grounds. The loose application of *Pro Swing* in lower courts has rendered the heated, yet valuable, debates between Judge Deschamps and Chief Justice McLachlin in vain. Resulting from this, the backdoor of discretion that the Supreme Court created to be shut when needed is in fact seldom shut.

111. *McClintock*, [2010] O.N.S.C. 5511; *Yemec*, [2010] O.A.C. 270; *Blizzard*, [2012] O.N.S.C. 3807; *Dish Network*, [2018] O.N.S.C. 4076; *Zashko Entertainment*, [2018] O.N.S.C. 3245.

112. Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, para. 40 [2006] 2 S.C.R. 612 (Can.).

113. *Id.* para. 49.

114. *Id.* para. 62.

115. *Id.* paras. 57, 117.

Second, Canadian courts do not create new factors to be considered for discretion of non-enforcement. Third, while considering the established factors, Canadian courts adopt a rather liberal approach. These latter features are illustrated by the cases below.

The first two cases contrast against *Pro Swing* on the issue of extraterritoriality. In *Blizzard Entertainment, Inc. v. Simpson*, the Ontario Superior Court of Justice was asked to enforce a California non-monetary judgment that permanently enjoined Mr. Simpson from infringing Blizzard's copyrights. [116] The court found no difficulty in enforcing the California judgment because the court was satisfied "that the terms of the Order of the California Court were clear and specific and that the considerations set forth in *Pro Swing* were satisfied."[117] Sharing a similar subject matter with *Pro Swing*, the Ontario Superior Court of Justice should have no difficulty following the reasoning and analysis of the Supreme Court of Canada in *Pro Swing*. Nevertheless, the Ontario Superior Court of Justice made no analysis on the issue of "extraterritoriality," on which Judge Deschamps in *Pro Swing* ruled that extraterritorial application of US trademark protection should not be allowed in default.[118] It is important to bear in mind that the issue of extraterritoriality did not cause much concern in *Pro Swing* because the onus of the question was whether the consent decree could be interpreted as Elta having agreed to such extraterritorial application in the consent decree. [119] However, in the case of *Blizzard*, the injunction was not contained in a consent decree by which the Ontario court could have evaded the issue of extraterritoriality. The Ontario court, if following *Pro Swing* strictly, should have considered the issue of extraterritoriality and potentially refused enforcement. The enforcement of the injunction revealed the Ontario court's loose reading of *Pro Swing*. Further, the Ontario court made no mentioning as to what other factors in *Pro Swing* were considered and how the facts of the case passed the required threshold. Instead, in one broad stroke, the

116. *Blizzard*, [2012] O.N.S.C. 3807.
117. *Id.* para. 17.
118. *Pro Swing*, 2006 SCC 52, para. 62.
119. *Id.* para. 56.

Ontario court declared that considerations in *Pro Swing* were satisfied.[120]

In *Dead End Survival LLC v. Marhasin*, once again, the plaintiff asked the Ontario Superior Court of Justice to enforce a Georgia non-monetary judgment that permanently enjoined the defendant from infringing the plaintiff's trademarks.[121] Once again, the Ontario court enforced the judgment on the basis that the court had jurisdiction and the defendant failed to establish any public policy defense.[122] Similar to *Blizzard Entertainment*, this case concerned permanent prohibitory injunction against infringements of trademarks, and thus should have followed the approach in *Pro Swing*. Instead, the Ontario court only considered the public policy defense after establishing the jurisdiction of the Georgia court being competent.[123] Contrasting with *Pro Swing*, the Ontario court considered neither the "clarity and specificity," nor the extraterritoriality issues in this case, notwithstanding that the two issues played a pivotal role in the *Pro Swing* judgment of the Supreme Court. This is not to mention that the Ontario court, once again, made no mentioning as to what other factors in *Pro Swing* were considered and how the facts of the case passed the required threshold. This again shows how lower courts of Canada selectively apply the test contained in *Pro Swing*.

The next case contrasts against *Pro Swing* on the difficulty of administering the enforcement of NMJ and potential impacts on third party right. In *Pelletier (Agents of) v. Pelletier*, the Alberta Court of Queen's Bench was asked to enforce a Cayman Freezing Order in Canada in response to the bankruptcy proceedings in the Cayman Islands.[124] The Alberta court acknowledged the list of factors posed by Judge Deschamps in *Pro Swing* and considered them one by one.[125] Concluding that those factors were satisfied, the Alberta court granted the application to enforce the Freezing Order. Although the Alberta court *prima facie* followed *Pro Swing* strictly, the analysis regarding the impacts on third party rights is

120. *Blizzard*, [2012] O.N.S.C. 3807, para. 17.
121. Dead End Survival LLC v. Marhasin, [2019] O.N.S.C. 2922 (Can.).
122. *Id.* para. 32.
123. *Id.* para. 26.
124. Pelletier (Agents of) v. Pelletier, [2020] A.B.Q.B. 984 (Can.).
125. *Id.* para. 53; Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612, para. 30 (Can.).

worthy of further discussion. In *Pro Swing*, Judge Deschamps ruled that the potential infringement of the third parties' rights of personal information protection should suffice to bar enforcement from a public policy perspective.[126] In this case, the Alberta court acknowledged that recognition of the Cayman Freezing Order could indirectly affect Mrs. Pelletier's son, Daniel, who was attending a private Canadian boarding school funded by the assets subject to the Freezing Order.[127] Yet it went on to rule that "recognition of the Cayman Freezing Order would need to accommodate spending that may be required by Mrs. Pelletier for Daniel's continued educational and medical needs."[128] In other words, not only did the Alberta court not refuse enforcement due to the impacts on innocent third parties, the Alberta court took on the responsibility to administer the Freezing Order to ensure that there would be sufficient assets exempted from the enforcement of the Freezing Order to support Daniel's educational and medical needs. This is to be further contrasted with Judge Deschamps's emphasis on the appropriateness of using local judicial resources in *Pro Swing*.[129] Instead of going through a cost-and-benefit analysis on the use of local judicial resources in this case, the Alberta court simply signaled the need to accommodate Daniel's needs, treated this factor as satisfied, and went on to grant the application. This is a good example of loose application of *Pro Swing*.

Lastly, in *Lanfer v. Eilers*, the British Columbia Court of Appeal ruled on whether a foreign judgment—a German judgment in this case—that adjudicated title of interest to land could be enforced in Canada by way of specific performance.[130] At first instance, the chambers judge refused to enforce the German judgment on the basis of a rule laid down by the Supreme Court of Canada in *Duke v. Andler*, which stated that Canadian courts would not enforce a foreign judgment that adjudicated title of interest to land in a foreign jurisdiction.[131] The decision in *Duke v. Andler* resonates

126. *Pro Swing*, 2006 SCC 52, para. 60.
127. *Pelletier*, [2020] A.B.Q.B. 984, para. 59.
128. *Id.*
129. *Pro Swing*, 2006 SCC 52, para. 48.
130. Lanfer v. Eilers, [2021] B.C.C.A 1333 (Can.).
131. *Id.* para. 2; Duke v. Andler, [1932] S.C.R. 734 (Can.). *Duke* involved a contract to sell land in Victoria, British Columbia. The parties to the contract resided in California and entered into the contract there. The vendors sued the purchasers for breach of contract

with the long-standing British common law Mozambique rule, which renders actions relating to title in foreign land, the right to possession of foreign land, and trespass to foreign land non-justiciable in common law jurisdictions.[132] The British Columbia Court of Appeal reversed the Chambers Judge's decision and ruled that *Pro Swing* should be taken implicitly to have overruled *Duke v. Andler* even though neither *Pro Swing* dealt with real property, nor the reasoning of the Supreme Court came close to make that overruling obvious.[133] Further, the Court of Appeal ruled that as long as the NMJs complied with the requirements of *Pro Swing*, they would be entitled to recognition and enforcement in British Columbia.[134] Although the ruling indicates strict adherence to *Pro Swing*, it lacks the vigilance that Judge Deschamps advocated in *Pro Swing* where she stated that Canadian courts should always be prepared to take into account new factors and new defenses when the situation so demands.[135] In this case, the subject matter was land, the strongest form of immovable property and a cornerstone of territorial sovereignty.[136] Further, apart from the long-standing British common law Mozambique rule, there was a precedent laid down by Supreme Court of Canada that spoke volume as to the special character of land in the law of recognition and enforcement. These facts cry out for the need to consider new factors under the *Pro Swing* test. Nonetheless, the British Columbia Court of Appeal oversaw the need and adopted *Pro Swing* on face value.

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and obtained a judgment for specific performance mandating the purchasers to re-convey the land in British Columbia to the vendors from the California court. The Supreme Court of Canada refused enforcement of the California judgment on the basis that the courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situated in such country. *Id.*

132. British South Africa Co. v. Companhia de Moçambique [1893] AC (HL) 602 (appeal taken from Eng.).

133. *Lanfer*, [2021] B.C.C.A 1333, para. 74:

> From this, I conclude that a foreign order for specific performance implicating rights or interests in immovable property that complies with the requirements of *Pro Swing* is capable of being recognized and enforced in British Columbia. *Duke* no longer compels a conclusion to the contrary in light of subsequent developments in private international law.

134. *Id.* para. 83.

135. Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612, para. 31 (Can.):

> The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity.

136. *British South Africa Co.*, [1893] AC (HL) 602.

Overall, these subsequent cases after *Pro Swing* show that, despite the clumsy first step, the Canadian courts encounter very few issues with enforcing NMJs. The practices of the lower Canadian courts have eliminated the concerns of the Canadian Supreme Court and paved a broad highway for the enforcement of foreign NMJs in Canada. This shows that the Supreme Court, in its judgment in *Pro Swing*, might be over-concerned with issues that do not arise in practice. On the other hand, these courts continued to blindly take the assumption of the Supreme Court on the presumed benefits of enforcing NMJs without asking any questions.[137] Nevertheless, by proving that the enforcement will come with little practical difficulties, one would expect the experiment is a successful one for the whole world to see. However, to date, only Jersey has elected to follow suit and to adopt the enforcement of foreign NMJs.[138] Thus, is there any reason stopping other major common law jurisdictions from taking on the liberal approach of Canada, given that the judicial costs might not be as high as one might have thought? Examining the respective approaches of the other two common law jurisdictions, England and the United States, shall yield the answer.

III. ENGLAND, THE CONSERVATIVE

In *Pro Swing*, when Judge Deschamps first discussed the traditional rule, she cited the authoritative English textbook, Dicey and Morris on the Conflict of Laws as the basis for the traditional rule instead of citing a Canadian authority.[139] Afterwards, she cited Canadian Conflict of Laws by Walker and Castel to confirm the English position in Canada.[140] From such a narrative, it shows that the traditional rule is heavily influenced by that of England. Hence, to analyze why other common law jurisdictions have not departed from the traditional rule as Canada has done so, we must investigate why the English jurisprudence, which at one point aligned with that of Canada, does not break away from the traditional rule like Canada did.

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137. *Pro Swing,* 2006 SCC 52, para. 1.

138. *See* Brunei Investment Agency & Bandone Sdn. Bhd. v. Fidelis Nominees Ltd. (2008) JRC 152 (Jersey).

139. *Pro Swing,* 2006 SCC 52, para. 10; DICEY, MORRIS & COLLINS, supra note 31, at 474-75.

140. *Pro Swing,* 2006 SCC 52, paras. 9-10; WALKER & CASTEL, *supra* note 15.

Various English authoritative hornbooks acknowledge and confirm the traditional rule as concisely put by Dicey, Morris & Collins on the Conflict of Laws that, the foreign judgment has to be for a fixed sum of money to be enforced in England.[141] These English hornbooks cite the case of *Sadler v. Robins* unanimously as the basis of the traditional rule.[142] In *Sadler v. Robins*, the English Hight Court (King's Bench Division) was asked to enforce a decree of the High Court of Chancery in the island of Jamaica.[143] The decree ordered the defendants to pay a certain sum of money to the plaintiffs on a specific date.[144] Nevertheless, at the time of trial, the defendant's costs were waiting for taxation by officers in Jamaica in the Jamaican proceedings.[145] Given that the defendant's costs would be deducted from the judgment sum, the judgment sum would be subject to adjustments in the future.[146] Lord Ellenborough refused to enforce the Jamaican judgment since the sum due on the decree on the date of trial was "quite indefinite" and could not be a foundation for a claim.[147] In other words, under *Sadler v. Robins*, one could only enforce a foreign judgment when the judgment debts are certain in amount. Thus, the case actually dealt with a monetary judgment which was rejected for lack of finality. Although the case of *Sadler v. Robins* does not concern enforcement of foreign NMJs, Lord Ellenborough's emphasis on the certainty of a fixed sum of money has been consistently construed by English courts and scholars as laying down the long-standing traditional rule against NMJ enforcement.

A number of English scholars have debated on whether England should retain the traditional rule in face of modern-day transactions. Leading English scholars argue that, if the foreign NMJs are entitled to recognition, whether they will be enforced will be of limited practical significance when the judgment creditor can initiate a new cause of action in England, as this cause of action will be in summary proceedings with the substantive merits of the foreign judgment being recognized under the doctrine of *res*

141. *See* DICEY, MORRIS & COLLINS, *supra* note 31, at 675; CHESHIRE, NORTH & FAWCETT, *supra* note 3; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, *supra* note 95.

142. (1808) 1 Camp. 253 (Eng.).

143. *Id.* at 253.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 255-57.

judicata, to establish liability.[148] They believe that this summary proceeding will be short and cost-effective.[149] After establishing liability through the recognized merits, the English courts will grant remedies available under English law. This will avoid the difficulty of giving effect to foreign remedy not known to local court, a concern voiced in *Pro Swing*.[150] It has been observed that the local remedies are often the same as those ordered in the foreign judgments.[151] Pursuant to this argument, these English scholars are certain that a departure from the traditional rule is neither imminent nor necessary.[152]

English scholars' conservative view is also reflected in the English courts. Our survey of English cases reveals a complete lack of recent decisions relating to the enforcement of foreign NMJs.[153] The only relevant case was *Airbus Industrie G.I.E. v. Jaisukh Arjun Bhai Patel and Others*.[154] Dating back to 1996, the English High Court (Queen's Bench Division) was asked to enforce an Indian anti-suit injunction restraining the defendants from claiming damages against the plaintiffs in any courts other than those in India.[155] The English Court quickly refused the enforcement under the traditional rule, citing Dicey and Morris.[156] In particular, it is important to note that Judge Colman's observation on the complete lack of decisions relating to enforcement of foreign NMJs.[157] In his words,

> The explanation for the total absence of any such authority is clearly that at common law a judgment for a monetary amount

148. *See* DICEY, MORRIS & COLLINS, *supra* note 31, at 673 n.74; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS *supra* note 95.

149. *See* DICEY, MORRIS & COLLINS, *supra* note 31, at 673 n.74; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, *supra* note 95.

150. *Pro Swing*, 2006 SCC 52, para. 51.

151. *See* DICEY, MORRIS & COLLINS, *supra* note 31, at 673 n.74; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, *supra* note 95.

152. *See* DICEY, MORRIS & COLLINS, *supra* note 31, at 673 n.74; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, *supra* note 95.

153. The authors first looked at the cases cited in the English hornbooks. *See* DICEY, MORRIS & COLLINS, *supra* note 31; CHESHIRE, NORTH & FAWCETT, *supra* note 3; BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, *supra* note 95. The authors then searched for subsequent cases citing those cases and tried to locate English judgments concerning enforcement of foreign NMJs.

154. [1996] I.L.Pr. 465 (Eng.).

155. *Id.* at 8-10.

156. *Id.* at 26; DICEY, MORRIS & COLLINS, *supra* note 31, at 673.

157. *Airbus*, [1996] I.L.Pr. 465 at 21.

> was analysed as giving rise to a judgment debt and, once that legal obligation was created by a valid foreign judgment, an action could be brought on that debt . . . However, an order of a foreign court *in personam* did not become a judgment debt. It gave rise to no independently enforceable obligation in the eyes of the English courts.[158]

Hence, we may attribute the lack of decisions relating to enforcement of foreign NMJs to the deeply rooted characterization of judgment in English jurisprudence. As evidenced by Judge Colman's quote above, English courts simply equate foreign judgments with foreign *monetary* judgment. Meanwhile, we found no case in England discussing *Pro Swing*. This suggests that the liberal movement in Canada has been largely ignored by English courts. This might not be a surprise given the tendency of English courts in staying with the traditional rules. For example, another important though not directly relevant jurisdictional development regarding "real and substantial" connection in Canada has also received limited attention by the English judiciary.[159] Another example was that the English House of Lords, in the case of *Harding v. Wealands*, refused to apply a modern Australian case, *John Pfeiffer Pty Ltd v. Rogerson*, which laid down Australia's liberal approach in regarding all questions about amounts of damages to be substantive issues.[160] Instead, the House of Lords resorted to a nineteenth century case, *Cope v. Doherty*, for the proposition that any statutory limits on the amounts of damages should be regarded as procedural.[161] These examples signify the English common law's "formidable degree of inertia."[162]

Finally, Hong Kong, a common law jurisdiction that closely follows the English enforcement rules, did recently ask if the time was ripe for a change to the traditional rule. In *Jiang Xi An Fa Da Wine Co Ltd v. Zhan King*, the Hong Kong Court of First Instance openly stated that today's globalized world already went beyond the imagination of the people living in the early nineteenth century

158. *Id.* at 474, ¶21.

159. *Morguard*, [1990] 3 S.C.R. 1077, at 1098.

160. Harding v. Wealands [2006] UKHL 32, 1 AC (HL) 1, 27 (appeal taken from Eng.); John Pfeiffer Pty Ltd v. Rogerson (2000) 36 HCA 1 (Austl.).

161. *Harding*, [2006] UKHL 32, 46; Cope v. Doherty (1858) 4 K. & J. 367, 1127 (hL) 1131-32 (appeal taken from Eng.).

162. *See* Briggs, *supra* note 97, at 1.

when *Sadler v. Robins* was ruled.[163] Given the developments in Canada and Jersey after *Pro Swing*, a re-assessment of the continuing applicability in Hong Kong of the two centuries old common law prohibition on the unenforceability of foreign NMJs is long overdue.[164]

In conclusion, the review of English authorities and literature, contrasted with the recent query raised in Hong Kong, suggests that the conservatism is so deeply rooted in the English jurisprudence. Along with the lack of precedence is the devoid of discussion on the benefits of changing the traditional rules. As mentioned in our analysis of Canadian authorities above, the Canadian courts never had any in-depth discussions there either. Rather than diving into the elusive benefits of the liberal approach, English courts prefer to refrain from judicial activism and adhere to the traditional and time-tested rules. This Article argues that such conservatism might be due to the interesting perception that statutory development is rather important.[165] Given that changes in the enforcement rules would inevitably affect national interests by extending the reach of foreign laws into English soil, it is in English jurisprudence that legislature is often in a better position to determine what is in the public interests.[166] This is particularly so when the benefits of enforcement of foreign NMJs are less obvious or quantifiable as previously argued. The Parliament, as a nation-wide public discussion forum on social and economic

163. [2019] H.K.C.F.I. 2411, HCMP 1574/2017 (H.K.).

164. *Id.* para. 84.

165. Briggs, *Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments*, *supra* note 97, at 1; In *Adams v. Cape Industries plc.* [1990] 1 AC 16, 151-52 (Eng.), the Court of Appeals restricted itself to discerning the law on jurisdictional competence, not changing it. In *Owens Bank Ltd. V Bracco* [1992] 2 AC (HL) 193, 202(appeal taken from Eng.) the House of Lords considered it too late for changing the long-standing common law rule on fraud as a defense to recognition and enforcement.

166. James v. United Kingdom, (1986)8 Eur. Ct. H.R. 123, para. 46:

> [T]he decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation.

Although the concept of margin of appreciation is usually employed in the context of human rights in England, the case of *James v United Kingdom* illustrates English courts' willingness to defer judgments of national interests to the legislature. *Id.*

policies, is more equipped in both expertise and resources than the judiciary to ascertain such less apparent nor quantifiable benefits brought by the enforcement of foreign NMJs. Hence, in the eyes of English courts, the legislature should be in the driving seat in changing the traditional rule by statutory development. In other words, it is expected that English courts would not change the traditional rule unless and until the English Parliament sees benefits to their national interests to do so and consequently enacts a new statute or codifies an international instrument to the same effect.

IV. UNITED STATES: THE MIXED BAG

A. Restatements

In the United States, the enforcement of foreign judgments is governed by state law. The full faith and credit clause in the constitution of the United States only applied to sister state judgments and has no effect on foreign judgments.[167] Further, even though each state has its own laws on the enforcement of foreign monetary judgments, state laws have been harmonized through the adoption of two model statutes.[168] There is, however, no model statutes on the enforcement of foreign NMJ. Thus, many state courts have to resort to the Restatement (Second) on Conflict of Laws and the Restatement (Third) on Foreign Relations for guidance regarding the enforcement of foreign NMJs. [169] The Restatements, however, do not provide a solid foundation in the first place on the rationale in enforcing foreign judgments. On the top of that, the state courts' interpretation on the Restatements are far from consistent. These lead to a very mixed practice of enforcing NMJs in the United States.

Although the Restatement (Second) of Conflict of Laws mainly addresses inter-state enforcement, [170] it also comments on the

167. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 68-69 (1938); U.S. Const. art. IV, § 1 cl. 1 ("Full Faith and Credit Clause").

168. *See, e.g.,* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (NAT'L CONF. COMM'R UNIF, STATE L. 2005).

169. *See* Stacie I. Strong, *Recognition and Enforcement of Foreign Judgments in US Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 68 (2014).

170. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, 5.2, INTRODUCTORY NOTE (AM. L. INST. 1971).

viability of state courts enforcing foreign NMJs.[171] The reporter admits at the outset that the "[e]xisting authority does not warrant the making of any definite statement" as to the enforcement of international NMJs. However, he also notes that some state courts have usually given effect to the foreign NMJs which meet the requirements for judgments rendered in the sister states.[172] In other words, sharing the same test for inter-state enforcement, a foreign NMJ would be enforced so long as such enforcement is (1) "necessary to effectuate the decree"; (2) "will not impose an undue burden upon the American court"; and (3) "consistent with fundamental principles of justice and of good morals."[173] The rationale behind such an approach is the adoption of the *res judicata* argument—in other words, to serve the public interest by putting an ultimate end on litigation.[174] Although *Restatement (Second)* focuses on inter-state issues and the abovementioned argument is in the form of a comment, this argument of enforcing foreign NMJs has been endorsed and adopted by several states in the United States, most notably Delaware and Florida.[175]

Turning to Restatement (Third) of Foreign Relations, it seems to suggest the opposite. Unlike the English conservative position, the general rule in the Restatement Third makes no express prohibition against the enforcement of foreign NMJs.[176] However, the commentary section expressly states that foreign NMJs are "not

171. *Id.* §92 cmt. g.

172. *Id*; Roblin v. Long, 60 How. Pr. 200 (N.Y. Sup. Ct. 1880).

173. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, 5.2, §92 cmt. g (AM. L. INST. 1971).

174. *Id.* §98 cmt. b.

175. For Florida, see *Cardenas v. Solis*, 570 So. 2d 996 (1990). For Delaware, see *Pilkington Bros. P.L.C. v. AFG Industries Inc.*, 581 F. Supp. 1039 (1984). *See also id.* §102 cmt. g ("A valid decree rendered in a foreign nation that orders or enjoins the doing of an act will usually be recognized in the United States…That is to say, such a decree will usually be given the same res judicata effect in the United States that it enjoys in the nation of its rendition. So far as enforcement is concerned, it can safely be said that a valid foreign nation decree that orders the payment of money will usually be enforced in the United States."). *See also id.* §102, Case Citations-by Jurisdiction, D.Del.; Fla.App.

176. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 (AM. L. INST. 1987):

> (1) Except as provided in §482, final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States; (2) A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.

generally entitled to enforcement, but may be entitled to recognition."[177] Hence, on this basis, foreign NMJs are generally not enforceable, just like the traditional rule in England.[178] Arizona, for example, is one of the states that has adopted this position.[179]

Interestingly, the narrative of the latest Restatement (Fourth) of Foreign Relations published in 2018 suggests a rather different position from that of its preceding version.[180] In the commentary, instead of speaking with a negative tone, the reporters acknowledge that the state courts regularly recognize foreign NMJs as a matter of comity.[181] Further, Restatement Fourth adds in a new section titled Foreign Injunctions in which it is stated that "a final and conclusive judgment of a court of a foreign state in an action seeking an injunction or a comparable nonmonetary remedy is entitled to *recognition* by courts in the United States."[182] Despite this section's general acceptance of recognition of foreign NMJs, state courts are given discretion not to enforce the foreign NMJs and to decide whether to provide injunctive relief or other types of remedies.[183] Although it makes no definite statement as to the enforcement of foreign NMJs, comparing with the narrative of Restatement (Third), Restatement (Fourth) has certainly taken a more liberal approach. Unfortunately, our survey reveals no case on the enforcement of foreign NMJs that has cited Restatement (Fourth). Hence, the effects of the more liberal approach suggested in Restatement (Fourth) remain unclear.

A review of the Restatements reveals that the position on the enforcement of foreign NMJs remains unsettled and they can point state courts in either direction. This is consistent with our survey of the United States cases. It is also a mixed bag: some of the states are more liberal as in Restatement (Second), while some are more conservative as in Restatement (Third). In the following section,

177. *Id.* §481 cmt. b.

178. *Cf.* Nahar v. Nahar, 656 So. 2d 225 (Fla. Dist. Ct. App. 1995); *Id.* §481, Case Citations – by Jurisdiction, Fla.App.

179. *See* Global Royalties, Ltd. V. Xcentric Ventures, LLC., No. 07-956-PHX-FJM 2007 WL 2949002 *2 (D. Ariz. Oct. 10, 2007).

180. The test for recognition and enforcement in Restatement Fourth is identical to the one contained in Restatement Third. *Compare* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 481, Rep. note 10 (AM. L. INST. 2018), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 (AM. L. INST. 1987).

181. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 481 cmt c (AM. L. INST. 2018).

182. *Id.* § 488 (emphasis added).

183. *Id.*

United States cases on enforcement of foreign NMJs would be examined to analyze the positions of the United States and the different states on enforcement of foreign NMJs.

1. Survey on United States cases from a state perspective

Table 3. Survey regarding United States cases on Enforcement of Non-Monetary Judgment[184]

No.	Case Name	Success-ful?	Subject Matter	Origin of Judgment
Florida				
1.	*Bullen v. Her Majesty's Government of the United Kingdom*	Yes	Receiving Orders	UK
2.	*Cardenas v. Solis*	Yes	Interim Freezing Order	Guatemala
3.	*Cleary de Pacanins v. Pacanins*	Yes	Interim Freezing Order	Venezuela
4.	*Nahar v. Nahar*	Yes	Mandatory Injunction on Transfer of Assets	Aruba
5.	*Intrinsic Values Corp. v. Superintendencia De Administracion*	Yes	Prohibitory Injunction	Guatemala

184. Bullen v. Her Majesty's Government of the United Kingdom, 553 So. 2d 1344 (Fla. Dist. Ct. App. 1989); Cardenas v. Solis, 570 So. 2d 996, 997 (Fla. Dist. Ct. App. 1990); Cleary de Pacanins v. Pacanins, 650 So. 2d 1028, 1029-30 (Fla. 1995); Nahar v. Nahar, 656 So. 2d 225 (Fla. Dist. Ct. App. 1995); Intrinsic Values Corp. v. Superintendencia De Administracion, 806 So. 2d 616 (Fla. Dist. Ct. App. 2002); Cermesoni v. Maneiro, 144 So. 3d 627 (Fla. Dist. Ct. App. 2014); Amezcua v. Cortez, 314 So. 3d 666 (Fla. Dist. Ct. App. 2021); Roblin v. Long, 60 How. Pr. 200, 201 (N.Y. Sup. Ct. 1880); In re: Letter Rogatory Issued By the Second Part of the III Civil Regional Court of Jabaquara/Saude, Sao Paulo, Brazil, No. 01-MC-212, 2002 WL 257822 (E.D.N.Y Feb. 6, 2002); Wolff v. Wolff, 40 Md. App. 168 , 389 A.2d 413 (Md. Ct. Spec. App. 1978); Pilkington Bros. v. AFG Industries Inc., 581 F. Supp. 1039 (D. Del. 1984); Siko Ventures Ltd. V. Argyll Equities, LLC, No. SA-05-CA-100-OG, 2005 WL 2233205 (W.D. Tex. Aug. 5, 2005); Global Royalties, Ltd. V. Xcentric Ventures, LLC, No. 07-956-PHX-FJM, 2007 WL 2949002 (D. Ariz. Oct. 10, 2007); Ravasizadeh v. Niakosari, 94 Mass. App. Ct. 123, 112 N.E.3d 807 (2018).

6.	*Cermesoni v. Maneiro*	Yes	Interim Freezing Order	Argentina
7.	*Amezcua v. Cortez*	Yes	Interim Prohibitory Injunction	Mexico
New York				
8.	*Roblin v. Long*	No	Mandatory Injunction	Canada
9.	*In re: Letter Rogatory Issued By the Second Part of the III Civil Regional Court of Jabaquara/Saude, Sao Paulo, Brazil*	No	Freezing Order	Brazil
Others				
10.	*Wolff v. Wolff*	Yes	Alimony Provisions	UK
11.	*Pilkington Bros. P.L.C. v. AFG Industries Inc.*	No	Interim Freezing Order	UK
12.	*Siko Ventures Ltd. v. Argyll Equities, LLC*	Yes	Mandatory Injunction on Transfer of Shares	Hong Kong
13.	*Global Royalties, Ltd. v. Xcentric Ventures, LLC*	No	Mandatory and Prohibitory Injunctions	Canada
14.	*Ravasizadeh v. Niakosari*	Yes	Islamic Marriage Contract on Marital Assets	Iran

As enforcement of foreign judgments is a matter of state law, it would be appropriate to analyze Table 3 from a state perspective. Florida's overwhelming track record in the past thirty years of enforcing seven foreign NMJs provides convincing evidence that Florida has fully embraced the enforcement of foreign NMJs.

With regard to New York, although enforcement of foreign NMJs was unsuccessful in both cases, a closer analysis of the cases reveals that New York courts did not rule out the enforcement of

foreign NMJs, but simply rejected on other bases in these two cases. In *Roblin v. Long*, the Supreme Court of New York decided whether to enforce a Canadian judgment ordering the defendant to deliver to the plaintiff "the patent of the lands and premises."[185] Although the court refused to enforce the Canadian judgment, the New York Supreme Court stated that judgments of another state or country would be enforced provided that such enforcement would not violate New York's own laws or inflict injuries upon its citizens.[186] In this case, the Supreme Court of New York expressly endorsed the enforcement of the Canadian judgment in principle but failed to enforce it because the lands and premises were situated in Canada and thus out of the jurisdiction of New York.[187] In *In re: Letter Rogatory Issued By the Second Part of the III Civil Regional Court of Jabaquara/Saude, Sao Paulo, Brazil*, the New York District Court decided whether to enforce a Brazilian letter of rogatory mandating that a certain amount of money be frozen.[188] The New York District Court refused the enforcement on two bases: first, that letters rogatory were an impermissible method for enforcing a foreign NMJ in United States; second, the applicants failed to demonstrate the risks that the assets would be dissipated and unavailable to fulfil a judgment.[189] It must also be noted that the New York court refrained from ruling out the enforcement of foreign NMJs in principle. Hence, despite the failure in the two cases above, one cannot conclude that the New York state is against the enforcement of foreign NMJs.

Regarding the other states above, the lack of authorities of each state renders an articulation of a trend impossible. Some states enforce the foreign NMJs solely based on the principle of "comity."[190] The principle of comity originated from the federal case of *Hilton v. Guyot*, in which it is stated that reciprocity was a pre-condition of such enforcement.[191] Nevertheless, it is widely acknowledged that *Hilton v. Guyot* is not binding on state courts in

185. *See Roblin*, 60 How. Pr. at 201.

186. *Id.* at 205.

187. *Id.*

188. *In re: Letter Rogatory*, 2002 WL 257822.

189. *Cf. Cleary de Pacanins*, 650 So. 2d 1028 (enforcing a freezing order contained in a letter rogatory issued by Venezuela.).

190. *See Wolff v. Wolff*, 40 Md.App. 168, 389 A.2d 413 (Md. Ct. Spec. App. 1978); *Ravasizadeh v. Niakosari,* 94 Mass. App. Ct. 123, 112 N.E.3d 807 (2018).

191. *See* Hilton v. Guyot, 159 U.S. 10 (1895).

the realm of enforcement and reciprocity should not be a pre-condition.[192] The negative treatment of *Hilton v. Guyot* by the state courts makes one wonder the kind of legal basis the principle of comity is, especially when the Restatements have not been cited in support. It keeps one wondering whether the principle of comity is a valid legal basis; if so, what legal basis is it? What purpose does it seek to achieve? What definitions, tests, or standards does the principle of comity carry along? The concept of "comity" has no contribution to rendering the position on the enforcement of foreign NMJs more certain. In addition, the distinction between the liberal approach in Restatement Second and the conservative approach in Restatement Third has given state courts discretion to choose which path they would like to take. [193] The split in authorities suggest that the position of the United States on enforcement of foreign NMJs falls within the grey area due to the different approaches in the two Restatements and the ambiguous understanding of comity.

B. Reciprocity

As stated in the preceding Section, the element of reciprocity was ruled to be a pre-condition of enforcement of foreign judgments in *Hilton v. Guyot* by the Supreme Court of the United States.[194] Nevertheless, various state courts decided not to follow *Hilton v. Guyot*.[195] It has become almost a consensus among the states that reciprocity is not a prerequisite for the enforcement of foreign judgments.[196] Thus, when considering whether to enforce foreign judgment, including NMJs, state courts generally do not consider the enforceability of US judgments in the relevant foreign country. This is reflected in the way that state courts handle

192. *See generally* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381 (1926).

193. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC,* No. 07-956-PHX-FJM, 2007 WL 2949002 at *2 (D. Ariz. Oct. 10, 2007) (showing that the state court had discretion in deciding how to handle the concept of comity and refusing enforcement by citing Restatement (Third) of Foreign Relations); *Siko Ventures, Ltd. v. Argyll Equities, LLC,* No. SA-05-CA-100-OG, 2005 WL 2233205 at *2 (W.D. Tex. Aug. 5, 2005) (advocating for granting enforcement by citing Restatement (Second) of Conflict of Laws.)

194. *See Hilton*, 159 U.S. at 210.

195. *See Erie Railroad Co.,* 304 U.S. at 64; *Johnston*, 242 N.Y. at 381.

196. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 cmt. D, Rep. n.1 (AM. L. INST. 1987).

enforcement of NMJs from Canada. As shown in Table 1, ten of the thirteen NMJs enforced by Canadian courts since *Pro Swing* are NMJs originated from the United States.[197] Even though there is no general requirement of reciprocity, a comity perspective suggests that US state courts shall reciprocate and enforce NMJs from Canada. This will forge a conducive pact on enforcement of NMJs between Canada and the United States and will facilitate business transactions between the two countries.

Further analysis, however, suggests otherwise. The only NMJ related case post-*Pro Swing* is *Global Royalties, Ltd. v. Xcentric Ventures, LLC.*[198] In this case, the Arizona state court refused to enforce mandatory and prohibitory injunctions from Ontario Superior Court of Justice on the basis of the conservative Restatement (Third).[199] The judge made no mentioning of *Pro Swing* or how the Canadian courts allowed enforcement of foreign NMJs.[200] Further, *Global Royalties Ltd* is not alone, our research reveals no subsequent cases citing *Pro Swing* nor enforcing Canadian NMJs. Thus, not only was the judicial development in Canada after *Pro Swing* largely ignored, there was also no reciprocity between the courts of Canada and the United States on enforcement of NMJs, whether as a legal condition or based on comity.[201]

Does the practice of the state courts entail the end of the reciprocity rule? United States scholars suggest the otherwise. In 2005, the American Law Institute ("ALI") issued the *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed*

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197. *See supra* tbl.1; *supra* note 109 and accompanying text (highlighting NMJs enforced by Canadian courts; *Bienstock*, [2014] O.N.S.C.; *Blizzard Entertainment*, [2012] O.N.S.C. 3807; *Dead End Survival*, [2019] O.N.S.C. 2922; *Dish Network*, [2018] O.N.S.C. 4076; *Law Society of Upper Canada*, [2016] O.N.L.S.T.H. 181; *McClintock*, [2010] O.N.S.C. 5511; *Oesterlund*, [2014] O.N.S.C. 2313; *Yemec*, [2010] O.A.C. 270; *Van Damme*, [2012] O.N.S.C. 5394; *Zashko Entertainment*, [2018] O.N.S.C. 3245).

198. *Global Royalties*, 2007 WL 2949002. See *Roblin*, How. Pr. At 205 for an example of US enforcement of a Canadian judgment prior to the *Pro Swing* decision. The New York state court refused enforcement as the land in British Columbia, the subject matter of the case, was outside the jurisdiction of the New York State Court. *Id.*

199. *See Global Royalties*, 2007 WL 2949002, at *930, *932. The case was a defamation claims and the injunctions granted by the Canadian court required the defendant to remove any references to the plaintiff from the defendant's website and prohibited the defendant from posting any further defamatory messages. *Id.*

200. *See id.*

201. *See supra* tbl.1; *supra* note 109 and accompanying text (highlighting inconsistency in NMJ enforcement in post-*Pro Swing* jurisprudence).

Federal Statute ("the ALI Proposal") to invite the United States Federal Government to impose uniform standards for recognition and enforcement of foreign judgments throughout the United States.[202] Although the ALI Proposal has not materialized into legislation, it has provoked much academic discussion, especially concerning the reciprocity rule. The reciprocity rule is contained in Clause 7(a) of the Proposed Federal Statute, which states that "[a] foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin."[203] Accordingly, the ALI Proposal would revive the reciprocity rule laid out in *Hilton v. Guyot* if adopted and enacted.

The ALI argued that the rationale behind the reciprocity rule was two-fold: (1) the need for uniformity across the United States; and (2) to provide an incentive for other countries to enforce United States judgments.[204] Regarding the first reason, the ALI suggested that eight states adopted the 2005 Foreign-Country Money Judgments Recognition Act with a reciprocity provision; two other states adopted the 2005 Act with a mandatory reciprocity provision. Hence, to ensure that the enforcement rules are uniform across different states, the ALI suggested that the federal government to include a reciprocity rule.[205] This argument might not be the strongest considering that the rest of the states do not have a reciprocity rule. Uniformity would be more easily achieved if the ten states with reciprocity above abolish the rule. Thus, the reason with more persuasiveness is the second one on incentive and it is highly controversial among scholars.[206] ALI argued that the reciprocity rule was intended to create an incentive for foreign courts to recognize and enforce US judgments rendered, thus protecting and promoting US national interests by lowering

202. RECOGNITION AND ENF'T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. L. INST., Proposed Final Draft 2005).

203. *Id.* § 7(a).

204. *Id.* §7 Rep. note 3.

205. *Id.*

206. *See* Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI judgments project's proposed federal foreign judgments statute*, 45 NEW ENG. L. REV. 63, 68, 94 (2010); Nathan S. Park, *Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution,* 38 UNIV. PA. J. INT'L L. 999 (2017).

the threshold required to enforce US judgments in foreign jurisdictions.[207]

Although the ALI Proposal was issued in 2005, the reciprocity rule has continued to provoke further discussion ever since. On the one hand, it is argued that in the interests of judicial economy and justice, foreign NMJs should be enforceable in different countries.[208] To achieve this outcome, and in the worldwide context of decentralized legal systems, top-down directives are not available and one must rely on horizontal negotiations.[209] To facilitate such horizontal negotiations, reciprocity is the only practical motivation for other countries to mutually allow enforcement of foreign NMJs.[210] On the other hand, the reciprocity rule is objected to on numerous grounds.[211] First, the reciprocity rule sacrifices private rights because foreign NMJs might fail to be enforced in the United States for lack of reciprocity and this would bar private parties from obtaining the remedies that they are entitled to under the foreign NMJs.[212] Second, the rule would incur further judicial costs.[213] Assuming that the foreign NMJ is not enforced for lack of reciprocity, the plaintiff would need to initiate a new cause of action, and it remains in doubt whether the lack of reciprocity would also bar the foreign judgment from being recognized on the basis of *res judicata*.[214] If so, the new cause of action would start from scratch and incur further costs.[215] Third, the rule would cause additional burden on the US legal system

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207. "The purpose of the reciprocity provision in this Act is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States . . . " RECOGNITION AND ENF'T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7 cmt. B (AM. L. INST., Proposed Final Draft 2005); *Id.* § 7 Rep. note 1:

> Thus, the rationale behind this section is that the interest of the United States extends to having its judgments recognised and enforced in foreign courts, as well as to recognising and enforcing judgments of foreign courts. The expectation is that the incentives created by a reciprocity provision . . . would lead generally to more liberal enforcement of judgments internationally.

208. Park, *supra* note 206, at 1018.
209. *Id.* at 1029.
210. *Id.*
211. McFarland, *supra* note 206.
212. *Id.* at 96.
213. *Id.* at 97.
214. *Id.*
215. *Id.* at 70-71.

because further expert evidence is needed to determine whether the foreign jurisdiction satisfies the reciprocity requirement.[216] Lastly, the rule gives rise to the issue of circularity.[217] If another jurisdiction has the same reciprocity rule, then a question arises as to when and where the first foreign judgment will be enforced between these two jurisdictions.[218] Since no prior foreign judgment has been enforced to act as the basis for the reciprocity rule to apply, the answer is that no foreign judgment will ever be enforced between those two jurisdictions and this outcome goes against the purpose of the reciprocity rule which is to facilitate international enforcement of judgments.[219] Although the ALI Proposal remains unenacted and scholars continue to diverge on the issue of reciprocity, one must not overlook the importance of reciprocity when advocating for a change in the enforcement rules.[220]

V. A COMPARISON

The costs of enforcing foreign NMJs is not as high or as complicated as what the Canadian Supreme Court has suggested in *Pro Swing*.[221] This is clearly reflected in the sixteen post-*Pro Swing* Canadian cases. Along with the high rate of success in enforcing foreign NMJs, no case failed because of such costs.[222] From a cost perspective, therefore, the difficulty of enforcing foreign NMJs is not substantially higher than that of monetary judgments to merit a difference between the enforcement of NMJs and monetary judgments. Therefore, the two are only distinguished by their

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216. *Id.* at 97.

217. *Id.*

218. *Id.*

219. *Id.* at 97-98.

220. *See* Elias M. Medina, *Recognizing the Need to Recognize: Proposed Foreign Judgment Recognition Statute and Procedure for Enforcement in Louisiana*, 80 Louisiana L. Rev. 915 (2020); Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUMBIA J. TRANSNAT'L L. 277 (2017); John F. Coyle, *Rethinking Judgements Reciprocity*, 92 N.C. L. REV. 1109 (2014); Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is it Broken and How Do We Fix It*, 31 BERKELEY J. INT'L L. 150 (2013).

221. Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612 (Can.); *see* discussion *supra* Part II.A.

222. *See supra* tbl.1; *supra* note 109 and accompanying text (citing *Fédération des producteurs acéricoles du Québec*, [2015] N.B.Q.B 115; *Specialist Hygiene Solutions,* [2017] Q.B.G. 379.).

benefits. The advantages of enforcing NMJs are not obvious. Across the three jurisdictions, no court has had any elaboration of the benefits of enforcement of NMJs. In the rare cases in which courts discussed this aspect, they resorted to "slogans" such as the perceived necessity to facilitate international commerce. [223] Admittedly, it is difficult to argue against the slogan that the enforcement of foreign NMJs will have a positive effect on world trade and reduce re-litigation as stated by Judge Deschamps in *Pro Swing* and the Hong Kong judge in *Jiang Xi An Fa Da Wine Co Ltd.*[224] On the other hand, it is also difficult to quantify the advantages of the enforcement of foreign NMJs as easily as monetary judgments. A court can easily see the judgment debt in clear numbers for a monetary judgment. As *Sadler v. Robins* has shown, when that number is not certain, it gives a judge pause on enforcement.[225] Whereas the benefits of enforcing an injunction will be much harder to quantify. For sure, there will be *some* benefits to private parties and the nation, but will it be high enough to justify a change to the long-standing traditional rule against NMJ enforcement? This is much less certain. Accordingly, it is more difficult to draw a positive cost-and-benefit analysis on the enforcement of foreign NMJs. It has then become a speculation of benefits, depending on how positive a jurisdiction is toward the enforcement of NMJs. On one end of the spectrum, we have Canada, while on the other, England. Since individual state courts in the United States can form their own views, it is not a surprise that their practices spread across the two spectrums, with difficulty in finding a consensus. However, once the green light has been given by the Canadian Supreme Court, Canadian courts have no technical difficulties in implementing the enforcement of NMJs.

In summary, the answer to the question why different common law jurisdictions have not adopted Canada's liberal approach in enforcement of foreign NMJs seems to lie in the lack of motivation to change the status quo. This Article argues that the motivation could come from reciprocity as advocated by the ALI. As we can see from Canada's experience after *Pro Swing*, the generous lifting of the traditional rule has received no corresponding enforcement from other jurisdictions, particularly

223. *Pro Swing*, 2006 SCC 52, para. 1; *Jian Xi An Fa Da Wine*, [2019] H.K.C.F.I. 2411.
224. *Pro Swing*, 2006 SCC 52; *Jian Xi An Fa Da Wine*, [2019] H.K.C.F.I. 2411.
225. Campbell, *supra* note 142.

the United States, which, is Canada's largest trading partner.[226] Instead, the United States simply benefitted from Canada's liberal approach without affording reciprocal treatment of Canadian judgments.[227] This situation could serve as a caution to other jurisdictions that are considering initiating the enforcement of foreign NMJs in the hope of other jurisdictions returning the favor. Having enjoyed the benefits provided by Canada, the United States ironically has one fewer incentive to reciprocate. Understanding that the friendly gesture has been taken advantage of, Canadian scholar, Professor Vaughan Black, advocated for a balance between the United States and Canada. Echoing the reciprocity argument, he advocated forming a bilateral private international law treaty between the United States and Canada.[228] In the authors' opinion, Professor Black, a key academic figure cited by the majority of the Canadian Supreme Court in *Pro Swing*, most likely took this view as the unlevel playing field in NMJ enforcement between the courts of United States and Canada later became increasingly apparent. Reciprocity as a legal condition on NMJ enforcement might just be the motivation that common law jurisdictions need to change the rule. The Hague Judgments Convention might just provide the timely motivation.

VI. HAGUE JUDGMENTS CONVENTION: THE PIGGYBACK RIDE

A. Negotiation History on the Enforcement of NMJs

Recognizing that international transactions have become increasingly important, the Hague Judgments Convention seeks to reduce the legal obstacles in international trades by implementing an efficient and predictable legal framework for the recognition and enforcement of judgments across different jurisdictions.[229]

226. *See* GLOBAL AFFAIRS CANADA, CANADA'S STATE OF TRADE 2020 16.

227. *See supra* tbl.1; *supra* note 109 (citing USA et al. v. Yemec et al., [2010] O.A.C. 270 (Can.)).

228. Vaughan Black, *A Canada-United States Full Faith and Credit Clause*, 18 S.W. J. INT'L L. 595, 602 (2011) ("Still, given the extent of the Canada-U.S. commercial and cultural relationship, a relationship facilitated by two important trade conventions, formal institutional cooperation in the private law field is miniscule.").

229. Hague Conference on Private International Law [HCCH], *Overview of the Judgments Project*, at 3, https://www.hcch.net/en/publications-and-studies/details4/?pid=6843&dtid=61 [https://perma.cc/8QVL-SAAA]; Convention of 2

The Hague Judgments Convention traces back to 1992 when the Hague Conference on Private International Law initially proposed to develop a broad convention on international jurisdiction and enforcement rules.[230] It did not bear fruit in terms of recognition and enforcement rules until 2012. [231] In 2012, the Hague Conference decided to re-launch the project and worked on recognition and enforcement rules. [232] In July 2019, the Hague Judgments Convention was concluded. [233] Currently, the Hague Judgments Convention is not yet in force, with only four countries having signed the Convention—Israel, Ukraine, Uruguay, and Costa Rica.[234] The European Union is now considering signing after they invited feedbacks on the Convention in early 2020.[235] More states are likely to become signatories in the future should the European Union decide to sign the Convention.

With regard to the enforcement of NMJs, Clause 1(b) of the Convention provides that NMJs are within the scope of the Convention:

> "[J]udgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this

July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (not yet in force).

230. *Id.* at 1.

231. The initial proposal was later scaled down to focus on choice of court agreements, and later led to the conclusion of the Convention of 30 June 2005 on Choice of Court Agreements, which only attracted few countries to ratify; *Id.* at 1.

232. *Id.*

233. *Id.*

234. Hague Conference on Private International Law [HCCH], *Status Table*, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 [https://perma.cc/C6TT-XHR8].

235. Directorate-General Justice and Consumers, *The Possible EU Accession to the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Summary Report – Public Consultation*, European Commission (November 2020); *Commission Proposal on the Accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, at 42, 58, COM (2021) 388 final (July 16, 2021).

> Convention. An interim measure of protection is not a judgment.[236]

The enforcement of NMJs in general did not cause much controversy during the negotiation of the Hague Judgments Convention. As early as 2000, a large majority of the Special Commission tasked with preparing the Preliminary Draft Convention rejected a proposal that a distinction be drawn between the enforcement of monetary judgments and NMJs.[237] The Permanent Bureau of the Hague Conference acknowledged that most of the common law jurisdictions adhere to the traditional rule and prohibit enforcement of foreign NMJs.[238] However, during preliminary discussions within the Commonwealth Secretariat, it became clear that some common law jurisdictions might be willing to consider covering at least some NMJs on the recognition and enforcement of foreign judgments.[239] The basis of such willingness rested on the finding that the non-enforcement of NMJs equate to a failure in recognizing the fact that judgments often require more than simple payment of a sum of money.[240] This is especially the case in commercial contexts.[241] Common law jurisdictions' willingness to enforce NMJs did not come as a surprise because they were also given the discretion not to sign the Hague Judgments Convention, or wait for a later date to sign and ratify. The Permanent Bureau also found that non-monetary rewards of arbitration proceedings were enforceable in those common law jurisdictions.[242] Therefore, the Permanent Bureau argued that common law jurisdictions should encounter little difficulty in the enforcement of foreign NMJs.[243] Further, the Permanent Bureau

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236. *See* HCCH, *Overview of the Judgments Project*, *supra* note 229, art. 3(1)(b).

237. Hague Conference on Private International law [HCCH], *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar*, Prel, Doc, No 11, at art. 23 (a), n. 147 (Aug. 2000).

238. Hague Conference on Private International Law [HCCH], *Annotated Checklist of Issues to be Discussed by the Working Group on Recognition and Enforcement of Judgments (prepared by the Permanent Bureau)*, at 19, ¶ 74 (Jan. 2013).

239. *Id.* at 20, ¶ 76.

240. *Id.*

241. *Id.*

242. Hague Conference on Private International Law [HCCH], *Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues (drawn up by the Permanent Bureau)*, Prel. Doc. No 2 (April 2016) at 12, ¶ 52.

243. *Id.* at 12, ¶ 53.

discovered that, none of the international instruments studied were limited to money judgments.[244] As a result, the Hague Conference found sufficient support to cover the enforcement of NMJs in the Hague Judgments Convention.

However, the Hague Conference did struggle to come to a consensus in two respects, both relating to the enforcement of NMJs: first, enforcement of provisional and protective measures; second, inclusion of intellectual property.[245] With regard to provisional and protective measures, they were originally included in the 1999 Preliminary Draft Convention.[246] Nevertheless, due to concerns of finality and compatibility with different legal systems of the enforcing jurisdictions, the Hague Conference eventually decided to exclude provisional and protective measures from the definition of "judgment" in Article 3(1)(b) of the Convention.[247] With regard to intellectual property, delegates of different jurisdictions could not agree as to whether intellectual property rights should fall within the scope of the Hague Judgments Convention, nor whether there should be enforcement of NMJs originating from intellectual property rights.[248] Since intellectual property rights were expected to require much more lengthy deliberation and special treatments of the Hague Judgments Convention, the Hague Conference resolved to exclude intellectual property rights from the Convention and left it for another date.[249] Although the exclusion of provisional and protective measures, and intellectual property rights would undoubtedly curtail the scope of enforceable NMJs, it is no doubt a positive step toward global enforcement of NMJs. The Hague Judgments Convention is the first international instrument advocating for the enforcement of NMJs and displacing the distinction between monetary and non-

244. There are four regional instruments are: the Montevideo Convention, Las Leñas Protocol, Riyadh Arab Agreement and Lugano Convention; *Id.* at 18, ¶ 75.

245. HCCH, *Explanatory Note*, supra note 242; and AIPPI, *Resolution on HCCH Judgments Project, supra* note 107.

246. HCCH, *Explanatory Note*, *supra* note 242.

247. *See* Hague Conference on Private International Law [HCCH], *Comments on the Preliminary Draft Convention, adopted by the Special Commission on 30 October 1999, and on the Explanatory Report by Peter Nygh and Fauso Pocar*, Prel. Doc. No 14 of April 2011 (discussing the disapproving views of Korea and Japan); HCCH, *Explanatory Note*, *supra* note 242, at 12, ¶ 52.

248. AIPPI, *Resolution on HCCH Judgments Project*, *supra* note 107.

249. Hague Convention, *supra* note 5, at 2.

monetary judgments. For advocates of NMJ enforcement, it is hoped to be the first of many steps to come.

B. Is the Time Ripe to Ride on Piggyback?

The enforcement of NMJs is just one of the many changes proposed and advocated in the Hague Judgments Convention. It is not expected to be the key motivation for countries to join the Hague Judgments Convention. Yet, given the other perceived benefits of joining the Convention, most notably the reciprocal enforcement of monetary judgment, NMJ enforcement may indirectly be adopted across the signatories as a "tie-in." Plenty of jurisdictions across the world, though not generally common law jurisdictions, to date impose difficult hurdles to enforce monetary judgment.[250] This Article does not speculate on whether countries will join the Convention. However, it is safe to say that, for the countries which decide to join the Convention, the Convention provides a piggyback ride for NMJs enforcement. Thus, whether the time is ripe for common law jurisdictions to change the traditional rule and allow enforcement of foreign NMJs ultimately depends on whether countries, especially those major economic powers, see it ripe and beneficial for their national interests to join the Hague Judgments Convention.

In the end, enforcement of foreign NMJs is good on paper, yet its benefits are difficult to be quantified in practice. Without a clear picture of the benefits that the enforcement of foreign NMJs will bring in practice, it is difficult to motivate the common law jurisdictions to make a wholesale change. If the issue of enforcement of foreign NMJs is read on its own, it is hard to see the time will ever be ripe. If Canada changed the traditional rule in the hope of encouraging foreign countries to enforce Canadian NMJs, it must be said that the result was not successful.[251] The Hague Judgments Convention provides a window of opportunity because the Convention includes changes other than the enforcement of NMJs and countries might join the Convention due to other benefits. Further, countries would have a much clearer picture of the

250. For example, Indonesia does not enforce foreign judgment at all. *See* John Coyle, *Rethinking Judgment Reciprocity*, 92 N.C. L. REV. 1109, 1151-53 (2014).

251. Though the Canadian court has never formally acknowledged this. *See supra* tbl.3.

benefits yielded by the Convention because they can observe what the other signatories are before joining. If the signatories are major economic powers, for example the European Union, other countries are more incentivized to join the Convention. Consequently, enforcement of foreign NMJs will ride the piggyback of the Convention.

VII. CONCLUSION

This Article asks if the time is ripe for common law jurisdictions to alter the traditional rule and allow the enforcement of foreign NMJs, and if so, how the change will take place. By first reviewing *Pro Swing*, it set the framework of the costs-and-benefits considerations in the enforcement of foreign NMJs. Survey of subsequent Canadian cases then show that despite the sluggish start in *Pro Swing*, the Supreme Court of Canada exaggerated the costs in enforcing foreign NMJs. Meanwhile, with the benefits of adopting such a liberal approach has never been made clear, it begs the question as to why other common law jurisdictions should follow suit.

These same costs-and-benefits considerations are reflected too in England and the United States. England is the most conservative among the three. Both the academic literature and the complete lack of cases on enforcement of foreign NMJs suggest that the traditional rule is so deep-rooted in English jurisprudence that English courts choose to circumvent the bar against NMJ enforcement by the doctrine of *res judicata* rather than changing it. Again, courts in England have never discussed the benefits of enforcing foreign NMJs, possibly under the impression that the Parliament is in a better position to assess such benefits. On the other hand, United States is a mixed bag. Since enforcement of foreign judgments is a matter of state law, different states take different approaches to NMJs. Depending on the view of the courts on costs and benefits of NMJs, they can draw on different sources of authorities to establish their respective NMJ enforcement rule, especially when the Restatements also differ on this issue. The US states' approaches towards NMJs largely remain unclear. With the exception Florida, which possesses an overwhelming track record of enforcing foreign NMJs, most states lack instructive caselaw or express statements of their stances.

A comparison of these three common law jurisdictions reveals that there is no compelling argument supporting their legal positions in terms of the enforcement of foreign NMJs. It is currently a matter of preference instead of obligations. Therefore, the common law jurisdictions need an incentive to change the traditional rule, as suggested by the ALI Proposal. The Hague Judgments Convention in 2019 appears to be just the motivation that is needed. It proposes and advocates different changes in recognition and enforcement rules, one of which is the inclusion of enforcement of NMJs. Should more countries be enticed to join the Convention for their national interests, the rule for the enforcement of foreign NMJs will ride on the piggyback of the Convention and become more common across countries and jurisdictions. Although only four countries have signed up for the Hague Judgments Convention for now, European Union's recent interest in joining indicates that the time may soon be ripe.