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I. INTRODUCTION

Where conflict of law rules designate foreign law as applicable, the foreign law is generally recognized and applied in order to determine the rights and obligations of the parties. This hospitality encounters a certain reserve, however if the foreign law has a "public law" character. In the absence of an international treaty or convention, the courts of Canada,[1] Switzerland and other countries will not enforce foreign tax, penal and other laws that may be characterized as "public" or "political" in nature.[2] This general refusal to recognize foreign public law in enforcement proceedings has been described as the "public law taboo."[3]

Two developments have taken place over the last few decades that demand clarification and reevaluation of non-enforcement of certain foreign public laws. First, assuming that a clear distinction

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1. The terms "Canadian courts" or "Canadian law" refer to the Canadian common law provinces or territories. This article does not address the laws of the province of Quebec.

2. *See* J.G. CASTEL, CANADIAN CONFLICT OF LAWS 161–63 (3rd ed. 1994); *see also* DICEY AND MORRIS ON THE CONFLICT OF LAWS 108 (Lawrence Collins, ed., 11th ed. 1987) (stating that "[t]he issue thus still remains open for decision in England whether the doctrine that penal and revenue laws will not be enforced extends to laws of a 'political' or 'public' character") [hereinafter DICEY AND MORRIS]; *see generally* IPRG KOMMENTAR 107–11, 256 (Anton Heini et al., eds. 1993).

3. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, *in* RECUEIL DES COURS 322 (1979).

between private and public law once existed, modern legislation and court awards of "punitive civil sanctions" have obscured that distinction.[4] Second, the ongoing trend toward internationalization and globalization has forced courts to deal with international matters more frequently.

The state's concern for public welfare and economic order extends to relations between private parties. This concern has led to state interference through the use of public law.[5] Even western "capitalist" countries regulate, license, tax, and punish more types of activities.[6] After determining that complex issues require positive state intervention, legislatures enact statutory and regulatory regimes to provide for civil and administrative remedies in areas such as environmental, securities, and competition law.[7] In addition, some states, most notably the United States, have innovatively created new enforcement mechanisms whereby a private litigant, induced by an award of multiple damages, acts as a "private attorney-general who protects the public interests."[8] In the United States, civil courts increasingly tend to grant "punitive civil sanctions."[9] This makes civil law more punitive, thus departing from the traditionally compensatory alignment.[10]

Due to ongoing developments in private international law, it is uncertain whether any one state will enforce the penal laws of another. Furthermore, by their increased participation in commercial activities, many states have become players in the global market-place, where they compete with private entrepreneurs and corporations. As a result, public and private law have become increasingly interwoven, and the traditional distinctions no longer apply.[11] These developments require the prohibition on the en-

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4. The term "punitive civil sanctions" was introduced by Kenneth Mann. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

5. *See* Frank Vischer, *General Course on Private International Law*, *in* RECUEIL DES COURS 150 (1992) (referring to the developments in labor law, the law of tenants, and the field of economic law).

6. *See* Lowenfeld, *supra* note 3, at 325.

7. *See* United States of America v. Ivey [1995] O.R.3d 533, 534.

8. Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985).

9. *See* K. Mann, *supra* note 4, at 1795.

10. *See id.* at 1798.

11. This is so even for Continental European systems, where the dichotomy between public and private law is—or rather used to be—much more pronounced than in the common law.

forcement of foreign penal and public law to be reevaluated. Developing a modern system is necessary to deal with these changes.

Parallel to these "internal" developments, which blur the distinction between public and private law, lies a strong trend toward globalization. Activities such as trade, investment, communications, transportation, financial transactions, and others increasingly cross national boundaries.[12] Internationalization leads to an increased quantity of cases where courts are asked to apply foreign law or to give effect to foreign judgments. This may compel courts to discuss issues relating to the enforcement of foreign public law.

Switzerland is highly vulnerable to this trend for two reasons. First, as one of the leading countries in asset management,[13] Switzerland contains many seizable assets. Second, Swiss law establishes jurisdiction were the attachment of assets occurs.[14] The Swiss court system (i.e., courts in the district where a judgment debtor's assets are located) is thus an inviting "forum" for judgment creditors.

Canada takes a different approach to enforcing foreign judgments. With the exception of Quebec, Canada is a common law jurisdiction like the United States. Due to its geographical location, Canadian courts frequently deal with U.S. law and judgments.

One can systematically evade enforcement of tax laws simply by transferring funds subject to a judgment out of the court's jurisdiction to another state or country.[15] Thus, collection on such a judgment might be impossible, even though the foreign tax law is perfectly reasonable or even less rigid than the laws of the state's courts asked to enforce it. In fact, the judgment debtor will not have to pay any taxes at all and can essentially shirk its responsibility under the judgment completely. Thus, the non-enforcement rule facilitates "fraudulent practices which damage all states and

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12. *See* Lowenfeld, *supra* note 3, at 325.

13. A recent study estimated that Swiss banks manage assets on behalf of national and international clients that total over 2.300 billion Swiss francs (approximately 2.530 billion Canadian dollars).

14. *See* SR 291.435.1 (Switz.). For English translation, see Appendix 1 citing to the Federal Statute on Private International Law, Dec. 18, 1987 (Switz.) *translated in* PIERRE A. KARRER & KARL W. ARNOLD, SWITZERLAND'S PRIVATE INTERNATIONAL STATUTE OF DECEMBER 18, 1987 127 (1989).

15. *See* Government of India v. Taylor [1955] E.R. 292 (stating that when India attempted to collect a tax from the liquidator of a firm that had long operated in India, the House of Lords denied the claim for the sole reason that it was a foreign tax claim).

benefit no state."[16]

The customary explanation for non-enforcement of foreign public rights (including tax collection) is that the ability to claim public rights is an exercise of sovereign power, which is, *per definitionem,* limited to laws within a state's territory. Traditionally, no state would tolerate intrusion by a foreign state on its exercise of sovereignty.[17] Many unscrupulous individuals and corporations take advantage of this sovereignty principle to avoid paying debts.

Although Canada and Switzerland are reluctant to enforce foreign public and domestic laws, they assist the enforcement of foreign criminal laws by routinely granting extradition. Therefore, it can hardly be said that the enforcement of foreign public law is contrary to all Canadian and Swiss principles of territorial sovereignty. This raises various questions. To what extent should foreign public law be enforced in the absence of an international treaty? What is the significance of sovereignty in today's world? When is a state's sovereignty endangered? Finally, how far should states go in order to help each other enforce their respective laws and judgments? Only by developing a policy for enforcement of foreign public law that uses a system to weigh the interests involved will these questions be answered.

Thus, an absolute exclusion of enforcement of foreign public law is inappropriate and should be abolished. To reach this conclusion, an examination of how the "penal rule" affects the punitive civil sanctions and a reassessment of the "tax rule" are necessary.

A. Scope of Analysis

Discourses on the enforcement of foreign judgments usually focus on issues of international jurisdiction. A common issue to resolve is whether the court that rendered the judgment had properly assumed its jurisdiction.[18] This Article, however, will examine the rationale that excludes certain categories of judgments from international enforcement solely because of their subject matter.

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16. Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368, 428.

17. *See* FREDERICK A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 358–61 (1990).

18. *See* discussion *infra* Part I.E.2.

After defining relevant terminology and presenting the methodological framework, this Article will provide an overview of the different requirements that Canadian and Swiss law rely upon for recognizing and enforcing foreign judgments.

Parts II and III provide a comparative analysis of Canadian and Swiss enforcement of foreign judgments based on foreign revenue, penal and other public laws. These parts will provide an objective investigation and realistic overview of the underlying theme of enforcement of foreign judgments.

Part IV examines the rationale behind the refusal to enforce certain judgments due to their subject matter. It also includes a critique of the various court rationales for excluding foreign public law as well as a redefinition of the exclusionary rule.

Part V concludes by proposing a new rationale for state enforcement of foreign public law.

B. Methodological Basis

This Article uses two methodological approaches in examining existing foreign policy: first, a comparative law approach; and second, an approach which examines the contributions of public international law achievements in analyzing the modern regime of law enforcement.

1. Comparative Law

Judging from its literal meaning, comparative law can be described as the juxtaposition of different legal orders. This juxtaposition extends both to the spirit and style of the entire legal system ("macro-comparison") and to the solutions of specific problems ("micro-comparison").[19] Following a description of the basic structure and general requirements of Canadian and Swiss enforcement of foreign judgments, there will be a comparative analysis of the doctrine and cases which examine how Canadian and Swiss law treat foreign judgments based on foreign penal, tax and other public law. Where appropriate, the policy for enforcement of foreign judgments from other jurisdictions will be considered.

Ultimately, comparative law is a method of gaining knowledge.[20] It enlarges the number of possible solutions to a specific

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19. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARITIVE LAW 4–5 (Tony Weir trans., 2d ed. 1987).

20. *See id.* at 15.

problem, thereby increasing the chances of finding a "better solution." In the arena of private international law, comparative law is "indeed so indispensable for its development that the methods of private international law today are essentially those of comparative law."[21] The preparation of a transnational unification of the law is probably the most important function of comparative law.[22] Unification is most desirable in private international law, because it applies the same national law regardless of the court that assumes jurisdiction. Furthermore, uniformity in enforcement is crucial so long as courts require reciprocity when asked to enforce a foreign judgment.[23] It is thus the interaction of the methodology of comparative law and private international law that plays a key role in the examination of enforcement of foreign judgments.

2. Public International Law

This Article focuses on the enforcement of international laws that lie on the border between "private" and "public." Enforcing foreign judgments focuses on the effects of a foreign act; *jure imperii* (the foreign judgment), and thus, generally deals with the relations between the states (public international law). Therefore, it is necessary to explore the principles of public international law.

Discourse in the field of enforcement of foreign judgments and foreign public law deals with the concept of state sovereignty and the principle of territoriality of laws. It is also worth exploring whether the principles of international cooperation, solidarity and comity require a more generous attitude towards enforcement of foreign judgments. Recent developments in Canada tend towards this conclusion. In *Morguard Investments Ltd. v. De Savoye*, the Supreme Court explicitly referred to the comity principle in order to grant the enforcement of an extraprovincial judgment.[24]

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21. *See id.* at 6.

22. *See id.* at 23.

23. A comprehensive comparative law discourse about the requirement of reciprocity in international enforcement of judgments can be found in Kurt H. Nadelmann, *Non-Recognition of American Money Judgments*, 42 IOWA L. REV. 236, 249 (1957). Yet, the requirement of reciprocity, although still in existence in several national laws, continues to disappear. For a more recent study, see Friederich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1 (1988).

24. *See* Morguard Investments Ltd. v. De Savoye [1990] S.C.R. 1077. The issue was whether the original court properly assumed jurisdiction. The Supreme Court's reasoning, however, regarding comity was not limited to jurisdictional issues, but in favor of enforcement of foreign judgments.

C. Terminology

1. Enforcement

The term "enforcement" or "to enforce" will be used to mean a writ or other judicial directive issued upon application of a plaintiff that empowers and directs a state official to seize a debtor's assets.[25] In this sense, enforcement is part of the execution process. It consists of the actual seizure, the sale, and the distribution of the proceeds in the amount of the judgment to the judgment creditor.[26]

2. Money Judgment

In this Article, the term "money judgment" refers to every kind of order, decree, or judgment of a judicial or administrative authority where a defendant must pay a sum of money, rather than other types of relief (e.g., injunction or specific performance).

3. Civil Matter, Private Law and Public Law[27]

Under common law, the term "civil matter" usually describes anything that is not a "criminal matter."[28] In civil law jurisdictions, however, the term "civil matter"[29] is synonymous with a "matter governed by private law" as opposed to administrative and criminal law. The term "public law" is used in the same way in both legal systems. It refers to laws dealing with relations between an individual and the state or between states and the organization of government.[30] "Public law" includes international, constitutional, criminal, and administrative law.[31] Tax law is generally ac-

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25. *See* BLACK'S LAW DICTIONARY 528 (6th ed. 1990).

26. *See id.*

27. For a detailed discussion of the historical evolution of public law as a distinct subject of jurisprudence, see Hans W. Baade, *Operation of Foreign Public Law*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3–7 (Tübingen: J.C.B. Mohr, 1991).

28. THE DICTIONARY OF CANADIAN LAW 188 (2nd ed. 1995). For U.S. law, see L. Frei, *Discovery, Secrecy and International Mutual Assistance in Civil Matters*, *in* LITIGATION OF BUSINESS MATTERS IN THE UNITED STATES AND INTERNATIONAL LEGAL ASSISTANCE 196 (R. Zäch ed., 1984).

29. German: "*Zivilsache*"; French: "*Matière civile*".

30. THE DICTIONARY OF CANADIAN LAW, *supra* note 28. From a civil law perspective, the category administrative law includes bankruptcy law, procedural law (both civil and criminal), social security law, parts of security, competition and environmental law.

31. *See id.*

cepted into the category of "public law."

D. Manifestation of Foreign Public Law in Conflict of Laws

A court may be asked to apply foreign public law to a preliminary or incidental question.[32] This occurs, for example, when a conflict of law is over a person's nationality. Article 22 of the PIL Statute states a rule of universal applicability. It provides that the law of the state that is at issue determines a person's nationality. The consequence is that a Swiss court would apply foreign public law when determining a person's nationality. Tort claims are another example where the applicable conflicts rule points to the *lex loci delicti.* Thus, to determine whether there was negligent conduct in a car accident, the court must consider foreign road rules. It seems unlikely that any court would see a problem in applying these types of foreign administrative rules. Likewise, where a contract is written solely to evade foreign taxes, courts are more likely to enforce foreign tax laws.[33] In these types of cases the courts are free to argue that domestic rules of public morality render such a contract void.

The real problem with enforcing foreign public law arises where the *lex causae*, the law on which a claim is founded, is of a public nature. Two types of cases can be distinguished when operating under foreign public law: (1) those cases where an action commences before a domestic court and one party asks for a direct application of foreign law; and (2) those cases where the enforcement of a judgment is at issue. In both cases, the court is required to give effect to the foreign law.

In an enforcement action, plaintiffs ask the court to extend the effect of res judicata to its jurisdiction, impliedly enforcing foreign law. Swiss law applies a flexible standard where a foreign court has already determined rights and duties. In a Swiss enforcement procedure, as opposed to a direct application of foreign law, a less strict attitude governs.[34] Conversely, Canadian law ap-

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32. *See generally* CASTEL, *supra* note 2, at 157–60; IPRG KOMMENTAR, *supra* note 2, at 108. There is no problem with applying foreign public law to a preliminary question in connection with a private law issue.

33. *See* J.G. Castel, *Foreign Tax Claims and Judgments in Canadian Courts,* 42 CAN. B. REV. 277, 300–01 (1964) [hereinafter Castel, *Tax Claims*].

34. Adopting the French doctrine of "ordre public atténué de la reconnaissance." *See infra* Part I.E.3; BGE 103 Ia 531; BGE 103 Ia 204; *see also* Vischer, *supra* note 5, at 198 (regarding jurisdiction (indirect competence) of the original court).

plies the same standard in both situations.[35] Nevertheless, it seems safe to conclude that in cases where the direct application of a foreign law would be granted, the enforcement of a judgment based on such a law will not be measured on higher standards concerning its compatibility with public policy or with the exclusion of foreign public law. This Article will focus primarily on the enforcement of judgments.

E. Common Requirements of Enforcement of Foreign Judgments[36]

1. General Remarks

There are three basic approaches to determine whether judgments rendered abroad should be given the effect of res judicata locally: (1) the forum may simply disregard foreign judgments; (2) it may recognize only those judgments rendered in jurisdictions that grant reciprocity; or (3) it may recognize any foreign judgment that meets certain procedural and substantive standards.[37] Switzerland and Canada chose the third approach. Neither country allows parties to re-litigate the merits of the dispute,[38] and they both waive the reciprocity requirement.[39]

Generally, both Switzerland and Canada will enforce a foreign judgment where it was rendered by a competent court (jurisdiction in the international sense), after due notice to the defendant,[40] in accordance with natural justice, and so long as the foreign judgment does not violate public policy.[41]

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35. *See* CASTEL, *supra* note 2, at 275; *but see id.* at 164.

36. Despite its practical relevance no effort will be made to distinguish between prerequisites and defenses, but each requirement will be discussed on its merits.

37. *See* Juenger, *supra* note 23, at 5.

38. *Compare* CASTEL, *supra* note 2, at 268–69 *with* SR 291 art. 27(3); *see* IPRG KOMMENTAR, *supra* note 2, at 293–94.

39. Until 1989, when the PIL Statute came into force, cantonal law governed the enforcement of foreign judgments, and most cantons required reciprocity. Under the PIL Statute the reciprocity requirement still exists in the recognition of foreign bankruptcy decrees. *See infra* Part III.D.4.

40. For obvious reasons, the due notice-requirement is only relevant for default judgments. *See* SR 291 art. 27(2)(a).

41. In addition, the adjudication must be final and conclusive and the judgment must not have been procured by a fraud on the court. With regard to the former requirement, for Canadian law, see Nouvion v. Freeman , 15 App. Cas. 1 (1889). *See* Robert J. Sharpe, *The Enforcement of Foreign Judgments*, *in* DEBTOR-CREDITOR LAW: PRACTICE AND DOCTRINE 668 (M.A. Springman & E. Gertner eds. 1985); *see also* P. J.M. Lown, *Conflict of Laws*, *in* CREDITOR-DEBTOR LAW IN CANADA 686 (1995). For Swiss law, see SR 291

2. Jurisdiction in the International Sense

There are pronounced differences in jurisdictional regulation in the Continental European tradition and the Anglo-American system.[42] While the latter is mainly concerned with providing an adequate solution in each case, the concern with certainty of the law in continental Europe has led to the creation of pre-fixed rules stating the conditions under which courts may, or must, assume jurisdiction.[43]

The most important requirement for the enforcement of foreign judgments is whether, in the eyes of the enforcing court, the original court properly assumed jurisdiction. Both legal systems recognize that the defendant's presence[44] within the jurisdiction, or his or her submission[45] to the court's jurisdiction, is a natural basis for the appropriate assumption of jurisdiction.[46]

More complex jurisdictional issues arise in default judgments, where the defendant resides outside of, and has not submitted to, the jurisdiction of the original court. In *Morguard Investments Ltd. v. De Savoye,* the Supreme Court of Canada expanded the obligation to recognize extra-provincial judgments within Canada. Referring to comity as "the informing principle of private international law,"[47] and the constitutional framework, the Court held that the original court's jurisdiction over a non-resident, non-submitting defendant was justified by the real and substantial connection between the case and the forum.[48]

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art. 25(b). *See* IPRG KOMMENTAR, *supra* note 2, at 260.

42. *See* Vischer, *supra* note 5, at 204.

43. *See id.* at 205. The doctrine of *forum non conveniens* is unknown in Continental Europe.

44. Swiss law requires "domicile" of a person in the rendition state. But the Swiss concept of domicile is distinct from the Canadian one. In the terminology of the PIL Statute an individual has his or her domicile in the country in which he or she is living with the intention of staying permanently. *See* SR 291 art. 20(1)(a). In this sense, if a person has no domicile, SR 291 article 20(2) provides that his or her habitual residence serves to replace domicile (and not the domicile of origin that is of no significance in Swiss law). A person's habitual residence is the place where a person is living for a certain time, even if this time is limited from the outset. *See* SR 291 art. 20(1)(b). Therefore, under Swiss law, a temporary presence that does not amount to a habitual residence, would not be regarded as a basis for a proper assumption of jurisdiction.

45. By consent (before or after the dispute arose: *forum prorogatum*); by unconditional appearance (e.g., by arguing the merits of the case). *See* CASTEL, *supra* note 2, at 260ff.

46. *See* Juenger, *supra* note 23, at 13–20.

47. Morguard Investments Ltd. v. De Savoye [1990] S.C.R. 1077, 1095.

48. *See* Joost Blom, *Conflict of Laws - Enforcement of Extraprovincial Default Judg-*

In *Moses v. Shore Boat Builders Ltd.*, the British Columbia Court of Appeal applied the "real and substantial connection test" to a non-Canadian judgment. The court enforced an Alaskan judgment because the original court had sufficient connections with the litigation and, therefore, had properly ascertained jurisdiction in the matter.[49]

In *Hunt v. T & N plc.* the Supreme Court of Canada confirmed the constitutional dimension of the rules set forth in *Morguard*.[50] *Morguard* and *Hunt*, however, leave open many questions, especially in the context of international enforcement. Nevertheless, there is a distinct trend towards accepting a foreign court's jurisdiction on the basis of comity, so long as the assumption of jurisdiction is reasonable in the eyes of the enforcing court.

In Switzerland, the PIL Statute contains an inclusive set of jurisdictional provisions for the recognition and enforcement of foreign judgments in each regulated field of law.[51] Additionally, Swiss general rules provide that a foreign court's jurisdiction may be based on the defendant's domicile[52], his or her submission[53], or, in the case of a counterclaim, on the basis that the foreign court had jurisdiction over the principal claim, and the two claims are materially connected.[54]

Canadian and Swiss law share a great deal of conformity regarding the acceptance of a foreign court's jurisdiction. Nevertheless, even a preliminary review of these legal systems reveals certain differences in jurisdictional requirements. The Canadian common law practice of acquiring jurisdiction solely on the service of process within the forum state (the "transient rule")[55] would, in the eyes of a Swiss court, presumably fail as a basis of jurisdiction in the international context. On the other hand, the assumption of

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ment - Real and Substantial Connection: Morguard Investments Ltd. v. De Savoye, 70 CAN. B. REV. 733 (1991); *see also* E.R. Edinger, Morguard v. De Savoye: *Subsequent Developments*, 22 CAN. BUS. L.J. 29 (1993).

49. Moses v. Shore Boat Builders Ltd. [1993] D.L.R. 654.

50. *See* Hunt v. T&N plc. [1993] S.C.R. 289; *see also* Catherine Walsh, *Conflict of Laws - Enforcement of Extra Provincial Judgments and in personam Jurisdiction of Canadian Courts:* Hunt v. T&N plc, 73 CAN. B. REV. 394 (1994).

51. Those fields of law include: Law of Persons, Family Law, Inheritance and Succession Law, Real Rights, Intellectual Property, Contract Law, Tort Law, Company Law, Bankruptcy Law, and International Arbitration.

52. *See* SR 291 art. 26(a).

53. *See id.* art. 26(b)–(c).

54. *See id.* art. 26(d).

55. *See* Forbes v. Simmons [1914] Alta. L.R. 87; *but see* Sharpe, *supra* note 41, at 648.

jurisdiction in a suit seeking to enforce an order attaching Canadian-held assets[56] would probably be considered exorbitant under Canadian law.

Notwithstanding these complications, this Article investigates and develops the law only in those cases where the international jurisdiction of the original court is not in question.

3. Public Policy

Even where a foreign court's jurisdiction is clear, some courts will refuse to recognize and enforce a judgment that violates their public policy.[57] The public policy exception in private international law has been described as a "safety valve"[58] that allows courts to refuse recognition of a foreign judgment where enforcement conflicts with the forum state's fundamental concepts of justice.[59] The public policy exception comes into play where the application of a foreign law, or the enforcement of a foreign judgment, would lead to an unacceptable result. The goal of public policy is to protect a state's fundamental values and principles. According to Mosconi, the public policy exception is rooted in the body of the international law rules that define and safeguard state sovereignty.[60]

The public policy exception focuses on the result of the litigation. If the outcome of a foreign suit violates a state's fundamental notions of justice and fairness, the state will refuse enforcement.[61]

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56. *See* SR 291 art. 4.

57. In Switzerland, the French term *ordre public* is common. *See* SR 291 art. 27(1). For a comparison of the two expressions, see Franco Mosconi, *Exceptions to the Operation of Choice of Law Rules*, *in* RECUEIL DES COURS 13, 23–25 (1989). In this Article, however, the expression "public policy" will be used.

58. *See* Sharpe, *supra* note 41, at 685.

59. Or, to use other descriptions, contrary to "essential public or moral interest," or contrary to the "conception of essential justice and morality." CASTEL, *supra* note 2, at 163. Castel properly states that it is almost impossible to give a precise definition of public policy. *Id.*

60. *See* Mosconi, *supra* note 57, at 20.

61. An example of an incorrect application of the principle can be found in BGE 88 I 48. The Swiss Supreme Court refused to recognize a divorce based on *talak*. *Talak* is the repudiation of a wife under Islamic law. It is generally considered valid grounds for divorce. After the Egyptian consul in Moscow performed a divorce, a Swiss court denied the wife's request to transcribe the divorce into Swiss public records. The Swiss Court held that a divorce on such grounds went against public policy. As a result, the husband was divorced under Egyptian law, whereas the wife, a Swiss citizen, had to initiate new divorce proceedings in Switzerland. The court evaluated the foreign law abstractly instead of looking at the actual result. *See* Vischer, *supra* note 5, at 101.

Mere disagreement with the foreign state's procedural, substantive, or conflicts rules, however, is an insufficient reason to invoke public policy. With respect to the international enforcement of foreign judgments, the public policy defense is usually interpreted very narrowly. Enforcement of a foreign judgment should only be refused if it is "contrary to . . . conceptions of essential justice and morality."[62]

Other than these references to morality, fairness, and justice, the public policy exception has also been recognized as a means to protect domestic economic interests against the egoistic or coercive measures of foreign states.[63] Public policy considerations also find expression in specific legislation[64] and statutory provisions[65] that deal with the enforcement of foreign judgments or the application of foreign law.[66]

Swiss law recognizes that the intensity of the public policy exception varies depending upon the local or personal connections between the case and Switzerland.[67] The more distant the connection of a case to the Swiss forum, the narrower the application of the exception. Further, application of the exception depends on

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62. National Surety Co. v. Larsen [1929] D.L.R. 918, 920.

63. *See* BGE 64 II 98; IPRG KOMMENTAR, *supra* note 2, at 181.

64. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 8(1) (1985) (Can.), *reprinted in* 24 ILM 794. It reads as follows:

> Where a foreign tribunal has . . . given a judgment in proceedings instituted under antitrust law and, in the opinion of the Attorney General of Canada, the recognition or enforcement of the judgment in Canada has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or otherwise has infringed or is likely to infringe Canadian sovereignty, he may: (a) in the case of any judgment, by order declare that the judgment shall not be recognized or enforceable in any manner in Canada; or (b) in the case of a judgment for a specified amount of money, by order declare that, for the purposes of the recognition and enforcement of the judgment in Canada, the amount of the judgment shall be deemed to be reduced to such amount as is specified in the order.

See, e.g., SR 211.412.4.

65. *See* Competition Act, R.S.C., ch. 19 J-G, § 82 (1985) (Can.); CASTEL, *supra* note 2, at 296.

66. SR 291 article 135(2) provides: "If claims based on a defect or defective description of a product are governed by foreign law, no damages can be awarded in Switzerland beyond those that would be awarded under Swiss law for such a damage or injury." SR 291 article 137(2) provides a similar rule regarding the application of foreign law to claims of competition restraint. *See* IPRG KOMMENTAR, *supra* note 2, at 285.

67. This principle is called "*Binnenbeziehung.*" *See* IPRG KOMMENTAR, *supra* note 2, at 186; Mosconi, *supra* note 57, at 98.

whether the case deals with the direct application of foreign law or the recognition and/or enforcement of a foreign judgment. In the latter, the court is asked to apply the public policy doctrine with more restraint,[68] since the foreign court has already authoritatively decided the matter. Non-recognition would disregard the res judicata effect created by the foreign judgment and lead to a "limping" legal relation.[69] Accordingly, the Federal Supreme Court of Switzerland held:

> La réserve de l'ordre public, en tant que clause d'exception, doit être interprétée de manière restrictive. Il en va tout spécialement ainsi en matière de reconnaissance et d'exécution de jugements étrangers où l'on a affaire à des rapports juridiques qui ont force de chose jugée ou qui sont définitivement acquis à l'étranger. En refusant de les reconnaître en Suisse, on créerait des rapports juridiques boiteux. C'est pourquoi on ne peut invoquer la réserve de l'ordre public Suisse que si la contradiction avec le sentiment Suisse du droit et des moeurs est sérieuse. Autrement dit, la reconaissance constitute la règle, dont il ne faut pas s'écarter sans de bonnes raisons. (citations omitted).[70]

The Swiss Federal Supreme Court has often considered the non-enforcement of foreign public law as arising out of the principle of territoriality, and sometimes as an application of the public policy exception.[71] A clear distinction has not been made. Under Canadian law, the rule of non-enforcement of foreign penal and tax laws is also sometimes considered to fall within the public policy exception.[72]

If, however, the rule is covered by public policy, it is a rather atypical application of the principle because the rule applies irrespective of the result of the case. This is true for Canadian as well as Swiss law. With regard to this non-enforcement rule there is no

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68. Adopting the French doctrine of "*ordre public atténué de la reconnaissance*," *see* IPRG KOMMENTAR, *supra* note 2, at 188. *But see* Y. SCHWANDER, EINFÜHRUNG IN DAS INTERNATIONALE PRIVATRECHT 333 (1990).

69. Note that SR 291 article 27(1) requires that the foreign judgment must be *clearly* incompatible with Swiss public policy, whereas the public policy exception of SR 291 article 17 lacks this special qualification.

70. BGE 116 II 625, 630.

71. *See* BGE 42 II 179; BGE 60 II 294; BGE 64 II 88; BGE 68 II 203; BGE 81 I 196; BGE 95 II 209; BGE 107 II 492.

72. *See, e.g.*, Van deMark v. Toronto-Dominion Bank [1989] O.R.2d 379; For a discussion on enforcement of foreign penal and tax laws under the title "Public Policy," see Sharpe, *supra* note 41, at 684–89.

moral judgment or interest analysis involved.

4. Natural Justice

Under Swiss law, public policy allows the court to refuse enforcement if the foreign procedure violates the essential principles of Swiss procedural law (procedural ordre public).[73] For instance, from the Swiss perspective, the right to be heard is of crucial importance. This right has its basis in Section 4 of the Swiss Constitution and in Article 6(1) of the *European Convention of Human Rights*. While violation of procedural public policy is often invoked, it rarely succeeds.[74]

The corresponding requirement under Canadian law is whether the foreign proceedings are in accordance with natural justice.[75] The question is not whether the foreign procedure differs from Canadian procedure, or that the foreign rule has been applied incorrectly. Instead, the question concerns whether the party had the opportunity to present, and properly defend, its case before the foreign tribunal.

II. CANADIAN ENFORCEMENT OF FOREIGN JUDGMENTS BASED ON FOREIGN PUBLIC LAW

Castel states the following:

> In principle, the courts of a common law province or territory will not enforce a foreign penal law or judgment, either directly or indirectly.[76]
>
> Laws that are enforced by a foreign state as an assertion of sovereign power, such as anti-trust and regulation of competition laws, securities legislation, trading with the enemy legislation, requisition, confiscation, expropriation or nationalization laws and decrees, and national security laws may not always be recognized and enforced by Canadian courts if they are of a political nature.[77]

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73. *See* SR 291 art. 27(2)(b).

74. *See* IPRG KOMMENTAR, *supra* note 2, at 290.

75. *See generally* CASTEL, *supra* note 2, at 272–273. *See generally* Sharpe, *supra* note 41, at 677–684. For a recent case where the natural justice defense was unsuccessfully invoked, see Ivey [1995] D.L.R. at 690–93.

76. CASTEL, *supra* note 2, at 161.

77. *Id.* at 163.

> As Canadian courts will not entertain an action for the enforcement, either directly or indirectly, of a foreign penal or revenue law, they will not enforce a foreign judgment ordering the payment of taxes or penalties.[78]

Dicey and Morris declare the following rules:

> Rule 3: English courts have no jurisdiction to entertain an action:
>
> (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or
>
> (2) founded upon an act of state.[79]
>
> Rule 36 (1) states that a foreign judgment may be enforced if the judgment is
>
> (a) for a debt, or a 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).[80]

A. Non-Enforcement of Foreign Penal Judgments

The principle of non-enforcement of foreign penal judgments was recognized as early as 1789.[81] In *Folliott v. Ogden*, Lord Loughborough pointed out that "[t]he penal laws in foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority."[82]

Huntington v. Attrill is the leading authority for the non-enforcement of foreign penal judgments.[83] In this case, an individual plaintiff sought enforcement in Maryland of a New York judgment ordering the defendant to pay $100,240. The claim was based on a New York statute that imposed personal liability on directors and officers for company debts where they had made false representations. In opposing enforcement, the defendant argued that the judgment was a penalty inflicted by a foreign jurisdiction, and as such should not be enforced by the courts of a foreign state.

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78. *Id.* at 275.
79. DICEY AND MORRIS, *supra* note 2.
80. *Id.*
81. *See* Sharpe, *supra* note 41, at 688 n.209.
82. Folliott v. Ogdon , 126 Eng. Rep. 75, 82 (1789).
83. Huntington v. Attrill, 146 U.S. 657 (1892).

While New York considered the law to be penal in nature, the *Huntington* court held that the characterization[84] of the foreign law must be done in accordance with the principles of *lex fori*, or forum state.[85]

The court determined for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.[86]

Having decided on the question of how to characterize a foreign law, the court noted:

> The rule [of non-enforcement of foreign penal laws] has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense that they are only cognizable and punishable in the country where they were committed. Accordingly, no proceedings, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country.[87]

The court further stated that the phrase "penal actions" did not provide an accurate definition and stated:

> In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract;

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84. This process is sometimes described as "classification." In Switzerland, the term *Qualifikation* is common (French: "qualification").

85. Theoretically, there are three, maybe four, conceivable approaches: characterization according to (1) principles of public international law; (2) the rendition state's law; (3) the enforcing state's rules, or (4) a combination of (2) and (3). *See* F.A. MANN, *supra* note 17, at 362; *see also* F.A. Mann, Note, *Any Civil or Commercial Matter*, 102 L.Q. Rev. 505, 507 (1986).

86. *Huntington*, 146 U.S. at 682–83.

87. *Id.* at 681.

> and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule.[88]

The Privy Council made clear that a penal suit in this sense must be a suit in favor of the State for the recovery of pecuniary penalties.[89] Therefore, the conclusion can be drawn that the term "penal law" does not include statutory remedies conferred upon individuals,[90] but simply describes a forum's substantive criminal law. A penal judgment in this sense is the result of proceedings initiated by a state, under criminal procedural rules, with the goal of punishing a wrongdoer by imprisonment or fine payable to the state.

Consequently, punitive or multiple damages awarded to private litigants in civil proceedings, would be enforceable under Canadian law.[91] This view is endorsed by the Canadian courts' practice of awarding punitive damages for despicable conduct, although only under very narrow circumstances.[92]

It is submitted, however, that an analysis of the purposes of punitive damages might lead to a different result. By definition,

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88. *Id.*

89. *See id.* The Council adopts a definition given by the U.S. Supreme Court in Wisconsin v. The Pelican Co., 127 U.S. 265 (1888).

90. *See* Sharpe, *supra* note 41, at 688.

91. There may be no Canadian case law explicitly confirming this opinion. In Four Embarcadero Ctr. Venture v. Kalen [1988] O.R.2d 551, 557, the High Court of Justice held that the allegations of the defendant that the default judgment included an award of exemplary damages did not raise an issue of public policy since it is not a foreign state recovering a penalty. *See id.* at 574. In the English case, Raulin v. Fischer, 2 K.B. 93 (1911), the civil damage portion of a combined civil/penal condemnation has been enforced. In another English case, SA Consortium General Textiles v. Sun and Sand Agencies Ltd., Q.B. 279 (1978), the court enforced a French judgment including Ffr 10,000 damages for "résistance abusive" (unjustifiable opposition). Lord Denning M.R. held that there is "nothing contrary to English public policy in enforcing a claim for exemplary damages . . . ." *Id.* at 300. Additionally, "[p]enalizing the defendant by the award of punitive damages to the plaintiff is, however, by no means unknown to the legal systems derived from English law, and if the plaintiff keeps the damage for himself, this, it is submitted, may be decisive." F.A. MANN, *supra* note 17, at 364.

92. Vorvis v. Insurance Corp. of British Columbia [1989] D.L.R. 193, 208, states:

> [P]unitive damages may only be awarded in respect of conduct which is of such a nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

punitive damages go beyond compensation and aim to punish the wrongdoer.[93] In addition to the function of punishment, punitive damages are designed to deter undesirable behavior. Deterrence may be both specific (to prevent the defendant from repeating the offence) and general (to prevent others from committing similar offenses).[94] Punishment and deterrence are also the main features of criminal law and thus, based on this functional approach, punitive damages could be regarded as part of the penal law. Punitive damages, however, are merely "aspects" of penal law and therefore the penal law rule should not be applied to judgments awarding punitive damages.[95]

In the United States, statutes like the Clayton Act (antitrust)[96] and the Racketeer Influenced Corrupt Organizations Act (RICO)[97] expressly provide multiple damages for individual plaintiffs. Canada's Foreign Extraterritorial Measurements Act, however, specifically prevents enforcement of such decisions.[98] The following is a brief discussion of treble damages under RICO.

In 1970, the U.S. Congress enacted RICO to eradicate organized crime in the United States. The act identifies certain predicate acts which give rise to liability when they occur in a pattern

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93. *See* S.M. WADDAMS, THE LAW OF CONTRACTS 509 (3d ed. 1993); S.M. WADDAMS, THE LAW OF DAMAGES 11.10, 11.20 (2d ed. 1991); Norberg v. Wynrib [1992] D.L.R. 449, 469.

94. A U.S. commentator has identified other purposes of punitive damages as expressed in judicial opinions and commentaries: preservation of the peace, inducement for private law enforcement, compensation to victims for otherwise uncompensable losses, and reimbursement of plaintiff's attorney's fees. *See* D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 S. CAL. L. REV. 1, 3 (1982).

95. If the punitive damages have been assessed in an outrageous manner, however, the punitive damages portion of a judgment could be regarded as violating fundamental notions of justice and fairness, and thus also violating Canada's public policy. Nevertheless, courts are reluctant to apply the public policy doctrine, even though the foreign judgment may greatly exceed the limits of an award in Canada. *See, e.g.*, Stoddard v. Accurpress Mfg. Ltd. [1993] B.C.L.R.2d 194, 204–05. A recent example of what seems to be an outrageous assessment was when a Mississippi jury awarded 500 million U.S. dollars in punitive damages where the actual reported claim for compensation was less than ten million U.S. dollars. *See* David Baines, *B.C. Funeral Firm Settles Suit for $85 Million: Out-of-Court Deal With U.S. Company Saved the Loewen Group from Bankruptcy*, THE VANCOUVER SUN, Jan. 30, 1996, at A1.

96. 15 U.S.C. § 15(a) (1982).

97. *See* Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961–68 (1998).

98. *See* Competition Act, R.S.C., ch. 19 J-G, § 82. There are no readily available cases where the Attorney General made an order pursuant to the Act.

relationship.[99] RICO broadly defines predicate acts to include the federal mail and wire fraud statutes. This leads to a potentially broad application of RICO. Additionally, RICO grants a private right of action to anyone injured by a RICO-violation.[100] RICO plaintiffs may recover treble damages, costs, and attorney's fees.[101] RICO's legislative history reveals that the treble damages provisions were intended to encourage citizens to supplement state enforcement measures with private suits.[102] This is the so-called "private Attorney General" role of civil RICO plaintiffs.[103] Thus, it is highly formulaic to deny a defendant the "non-enforcement of foreign penal laws" defense simply because a private plaintiff is seeking enforcement. In essence, although the state chose to create a statutory incentive for private plaintiffs to enforce public interests, it is essentially a case of a foreign state enforcing its rights.

In conclusion, the rule of non-enforcement of foreign penal judgments is clear as long as the plaintiff is a foreign state. In cases where an individual plaintiff demands the enforcement of a civil judgment including a penal award, courts have generally granted enforcement.[104] In other cases where a plaintiff acts as a "private attorney-general who protects the public interests,"[105] the enforcement could be refused on the grounds that it is actually the state, acting through a private person or corporation, asserting extraterritorial enforcement of penal laws. This view, which rejects the formalistic approach of asking "who is the plaintiff?", allows for the preclusion of enforcement of penal awards on a case by case basis.

B. Non-Enforcement of Foreign Tax Judgments

In *United States v. Harden*,[106] the Canadian Supreme Court held that the British Colombian courts lacked jurisdiction to both entertain an action for the recovery of foreign taxes and to enforce foreign tax judgments. This is true even in the case of a consent

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99. *See* M.A. DiMedio, *A Deterrence Theory Analysis of Corporate RICO Liability for "Fraud in the Sale of Securities"*, 1 GEO. MASON L. REV. 135 (1994).
100. *See id.* at 135.
101. *See id.* at 137–38.
102. *Id.* at 143.
103. *See id.* at 155.
104. *See* Norberg, D.L.R. 449.
105. Mitsubishi Motors Corp., 473 U.S. at 460.
106. United States v. Harden [1963] S.C.R. 366.

judgment bearing the characteristics of an agreement. About fifteen years later, the roles were reversed when the province of British Columbia sought to enforce logging taxes against U.S. residents.[107] In *Gilbertson*, the court held that the non-enforcement rule was still in effect, and there was no reciprocity between British Columbia and the United States.[108] The rule of non-enforcement of foreign tax laws is well-established by authority, but has been severely criticized,[109] especially with respect to its application in the interprovincial context.

Canadian courts have also denied the indirect enforcement of foreign tax claims. An illustrative example of this rule is the case of *Van deMark* v. *Toronto-Dominion Bank*.[110] In this case, the U.S. Internal Revenue Service served notices of levy upon the New York offices of the defendant bank. The IRS alleged that Van de Mark held funds as a nominee of his parents who were indebted to the United States for tax arrears. Subsequently, the bank froze Van de Mark's assets at two Toronto branches. Van de Mark then applied for an order requiring the bank to pay out the moneys held on his behalf. The court held:

> [I]t is a well-established rule of public policy that Canadian law forbids a foreign state from suing, either directly or indirectly, in Canada for taxes alleged to be due to the state. To permit the Ontario branches of the bank to defend the applicant's claim on the basis of the bank's liability in the United States, would be to enforce indirectly a claim for taxes by a foreign state.[111]

In *Re Reid*,[112] the court held that a trustee was entitled to indemnification for taxes he had already paid, even though it was a foreign tax that would be unenforceable under Canadian law. The court held that the determination of a private suit was at issue, and

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107. *See* R. v. Gilbertson, 597 F.2d 1161 (1983).

108. *See id.* at 1166. It should be noted that since January 1996, Canada and the United States mutually enforce revenue claims that are final determinations by the other country. *See* Article XXVI.A ("Assistance in Collection") of the Third Protocol amending the Convention between Canada and the United States with respect to taxes on Income and on Capital (signed on Sept. 26, 1980). Harden, however, still expresses the state of law with respect to foreign tax judgments if there is no international arrangement to this effect. *See* Harden [1963] S.C.R. 366.

109. See Castel, *Tax Claims*, *supra* note 33, at 277.

110. *See* Van deMark v. Toronto-Dominion Bank [1989] O.R.2d 379.

111. *Id.*

112. Re Reid [1970] D.L.R.3d 199.

not the indirect enforcement of a foreign tax.[113] Therefore, granting the indemnification would not enrich the foreign treasury.

On the other hand, the English case of *Peter Buchanan Ltd. v. McVey*[114] considered a liquidator's claim against a director or shareholder for the recovery of sums paid as foreign taxes. The *Buchanan* court held that collection would be an indirect enforcement of foreign tax laws. Judge Kingsmill Moore wrote:

> [I]f I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting debts of a foreign revenue it must be rejected.[115]

Kingsmill put great weight on the fact that the sole object of the suit was the collection of foreign taxes. Thus, there were no other unpaid creditors, and the liquidator was assigned to "chase the tax" for the exclusive benefit of the tax authorities.[116] This tax rule, however, is less strictly applied when a liquidator seeks the mere transfer of assets, even though part of these assets will be used to pay taxes.[117]

In 1775, Lord Mansfield stated, by way of dictum, that "no country ever takes notice of the revenue laws of another."[118] The exclusion of foreign tax law, however, is not absolute. Thus, Canadian courts would probably take notice of foreign tax law if it rendered a contract void under specific tax provisions.[119] In such a case, the claim or judgment is based on a contractual relation. Again, the non-enforcement rule finds its application only in cases where the *lex causae* is a foreign tax law.

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113. *Id.*

114. Peter Buchanan Ltd. v. McVey [1955] A.C. 516

115. *Id.* at 529.

116. *See* F. A. MANN, *supra* note 17, at 375 (considering *Peter Buchanan Ltd. v. McVey* as an obvious case of indirect enforcement of foreign tax laws). Of course, indirect enforcement would not be allowed.

117. *See* Baade, *supra* note 27, at 44 (indicating that a great deal of uncertainty exists in this regard).

118. Holman v. Johnson [1775] Eng. Rep. 1120.

119. *See* P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 117 (12th ed. 1992).

In *Re Sefel Geophysical Ltd.*,[120] a bankruptcy trustee applied for guidance in the administration of a complex estate. The issue was "[w]hether United States claims and United Kingdom claims, similar in nature to Canadian Crown claims, are to be considered preferred, unsecured, or disallowed."[121]

The claims included, *inter alia*, claims for foreign taxes. The court noted that the prior cases, *Government of India v. Taylor*[122] and *U.S.A. v. Harden*[123], have created a hurdle by holding that courts will not enforce foreign revenue claims.[124]

Cases were cited in support of the proposition that claims proven in bankruptcy must be claims that would be enforceable by a court. *Re Morton*[125] illustrates that statute barred claims are not provable. The same syllogistic conclusion is urged in the case of revenue claims which are barred by the holding in *U.S.A. v. Harden*. In fact, *Government of India v. Taylor* is specific authority for the principle that foreign revenue claims are not provable in a liquidation setting. Given the present trends of international comity in the recognition of foreign bankruptcy proceedings, however, I am not certain that the Government of India case is compatible with the current judicial climate.[126]

Judge Forsyth continued:

> If our bankruptcy proceedings are respected and deferred to, as they were in the case at bar, I am of the opinion that the claims of foreign states should be respected in our proceedings as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens.
>
> I specially restrict my opinion to the special case of liquidation proceedings. The underlying consideration in a liquidation setting are significantly different from those in a setting where the action is simply one on a tax judgment as in *U.S.A. v. Harden*. I can find no authority within Canada that binds me with respect to the holding in *Government of India v. Taylor*.[127]

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120. Re Sefel Geophysical Ltd. [1988] D.L.R. Lexis 1504.
121. *See id.* at 1505.
122. Government of India v. Taylor [1955] A.C. 491 (H.L.).
123. U.S.A. v. Harden [1963] S.C.R. 366.
124. *See* Re Sefel Geophysical Ltd. [1998] D.L.R. Lexis at 1509.
125. Re Morton [1922] 3 C.B.R. 114 (Sask. K.B.).
126. *Id.* at 1510–11.
127. *Id.* at 1511.

Based thereon, the court allowed the foreign tax claims, and by doing so, enforced foreign tax claims. With regard to the U.S. claims, the court held that the estate had been enriched by U.S. assets, and that equity demanded recognition of the foreign claim as preferred. As for the U.K. claims, the court found that no U.K. assets had been recovered, and therefore the claims should be recognized as claims of general creditors.[128]

The court expressly restricted its opinion to the special case of liquidation proceedings, where the underlying considerations are significantly different from those where the action is simply based on a tax judgment. The opinion, however, neglected to explain the basis for this distinction. In fact, there is no clear basis for a less stringent application of the tax rule in liquidation proceedings. Interestingly, the court relied on the principle of comity as the basis for a more generous attitude towards the recognition and enforcement of foreign claims.[129] Without expressly mentioning it, the court also heavily relied on the principle of reciprocity. Finally, it should be noted that the court applied a public policy test, when it stated that foreign claims should be respected "as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens."[130]

The rule of non-enforcement of foreign tax judgments is indeed well-established, and its application does not bear great uncertainties. There is no "middle ground" discernible as there is regarding penal matters. Also, the Canadian-U.S. tax convention demonstrates that an international treaty may be necessary to allow the enforcement of foreign tax judgments. While *Re Sefel Geophysical Ltd.*[131] opened the way to a more favorable enforcement practice, one should remember that the facts of the case were unusual. The assets of the bankrupt company had been transferred from the United States to Canada by a U.S. court order. Under these circumstances, it would have been most offensive to disallow the U.S. revenue claims.

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128. For U.S. claims, *see id.* at 1512–13. For U.K. claims, *see id.* at 1513–14.
129. *See* discussion *infra* Part IV.D.1.
130. Re Sefel Geophysical Ltd. [1989] A.R. at 1511.
131. *See id.*

C. Non-Enforcement of "Other Public Law"

While the law regarding the non-enforcement of foreign judgments based on penal and tax laws is more or less settled, uncertainties exist whether this rule should extend to the entire body of public law.[132] Thus, some courts will construe the words "penal" and "revenue" laws as generic terms into which every "suspicious" public right has to be pressed.[133]

The public law exception was pronounced by Denning M.R. in *New Zealand (Attorney General) v. Ortiz*.[134] *Ortiz* involved an attempt to enforce a New Zealand statute providing for the forfeiture of "historical articles" exported (or attempted to be exported) in violation of the statute. M.R. Denning concluded that the asserted rights under the statute were an exercise of sovereignty beyond the territory of New Zealand and therefore fell into the category of non-enforceable public law.[135]

The following sections examine the various fields of law that are generally considered public law. Also, since Canadian authority on the point is sparse, I will consider cases from other common law jurisdictions.

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132. *See* discussion in DICEY AND MORRIS, *supra* note 2, at 106–09. *See also* NORTH AND FAWCETT, *supra* note 119 (finding the "public law" category as "firmly established" although "difficult to define"); *see also id.* at 122, 381–82. "It is a well established rule that our courts will not enforce a foreign revenue, penal or public law." R. v. Pentonville Prison Governor, ex parte Budlong [1980] W.L.R. 1110, 1125. Kerr L.J. characterized the principle as "general international acceptation." *See* In re State of Norway's Application [1987] Q.B. 433, 478. But it seems that Canadian law has never adopted the public law exception. *See, e.g., supra* notes 79–81 and accompanying text (avoiding the term "public law").

133. *See, e.g.*, Weir v. Lohr [1967] D.L.R. 717, and Schemmer v. Property Resources Ltd., 1975 Ch. 273 (Eng.); F.A. MANN, *supra* note 17, at 358.

134. See New Zealand v. Ortiz [1984] A.C. 1. M.R. Denning described the principle of non-enforcement of foreign public law as a rule "no one has ever doubted." *Id.*

135. *See id.* at 24. The House of Lords affirmed the decision of the Court of Appeal, but solely on the ground that the New Zealander had not become owner of the article, because the forfeiture is not complete until seizure (which had never happened). *See* Ortiz, A.C. 35. The House of Lords expressly declared that Lord Denning's opinion on the public law exception were *obiter* and did not comment on the public law rule at all. *See id.* at 46. Other cases where the public law argument was discussed as a third category of non-enforceable claims are Attorney General v. Heinemann Publishers Australia Pty. Ltd. [1988] C.L.R. 30 and Attorney-General for the United Kingdom v. Wellington Newspapers Ltd. [1988] N.Z.L.R. 129.

1. Recognition of Bankruptcy Decrees

Canada's Bankruptcy and Insolvency Act[136] does not contain any provisions dealing with the effect of a foreign bankruptcy's assignment of Canadian property.[137] In the common law provinces, a foreign trustee's title will be recognized with respect to movables, if, in the eyes of Canadian law, the foreign court had properly assumed jurisdiction.[138]

Thus, with regard to Canadian movables, Canadian law recognizes both the appointment and seizure power of a trustee empowered by foreign bankruptcy law. Bankruptcy laws are a typical example of a state's exercise of the "monopoly of legitimate coercive power,"[139] and their effects are comparable to confiscation laws. The purpose of bankruptcy law, however, is best understood as a means to satisfy unpaid debts, rather than as an assertion of foreign sovereign power.

2. Judgments for Costs

In *Deutsche Nemectron GmbH* v. *Dolker*,[140] the plaintiff sought Canadian enforcement of a German court order granting indemnification for German court costs. The plaintiff company had obtained this order after the defendant unsuccessfully initiated proceedings against the plaintiff in Germany. The court considered, but ultimately rejected the tax argument. The *Dolker* court held that the German court costs are "certainly not tantamount to taxation by a foreign state."[141] The court did not address the public law argument, even though German public law provided the basis for the German court order. Instead, the court found that the German court order was within the definition of "judgment" under the Court Order Enforcement Act[142] and granted the plaintiff's application.

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136. The Bankruptcy and Insolvency Act, R.S.C., ch. B-3 (1985) (Can.).

137. *See* CASTEL, *supra* note 2, at 530.

138. *See id.*

139. Translation of "Monopol legitimer Gewaltsamkeit," found in MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT II, at 829–30 (4th ed. 1956).

140. See Deutsche Nemectron GmbH v. Dolker [1984] B.C.L.R. 162.

141. *Id.* at 165.

142. Court Order Enforcement Act, R.S.C., ch. 75, § 30(1) (1979) (Can.). The order defines "judgment" as "a judgment or order of a court in a civil proceeding, where money is made payable." *See* Deutsche Nemectron GmbH B.C.L.R. at 165.

While I believe the outcome of the case is correct, the clearly compensatory nature of the German court order should have decided the issue.

3. Subrogation Claims in Social Security Matters[143]

In *Weir v. Lohr*,[144] the plaintiff was injured in an automobile accident. His hospital bill was paid for by the Minister of Public Health pursuant to the Manitoba Hospitalization Act.[145] This Act required the plaintiff to recompense the Minister from any recovery resulting from a claim against the tortfeasor.[146] Furthermore, the Act provided that the Minister of Public Health should be subrogated to all rights of recovery.[147] The plaintiff brought an action against the defendant in Manitoba (where the latter was domiciled) for the hospitalization costs.

The defendant argued that the suit was an inappropriate attempt to enforce a "foreign" (i.e., extra-provincial) revenue claim. While the court was clearly correct in not characterizing the claim as a tax,[148] the court also justified the denial of the defense by holding that sister provinces of Canada are not foreign states.[149] The court did not consider the public law argument, but it would have been rejected nevertheless under the second argument of the court.

4. Enforcement of Securities Laws

U.S. securities laws are of primary interest because the U.S. financial markets are the largest, and probably the most highly regulated in the world.[150] They comprise six federal statutes, of which the Securities Act of 1933[151] and the Securities Exchange Act of 1934 (the "1934 Act")[152] are of great significance. The 1934 Act prohibits fraud in the purchase and sale of securities, requires

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143. At the time of this writing the author could not find a case dealing with the enforcement of a social security judgment or direct application of a foreign social security law as the *lex causae*.

144. Weir v. Lohr [1967] 65 D.L.R.2d 717.

145. *See id.* at 718.

146. *See id.*

147. *See id.* at 718–19.

148. *See id.* at 720.

149. *See id.* at 721–23.

150. *See* Lowenfeld, *supra* note 3, at 344.

151. *See* Securities Exchange Act of 1933, 15 U.S.C. §§ 77a–77bbbb (1998).

152. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78kk (1998).

corporations listed on U.S. stock exchanges to file periodic reports to the Securities and Exchange Commission (SEC), and states certain minimum requirements for broker-dealers. The SEC is an independent agency established by section 4(a) of the 1934 Act, charged with the duty of administering the federal securities laws and enforcing the applicable anti-fraud provisions. The SEC is primarily responsible for protecting investors in securities and the general public interest.[153] The SEC's powers to impose sanctions for violations of the securities laws have been summarized as follows:

> The two functions of the Commission are the investigation of possible illegal activity and the adjudication of alleged violations. To this end, the Commission may bring actions in its own name to enjoin violations of the securities laws and may refer evidence of a criminal violation to the Attorney General, who may institute the necessary criminal proceedings under the law.[154]

The SEC has three sets of powers concerning the imposition of sanctions. First, it may decide whether to impose administrative sanctions.[155] Second, it may apply to the U.S. federal courts for the imposition of civil sanctions.[156] Third, it may assist the Attorney General by providing information of relevance to a criminal prosecution.[157]

In the English case *Schemmer v. Property Resources Ltd.*, the court held:

> The Act of 1934 is, in my judgment, a penal law of the United States of America and, as such, unenforceable in our courts. I have read enough of it to show that it was passed for public ends and that its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful. It was, of course, enacted not merely in the interest of the nation as an abstract or political entity, but to protect a class of the public. In that it resembles the greater part of the criminal law of any country. Like many other penal laws, the Act of 1934 also pro-

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153. *See* 79 C.J.S. § 242 (1995).

154. *Id.* § 243 (1998) (citations omitted).

155. Such as issuing injunctive orders. *See* 15 U.S.C. § 78u-3 (1998). Or perhaps, requiring administrative disgorgement. *See* 15 U.S.C. §§ 78u-2(e), -3(e) (1998).

156. For instance, disgorgement of profits. For discussion of the enforceability of disgorgement judgments, see *infra* Part III.D.7.

157. 15 U.S.C. § 77(b) (1998).

> vides in some cases a private remedy available to the victims of the offences which it forbids, and it may possibly be that a private plaintiff who recovers a judgment in a federal court under the Act of 1934 can enforce it by action here.[158]

In *Schemmer*, the plaintiff had been appointed as a receiver by a U.S. District Court, upon motion by the SEC. The court held that the plaintiff was, in effect, a public officer of a foreign state attempting to enforce a foreign criminal law. Therefore, his claim was deemed unenforceable in England.[159] The court, however, left the door open for private law claims brought by private plaintiffs under the 1934 Act.[160]

To prevent unfair insider trading, section 16(b) of the 1934 Act provides that a corporate officer must account to the corporation for any profits made within six months of a purchase and sale of the corporation's shares. In *McIntyre Porcupine Mines Ltd. v. Hammond*,[161] the plaintiff company, whose shares were listed on the Toronto and New York Stock Exchanges, tried to enforce this provision against the defendant officer who sold company stock on the Toronto Stock Exchange during the critical period. The defendant was a Canadian citizen, who had no business or assets in the United States. The plaintiff company received a default judgment against the defendant in a New York court. The plaintiff then sought both enforcement of the default judgment and a new action under section 16(b) of the 1934 Act, in the Toronto court.

The Toronto court held that the New York court lacked jurisdiction over the defendant, and that the judgment was therefore unenforceable in Canada.[162] It further held that the 1934 Act had no extraterritorial effect, and consequently, the plaintiff had no cause of action.[163] The court briefly raised the issue of whether

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158. Schemmer v. Property Resources Ltd., 1975 Ch. 273, 288 (Eng.).

159. *See id.* The reasons provided by the court are convincing in view of the existing framework. It may have been more convincing, however, to use the term "public laws" instead of "penal laws," since the plaintiff did not try to enforce a punishment, but rather, plaintiff tried to "reduce the London funds into possession in order to prevent the commission or continuation of offences against [U.S.] federal law." *Id.*; *see also* F.A. MANN, *supra* note 17, at 358.

160. *See supra* note 158 (emphasis on last sentence in quoted text).

161. *See* McIntyre Porcupine Mines Ltd. v. Hamond [1975] O.R.2d 452.

162. *See id.* at 461. For a discussion on lack of jurisdiction in the international sense, see discussion *supra* Part I.E.2.

163. *See* McIntyre Porcupine Mines Ltd., D.L.R.3d at 147–48. It is not quite clear whether the court, when referring to legislative jurisdiction, intended that the 1934 Act could not be applied to conduct exclusively performed in Canada (according Canadian

the 34 Act was a penal statute:

> [I]t is unnecessary to decide whether the United States legislation is, in fact, a penal statute. Prima facie it has at least some of the characteristics of a penal statute. If it in fact is, that would be a further reason to refuse to countenance it in this jurisdiction.[164]

According to Castel, based on the quote above, "one must assume that a judgment rendered in the United States pursuant to the Securities and Exchange Act would not be enforced in Canada."[165] This statement is too broad. As it stands, it encompasses civil litigation between private parties, an area which the *Schemmer* case distinguished.[166] *McIntyre Porcupine Mines Ltd. v. Hammond* illustrates the different aspects of jurisdiction. It deals with (judicial) jurisdiction in the international sense, with (presumably) legislative jurisdiction, and with the non-enforcement of certain (*in casu*: penal) foreign laws.

5. Judgments Based on Environmental Laws

In *United States v. Ivey*,[167] the plaintiff brought an action to enforce two judgments it obtained against the defendants in Michigan pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[168] The plaintiff sued for reimbursement for the cost of measures undertaken by the Environmental Protection Agency (EPA) in relation to a waste disposal site in Michigan. Liquid Disposal Incorporated (LDI), a Michigan corporation, conducted the waste disposal business on the site. The defendant, an Ontario resident, had a controlling interest in LDI and oversaw its management and operations.

CERCLA provides for the recovery of environmental clean-up costs from a variety of parties legislatively deemed responsible for the contamination. These include "owner and operator,"

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choice of law rules), or that the 1934 Act could not be applied in general as its application is *per se* limited to the U.S. judiciary.

164. *Id.*

165. J. G. CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE 114 (Robert McConkey, Marie Graham, et al, eds., 1988) [hereinafter CASTEL, EXTRATERRITORIALITY].

166. *See supra* note 159.

167. *See* Ivey [1995] D.L.R.4th 674.

168. 42 U.S.C. § 9607(a) (1980).

which has been interpreted by the U.S. courts to include both individuals and corporations who exercise control over the disposal site, even if title to the site is held by a distinct corporation. Liability under CERCLA is strict, and defenses are very limited.[169]

In enforcement proceedings before the Ontario court, Ivey raised the following defenses: (1) the U.S. court lacked jurisdiction; (2) the U.S. judgments were non-enforceable because they were based on the "penal, revenue or other public law" of a foreign state; (3) the U.S. judgments were obtained in violation of the rules of natural justice; and (4) the U.S. judgments are contrary to public policy.[170]

Applying the real and substantial connection test established in *Morguard Investments Ltd. v. De Savoye*, the court rejected the jurisdictional challenge,[171] as well as Ivey's natural justice[172] and public policy arguments.[173] It is worthwhile to carefully examine the court's reasoning with respect to the penal/public law defense.

The court refused to characterize the CERCLA provisions as penal in nature. After stating that the measure of recovery is directly tied to the cost of the clean-up of the site, the court held that the liability "[i]s restitutionary in nature and is not imposed with a view to punishment of the party responsible."[174] The court rejected the revenue law argument on similar grounds.[175] It then went on to address the public law argument by referring to, *inter alia*, *New Zealand (Attorney General) v. Ortiz*,[176] *Attorney General v. Heinemann Publishers Australia Pty. Ltd.*,[177] and *Attorney General v. Wellington Newspapers Ltd.*[178] After noting that Canadian

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169. *See* Ivey, D.L.R.4th at 679.

170. *See id.* at 676–77.

171. *See id.* at 681–83; *see* discussion *supra* Part I.E.2.

172. *See* Ivey, D.L.R.4th at 690–92; *see* discussion *supra* Part I.E.3.

173. *See* Ivey, D.L.R.4th at 693–94; *see* discussion *supra* Part I.E.3.

174. Ivey, D.L.R.4th at 684.

175. *See id.* at 685. As there is no Canadian precedent dealing with the public law argument, the counsel for the defendant probably had to plead other defenses to account for the inability to predict how the court would consider the public law argument.

176. Ortiz, A.C. 24. Judge Sharpe pointed out that although there are dicta in English cases which accept the public law exception, it had not received the direct approval of the House of Lords in the *Ortiz* case, nor in any other case. *See* Ivey, D.L.R.4th at 684.

177. *See* Attorney General v. Heinemann Publishers Australia Pty Ltd. [1988] C.L.R. 30 (noting that the court did not approve of a general rule excluding the enforcement of foreign public law).

178. *See* Attorney General of U.K. v. Wellington Newspapers, Ltd. [1988] N.Z.L.R. 129.

authority on the point is sparse, and quoting Castel's statement on the issue,[179] Judge Sharpe held:

> In my view, the "public law" argument advanced by the defendant should be rejected for two reasons. First, even if one sets to one side the rather shaky foundation of the doctrine, the cases which do apply the "public law" exception are distinguishable.
>
> If one turns to the principle said to underlie these decisions [purporting the public law exception], it does not apply to the present case. The claim advanced here cannot fairly be characterized as an attempt by a foreign state to assert its sovereignty within the territory of Ontario.[180]

The defendants chose to engage in the waste disposal business in the United States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused.[181]

As a second basis for his decision, Judge Sharpe held "it would be highly undesirable in principle to interpret and expand the 'public law' defense to encompass the circumstances of the case at bar."[182] He referred to the fact that Ontario has also established regulatory regimes providing for the imposition of civil liability for such clean-up costs, and went on to say:

> In this light, it is difficult to see the rationale for this court to refuse enforcement on the grounds that the efforts of the plaintiff to recover the costs it has incurred to remedy the environmental problems at the L.D.I. site represent an illegitimate attempt to assert sovereignty beyond its borders.[183]

The court further held that the principle of comity should inform the development of this area of the law, and despite the fact that there was clearly a foreign public purpose at stake, considerations of comity strongly favored enforcement.[184] Finally, the court noted that the United States enforces foreign judgments for environmental clean-up costs.[185] The court considered this to be sig-

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179. See CASTEL, *supra* note 2, at 163.
180. Ivey, D.L.R.4th at 688–89.
181. *Id.* at 689.
182. *Id.*
183. *Id.*
184. *See id.* at 689–90.
185. *See id.* at 690.

nificant with respect to the principles of comity[186] and reciprocity.[187]

The *Ivey* judgment is impressive for its careful reasoning. It should be emphasized that Judge Sharpe did not pass judgment as to whether the public law exception doctrine would ever apply in Canada. Nevertheless, he carefully examined the case under this doctrine. He finally concluded that even if the doctrine were applied, it would not lead to the non-enforcement of the U.S. judgments. Clearly, a decisive factor was the fact that the statutory basis for the claim was purely remedial, and clearly distinguishable, from a penal sanction. This was true even though the plaintiff was a foreign state agency claiming public rights. Furthermore, it should be noted that Judge Sharpe characterized the efforts of the United States to recover the costs as "not an *illegitimate* attempt to assert sovereignty beyond its borders."[188] Thus, we are left with the question whether some assertion of sovereignty beyond the borders of a foreign state may be tolerated.[189]

6. Judgments Based on Competition and Anti-Trust Laws

Attempts to internationally enforce competition and anti-trust laws face hurdles on several levels. First, questions arise as to whether a state's legislature has jurisdiction over conduct performed outside the jurisdiction when the effects are felt inside the jurisdiction.[190] Second, a question may exist as to whether the court has personal jurisdiction over the defendant. Third, whether proceedings aimed at the enforcement of foreign anti-trust judgments, including multiple damages, may fall victim to the penal rule of non-enforcement.[191] Finally, and related to the third category, issues of public policy and national interests are at stake. These concerns find their legal basis in the so-called blocking statutes.[192]

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186. With respect to comity, *see infra* Part IV.D.1.

187. *See* Ivey, D.L.R.4th at 689–90.

188. *Id.* at 689 (emphasis added).

189. *See infra* Part IV.C.

190. CASTEL, EXTRATERRITORIALITY, *supra* note 165, at 170; Lowenfeld, *supra* note 3, at 326–29.

191. *See supra* Part II.A.

192. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 8(1) (1985) (Can.); Federal Statute on the Acquisition of Real Property by Person Domiciled Abroad, R.S.C., ch. 19, J.-G. (1985)(Can.).

Given all of these special considerations, this field of the law has produced its own rules[193] and the public law exception is of secondary significance.

7. National Security Matters

The cases discussed below do not concern the enforcement of judgments, nor are they claims brought to recover a certain sum of money. Nevertheless, due to the impact of the public law exception, they are of considerable importance for this investigation.

In *Attorney General v. Heinemann Publishers Australia Pty. Ltd.*,[194] the United Kingdom sought an Australian injunction to restrain the publication of a book containing confidential information obtained by the author while he was a member of the British Security Service. The claim was based upon breach of contract, breach of fiduciary and equitable obligations, and a statutory obligation of confidence imposed by the Official Secrets Act of the United Kingdom.[195]

The Australian High Court refused to grant the injunctive relief on the ground that it would not "protect the intelligence secrets and confidential political information of the United Kingdom Government."[196] The court reviewed the authorities with regard to the public law exception and concluded that the expression "public laws" had no accepted meaning in Australian law. The court went on to state that it would be more apt to refer to "public interests" or "governmental interests" when describing the non-enforceable foreign claims.[197] The court held:

> [T]he action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign state. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as "part of the Defence Forces of the country." The claim for relief made by the appellant in the present proceedings arises out of, and is secured by an exercise of prerogative of the

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193. CASTEL, EXTRATERRITORIALITY, *supra* note 165; *see, e.g.*, *Special Defenses in International Antitrust Litigation* (1995) A.B.A. ANTITRUST SECTION, Monograph N. 20 (representing the U.S. point of view).

194. Attorney General v. Heinemann Publishers Australia Pty. Ltd. [1988] 165 C.L.R. 30. *See* F.A. Mann, Note, *Spycatcher in the High Court of Australia*, 104 L.Q.R. 497 (1988); *see* Baade, *supra* note 27, at 39.

195. *See id.*

196. Heinemann [1988] 165 C.L.R. at 54.

197. *See id.* at 42.

> Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable.[198]

It is interesting to note that the New Zealand Court of Appeal took a different approach when faced with the same issue.[199] It observed that, in a shrinking world, it seemed "anachronistic for the Courts to deny themselves any power to do what they can to safeguard the security of a friendly foreign state."[200] This was, however, subject to the qualification that such a claim could only be entertained if it was not contrary to the interests of the New Zealand Government as articulated by the competent political authorities.[201] Ultimately, the attempt to restrain the publication of the book in New Zealand also failed, since the local publication of the author's revelations was held to be in New Zealand's public interest.[202]

8. Conclusion

There are no precedents stating that foreign public laws are unenforceable in Canada. In *United States of America v. Ivey*, the court left open whether the "public law rule," as pronounced in some English cases, is controlling in Canada. Thus, judgments based on foreign public law (as the *lex causae*) have been enforced in Canada,[203] even though the plaintiff is a foreign state pursuing public interests.[204] All of these cases turned upon judgments which were compensatory in nature.

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198. *Id.* at 46–47. *See* F.A. MANN, *supra* note 17, at 358–59 (severely critiquing the concept of "governmental interests" and holding that this concept would preclude any state claim of whatever nature in a foreign court).

199. *See* Attorney-General for the U.K. v. Wellington Newspapers Ltd. [1988] 1 N.Z.L.R. 129.

200. *Id.* at 173–74.

201. *See id.* at 174.

202. *See id.* at 176–77; *see also* J.P. Meagher, *Act of State and Sovereign Immunity: The Marcos Cases*, 29 HARV. INT'L L.J. 127, 127–34 (1988) (discussing the Marcos Litigation in the United States).

203. *See* Deutsche Nemectron GmbH v. Dolker [1984] B.C.L.R. 162.

204. *See* United States of America v. Ivey [1995] O.R.3d 533.

III. SWISS ENFORCEMENT OF FOREIGN JUDGMENTS BASED ON FOREIGN PUBLIC LAW

A. Introduction and Applicable Law

The federal legislature exercised its power to regulate the enforcement of foreign judgments by enacting the Federal Statute on Private International Law ("PIL Statute").[205] This became law in January 1989. The PIL Statute replaced the cantonal rules, and established a uniform system of Federal rules. The PIL Statute contains choice of law rules, and regulates the jurisdiction of Swiss courts and administrative bodies in international matters. It also controls the recognition and enforcement of foreign judgments, bankruptcy and composition agreements, and international arbitration.[206]

Section 1(2) of the PIL Statute provides that international treaties take precedence over application of the PIL Statute.[207] The enforcement of foreign judgments in the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention")[208] is essential. A brief discussion of its scope follows.

B. The Scope of the Lugano Convention

In 1988, the Member States of the European Union (EU) and the Member States of the EFTA concluded a convention in Lugano, Switzerland, on jurisdiction and the international enforcement of judgments in civil and commercial matters. The Lugano Convention is based on the Brussels Convention,[209] and

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205. *See infra* Appendix 1.

206. *See* PIL Statute §1; D. HOCHSTRASSER & N.P. VOGT, COMMERCIAL LITIGATION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN SWITZERLAND 80 (1995).

207. Switzerland has ratified various multilateral conventions, including, for example: The Hague Convention on the Recognition and Enforcement of Judgments in Matters of Maintenance of Minors, Apr. 15, 1968; The Hague Convention on the Recognition and Enforcement of Maintenance Orders, Oct. 2, 1973.

208. *See* SR 0.275.11. Statute in force for Switzerland since January 1, 1992. For translation see BUTTERWORTHS JURISDICTION, FOREIGN JUDGMENTS AND AWARDS HANDBOOK 666 (Graham S. McBain ed., 1994) [hereinafter BUTTERWORTHS JURISDICTION].

209. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 1968, in force among the original Member States since February 1, 1973. The Brussels Convention is reprinted in BUTTERWORTHS JURISDICTION, *supra* note 208, at 661.

thereby shares many identical provisions.[210] The purpose of the Lugano Convention is to extend the principles of the Brussels Convention to non-EU countries.[211]

An important feature of both the Lugano and Brussels Convention ("Conventions") is that except in very limited circumstances, the courts of Member States may not question the jurisdiction of the original court in enforcement proceedings.[212] Instead, the Conventions contain rules of international jurisdiction that bind the enforcing court to the original court's findings of fact. The jurisdiction of the original court may only be reviewed under the provisions contained in the Conventions themselves.[213]

The scope of both Conventions is defined by article 1, which is common to both Conventions:

> *Article 1.* This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The convention shall not apply to:
>
> 1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
>
> 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
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> 3. social security arbitration.

Article 1 of the Conventions raises the following questions that are pertinent to this discussion. First, why is the scope limited

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210. Jenard and Möller's report on the Lugano Convention is reprinted in BUTTERWORTHS JURISDICTION, *supra* note 208, at 731. *See also* R.C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. OF INT'L L. 559, 570 (1993).

211. As of July 1995, the Lugano Convention is applicable among the following countries: Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. Austria, Belgium, Denmark, Greece and Iceland have signed but not yet ratified the Convention.

212. *See* European Communities - European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 28(a), 28 I.L.M. 620, 629 [hereinafter Lugano Convention].

213. *See id.* art. 28(3). For further grounds, though very limited, for challenging the original court's jurisdiction *see id.* art. 27(2).

to "civil and commercial matters"? Second, according to which legal system is the characterization to be done?[214] Third, what exactly constitutes a "civil" or a "commercial matter"? Finally, why are certain fields of law enumerated in paragraph 2 of article 1 excluded?

The limitation to "civil and commercial matters" is explained in article 220 of the EEC Treaty.[215] "Member States shall, so far as necessary, enter into negotiations with each other with a view to securing *for the benefit of their nationals* . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and arbitration awards."[216]

State claims and related matters, therefore, were not the goal of the mutual enforcement treaty. Presumably, the authors of the Brussels Convention assumed that the limitation on the Convention's scope to "civil and commercial matters" would cover the assignment as formulated in Article 220 of the EEC Treaty.[217] Furthermore, judgments other than civil and commercial, such as criminal judgments, either fall outside the scope of the economic union, or relate to the public administration of economic matters, which are properly addressed by Community laws.

The characterization of a "civil and commercial matter," is aided by *L.T.U. v. Eurocontrol*.[218] In this case, Eurocontrol, a public organization that provided air navigation safety services, brought an action in Brussels against a German company, alleging that the German company owed money to Eurocontrol. The Bel-

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214. *See supra* note 85 and accompanying text; F.A. MANN, *supra* note 17, at 662.

215. *Id.*

216. *See* T.C. HARTLEY, CIVIL JURISDICTION AND JUDGMENTS 1 (1984) (emphasis added).

217. It should be noted that neither the original text of the 1968 Brussels Convention nor the accompanying report by Jenard included a definition of "civil and commercial matters" (as opposed to "public law"). After their accession to the Brussels Convention, it was apparent that Ireland and the United Kingdom make almost no distinction between private and public law. *See* P. Schlosser, Report on the Accession of Denmark, Ireland and the United Kingdom to the Brussels Convention, *in* BUTTERWORTHS JURISDICTION, *supra* note 208, at 706.

218. Case 29/76, L.T.U. v. Eurocontrol, 1976 E.C.R. 1541. This case was decided under the Brussels Convention, which is not applicable in Switzerland. The scope of the Lugano Convention, however, is worded identically, so the *Eurocontrol* decision may nevertheless be of considerable importance for the construction of article 1 of the Lugano Convention. Furthermore, the Member States of the EU and the EFTA agreed on an Annex to the Lugano Convention in order to "prevent, in full deference to the independence of the courts, divergent interpretations" of the Brussels and the Lugano Conventions. *See* Lugano Convention, *supra* note 212, at 641.

gium court ruled for Eurocontrol and rejected the defendant's argument that the matter was one of public law.[219] Eurocontrol subsequently sought enforcement in Germany. The German court, however, requested a preliminary ruling from the European Court of Justice with respect to the meaning of "civil and commercial matters." It wanted to know whether the Brussels Convention was applicable at all.

The European Court ruled that the expression "civil and commercial matters" must be independent and interpreted by reference, "first to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems."[220] Indeed, characterizing "civil and commercial matters" according to an independent community definition was the only possible way to secure an equal and uniform interpretation within all of the Member States.[221] Applying this new standard, the court stated that although certain proceedings between a public authority and a private person or company may fall within the scope of the Convention, cases in which the public authority exercises its powers are excluded.[222] The court found that there is a strong indication of governmental exercise of power when the use of services, such as those provided by Eurocontrol, are obligatory and the scale of charges and procedures for their collection were fixed unilaterally by the public authority. Consequently, the judgment was not enforceable under the Brussels Convention.[223]

Netherlands v. Rüffer is a second case that dealt with the interpretation of a "civil and commercial matter."[224] In this case, a

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219. *See Eurocontrol*, 1976 E.C.R. at 1542.

220. *Id.* at 1551–52.

221. For a deeper analysis of this "independent Community interpretation," see PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 62–84 (1987).

222. In rendering its decision, the court used the German phrase "*hoheitliche Befugnisse.*" This can be translated as "sovereign power." In French the common term is "*puissance publique.*"

223. *See id.* at 590. In Case 9, 10/77, Bavaria Fluggesellschaft Schwabe and Germanair v. Eurocontrol, 1977 E.C.R. 1517, a case based on the same facts, Eurocontrol prevailed in the enforcement proceedings under a bilateral treaty between Belgium and Germany. The scope of this treaty was also limited to civil and commercial matters. Under the practice existing in Germany prior to the Eurocontrol case, however, it was recognized that the judgment had to be classified according to the law of the judgment-granting country. *See* HARTLEY, *supra* note 216, at 13.

224. *See* Netherlands v. Rüffer [1980] E.C.R. 3807; *see also* HARTLEY, *supra* note 216,

German-owned vessel sunk in the Bight of Watum. According to a treaty between Germany and the Netherlands, the Netherlands was responsible for "river-police functions" regarding the Bight. If the Dutch government viewed the German vessel as a danger to other ships, it raised and disposed of the ship. It then brought an action for the recovery of costs in the Dutch courts. The issue was whether the Dutch courts had jurisdiction under the Brussels Convention. If the matter could be considered "civil" or "commercial," as opposed to a public-law proceeding, jurisdiction would be proper. According to Dutch law, the right to recover costs is based on the ordinary law of tort.[225] The court, however, considered the removal of the wreck to be an exercise of the Dutch Government's "governmental" or "sovereign" powers. It concluded, therefore, that the claim for costs must have also been made in the exercise of "governmental" or "sovereign" powers. Based thereon, the Rüffer court held that the Dutch courts were without jurisdiction. The Rüffer court failed to distinguish the act of removal of the wreck (which might properly be considered a governmental act) from the compensatory claim aiming to recover the costs.[226]

There are various reasons for the exclusions catalogued in article 1, paragraph 2 of the Lugano Convention. The Lugano Convention exempted arbitration because there were already several international treaties in force, and the Committee of Experts ("Committee") did not see the need to add to the existing body of law.[227] Bankruptcy and related matters were excluded because the Committee deemed that a separate convention would be more appropriate for such complex matters.[228]

Similarly, the Committee excluded matters concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, and wills and succession. Thus, the Committee recognized the wide disparity of these matters in the various legal systems of the Member States. This disparity includes both substantive law and jurisdictional rule, as well

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at 13–16; KAYE, *supra* note 221, at 70–82.

225. *See* HARTLEY, *supra* note 216, at 14.

226. For a critique, see A.D. BESSENICH, DER AUSLÄNDISCHE STAAT ALS KLÄGER 200–02 (Basel & Frankfurt, 1993); Ivey, O.R.3d 533.

227. *See* KAYE, *supra* note 221, at 146–150; HARTLEY, *supra* note 216, at 23; Reuland, *supra* note 210, at 588.

228. *See* KAYE, *supra* note 221, at 129–44; HARTLEY, *supra* note 216, at 20–21; Reuland, *supra* note 210, at 586–87.

as conflict rules. The Committee feared that the courts would apply the public policy exception too frequently[229] and be tempted to reexamine the foreign court's judgment granting jurisdiction. Therefore, rather than risk disruption of the Lugano Convention's effectiveness, the Committee of Experts excluded such matters altogether.[230]

There are two reasons for the exclusion of social security matters. First, some countries treat social security issues as matters of public law,[231] which creates difficulties in light of article 1, paragraph 1 of the Convention and the *Eurocontrol* decision. Second, as with arbitration, substantial regulation of this area of law is already in place.[232] Commentators agree, however, that the Convention does apply to a limited class of subrogation claims brought by the social security authority against a tortfeasor.[233]

In conclusion, there are two basic reasons for an issue's exclusion under the Convention. First, there may be a separate convention dealing with the specific branch of law. Alternatively, the exclusion may be based on the fear that defenses of violation of public policy[234] or lack of international jurisdiction[235] would be invoked too often, jeopardizing the effectiveness of the Convention.

C. Enforceable Judgments under the PIL Statute

1. Introduction

In general, foreign judgments may be enforced if they qualify as a "decision in a civil matter,"[236] also referred to as a "private law matter."[237] Therefore, it is generally held that judgments based on foreign private law are enforceable, and judgments based on foreign public law are not.[238]

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229. As provided in Lugano Convention, *supra* note 212, art. 27(1).

230. *See* Reuland, *supra* note 210, at 583–587; HARTLEY, *supra* note 216, at 16; KAYE, *supra* note 221, at 85–129.

231. Or partly as a matter of tax law.

232. *See* KAYE, *supra* note 221, at 144–45.

233. *See id.* at 145–46; HARTLEY, *supra* note 216, at 21–22. *See also* discussion on Brussels Convention *supra* Part I.C.3 and *infra* Part III.D.6.

234. *See* discussion on Brussels Convention *supra* Part III.A.

235. *See infra* Part I.E.2.

236. *See infra* Part III.D.

237. German: "*Entscheid in Zivilsachen*"; French: "*Décision en matière civile.*"

238. *See generally*, M. Guldener, *Das internationale und interkantonale Zivilprozessrecht der Schweiz* 97 (1951); T.S. STOJAN, *Die Anerkennung ausländischer Zivilurteile in*

In 1980, the Federal Supreme Court of Switzerland held:

"En vertu du principe de la territorialité, le droit public n'est applicable que dans l'Etat qui l'a édicté: en règle générale, le droit public étranger ne trouve donc ni application ni exécution en Suisse."[239] Thus, Swiss law provides the standard for characterizing something as a civil matter.[240]

While Swiss law provides theories which aim to distinguish private law from public law,[241] the application of these theories poses great difficulties even within the domestic context for which they were developed. These theories might encounter even greater difficulties when they are applied to foreign law.

The general rule of non-application and non-enforcement of foreign public law is broad, yet formal in its application. The courts must decide whether the foreign judgment is based on public or private law. In the former, the courts must refuse enforcement. The courts have failed to answer the important question of whether the sovereignty of Switzerland is at stake.

In *Ammon v. Royal Dutch,* the Federal Supreme Court of Switzerland narrowed the scope of the public law rule.[242] The case turned upon measures adopted by the Dutch Government enacted to counteract the confiscation of property belonging to Dutch citizens by the German occupation forces. Based on this (public law) legislation, the Royal Dutch Company refused to register Ammon as a shareholder of the company with respect to shares Ammon had bought at the Zurich Stock Exchange. This refusal was based on the Dutch authorities' identification of these shares as part of

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Handelssachen 60–63 (1986); H.U. Walder, *Einführung in das internationale Zivilprozessrecht in der Schweiz* 30 (1989); R. Hauser, *Zur Vollstreckbar-erklärung ausländischer Leistungsurteile in der Schweiz, in* F.S. KELLER 589 (1989).

239. Judgment of the II Civil Chamber of the Federal Supreme Court of Switzerland, June 26, 1980 (unpublished).

240. *See* BGE 79 II 87; *see also* STOJAN, *supra* note 238, at 61; IPRG KOMMENTAR, *supra* note 2, at 256 (a reexamination of the nature of the claim must be implemented despite the prohibition of the *révision au fond*).

241. *See* R. FLEINER, GRUNDZÜGE DES ALLGEMEINEN UND SCHWEIZERISCHEN VERWALTUNGSRECHTS 37 (1977); F. GYGI, VERWALTUNGSRECHT 36 (1986). According to the "theory of interests," laws which serve the public interest belong to the public law, whereas laws which serve private interests belong to the private law. The "theory of subjects" looks to the parties involved. If at least one of the parties is a public authority, the legal relation is likely to be of a public nature. Finally, the "theory of subordination" distinguishes private law from public law by determining whether the parties are legally equal and act as partners or whether one party is subordinate to the other.

242. *See* BGE 80 II 53.

the confiscated goods formerly belonging to Dutch inhabitants.[243] Ammon brought an action for damages against Royal Dutch before the Swiss courts. On appeal, the Federal Supreme Court of Switzerland characterized the issue as a question of company law, and therefore held that Dutch law was applicable.[244] Ammon argued that the Dutch legislation designed to counteract confiscation falls within the category of non-applicable foreign public law. The Supreme Court agreed with Ammon's argument insofar as the Dutch legislation was foreign public law. The court, however, distinguished between foreign public law serving primarily "egoistic" interests of the state and foreign public law which strengthens or protects the interests of individuals.[245] With respect to the latter category of public law, the so-called "private-law-friendly" public law, the court saw no reason to deny the application for the sole reason that the law in question was of a public law nature.[246]

Ammon v. Royal Dutch introduced an important limitation to the public law rule. Although the distinction between "private-law-friendly" public law and public law "enacted in the interest of the state itself" seems artificial and arbitrary, it has opened the way towards a more favorable application of foreign public law in Switzerland.

BGE 75 II 125 (1949)[247] is another case where the Federal Supreme Court of Switzerland chose a more imaginative approach than the one provided for by the public law rule. In this case, the State of Hungary brought an action against a former employee who withheld the key to a safe deposit box at a Swiss bank. The safe contained Hungarian assets designated as governmental funds. The defendant refused to recognize the constitutionality of the new Communist Government and defended the action by arguing that the civil courts had no jurisdiction because the claim in question stemmed from a relationship governed by foreign public law. The Federal Supreme Court of Switzerland admitted the claim, holding that the duties of the defendant may well have their basis in Hungarian public law. The Court noted that the defen-

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243. *See id.* at 53–55; Vischer, *supra* note 5, at 183.

244. *See* BGE 80 II at 58–61.

245. *See id.* at 62; Vischer, *supra* note 5, at 183. For a harsh critique of this distinction, see F.A. Mann, *Conflict of Laws and Public Law*, *in* RECUEIL DES COURS 190–91 (A.W. Sijthoff, ed., 1971) [hereinafter F.A. Mann, *Public Law*].

246. *See* BGE 80 II at 63.

247. BGE 75 II 125.

dant became subject to the general principles of private law once the public service relationship was terminated. The defendant had to surrender the key because the termination of his public office suspended the right to retain the *instrumentum possessionis*, which had been entrusted to him.[248]

Instead of merely characterizing the claim as one of either public or private law, the court managed to apply "general principles of private law." Based on this consideration, the court granted the plaintiff's application. In so doing, the court avoided embarrassing the foreign state by denying a claim for the sole reason that the *lex causae* was a foreign public law.

2. The Operation of Foreign Public Law in the PIL Statute

The general rule of non-application and non-enforcement of foreign public law has been expressed in several decisions of the Federal Supreme Court of Switzerland.[249] Whether this rule is still valid, however, is open for debate under the regime of the PIL Statute. Sentence two, article 13 of the PIL Statute deals with the application of foreign public law. The section reads, "[a] foreign provision is not inapplicable for the sole reason that it is characterized as public law."[250] Although the PIL Statute provides for a conclusive set of rules with regard to recognition and enforcement of foreign judgments,[251] it does not contain any provisions that actually define the scope of enforceable judgments.

There has not been, however, a Supreme Court judgment confirming the public law rule in accordance with the cases rendered before the PIL Statute came into force.[252] The IPRG-Kommentar, which is probably the most influential commentary on the PIL Statute, refers to the cases decided before the new stat-

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248. *See* Vischer, *supra* note 5, at 189.

249. *See* BGE 42 II 183; BGE 50 II 58; BGE 74 II 279. Lastly, see (although toned down) the opinion of the Federal Supreme Court of Switzerland in BGE 107 II 489, 492.

250. Compare the 1975 resolution of the *Institute de droit international*: I. 1. The public-law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject to the fundamental reservation of public policy. Baade, *supra* note 27, at 50.

251. *See* App. 1, §§ 25–32.

252. In BGE 118 II 353, the Federal Supreme Court of Switzerland made the following statement: "Neither according to the *PIL Statute* nor according to the previous case law and doctrine, which was even more restrictive with respect to public intervention law [*öffentlichrechtliches Eingriffsrecht*], may foreign public law which serves to enforce sovereign claims [*Machtansprüche*] be recognized." [author's translation].

ute came into effect.[253]

Article 13 of the PIL Statute, however, raises many questions. First, section 13 deals with the (direct) application of foreign law, so it is not entirely clear whether this provision should also operate with respect to the enforcement of judgments. At the least, it seems safe to say that the exclusion of foreign public law in enforcement proceedings is less stringent than with regard to the direct application of foreign laws that are at odds with Swiss legal concepts.[254]

The more difficult question is whether foreign public law may be applied if it is the *lex causae* of a case, or whether article 13 is simply meant to incorporate existing case law by allowing for the preliminary or incidental application of foreign law ("private-law-friendly" public law) into the new PIL Statute.[255] Article 13 of the PIL Statute seems to allow for a less rigid exclusion of foreign public law. The Federal Supreme Court of Switzerland agreed with this view in BGE 118 II 353 (1992), where it stated that the law before the introduction of the PIL Statute was more restrictive with respect to foreign public intervention law.[256]

D. Specific Branches of Public Law

1. Non-Enforcement of Foreign Criminal Judgments

Based on the foregoing chapter, it is clear that foreign criminal judgments will be considered unenforceable under the PIL Statute.[257] Swiss authorities, however, will grant judicial assistance in criminal matters according to both international treaties and the Federal Statute on International Legal Assistance in Criminal Matters.[258]

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253. *See* IPRG KOMMENTAR, *supra* note 2, at 256.

254. *See supra* note 34 and accompanying text.

255. This question was left open in IPRG KOMMENTAR, *supra* note 2, at 107–108.

256. *See* BGE 118 II 353.

257. *See* STOJAN, *supra* note 238, at 66–67; BESSENICH, *supra* note 226, at 190–91; *but see* IPRG KOMMENTAR, *supra* note 2, at 256.

258. SR 351.1 art. 74(2) (Switz.) (provides for the seizure and transfer of proceeds of crime (*producta sceleris*) to the requesting state for the purposes of forfeiture and/or restitution). *See* BESSENICH, *supra* note 226, at 216. Furthermore, according to SR 351.1 art. 94 (Switz.), foreign criminal judgments may be enforced under certain conditions. *See id.* at 198–99.

2. Enforcement of Judgments Awarding Punitive Damages

Difficulties arise with respect to the enforcement of punitive or multiple[259] damages awarded to private litigants in civil proceedings.[260] There are two cases where Swiss courts had to address the enforceability of U.S. judgments awarding punitive damages.

In one unpublished case, plaintiffs attempted to enforce a Texas state court judgment in the Canton of St. Gallen, Switzerland.[261] The Texas judgment, based on the defendant's misrepresentation in connection with the sale of real estate, awarded punitive damages three times the amount of the actual damages. In its 1982 decision, the Swiss District Court denied enforcement because the Texas judgment violated the policy of *Bereicherungsverbot Bereicherungsuerbot.*[262] This Swiss public policy requires that a damages award not put the plaintiff in a better financial position than he would have been in had the damage or loss not occurred. The District Court further held that the purpose of the punitive damages (deterrence and punishment) lacked a "civil" character, an additional reason not to enforce the Texas judgment.[263] Apparently, the decision was not appealed.

In the second case, the Civil Court of the Town-Canton of Basle enforced a U.S. judgment awarding punitive damages.[264] In *S.F., Inc. v. T.C.S. AG,* the Swiss company T.C.S. AG conducted transportation services for S.F., Inc., a California company. The parties had stipulated that English law would be applied. After a dispute arose between the two parties, T.C.S. AG brought an action before a California District Court claiming outstanding fees

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259. For the sake of brevity, this Article will only refer to "punitive" damages. Where other considerations are relevant with regard to multiple damages reference thereto will be made.

260. *Cf. supra* note 91.

261. Unpublished decision rendered by the District Court of Sargans before the PIL Statute was in force. *See* J. Drolshammer & H. Schärer, *Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen 'punitive damages-Urteils,'* 82 SJZ 309 (1986); M. Bernet & N.C. Ulmer, *Recognition and Enforcement in Switzerland of US Judgments Containing an Award of Punitive Damages*, 22 IBL at 272 (1994).

262. With regard to the *Bereicherungsverbot, see infra* notes 274–75 and accompanying text.

263. *See* Bernet & Ulmer, *supra* note 261, at 273.

264. The judgment in S.F,. Inc. v. T.C.S. AG was confirmed by the Court of Appeal of BJM 1991 n.31, 38. The appeal to the Federal Supreme Court of Switzerland was rejected on procedural grounds. *See* BGE 116 II 376.

for the services. S.F., Inc. filed a counterclaim for damages regarding the misappropriation of containers they had provided and for punitive damages based on fraud. The court held S.F., Inc. liable in the amount of $70,800.19. S.F., Inc., however, was to recover actual damages of $120,060 and punitive damages in the amount of $50,000. S.F., Inc. successfully enforced the outstanding balance of $99,259.81 at T.C.S. AG's domicile in Basle.[265]

From the Swiss point of view, there are three basic questions regarding the enforcement of punitive damages:[266]

(i) Should a judgment awarding punitive damages be considered a civil judgment at all?

(ii) Would Swiss public policy be offended by enforcing such a judgment?

(iii) In case the punitive award cannot be enforced, should there be a partial enforcement of the judgment?

In answering the first question, we can note that ten years ago, Swiss scholars tended to regard punitive damages as penal in nature, and therefore concluded that such judgments were not enforceable in Switzerland.[267] Indeed, under Swiss law, punitive damages may not be awarded, as they fulfill to a large extent the functions reserved for criminal law, namely punishment and deterrence.[268]

More recent authors point out that under the *Federal Statute on International Legal Assistance in Criminal Matters,*[269] judgments that include punitive damages do not fall within the category of criminal judgments. Therefore, some argue that such judgments fall within the scope of the PIL Statute.[270]

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265. I will refer to the court's reasoning below.

266. *See* CH. LENZ, AMERIKANISCHE PUNITIVE DAMAGES VOR DEM SCHWEIZER RICHTER 133 (1992).

267. *See* P.C. HONEGGER, AMERIKANISCHE OFFENLEGUNGSPFLICHTEN IN KONFLIKT MIT SCHWEIZERISCHEN GEHEIMHALTUNGSPFLICHTEN 213, 219–20 (1986); G. Kaufmann-Kohler, *Enforcement of United States Judgments in Switzerland* 35 WIRTSCHAFT UND RECHT 211, 243 (1983) (concerning treble damages); STOJAN, *supra* note 238, n.66 (question left open) and n.74 (enforceability rejected with respect to treble damages in U.S. anti-trust litigation).

268. *See supra* notes 96–97 and accompanying text.

269. *See* LENZ, *supra* note 266, at 137. In BGE 116 II 378, the Federal Supreme Court of Switzerland held that a foreign judgment awarding punitive damages is not a criminal judgment as defined by the Federal Statute on International Legal Assistance in Criminal Matters. The court, however, did not say that judgments including punitive damages fall within the scope of the PIL Statute.

270. *See* IPRG KOMMENTAR, *supra* note 2, at 1200.

Furthermore, Swiss civil law also employs penal sanctions. Contractual penalties (*peine conventionnelle* or *clause pénale*), for instance, are commonly enforced.[271] These penalties are founded on a contractual basis where the contracting parties consent to pay damages in case of a breach of contract. This latter argument, however, is not valid with respect to the statutorily provided "compensation"[272] owed by an employer to an employee in the case of improper notice of termination.[273] There is a similar provision regarding the unjustified dismissal of an employee.[274] These provisions punish the wrongdoer and prevent others from repeating such malicious behavior.[275] Swiss civil law recognizes, albeit under very limited conditions, claims featuring penal elements and claims which may over-compensate an aggrieved party. Therefore, judgments awarding punitive damages should be considered a private law matter under the PIL Statute.[276]

With this in mind, the Appeal Court of Basle in *S.F., Inc. v. T.C.S. AG* held that a judgment awarding punitive damages must be characterized as a "civil matter" in the sense of the PIL Statute.[277] The court was aware of the penal element in the California judgment, but distinguished between "criminal law punishments" (*kriminalrechtliche Strafe*) and "private law punishments" (*privatrechtliche Strafe*).[278] The court went on to hold:

> While the former (i.e., criminal law punishments) are founded on the state's right to punish, the latter serve to secure and enforce private law claims. The fact that they (private law punishments) serve [*inter alia*] a penal function, does not alter any-

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271. *See* SR 220 art. 160 (Switz.).

272. The word "compensation" is not accurate in this context because the employee is entitled to a certain sum of money irrespective of financial loss.

273. "The compensation shall be determined by the judge considering all circumstances. It shall, however, not exceed the employee's wages for six months. Claims for damages on other legal grounds are unaffected." SR 220 art. 336a(2).

274. *See* SR 220 art. 337(c) (Switz.).

275. *See* LENZ, *supra* note 266, at 99–105.

276. In cases with multiple damages, however, where private parties act as "private attorney generals," then the penal code would apply under RICO. *See* 15 U.S.C. § 15(a) (1998).

277. *See* BJM 1991 n.33.

278. Swiss law does not recognize punitive damages: "Le droit civil connaît aussi des sanctions et offre, par l'institution de la peine conventionnelle ou clause pénale, un moyen de coercition qui agit sur le contrevent comme le ferait une sanction de droit public. Cette fonction pratique ne la fait pas sortir juridiquement du domaine du droit privé." BGE 57 I 204.

> thing with respect to their qualification as an institution of the private law. Therefore, a judgment that pronounces such a private law punishment is a private law matter in the sense of Swiss enforcement law.[279] (footnotes omitted, author's translation)

The second issue relates to the public policy exception. In the field of products liability, a plaintiff might be entitled to punitive or multiple damages according to the applicable foreign *lex causae*.[280] Article 135(2) of the PIL Statute, however, limits the amount of damages recoverable by these types of plaintiffs before Swiss courts. Assuming that this provision is also applicable in enforcement proceedings, article 135(2) does not allow enforcement of the penal portion of an award, but allows enforcement for actual damages.[281]

In other fields of the law where punitive damages may be awarded, the courts will face the difficult task of applying the general public policy exception. A fundamental principle of the Swiss law of damages is the rule that an aggrieved party may not be overcompensated by damages (*Bereicherungsverbot*).[282] The Swiss law of damages basically allows claims for two types of damages: compensatory, and pain and suffering. Compensatory damages are limited to the actual economic damage caused by the tortious act or the breach of contract. Tort law damages for pain and suffering are available only to compensate a party for non-economic loss, such as pain or other psychological or physical stress. The prohibition on overcompensation of an aggrieved party is interwoven into Swiss public policy.[283] Punitive damages may be awarded, however, in order to reimburse a party's attorneys' fees.[284] Here, there is no overcompensation because Swiss courts *ex officio* award attorneys' fees to the prevailing party (to some extent). Swiss public policy, therefore, does not exclude punitive

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279. BJM 1991 n.32–33.

280. *See* SR 291 art. 135(2) (Switz.).

281. The amount of actual damages must be determined by applicable foreign law such as the *lex causae*. This is true even where the *lex causae* considers the actual damages to a greater extent than would domestic law. The limitation set forth in SR 291 article 135(2) tries to exclude categories of damages not known to Swiss law. *See* IPRG KOMMENTAR, *supra* note 2, at 1179.

282. *See supra* note 272 and accompanying text.

283. *See* THEO GUHL, ET AL., DAS SCHWEIZERISCHE OBLIGATIONENRECHT (7th ed. 1980); KARL OFTINGER, SCHWEIZERISCHES HAFTPFLICHTRECHT 66 (4th ed. 1975).

284. *See supra* note 94 concerning purposes of punitive damages.

damages as compensation for attorneys' fees.

In addition to strictly compensatory claims, the Swiss Code on Obligations allows claims for unjust enrichment.[285] These punitive damages, which restore profits unjustly realized by the defendant, could also be enforceable under Swiss law.[286]

As discussed above, Swiss civil law may have certain penal repercussions. From the Swiss point of view, punitive damages are dangerous because of the potential for broad application and excessive awards. The public policy test should therefore focus on the amount a party is overcompensated, and the reasons why punitive damages were awarded. This requires a thorough examination of the merits of the case, which article 27(3) of the PIL Statute permits. Whenever the incompatibility with public policy is at issue, an examination should be in order.

Furthermore, the doctrine of restrained application of the public policy exception in enforcement proceedings (*ordre public atténué*)[287] and the doctrine of "*Binnenbeziehung,*"[288] direct a court to be more tolerant of foreign judgments, where they offend fundamental principles of Swiss law.

Turning to the third question regarding the partial enforcement of punitive damages, courts should always be allowed to review the merits of a case. The courts can review the decisive factors leading to the punitive damages award, and feel free to award the whole amount, a partial amount, or none of the punitive damages.[289]

Courts should consider the following factors: (1) proximity of the case to the Swiss *forum*;[290] (2) nature of the punitive damages (compensatory, restitutionary or truly penal); and (3) amount of punitive damages designated to actually punish.[291]

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285. *See* SR 220 art. 62 (Switz.).

286. In BJM 1991 note 36, the court emphasized that punitive damages were designed to prevent unjust enrichment rather than to serve as a means of deterrence.

287. *See supra* notes 68–70 and accompanying text.

288. *See supra* note 67 and accompanying text.

289. *See* Bernet & Ulmer, *supra* note 261, at 274.

290. For example, if the parties are domiciled in Switzerland: (i) for tort cases examine if the wrong or the effect thereof occurred in Switzerland and (ii) for contractual claims examine if the contract is to be performed in Switzerland, or (iii) if there are other close contacts to Switzerland, and if the parties agreed to Swiss jurisdiction. Swiss courts should be more tolerant in applying the public policy exception where there are many connecting factors. Where only the assets are located in Switzerland, for example, there would be insufficient connecting factors.

291. Figures are hard to attain. Nevertheless, truly punitive damages (designed to

In conclusion, there is still no definite authority regarding the enforcement of punitive damages. It can safely be said, however, that punitive damages judgments are neither *per se* outside the scope of the PIL Statute, nor are they *per se* incompatible with Swiss public policy.[292]

3. Non-Enforcement of Foreign Tax Judgments

According to the Swiss view, tax laws constitute a typical public law matter, and are enforced *ex officio* by each state based on its constitutional power over its people. Therefore, Swiss courts will not directly or indirectly enforce foreign tax judgments.[293] Generally, there are no differences between Canadian and Swiss law in this area.[294]

4. Recognition of Bankruptcy Decrees

According to article 166 of the PIL Statute, if the country where the bankruptcy decree was made grants reciprocity, a foreign bankruptcy decree issued in the country of the debtor's domicile will be recognized upon motion by the foreign trustee/receiver in bankruptcy, or by one of the creditors. Such a motion must be brought before a Swiss court in the jurisdiction where the assets are located.[295]

Once a foreign bankruptcy decree is recognized, the debtor's assets in Switzerland are subject to both Swiss bankruptcy law and Swiss rules concerning priority of payments.[296] These rules pro-

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punish and deter) that exceed 50% of the actual damages awarded seem outrageous, even if there are only minimal contacts with Switzerland.

292. In 1992, the German Supreme Court (*Bundesgerichtshof*) held that foreign judgments encompassing damage awards that exceed compensation for the damages suffered are not enforceable because they violate German public policy. *See* BGHZ 118, 312. It further held that those damages which are compensatory, however, can be enforced even though they may exceed what a German court would award. *See* A.R. Fiebig, *The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments,* 22 GA. J. INT'L & COMP. L. 635, 648 (1992); Patrick J. Nettesheim & Henning Stahl, *Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award,* 28 TEX. INT'L L.J. 415 (1993).

293. *See* STOJAN, *supra* note 238, at 65; M. KELLER & K. SIEHR, ALLGEMEINE LEHREN DES IPR 162 (1986).

294. *But see* discussion *infra* Part IV on the handling of foreign tax claims in international bankruptcy cases.

295. SR 291 art. 167(1) (Switz.). A bankrupt debtor's claims are deemed to be located at the domicile of his or her debts. *See* SR 291 art. 167(3) (Switz.).

296. *See id.* art. 170(1) (Switz.).

vide that secured creditors are paid equally, irrespective of their domicile.[297] On the other hand, unsecured priority claims of creditors domiciled in Switzerland receive the first distributions.[298] After satisfaction of the claims of the secured creditors (of any domicile), and the preferred creditors domiciled in Switzerland, the remaining balance is made available to the foreign trustee/receiver or to the empowered creditors in bankruptcy.[299] This balance, however, will be made available only after the foreign schedule of claims has been recognized by the Swiss court.[300] The fact that a foreign schedule of claims includes tax claims or social security claims is no reason for refusing to recognize the schedule.[301]

5. Judgments for Costs

Under Swiss law, there are two different kinds of costs to be considered. The first category is actual court costs. These are paid to the court or state treasury by the losing party. In the absence of an international agreement, claims for such costs are unenforceable.[302]

Court awarded attorney fees, however, are enforceable so long as the primary judgment is enforceable within Switzerland.[303] A court order granting a winning party indemnification for court costs would probably be treated in a similar way. It would be enforceable if the underlying judgment is also enforceable.[304]

6. Social Security Matters

If payments to the social security program are mandatory, judgments will be unenforceable under the PIL Statute.[305] Swiss courts, however, will enforce a foreign judgment compelling payments from a voluntary program.[306]

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297. Foreign tax claims are not permitted. *See* BESSENICH, *supra* note 226, at 215.

298. *See id.* art. 172 (Switz.).

299. *See id.* art. 173(1) (Switz.). Therefore, preferred creditors domiciled in Switzerland have to claim their rights directly in foreign bankruptcy proceedings.

300. *See* SR 291 art. 173(2) (Switz.).

301. *See* BESSENICH, *supra* note 226, at 216 (for further references).

302. *See id.* at 205.

303. *See id.* at 216; *see also* STOJAN, *supra* note 238, at 50.

304. *But see* Deutsche Nemectron GmbH v. Dolker [1984] B.C.L.R. 162 and accompanying text.

305. *See* STOJAN, *supra* note 238, n.65.

306. *See id.*

Where a foreign provision provides for subrogation of the rights of recovery, Swiss courts will apply the foreign rule, regardless of whether the rule could be considered public in nature.[307] Similarly, courts will enforce a judgment granted to an insurer regardless of how the subrogation law is classified.

7. Enforcement of Securities Laws

This section examines the enforceability of judgments by U.S. courts and/or the U.S. Securities and Exchange Commission (SEC) ordering the disgorgement of profits based on the violation of U.S. securities law.[308] In order to accomplish this task, an outline of the legal nature of disgorgement proceedings will be examined before turning to disgorgement judgments under Swiss law.

Disgorgement is a form of civil restitutionary remedy for unjust enrichment. The 1971 case of *SEC v. Texas Gulf Sulphur Co.*[309] introduced the equitable remedy of disgorgement in the United States. One prerequisite for a judgment ordering disgorgement is a violation of the securities legislation.[310] The U.S. Second Circuit Court of Appeals stated that disgorgement "is a method of forcing a defendant to give up the amount by which he was unjustly enriched,"[311] and that, when ordering disgorgement, "the court is not awarding damages . . . but is exercising . . . discretion to prevent unjust enrichment."[312]

Disgorgement is available where the defendant has profited from illegal conduct. Although one would expect that the injured party would receive the profits, such "restitution" is not a crucial element of a claim for disgorgement.[313] While disgorgement always involves the reversal of unjust enrichment, it does not necessarily involve the remedy of restitution, and may be distinguished

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307. *See* IPRG KOMMENTAR, *supra* note 2, at 1238. It makes reference to SR 291 art. 13(2) (Swtiz.). The Federal Supreme Court of Switzerland applied foreign public law subrogation provisions before the enactment of the PIL Statute, as long as they were not fundamentally different from Swiss subrogation norms. *See* BGE 107 II 489, 492–93.

308. *Compare supra* Part I.C.

309. *See* 446 F.2d 1301, 1307–08 (2d Cir. 1971).

310. *See* SEC v. Unifund SAL, 910 F.2d 1028, 1041 (2d Cir. 1990).

311. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (1978).

312. *Id.* at 95.

313. *See* R.C. Flynn, *SEC Distribution Plans in Insider Trading Cases,* 48 BUS. LAW. 107, 121 (1992).

on this basis.[314]

A disgorgement order does not depend on proof that any parties have been injured by the illegal conduct.[315] As previously discussed, the courts will use the recovered funds to compensate injured parties[316] in accordance with a distribution plan.[317] When the proceeds of the disgorgement cannot be distributed to injured parties, they are paid out to the U.S. Treasury.[318] Also, if the proceeds of disgorgement exceed the sum of legitimate private claims, the excess may be transferred to the Treasury.[319] In accordance with these policies, a U.S. District Court dismissed a claim for the return of excess funds filed by the person whose profits had been ordered disgorged. The court held:

[In a suit] commenced by the SEC as a law enforcement agency . . . to permit the return of the unclaimed funds, a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if the adequate enforcement of the securities acts is to be achieved.[320]

It is necessary for the exploration of Swiss law to assume that the illegal profits fall within Swiss jurisdiction and that the SEC has tried to enforce a disgorgement judgment at the Swiss *forum arresti.* First, the U.S. characterization of SEC disgorgement claims as civil is not decisive, since this only says the claim is not criminal in nature.[321] Disgorgement claims aim to deprive the defendant of the illegal profit made in violation of securities laws. In addition, they allow "ill-gotten gains" to be obtained and transferred to the U.S. courts' jurisdiction, where they will be distributed according to the U.S. courts' distribution plan. The disgorgement judgment does not, however, determine the obligations between private parties.[322] Rather, it is intended to secure and re-

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314. For discussion on the traditional remedy of disgorgement and its distinction from compensation and restitution, see L.D. Smith, *Ontex Resources Ltd. v. Metalore Resources Ltd.*, 73 CAN. B. REV. 259 (1994).

315. It is assumed that if a participant in a securities exchange profits violates the law, that others incur losses or, at the very least, not profit as much as they would have had the violation not occurred.

316. This is not the primary objective of disgorgement. *See* Flynn, *supra* note 313.

317. *See id.* Approved by the court ordering the disgorgement.

318. *See id.*

319. SEC v. Lund, 570 F. Supp. 1397 (C.D. Cal. 1983); SEC v. Blavin, 760 F.2d 706, 711 (1985).

320. *See* SEC v. Golconda Mining, 327 F. Supp. 257, 259 (S.D.N.Y. 1971).

321. *See* Frei, *supra* note 28.

322. A disgorgement judgment would deal with obligations between private parties if

patriate the funds. Any attempt to enforce a SEC disgorgement judgment in Switzerland must, therefore, be characterized as an attempt to enforce foreign executionary measures within the Swiss territory. Foreign executionary measures ordered by foreign courts fall within the category of non-enforceable foreign laws, and a judgment based upon such laws cannot be enforced in Switzerland.

The same conclusion can be reached by an analysis of the U.S. securities legislation and the responsibilities of the SEC within this scheme. U.S. securities laws are designed to protect the integrity of securities markets and thus, may be characterized as laws designed for public ends.[323] The SEC is a powerful state agency[324] vested with a unique power of disgorgement not available to a private person.[325] These features clearly lead to the conclusion that SEC disgorgement judgments, according to the Swiss point of view, have to be considered an administrative matter.[326]

There is no need to characterize U.S. legislation as penal.[327] Under Swiss law, disgorgement judgments are administrative in nature, which is reason enough, according to Swiss law, to refuse enforcement.

8. Judgments Based on Environmental Laws

There are no available cases where the enforcement of a foreign judgment based on environmental law is at issue.[328] It seems highly doubtful, however, that Swiss courts would enforce a foreign judgment awarding clean-up costs to a foreign administrative authority.[329] Although the substance of the claim could clearly be considered compensatory in nature, the administrative character of such a judgment would weigh against Swiss enforcement. A

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they were with compensatory claims for injured parties or to a traditional party claim for restitution.

323. *See* BGE 80 II 53 (Switz.) for a discussion of the "theory of interests."

324. *See id.* (discussing the "theory of subjects").

325. *See id.* (discussing the "theory of subordination").

326. "[T]he disgorgement proceedings [initiated by the SEC] amounted to the enforcement of a sanction, power or right at the instance of the State in its sovereign capacity, and were, therefore, part of its public law." Nanus Asia Co. v. Standard Chartered Bank [1990] 1 H.K.L.R. 396. *See also* Lawrence Collins, *Provisional and Protective Measures in International Litigation*, *in* RECUEIL DES COURS 133 (1992).

327. *See* Schemmer v. Property Resources Ltd. 1973 S. No. 6773 273, 288 (1975).

328. *See* Rüffer E.C.R. at 3807.

329. *See* Ivey, 26 O.R.3d at 534.

party seeking enforcement of such a judgment would be well-advised to refer to the Hungarian case[330] and argue that "general principles of private international law" oblige a tortfeasor to pay compensation for the damages he has caused.

9. Judgments Based on Competition and Anti-Trust Laws

Article 137(2) of the PIL Statute expressly deals with the application of restraint of competition law. Article 137(2) states that even where foreign law is applicable, no damages may be awarded beyond those that would be awarded under Swiss law.[331]

The majority of Swiss scholars characterize treble damages under U.S. anti-trust legislation as penal or administrative matters in nature, and therefore fall within the public law exclusion.[332] A partial enforcement of the actual damages, as available under Swiss law, should be allowed.

10. Conclusion

In the Swiss law of conflicts, there is a general rule that judgments based on foreign public law are not enforceable. Also, the Lugano Convention, the single most important multilateral treaty with respect to the enforcement of foreign judgments, limits its scope of application to "civil and commercial matters."

The Swiss Federal Supreme Court, however, has introduced exceptions to the rule of non-enforcement. These exceptions considerably limit the scope of the public law rule. *Ammon v. Royal Dutch* opened the door for the enforcement of foreign public law that was enacted to protect and strengthen the interests of private parties.[333] In one case, the Swiss Federal Supreme Court enforced a claim based on foreign public law by applying general principles of private law.[334] Additionally, the PIL Statute contains rules for the recognition of foreign bankruptcy decrees. Under the conditions in the PIL Statute, these rules allow the transfer of assets to another jurisdiction irrespective of whether those assets will be used for satisfying tax or social security claims.

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330. *See* BGE 75 II 125; *see also supra* Part I.C.1.

331. *See* SR 291 art. 135(2) (Switz.).

332. *See* Kaufmann-Koller, *supra* note 267, at 242–44; STOJAN, *supra* note 238, at 74. *Cf.* LENZ, *supra* note 266, at 136. (Note that LENZ fails to distinguish between punitive and treble damages).

333. *See* BGE 80 II 58,61.

334. *See* BGE 75 II 125; *see also supra* Part I.C.1.

Uncertainties exist with regard to punitive and treble damages, mainly because this legal institution is unknown in Swiss law. Judgments awarding punitive damages should be dealt with under the PIL Statute, but must be subject to a thorough examination under the public policy doctrine.

E. Comparative Analysis

Canadian exclusionary law started with a "tax and penal rule." This basic rule has been expanded by English judgments and scholars. Thus, Canada now includes "other public law" as a third category of non-enforceable judgments. This public law rule, however, was never approved by the either the House of Lords or any Supreme Court of common law jurisdiction. Switzerland, on the other hand, began with the premise that all foreign public law is unenforceable in Switzerland. Therefore, Swiss law began to develop certain exceptions to the public law rule.

Despite those different starting points, a comparison of Canadian and Swiss law shows a remarkable level of conformity to the results of cases tried before Swiss and Canadian courts. Although the legal roots of the "non-enforcement of specific judgments" rule of the two jurisdictions are quite different, the independent evolution of both jurisdictions' law has led to striking similarities in the results of individual cases. In fact, there is reciprocity to a very great extent.

There are two ways to examine what it means to say reciprocity between Canadian and Swiss law in the investigated matter. First, the two legal systems may have arrived at a "natural frontier" by voluntarily enforcing each other's judgments. In that case, further development may be impossible. Second, it could mean that it is time to mutually evolve the law in a direction which will allow courts to enforce judgments that have traditionally been excluded from enforcement. In Part IV of this Article, there will be further discussion of the rationale for the "non-enforcement rule," a critique of the reasons given for its existence, and other plausible answers to the definition of reciprocity.

IV. RATIONALE FOR REFUSING THE ENFORCEMENT OF FOREIGN PUBLIC LAW JUDGMENTS

A. Introduction

Several justifications support the rule that foreign penal tax and certain other public laws[335] must not be enforced internationally.[336] Some reasons might be valid in the direct application of foreign public law, but are of no significance in the context of judgment enforcement.[337] Others, such as those expressed in *U.S. v. Harden*, reject all effects of foreign public law. In *Harden*, the court held that the general rule of non-application of foreign tax laws also applies in the context of judgment enforcement:

> [A] foreign State cannot escape the application of this rule [non-enforcement of foreign tax claims], which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.[338]

Further justification of non-enforcement of foreign public law judgments are covered by other prerequisites of enforcement as outlined in Part I.F. Problems of "long-arm jurisdiction," unfair proceedings, and morally offending foreign legislation are covered by the requirements of jurisdiction in the international sense,[339] natural justice, and public policy. This Part explores "judgment enforcement jurisdiction" or "admissibility of judgment enforce-

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335. For the sake of brevity, the term "public law" will refer to the specific field of foreign laws that are held unenforceable under Canadian or Swiss law. *See supra* Parts II, III.

336. *See* references in F.A. MANN, *supra* note 17, at 360.

337. *See, e.g.*, KELLER & SIEHR, *supra* note 293, at 160 (regarding the domestic authorities lack of legitimacy in dealing with foreign public law). *See id.* at 161; *see also* F.A. Mann, Public Law, *supra* note 245, at 170; *see also* Baade, *supra* note 27, at 41 (discussing the difficulties concerning the correct application of the foreign procedural and substantive law). Assume that state A sues a person before the court of state B based on an original tax claim. If the court of state B denies state A's claim, state A will be bound by state B's decision (*res judicata*). In practice, however, it seems unlikely state A will accept state B's decision. If the foreign law violates the public policy of the *forum*, should (and could) the court apply its own public law? To do so seems problematic.

338. United States v. Harden [1963] S.C.R. at 371.

339. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (4th ed. 1990). *See also* HUGH M. KINDRED ED., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 423 (5th ed. 1993).

ment."[340] Thus, the only reason for not enforcing the judgment or tax assessment would be the penal or the tax rule provisions, respectively.

After excluding reasons which do not provide an appropriate explanation in the context of judgment enforcement,[341] two explanations remain which merit a more thorough examination. First, since the public policy test always applies in proceedings for the enforcement of foreign judgments, it could cause political embarrassment if the enforcing court holds that a foreign public law is offensive to domestic notions of fundamental justice.[342] Secondly, it has been reasoned that public law is territorially limited to the boundaries of the enacting state and that international enforcement of such laws violates the sovereignty of the enforcing state.[343]

B. The "Courtesy" Argument (Avoid Public Policy Test)

The court in *United States of America v. Harden* quoted a passage from Lord Keith of Avonholm's speech in *Government of India v. Taylor.* That Article reads:

> Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore* v. *Mitchell.* This explanation is also quoted by Kingsmill Moore J. in the case of *Peter Buchanen Ltd* as follows: 'While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any

340. Canadian courts often refuse jurisdiction in cases where the public law rule applies. *See, e.g.,* United States v. Harden [1963] S.C.R. at 372–73 (quoting Buchanen [1955] A.C. at 516). Swiss courts hold foreign public law claims or judgments as "inadmissible." *See* BESSENICH, *supra* note 226, at 41.

341. *See* Ivey, O.R.3d at 534.

342. *See supra* Part II.B.

343. *See supra* Part II.C.

> rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.'[344]

Judge Learned Hand, in the passage quoted by Lord Keith of Avonholm, relies on an exaggerated effect of the act of state doctrine.[345] This view suggests that a domestic court should generally deny enforcement of foreign public law judgments.

This "courtesy argument," however, ignores the fact that the foreign state voluntarily submits to the jurisdiction of the domestic court. By doing so, the state waives its immunity. In addition, the explanation with respect to the embarrassment of the foreign state is unconvincing. Judge Hand's reasoning assumes that the flat refusal to even consider the foreign tax law or judgments based thereupon causes less embarrassment to another state than does an examination of the foreign tax law under the public policy doctrine. This assumption can hardly be upheld. It is certainly true that some types of foreign taxes must be disregarded when they are discriminatory or entirely arbitrary,[346] but the possibility of rejection in some cases should not be urged in favor of total disregard of all revenue laws.[347]

The rationale outlined above is an unconvincing explanation and does not justify the exclusion of foreign public law judgments.

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344. F.A. MANN, *supra* note 17, at 370–71.

345. *See id.* at 361. Regarding the act of state doctrine, see BROWNLIE, *supra* note 339, at 507–08. Regarding state immunities, see KINDRED, *supra* note 339, at 280.

346. "Retroactive legislation, such as was brought about by the Finance Act, 1943 [the foreign tax law], has recently come in for a great deal of criticism from sober thinkers on the ground that it is ethically and politically immoral." Buchanan [1955] A.C. at 517. Kingsmill Moore J., however, dismissed the action based on the exclusionary rule and not on the ground that the foreign law violated domestic public policy. *See id.*

347. *See* Castel, *Tax Claims*, *supra* note 33, at 297.

C. Enforcement of Public Law Judgments as a Violation of Territorial Sovereignty

1. Cases and Doctrine

In *Government of India v. Taylor*,[348] Lord Keith of Avonholm gave another, more convincing, explanation for the exclusionary rule. Again, the relevant sentences of that speech were adopted by and quoted in *United States of America v. Harden*:

> One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.[349]

In *Huntington v. Attrill*,[350] Lord Watson spoke four times of an "international rule"[351] requiring the unenforceability of foreign penal laws and of those actions (which include "penal actions") which "by the law of nations are exclusively assigned to their domestic forum."[352]

The rationale of the exclusionary rule in relation to revenue, penal, and other public laws is that these laws may not be enforced because they stem from the *jus imperii* of a state. Thus, the enforcement of a state's jurisdiction is limited to the state's boundaries.[353] The enforcement of such *jure imperii* claims or sovereign powers within the territory of another state would infringe the enforcing state's sovereignty, and therefore violate public international law.[354]

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348. *See* Government of India v. Taylor [1955] E.R. 292. In Re Sefel Geophysical Ltd., however, the court found no Canadian authority that would bind the court to the holding in *Taylor*.

349. United States v. Harden [1963] S.C.R. at 370.

350. Huntington v. Attrill [1893] A.C. 150 (P.C.).

351. *See id.* at 151, 155, 157, 161.

352. *See id.* at 156.

353. *See* KINDRED, *supra* note 339, at 284, 289, 290 (rightly pointing out that a precise distinction between *acta jure imperii* and *acta jure gestionis* may be impossible); *see also* F.A. MANN, STUDIES IN INTERNATIONAL LAW 499(1973)[hereinafter MANN INTERNATIONAL LAW] which also admits the difficulties in determining *acta jure imperii*.

354. *See* MANN INTERNATIONAL LAW, *supra* note 353 at 495; *see also* F.A. Mann, *Public Law*, *supra* note 245, at 168:

> The State which tries to recover penalties or taxes within the territory of another

Similarly, the Federal Supreme Court of Switzerland considers all public law as territorially limited to the state which enacted the public law in question. Therefore, the court held that foreign public laws *per se* cannot have any impact outside that very state.[355] Swiss courts will not enforce judgments based on a body of law which, according to Swiss standards, is public in nature. The underlying assumption is that all public law is implemented via state power and is intended to maintain and guarantee a state's sovereignty within its territory. The enforcement of such laws is done *jure imperii* and *acta jure imperii* must *per definitionem* be limited to the territory of a state.[356]

The question is whether a rule of public international law which prohibits the enforcement of foreign public law judgments actually exists. A related question is whether state enforcement of another state's public law judgments would endanger the enforcing state's independence and sovereignty. The next section briefly outlines the principle of territorial sovereignty.

2. The Principle of Territorial Sovereignty

The most important rule derived from the principle of territorial sovereignty is that one state may not exercise its power, in any form, within the territory of another state.[357] A "state" is defined by the presence of three essential elements: the exercise of undelegated governmental power, over a definite population, and in a de-

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> State purports to exercise extraterritorial enforcement jurisdiction. This is so, whether it sends troops or a bailiff, whether it issues letters of demand or institutes proceedings in the courts of the forum, thus using the latter's system of judicial administration and machinery. Even the last-mentioned method involves the assertion that the claimant State is entitled to recover its penalties and taxes in the territory of the State of the forum. It is the assertion of the right to have its sovereign powers in regard to penalties and taxes respected and enforced that constitutes the infringement of the sovereignty of the State of the forum and therefore is contrary to international law.

See also NORTH & FAWCETT, *supra* note 119, at 114; DICEY AND MORRIS, *supra* note 2, at 101.

355. *See* Judgment of the II Civil Chamber of the Federal Supreme Court of Switzerland (June 26, 1980) (unpublished); *see also* quoted material *supra* note 239.

356. *See* Vischer, *supra* note 5, at 151.

357. *See* The Steamship Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7): "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State"; *see also* Baade, *supra* note 27 at 10; KINDRED, *supra* note 339, at 426ff.

fined territory.[358] Therefore, a state which permits other states to exercise sovereign authority on its territory, beyond specific instances expressly agreed upon, faces the danger of losing one of the essential prerequisites of statehood.[359] This may be the true rationale underlying the exclusionary rule.

There is no obligation of any state to enforce a foreign judgment, excepting treaties or conventions. A foreign judgment is an *acta jure imperii*, and has no legal force outside the jurisdiction of the rendering court, except where the enforcing state's law supplies rules to that effect. But the "no effect *per se*" rule of foreign judgments equally applies to all foreign judgments, private law as well as public law.

Does public international law, therefore, oblige states to protect tax dodgers and other individuals corporations, rather than risk losing its sovereignty and status as a legal person in international law? Would Canada or Switzerland really jeopardize their independence and sovereignty if they enforced tax judgments?

3. Critique

R. Frank is the most profound critic of this rule of public international law.[360] Frank states that:

> A foreign State which attempts to appear as plaintiff in a domestic court does not interfere with foreign sovereign rights, but humbly and simply requests that the domestic jurisdiction should be put at his disposal for the decision of a specific case. In the event of such request being complied with there can be no question of the infringement of foreign sovereignty; in the event of it being rejected, the realm of domestic sovereignty likewise remains intact.[361]

Frank argues that the decisive issue is under what circumstances and conditions a jurisdiction will place its courts at the disposition of a foreign claimant state.[362] Frank convincingly concludes that if a state refuses to enforce foreign public law, the

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358. *See* Baade, *supra* note 27, at 10; *see also* BROWNLIE, *supra* note 339, at 72ff.; KINDRED, *supra* note 339, at 12ff.

359. *See* Baade, *supra* note 27, at 10. It is interesting to note that Baade is probably the only author who addresses the issue clearly and succinctly.

360. *See* R. FRANK, Öffentlich-rechtliche Ansprüche fremder Staaten vor inländischen Gerichten (1970) 32 RabelsZ 56ff.

361. *See id.* at 64 (translation by F. Mann, Public Law, *supra* note 245, at 169).

362. *See id.*

reasons for this refusal must be found within the state's domestic law, and not because there is a public international law rule prohibiting the enforcement.[363]

The principle of territorial sovereignty says only that a state may not exercise sovereign rights within the territory of another state against the latter's will. Notwithstanding F.A. Mann's opinion,[364] the mere filing of a foreign public law claim or the application to enforce such a judgment cannot be viewed as an unlawful extension of sovereign power. Even if the domestic court decides to grant, or enforce, judgment for the foreign state, it is solely the *forum* state which acts *jure imperii.* Whether a state wants to enforce foreign public law is entirely up to the *forum* state, and has to be decided in accordance with its own interests.[365] The internal law of each state must decide whether, and to what extent, the courts have the power to enforce foreign public law judgments.[366]

4. Conclusion

In the absence of treaty obligations, there is no duty to enforce foreign judgments of any kind. There is, however, no rule of public international law which actually prohibits such enforcement.[367] Each state must decide the extent to which its courts will enforce foreign public law judgments.

As Castel points out, with respect to foreign tax laws, the implementation of the non-enforcement rule has greatly exceeded Lord Mansfield's intended effect when he uttered that "no country ever takes notice of the revenue laws of another."[368]

Despite the lack of any intrinsic justification for the *a priori* exclusion on the enforcement of foreign public law judgments, there seems to be an international consensus that foreign enforcement of criminal and tax matters will only occur by way of treaties

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363. *See id; see also* P. Lalive, "L'application du droit public étranger," Annuaire de l'Institut de Droit International, Session de Wiesbaden (1975) 219, at 250; P. Lalive, "Sur l'application du droit public étranger" (1971) 27 S.J.I.R. 103, at 134.

364. *See* MANN INTERNATIONAL LAW, *supra* note 353 at 499.

365. See BESSENICH, *supra* note 226, at 63.

366. *See infra* Part IV.D.

367. The direct application of foreign public law in domestic courts poses many additional problems which renders the direct application of foreign law impracticable.

368. *See* Holman v. Johnson, [1775] 98 Eng. Rep. 1120; *see also* Castel, "Tax Claims," *supra* note 33, at 292. Castel rightly states "[a] rule is never so well established as to preclude inquiry into its justification or to preclude its abandonment if justice is promoted by doing so." *Id.*

and/or legislation.[369] Without such a basis, courts feel that they have no power to enforce such judgments.[370]

Due to the lack of a convincing explanation for the public law rule, this dogma should be restricted to criminal and revenue matters. Further, within these two categories, the rule should be interpreted narrowly. With respect to "other public laws," courts should not refuse the enforcement of judgments for the sole reason that the *lex causae* of a case is rooted in foreign public law. Rather, courts should be obliged to apply the public policy test and state in each case why the enforcement of a specific judgment would be detrimental to domestic morality and fairness, or to the state's vital interests. While articulating the public policy that leads to non-enforcement may sometimes embarrass another state, it recognizes the lack of an adequate justification for a mechanical exclusionary rule. It also opens the door for a more justice-oriented law.

D. Outlook

Public international law does not prohibit the enforcement of foreign public law judgments. The entire matter of the "exclusionary rule" falls within the competence of domestic law. Its development depends on the peculiarities of Canadian and Swiss law. Therefore, different solutions will be sought in either jurisdiction for the further development of this area.

1. Canadian Law

Having acknowledged the lack of a compelling reason to exclude public law judgments from international enforcement, the question arises as to how, or on what basis, judges should and may approach such issues.

The principle of comity may present an adequate basis for a more favorable attitude towards judgment enforcement. In *Morguard Investments Ltd. v. De Savoye*, Judge La Forest said:

> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites [*recte*: United] States in Hilton v. Guyot, 159 U.S. 113 (1895), at pp. 163-64, in a passage cited by Estey J. in Spencer v. The Queen, [1985] 2 S.C.R. 278, at 283, as follows:

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369. *See, e.g.*, F. A. MANN, *supra* note 17, at 361ff.
370. *But see* discussion *infra* Part IV.D.

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . . .[371]

Cases like *Re Sefel Geophysics Ltd.* and *U.S. v. Ivey* expressly relied on comity principles to accept foreign tax claims in domestic liquidation proceedings,[372] and to enforce foreign judgments awarded to a foreign state agency serving foreign public interests.[373]

Therefore, under Canadian law, the principle of comity provides a practical foundation to cope with the enforcement of foreign public law judgments on a case by case basis. In this sense, the rather elusive shape of comity[374] reveals itself as an advantage because of its flexibility in enforcing judgments involving governmental or state sovereignty issues.[375]

2. Swiss Law

Although the word "comity" (or any translation thereof) does not appear once in the over 1170 pages of the IPRG Kommentar,[376] it cannot be said that the principle of comity is unknown in Swiss law. Instead, comity is understood to operate as a guideline for policy makers and the legislature, rather than as a discretionary

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371. Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1096. With respect to the principle of comity, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 331 (2nd ed. 1993). For a more thorough, but rather critical investigation regarding comity, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991) (stating "[m]y thesis is that in this constellation of ideas about comity . . . obscures the underlying political tensions and makes it more difficult to address important policy differences among sovereigns."). *Id.* at 5.

372. *See* Re Sefel Geophysics Ltd. [1989] 92 A.R. 51, 55ff.

373. *See* Ivey, O.R.3d at 549–50.

374. *See* Paul, *supra* note 371, at 77: "Comity mitigates the conflict between sovereigns and between private and public law by blurring the lines that divide domestic and international law and policy."

375. *But see* Paul, *supra* note 371, at 8: "I conclude that a better solution to the courts' generous application of comity is to allow the political branches of government to resolve conflict through multilateral negotiation that will coordinate and establish harmony among the principles of private international law."

376. *See* IPRG KOMMENTAR, *supra* note 2.

rule directly applicable by courts. Courts, therefore, feel that a statutory basis, including treaties and conventions,[377] is a mandatory prerequisite for expanding the scope of enforceable judgments.

If the public law rule were abandoned, there would not be a fundamental change in the enforcement of foreign criminal and tax judgments. These matters are adjudicated based on domestic legislation and international treaties, respectively, which preempt the use of the PIL Statute as *leges speciales*. These laws designate the competent authorities, provide for specific proceedings, and determine the extent that foreign proceedings may be assisted or foreign judgments enforced.

The Federal Statute on International Legal Assistance in Criminal Matters[378] is crucial to the enforcement of criminal judgments.[379] In the field of tax law, Switzerland has executed numerous tax treaties with other countries designed to prevent double taxation. None of these international agreements, however, provide for the enforcement of tax claims and tax judgments.[380] In addition, policy considerations make it unlikely that Switzerland will agree on mutual enforcement rules. The continuing local adherence to the unenforceability rule, combined with bank secrecy, still attracts foreigners to invest their assets in Swiss banks.[381]

Based on a broad interpretation of article 13 of the PIL Statute,[382] courts could develop a more favorable enforcement practice in fields other than criminal and tax law. Restitutionary or compensatory judgments could be enforced, irrespective of whether they are founded on foreign public law, by referring to the

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377. According to Swiss constitutional law, treaties and conventions are applicable immediately upon ratification; there is no further implementation by way of legislation needed. *See* SR 291 art. 1(2).

378. *See* BGE 42 II 183; BGE 50 II 58; BGE 74 II 279; BGE 107 II 489, 492.

379. *See supra* Part III.D.1.

380. Lack of actual enforcement mechanisms, however, seems to be the rule in modern double taxation treaties. *See* BAADE, *supra* note 27, at 41. *See also* J.M. Mössner, Taxation, *International Encyclopedia of Public International Law*, vol. 8 (Amsterdam: Elsevier 1985), at 502 pointing out: "Levying taxes does not constitute a common interest of the international community as is the case for example with the struggle against crime or the protection of the environment." The Canadian-U.S. Tax Treaty, *supra* note 32, seems to be a rare exception.

381. Note, however, the treatment of foreign tax claims in international bankruptcy proceedings, *supra* Part III.D.4.

382. *See supra* Part III.C.2.

"general principle of private law."[383]

The public policy exception provides a broad basis for the non-enforcement of judgments that offend Swiss notions of essential morality and fairness, and judgments that run counter to Swiss economic interests. Obviously, this exception would compel the courts to articulate exactly what is offensive regarding the outcome of the foreign judgment.

V. CONCLUSION

Canadian and Swiss law independently developed an advanced regime of rules in the field of judgment enforcement. The different requirements stipulated in Canadian and in Swiss law, however, are surprisingly congruent. In both legal systems a certain judicial "reserve" arises when the judgment is founded on foreign public law (mostly penal and tax matters). Awards of "punitive civil sanctions" by foreign courts pose new questions about the scope of the rule that foreign penal judgments may not be enforced in Canada and in Switzerland. This Article argues that judgments awarding punitive damages should not fall under the penal law rule.

There is a well-established rule that Canadian courts will refuse to enforce foreign penal and tax judgments. Canadian courts so far have declined to extend this rule to other foreign public laws. Swiss law, on the other hand, started with the rule that no foreign public law (including criminal and tax laws) may be enforced within Switzerland. Subsequently, the Federal Supreme Court of Switzerland began to introduce exceptions to this rule because a broad application of this dogma would create injustice. Despite these different starting points, a comparative analysis of Canadian and Swiss law, with respect to the enforcement of foreign public law, demonstrates a great deal of conformity in the results of cases tried before each country's courts.

There is no rule of public international law that actually prohibits the enforcement of foreign penal, tax and other public law judgments. Courts, however, feel that in the absence of an international agreement and/or domestic legislation to this effect, that they have no power to enforce such judgments. Courts feel bound by an old rule, which has hardly been questioned. Indeed, there

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383. *See* BGE 75 II 125 (1949); *see also supra* note 239 and accompanying text.

seems to be no adequate justification to flatly exclude foreign judgments from enforcement solely because they deal with tax or other public law.

Given these weaknesses, and the lack of an adequate justification for the "public law rule," this rule must be reconsidered. The scope of the rule should be limited to foreign criminal judgments, in which case international agreements and/or domestic legislation would be the only foundation for international enforcement. For foreign tax claims, both legal systems demonstrate a certain obliging attitude, limited so far to liquidation proceedings. Canadian courts, aware of the weak justification of the "tax rule," should enforce foreign tax judgments where appropriate. For example, the principles of comity were applied when a foreign court ordered the transfer of assets to Canada for liquidation proceedings under Canadian law.[384] Furthermore, comity favors the enforcement of foreign tax judgments when the connection is minimal between the case and the enforcing court.[385] In such circumstances, the interest of the foreign state may override the interest of a domestic court in maintaining the tax rule.

In Swiss law, there is no such overarching basis for disregarding the tax rule. Swiss courts must consider treaties, conventions, and internal legislation as *leges speciales*. Consequently, tax law cannot be enforced under the PIL Statute. In the absence of specific legislation or an applicable treaty, courts have no power to enforce foreign tax laws or judgments. Swiss courts should, however, abandon the general rule of non-enforceability of foreign public law judgments, except in cases involving criminal or tax law.

As elaborated by the courts, the public policy exception (*ordre public*) provides a sufficient basis to refuse enforcement of foreign judgments that violate internal conceptions of essential justice and morality, a state's sovereignty, or the purely economic interests of a state. Together with the concept of jurisdiction in the international sense, the public policy exception guarantees an international judgment enforcement scheme that benefits both citizens and states.

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384. *See* Re Sefel Geophysics Ltd. [1989] 92 A.R. 51.

385. Regarding the doctrine of "*Binnenbeziehung*" and public policy, see BGE 116 II 625.

APPENDIX 1

Excerpts of the Swiss Federal Statute on Private International Law of 18 December 1987*

First Chapter: General Provisions

First Section: Field of Application

Section 1

1. This Statute regulates in international matters:
(a) the jurisdiction of the Swiss judicial or administrative authorties;
(b) the applicable law;
(c) the conditions for recognition and enforcement of foreign decisions;
(d) bankruptcy and composition;
(e) arbitration.
2. International treaties take precedence.

Second Section: Jurisdiction

Section 2

I. In General

Unless otherwise provided by this Statute, jurisdiction lies with the Swiss judicial or administrative authorities at the defendant's domicile.

Section 3

II. Subsidiary Jurisdiction

If this Statute does not provide for jurisdiction in Switzerland, and proceedings abroad are impossible or highly impracticable, jurisdiction lies with the Swiss judicial or administrative authorities at the place which has a sufficient connection with the case.

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* SR 291. This English translation relies heavily on the version published by P.A. Karrer, K.W. Arnold & P.M. Patocchi, *Switzerland's Private International Law*, (2nd ed. 1994).

Section 4

III. Validation of Attachment
Unless this Statute provides for another jurisdiction in Switzerland, a lawsuit in validation of attachment may be brought at the Swiss place of attachment.
(. . .)

Third Section: Applicable Law

Section 13

I. Scope of Conflicts Rule
Where this Statute refers to foreign law, the reference encompasses all provisions that are applicable to the case according to that law. A foreign provision is not inapplicable for the sole reason that it is characterized as public law.
(. . .)

Section 17

V. Swiss Public Policy Exception
The application of provisions of a foreign law is excluded if the outcome is incompatible with Swiss public policy.

Section 18

VI. Mandatory Application of Swiss Law
Provisions of Swiss law which, in view of their special policy, must be applied without regard to the law designated by this Statute remain reserved.

Section 19

VII. Taking Mandatory Provisions of a Foreign Law into Account
1. A provision of a law other than the one designated by this Statute that is meant to be applied mandatorily may be taken into account if interests that are according to Swiss views legitimate and clearly overriding so require and the case is closely connected to that law.
2. Whether such a provision should be taken into account de-

pends on its policy and its consequences for a judgment that is fair according to Swiss views.

(. . .)

Fifth Section: Recognition and Enforcement of Foreign Decisions

Section 25

I. Recognition

1. General Rule

A foreign decision is recognized in Switzerland:

(a) if jurisdiction lay with the judicial or administrative authorities of the country in which the decision was rendered;

(b) if no ordinary judicial remedy can any longer be brought against the decision or if the decision is final, and

(c) if no ground for non-recognition under Section 27 exists.

Section 26

2. Jurisdiction of Foreign Authorities

Jurisdiction lies with a foreign authority,

(a) if a provision of this Statute so provides or, if there is no such provision, if the defendant had his or her domicile in the country where the decision was rendered;

(b) if, in disputes of financial interest, the parties by an agreement valid under this Statute subjected themselves to the jurisdiction of the authority that rendered the decision;

(c) if in a dispute of financial interest the defendant entered an unconditional appearance, or

(d) if, in the case of a counterclaim, the authority that rendered the decision had jurisdiction over the principal claim, and the two claims are materially connected.

Section 27

3. Grounds for Nonrecognition

1. A foreign decision is not recognized in Switzerland if its recognition would be clearly incompatible with Swiss public policy.

2. A foreign decision is also not recognized if a party proves:

(a) that neither according to the law of its domicile nor according

to the law of its habitual residence was the party properly served with process, unless the party entered an unconditional appearance in the proceedings;

(b) that the judgment was rendered in violation of essential principles of Swiss procedural law, especially, the party was denied the right to be heard;

(c) that a lawsuit between the same parties concerning the same case was first commenced or decided in Switzerland, or was first decided in a third country, provided that the prerequisites for the recognition of that decision are met.

3. In no other respects may the foreign decision be reviewed on the merits.

Section 28

II. Enforceability

A decision recognized pursuant to Sections 25 to 27 is declared enforceable on petition by the interested party.

Section 29

III. Procedure

1. A petition for recognition or declaration of enforceability must be directed to the competent authority of the canton in which the foreign decision is invoked. The following must be attached to the petition:

(a) a complete and certified original of the decision;

(b) a certificate that an ordinary judicial remedy can no longer be brought against the decision or that the decision is final; and

(c) in case of a decision by default, a document establishing that the losing party was properly and timely served with process, and had a reasonable opportunity to defend itself.

2. The party opposing the petition must be heard; the party may present evidence.

3. If a foreign decision is invoked on a preliminary point, the authority seized may itself decide recognition.

Section 30

IV. Settlement in Court
Sections 25 to 29 also apply to settlement in court if, in the country in which it was made, the settlement is considered equivalent to a judgment.

Section 31

V. Noncontentious Jurisdiction
Sections 25 to 29 apply by analogy to the recognition and enforcement of a judgment or document of noncontentious jurisdiction.

Section 32

VI. Entry in Register of Civil Status
1. A foreign decision of document concerning civil status is recorded in the Register of Civil Status if it is so ordered by the cantonal supervisory authority.
2. Registration is permitted if the conditions of Sections 25 to 27 are met.
3. If it is unclear whether the procedural rights of the parties were sufficiently safeguarded in the foreign rendering country, the interested parties must be heard before registration.

(. . .)

Ninth Chapter: Obligations

Third Section: Unlawful Acts

Section 135

(b) Products Liability
1. Claims based on a defect or defective description of a product are governed at the option of the damaged or injured party:

(a) by the law of the country where the damaging party has his or her business establishment or, if he or she has none, his or her habitual residence, or
(b) by the law of the country where the product was acquired, unless the damaging party proves that it came to market in that country without his or her assent.

2. If claims based on a defect or defective description of a product are governed by foreign law, no damages can be awarded in Switzerland beyond those that would be awarded under Swiss law for such a damage or injury.

(. . .)

Section 137

(d) Restraint of Competition

1. Claims out of restraint of competition are governed by the law of the country in whose market the restraint directly affects the damaged or injured party.
2. If claims of restraint of competition are governed by foreign law, no damages can be awarded in Switzerland beyond those that would be awarded under Swiss law in case of an unlawful restraint of competition.