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## **...There are Parts of the World were Things are Badly Wrong...': Forum Selection Clauses and Unfair Jurisdictions**

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**'...there are parts of the world where things are badly wrong...':  
Forum Selection Clauses and Unfair Jurisdictions**

Janet Walker\*, Stefan Rützel<sup>†</sup> and Sylvia Wünsche<sup>‡</sup>

### Introduction

As markets and economies converge, the world is becoming a smaller place. However, for businesses taking up the opportunities that this affords, the world can sometimes seem larger and stranger than ever. When things go wrong it may be necessary to bring a claim or to defend against one in an unfamiliar legal system. At the very moment when they are most hoping for order to be restored, businesspeople can find themselves facing pitfalls and perils far worse than they imagined possible.

The problem is not new. The Commercial Court in London grew to prominence because it could provide effective and reliable dispute resolution in commercial matters that might otherwise fall to be resolved in fora which inspired

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less confidence. International commercial arbitration has similarly flourished as a result of the desire to secure effective and reliable dispute resolution in situations in which this might not be available in the local courts.

But the international business community itself has grown. A much greater variety of participants are operating in a much broader range of industries and markets. The business that is being done may be more conducive to dispute resolution in courts located away from the major financial centres. And even if it is not, the businesspeople now engaging in international transactions may be less experienced in planning for dispute resolution, and so wind up in other courts.<sup>1</sup>

Where businesspeople fail to plan for dispute resolution and find themselves in fora that they would not have chosen, the recommendation is obvious: think ahead. But even worse situations can arise when they plan badly. Their contract may contain a forum selection clause that calls for the resolution of disputes in a jurisdiction with an unfair legal system. They may find themselves in a place in which they sense an atmosphere of hostility to foreign businesses, or a place in which the judiciary seems to lack independence, or is widely thought to be corrupt. They may believe that they are unlikely to receive a fair hearing of their claims or defences or, even more troubling, that they are at risk of suffering personal harm by attending and participating in the proceedings.

Does a forum selection clause require a party to respond to a notice of proceeding and to defend against a claim brought in the nominated forum even if the legal system is unfair? If the clause is exclusive, does it preclude a party from presenting a claim in another forum? Must the courts of other countries recognise and enforce judgments issued in nominated fora whose judicial systems are demonstrated to be unfair? Difficult though they may be, these questions are pressing for litigants and for courts alike as they face the challenges of an increasingly globalised economy.

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1 Special provisions are made for consumers, workers and people involved in insurance claims. For example, Article 3149 CCQ confers jurisdiction on Quebec courts in cases involving consumer contracts or contracts of employment, and the waiver of such jurisdiction by the consumer or worker may not be set up against him or her. Article 3150 CCQ confers jurisdiction in an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is a domiciled resident in Quebec, the contract is related to an insurable interest situated in Quebec or the loss took place in Quebec. Articles 8–21 of the Brussels Regulation provide similar protections for these groups: EU Regulation on Jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters, Council Regulation (EC) No 44/2001 of 22 December 2000 ('Brussels Regulation') available at <http://eur-lex.europa.eu/en/index>. As more and more small businesses begin to conduct business with agreements containing forum selection clauses, courts are beginning to consider the extent to which they too should enjoy protections similar to other protected classes. No doubt, appropriate legal standards will emerge and will be refined for new participants in international business.

The effect of forum selection clauses in favour of unfair jurisdictions raises three kinds of issues: legal issues, evidentiary issues and issues of general perception. This article considers these three kinds of issues from the perspectives of the common law and the civil law.

### **The legal issues**

In principle, the legal issues seem to be the most straightforward. Instinctively, it seems wrong to consign a litigant to a tribunal in which justice will not be done, and wrong to give effect to the resulting judgment, even if the parties have nominated that forum in their agreement. Whether this is understood as a matter of public policy, or a denial of justice, or a breach of the minimum standards of treatment of foreign businesses, it reflects basic principles of fairness in international dispute resolution.

The study of the American Law Institute entitled *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*<sup>2</sup> recognised this. The proposed federal statute would require American courts to refuse recognition and enforcement if the party resisting recognition or enforcement established that the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness.

The Hague Conference on Private International Law, Convention on Choice of Court Agreements 2005<sup>3</sup> also contains provisions that could be invoked to address the concerns raised by forum selection clauses nominating unfair jurisdictions. Article 6 of the Convention excuses courts other than the chosen court from suspending or dismissing proceedings brought before them where this would lead to a manifest injustice. Accordingly, where trial in the nominated forum would be manifestly unjust, a court is not required to stay a proceeding before it that was commenced in breach of the clause. Article 9 permits courts to refuse recognition or enforcement of a judgment if the specific proceedings leading to the judgment were incompatible with the enforcing court's fundamental principles of procedural fairness. Thus, by agreeing to resolve disputes in an unfair forum, a party will not be deprived of the right to complain of unfairness in the proceeding and the right to ask an enforcing court not to give effect to the result.

But, as with many legal issues in the common law, things are a little less straightforward in practice than they are in principle. It is not the clear cases that cause us difficulty in deciding whether to hold the parties to

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2 American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (Philadelphia: The Institute, 2006), available at [www.ali.org](http://www.ali.org).

3 The Hague Conference on Private International Law, Convention on Choice of Court Agreements, 30 June 2005, available at [www.hcch.net](http://www.hcch.net).

their bargain or whether to relinquish them from it – it is the vast range of situations in between. Even small procedural differences and irregularities that are outcome-determinative may seem outrageously unfair to a party that has lost the case, or that stands to lose it. And forum selection clauses tend to be treated in an extraordinarily casual way until they are invoked. How much unfairness does it take to overturn a forum selection clause? How much deference should be shown to party autonomy in upholding a forum selection clause?

Common law courts retain a residual discretion to exercise jurisdiction in breach of a forum selection clause. In a number of countries, such as Canada,<sup>4</sup> the ‘strong cause test’<sup>5</sup> still applies. Courts will ordinarily stay a proceeding brought in breach of a forum selection clause except where there is strong cause not to do so. The factors initially proposed for determining what would constitute ‘strong cause’ seemed to involve a review of the same factors that would be considered in determining appropriate forum, but the better view seems to be that courts should not release parties from their bargain simply on the basis that it turns out to be a bad bargain; they should apply the kind of standards used for other contractual terms. Equitable doctrines such as mistake, frustration and change of circumstance can be invoked to relieve parties from the kinds of obligations that no reasonable person would undertake. This would appear to be a sensible approach to take in deciding whether to set aside forum selection clauses in favour of unfair jurisdictions.

Within Europe no discretion exists. Pursuant to Article 23 of the Brussels Regulation, a forum selection clause is presumed to be exclusive and it deprives the court of jurisdiction to decide the matter. There is no residual discretion, such as through a determination of the validity of the clause, to prevent unfairness by permitting a court to exercise jurisdiction over a matter commenced before it in breach of the clause.<sup>6</sup> Thus, the parties are bound to their choice of forum regardless of whether such a choice seems to be fair from the perspective of the party burdened by such a choice, or even from the perspective of the court seised in violation of the forum selection clause.

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4 *ZI Pompey Industrie v ECU-Line NV* (*The Canmar Fortune*), [2003] 1 SCR 450.

5 Based on *The Eleftheria*, [1969] 1 Lloyd’s LR 237 (Adm Div).

6 ECJ case C-159197 (*Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*). Cf ECJ case C-269105 (*Francesco Benincasa v Dentalkit Srl*), available at <http://curia.europa.eu>. There is, however, quite some debate on whether this approach should be upheld, cf Horn, *Einwand des Rechtsmissbrauchs gegen eine Gerichtsstandsvereinbarung iSd Art 23 EuGVO*, [2006] *Praxis des Internationalen Privat- und Verfahrensrechts* 2; Leible/Röder, *Missbrauchskontrolle von Gerichtsstandsvereinbarungen im Europäischen Zivilprozessrecht*, [2007] *Recht der Internationalen Wirtschaft* 481.

Further unfairness can arise through the operation of the *lis pendens* provisions in Article 27. A party can be deprived of access to the nominated forum by its opponent commencing an action in another forum because that court will need to rule on its own jurisdiction before the matter can proceed in the nominated forum.<sup>7</sup> This dilatory tactic is known as the ‘Italian torpedo’ owing to the pace by which Italian courts are expected to reach the conclusion that some other court had exclusive jurisdiction under a forum selection clause. By commencing an action in a court that is likely to be slow to recognise that it lacks jurisdiction, proceedings in the nominated forum are effectively torpedoed.<sup>8</sup>

If none of the parties to a forum selection agreement is domiciled in a Member State, the Brussels Regulation instructs European courts to apply their national laws.<sup>9</sup> As a result, in countries such as Germany, a German court may refuse a dismissal of an action sought in favour of a nominated forum in certain exceptionally ‘unfair’ situations. One such situation is where this would lead to the circumvention of mandatory provisions of German law where they form part of the German *ordre public*.<sup>10</sup> For some courts, the mere danger that the foreign court would not apply mandatory German law is sufficient.<sup>11</sup> Another situation in which a dismissal may be refused is where upholding the forum selection agreement would amount to a denial of legal protection, and thus invoking the forum selection clause would manifestly appear to be in bad faith.<sup>12</sup> This occurred in one case when it was found that trial in Lebanon would be impossible due to the war,<sup>13</sup> and in another case when it was found that proceedings could not be commenced in Iran due to a general strike,<sup>14</sup> and in yet another case when it was found that an Iraqi statute prohibited the determination of claims of foreign contractors.<sup>15</sup> However, German courts are extremely reluctant to set aside forum selection clauses

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7 ECJ case C-116/02 (*Erich Gasser GmbH v MISAT Srl*).

8 The Italian Supreme Court has taken steps to rectify this problem by holding that Italian courts lack jurisdiction under Article 5(3) over foreign defendants in declarations of non-infringement: Corte di Cassazione of 19 December 2003, no 19550 (*BL Macchine automatiche spa v Windmüller & Holscher K*).

9 Brussels Regulation, Article 23.

10 Federal Court of Justice, [1961] *Neue Juristische Wochenschrift* 1061; Federal Court of Justice, [1985] *Praxis des Internationalen Privat- und Verfahrensrechts* 216; Higher Regional Court of Munich, [2007] *Praxis des Internationalen Privat- und Verfahrensrechts* 322; Regional Labour Court of Frankfurt, docket no 10 Sa 982/99.

11 Higher Regional Court of Munich, [2007] *Praxis des Internationalen Privat- und Verfahrensrechts* 322.

12 Federal Court of Justice, [1974] *Aussenwirtschaftsdienst* 221.

13 Federal Court of Justice, [1979] *Neue Juristische Wochenschrift* 1119.

14 Regional Labour Court of Frankfurt, [1982] *Recht der Internationalen Wirtschaft* 524.

15 Higher Regional Court of Frankfurt, [1999] *Praxis des Internationalen Privat- und Verfahrensrechts* 247.

on the basis of a denial of legal protection in the nominated forum.<sup>16</sup>

Still, in cases in which a German court applies its national substantive law to determine the validity of a forum selection clause, provisions on interpretation, avoidance, frustration, review in standard business terms, good faith and immorality can result in a review of the clause.<sup>17</sup>

### The evidentiary issues

Far more difficult than the legal issues are the evidentiary issues. How can a litigant prove systemic unfairness?

The inherent difficulties for common law courts were acknowledged more than two decades ago by the English Court of Appeal. In *Muduroglu v TC Ziraat Bankasi*,<sup>18</sup> Mr Muduroglu asked the court not to grant a stay of his matter in favour of trial in Turkey, the natural forum, because he would be unable to get a fair trial there. The Court of Appeal upheld the stay and it observed that, in the absence of solid evidence, it should not adopt a line of reasoning involving a finding or assumption of impropriety or unfairness. Nevertheless, it was noted that courts must not be too unworldly. They 'must recognize that there are parts of the world where things are badly wrong, and that by virtue of this very fact it may be impossible to obtain direct and complete evidence of the grounds of complaint'.

That was 1986. The difficulties of demonstrating unfairness have not diminished as the pace of globalisation has increased. On the contrary, as courts have become more 'worldly' they have become less inclined to brand other fora as 'parts of the world where things are badly wrong'. For

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16 Cf eg Higher Regional Court of Hamburg, [1973] Außenwirtschaftsdienst 690. The court had to decide on the question whether the possibility that a *res judicata* USSR judgment could be annulled by the public prosecutor's office or the highest courts was sufficient to set aside the forum selection clause in favour of a USSR forum. According to the court, this would depend upon the likeliness of such interventions for the disadvantage of a foreign party. In the case at hand, the court did not overturn the forum selection clause because the number of such cassations was very low and there was no reason for an intervention as it was not a politically relevant dispute.

17 Higher Regional Court of Cologne, [1998] Praxis des Internationalen Privat- und Verfahrensrechts 472 (forum selection clause invalid if the judgment in the foreign jurisdiction would not be recognisable in Germany due to a lack of reciprocity and the defendant committed a wilful act in bad faith). Cf Higher Regional Court of Hamburg, [1982] Recht der Internationalen Wirtschaft 669 (forum selection clause in a bill of lading does not apply to an action for wilful falsification of that bill of lading as this would be an inadmissible exercise of legal rights).

18 *Muduroglu v TC Ziraat Bankasi*, [1986] QB 1225 (Eng CA); and see *Pei v Bank Bumiputra Malaysia Berhad* (1998) 41 OR (3d) 39 (Gen Div) in which an Ontario court refused a stay in favour of the courts of Malaysia noting the plaintiff's concerns about the independence of the judiciary. Neither of these cases involved forum selection clauses.



example, two decades later, in *Crown Resources Corporation v National Iranian Oil Company*<sup>19</sup> the Court of Appeal for Ontario granted a stay that was initially refused on the basis of allegations that the judicial system of the nominated forum lacked independence. The Court held that the contention that Iran's judicial system is not as independent as Ontario's could not be relevant. If it was relevant, then every forum selection clause would be open to attack because it could always be argued that no other system is as independent as the one being asked to exercise jurisdiction.

The Court held that businesspeople should be deemed to have informed themselves about the risks of foreign legal systems and deemed to accept those risks when they agree to a forum selection clause. This is because, with globalisation, businesses will increasingly deal with different judicial systems and must be taken to assess the risks of doing so when they enter into forum selection agreements. It would 'send the wrong message' if Canadian courts allowed them to resile from these agreements after the fact when problems arose.

A similar approach is taken in Germany if the party knew of the unfairness when the agreement was signed.<sup>20</sup> However, even though the parties can exclude legal recourse in certain circumstances,<sup>21</sup> they will not be taken to do so merely by entering into a forum selection clause.<sup>22</sup> Accordingly, where a forum selection clause effectively precludes legal recourse, it could be set aside.

Despite the observation of the English Court of Appeal, the reluctance of courts, particularly in the common law, to entertain evidence calling into question the quality of justice in a forum selected by the parties has caused them to be more exacting in the standard of proof, and not less so. But this reluctance has been matched by an increased determination on the parts of disappointed litigants, particularly where they are resisting the enforcement of a judgment from what they regard as an unfair legal system. In *Oakwell*

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19 *Crown Resources Corporation v National Iranian Oil Company* (2006) 273 DLR (4th) 65 (ON CA), available at [www.canlii.org/en/on/onca/doc/2006/2006canlii28334/2006canlii28334.html](http://www.canlii.org/en/on/onca/doc/2006/2006canlii28334/2006canlii28334.html), and see *Dornoch Ltd v Mauritius Union Assurance Co Ltd* 2005 EWHC 18887 Comm, available at [www.bailii.org/ew/cases/EWCA/Civ/2006/389.html](http://www.bailii.org/ew/cases/EWCA/Civ/2006/389.html).

20 Higher Regional Court of Koblenz, [1984] Praxis des Internationalen Privat- und Verfahrensrechts 267 (knowledge that Liechtenstein judgment would not be recognisable in Germany due to lack of reciprocity). Cf Higher Regional Court of Saarbrücken, [1989] Neue Juristische Wochenschrift – Rechtsprechungsreport Zivilrecht 828 (knowledge that Mali judgment would not be recognisable in Germany due to lack of reciprocity).

21 Greger, *Zöller: Zivilprozessordnung*, 26th edn (2007), before Section 253 no 19.

22 Federal Court of Justice, [1979] Neue Juristische Wochenschrift 1119.

*Engineering Ltd v Enernorth Industries Inc*<sup>23</sup> the Court of Appeal for Ontario upheld a decision to enforce a judgment from the Singapore courts in which jurisdiction had been exercised on the basis of a forum selection clause in a settlement agreement. The judgment debtor complained that the judicial system lacked independence and argued that the judgment should not be enforced. The motions judge observed that while the judgment debtor tendered some evidence relating to possible government interference in trials, that evidence applied only to political cases and there was no evidence that Singapore courts were biased when deciding a commercial case between private parties.

Greater determination on the part of judgment debtors in another case succeeded in preventing a judgment from being enforced on a motion for summary judgment. In *State Bank of India v Navaratna*<sup>24</sup> the defendants said that they did not defend against the proceedings in Singapore because they believed that if they did so they would be incarcerated by the Singapore authorities. Further, they presented evidence on the motion to show that their belief was an objectively reasonable one and that the Singapore justice system was biased in favour of the plaintiff banks. The court was careful to observe that a trial judge might not be persuaded that either of these allegations was well founded. Nevertheless, it could not grant the motion for summary judgment to enforce the foreign judgment because, as the court held, 'the Defendants have raised a genuine issue as to a material fact that would impede the enforcement of the judgments in question – namely, whether the judgments were rendered by a court that was corrupt or biased'.

Perhaps the most troubling feature of this case was the adjudicative challenge faced by the motions court judge. She was being asked to pass judgment on the quality of justice in another legal system. The parties provided as much evidence on the issue as could be expected – so much so that the summary proceeding resembled a full-blown trial of the foreign judicial system. And yet, it was not clear how any amount of evidence that could be adduced at a complete trial would place a judge in a better position to make the necessary findings for reaching a conclusion on the matter. Having pressed the question as extensively as they did, the parties may have succeeded in demonstrating that, as a matter of practice and prudence, systemic unfairness may simply be impossible to prove.

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23 *Oakwell Engineering Ltd v Enernorth Industries Inc* (2006) 81 OR (3d) 288 (CA), leave to appeal refused [2006] SCCA 343, available at [www.canlii.org/en/on/onca/doc/2006/2006canlii19327/2006canlii19327.html](http://www.canlii.org/en/on/onca/doc/2006/2006canlii19327/2006canlii19327.html).

24 *State Bank of India v Navaratna* [2006] OJ No 1125, available at [www.canlii.org/en/on/onsc/doc/2006/2006canlii8887/2006canlii8887.html](http://www.canlii.org/en/on/onsc/doc/2006/2006canlii8887/2006canlii8887.html).

In Europe, under the Brussels Regulation, a judgment of another European court may be refused recognition if it is manifestly contrary to the public policy of the state in which recognition is sought.<sup>25</sup> In order for this to occur, the recognition would have to be a manifest breach of a rule of law regarded as essential in the legal order of that state or of a right recognised as fundamental within that legal order.<sup>26</sup>

In Germany, recognition of a judgment from a non-European court<sup>27</sup> will be denied if the judicial proceeding differed from the main principles of German procedural law in such a way that the judgment can no longer be regarded as having been rendered in an orderly, constitutional proceeding (procedural *ordre public*).<sup>28</sup> These principles in particular include independence and impartiality, the right to be heard, and a fair trial.<sup>29</sup> However, features of a foreign judicial system such as US pre-trial discovery, the application of the American rule of costs and the existence of contingency fees are in line with the German procedural *ordre public*.<sup>30</sup> Recognition will also be denied if the result of the application of foreign law contravenes fundamental ideas of German provisions and the notions of justice contained therein in such a way that it would seem unacceptable under domestic considerations (substantive *ordre public*). This could include, for example, US judgments for punitive damages.<sup>31</sup> These safeguards are a matter of public policy and, therefore, cannot be waived by the parties in a forum selection clause.<sup>32</sup> Still, a party must have taken all realistically available measures in the foreign proceeding

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25 Brussels Regulation, Article 34 no 1.

26 ECJ case C-7/98 (*Dieter Krombach v André Bamberski*).

27 Section 328 of the German Code of Civil Procedure governs the recognition and enforcement in Germany of decisions from non-European courts.

28 Federal Court of Justice, 48 Bundesgerichtshofsentscheidungen 327 cf Federal Court of Justice, 118 Bundesgerichtshofsentscheidungen 312.

29 Geimer, *Zöller: Zivilprozessordnung*, 26th edn (2007), Section 328 no 218.

30 Federal Court of Justice, 118 Bundesgerichtshofsentscheidungen. 312.

31 In a 1992 decision, the Federal Court of Justice held that German civil law only focuses on the compensation of the plaintiff and has abolished damages that would lead to an enrichment of the victim and a punishment of the defendant. Further, German law makes a clear distinction between the law of damages and public prosecution and criminal law. Federal Court of Justice, 118 Bundesgerichtshofsentscheidungen 312. In a number of cases, the Federal Constitutional Court had to decide on the service of a US writ requesting punitive damages under Article 13 of the Hague Service Convention. This provision sets a narrower standard than the general *ordre public*, which must be respected when it comes to the recognition and enforcement of foreign judgments. Therefore, the considerations laid down in these decisions are not conferrable with the problems addressed here. Decision of 25 July 2003 (*Napster v Bertelsmann*), [2003] *Neue Juristische Wochenschrift* 2598. Decisions of 24 January 2007 and 14 June 2007 available at [www.bundesverfassungsgericht.de/entscheidungen.html](http://www.bundesverfassungsgericht.de/entscheidungen.html).

32 *Spellenberg, Staudinger, Internationales Verfahrensrecht in Ehesachen* (2005), Section 328 nos 251 and 470.

to object to violations of procedural law.<sup>33</sup> Similarly, if the foreign judgment violates the German substantive *ordre public* and that judgment could have been reviewed and corrected on appeal in the foreign jurisdiction, probably no review will be available.<sup>34</sup>

### The issues of general perception

Perhaps, in the end, the scourge of unfair jurisdictions is a matter of perception. Unfamiliar judicial procedures have a natural tendency to cause anxiety, especially among those who are familiar with the judicial process in their own courts. And where an adverse outcome results, this can be seen as demonstrating the unfairness of the unfamiliar process.

Discussions between specialists in procedural law from different countries comparing the features of their respective legal systems can be instructive. They will often express grave concern at the absence in another legal system of features that they regard as absolutely essential to fair process and yet they can be entirely untroubled by the absence in their own system of features that others regard as essential to fair process.

For example, it can be shocking to a common lawyer to consider a trial process in which the parties are not permitted to testify, but this works quite well in the civil law.<sup>35</sup> It can be equally shocking to civil lawyers to consider a trial process in which the result is placed in the hands of a group of laypeople who are not obliged to provide reasons, but jury trials are a constitutional right to Americans. And when confronted with the 'horror' of large damages awards that are granted from time to time in American courts, most Americans will shrug their shoulders and say: 'it happens, but it is usually corrected on appeal'.

It is important to distinguish here between systemic unfairness and specific instances of egregious procedural irregularity that have occurred in proceedings leading to judgments which are being resisted on enforcement. While the latter may still be difficult to prove, they are based on well-

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33 Nagel and Gottwald, *Internationales Zivilprozessrecht*, 6th edn (2007), s 11 no 177; Spellenberg, *Staudinger*, Section 328 no 471 *et seq.*

34 Spellenberg, *Staudinger*, Section 328 no 475.

35 See, eg, for Germany: Rützel, Wegen and Wilske, *Commercial Dispute Resolution in Germany*, p 70 *et seq.*

established standards<sup>36</sup> and they do not present the same problems posed by the need to speculate on the perceived potential for unfairness or to pass judgment on an entire civil justice system.

It is also important to clarify here that it would be wrong to try to draw any connection between the respect held for a country's government or its legal system as a whole and the quality of justice experienced in particular cases in its civil courts – either for the purpose of condemning judgments or for the purposes of refuting specific allegations of impropriety. This point is obvious to Canadians who are more likely than any to be involved in litigation in the United States – a country whose judicial system is highly respected, but which can sometimes produce surprising results.<sup>37</sup>

When taken as a whole, it is possible to understand the way in which the safeguards that exist in most civil justice systems work together to create a coherent process for resolving disputes; and it is usually possible to understand the way this process operates within a larger social context that accommodates its particularities. And so, in the end, evaluating a question such as the adequacy of judicial independence in another legal system is probably as complex and nuanced as evaluating the quality of another country's democracy or its adherence to the rule of law. Whether it can be done at all is far from clear. But what is becoming clear is that it cannot readily be done in the course of determining a motion for a stay of proceedings or for the enforcement of a foreign judgment.

To say that the quality of justice is a matter of general perception is not to be indifferent to the anxiety that is experienced by litigants who find themselves in unfamiliar tribunals that appear to be overlooking procedural steps which they regard as essential to the fairness of the outcome; nor is it to minimise the hardship that can result from the resolution of a dispute through a process for which a litigant was not adequately prepared. It is simply to say that a solution to the problem may not readily be found in the process of determining the validity of a forum selection clause or the enforceability of a foreign judgment.

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36 For example, common law courts generally make exceptions to recognition and enforcement for judgments rendered in breach of the principles of natural or substantial justice; see *Adams v Cape Industries plc*, [1991] 1 All ER 929 (CA); and Article 3155(3) of the Civil Code of Quebec is typical of civil code exceptions to the recognition and enforcement of judgments in providing that a Quebec court will not enforce a decision that was rendered in contravention of the fundamental principles of procedure.

37 For example, see *The Loewen Group, Inc and Raymond L Loewen v United States of America* Case No ARB(AF)/98/3 in which recovery under NAFTA Chapter XI was sought for a denial of justice in the US courts.

## Looking ahead

What is to be done? A great deal – and much of it involves the education of those brave souls now venturing into new markets and territories. They might never dream of entering into an agreement to do business that was unfamiliar to them or that required them to deal with complete strangers, but they can be surprisingly sanguine about leaving the resolution of disputes that might arise to chance or entrusting it to a judicial system about which they know nothing. A cursory review of the emerging jurisprudence shows that this is no more sensible than travelling somewhere new without the recommended inoculations with the false reassurance that you can always go to a doctor if you fall ill.

When controversy develops in business dealings, a party's rights are only as good as the terms of the contract that support them. The terms of the contract are only as good as the process through which they can be enforced. And in international contracts, the processes through which contract terms can be enforced are only as good as the forum selection clause.

The message to businesspeople is clear: in international business agreements, forum selection clauses are pivotal. They should be taken seriously. They should be negotiated first.

The message to legal advisers is also clear: in international business, a careful review of forum selection clauses is fast becoming an essential feature of any due diligence protocol – attention to the risks posed by resolving disputes in unfamiliar fora is potentially as significant as assessing political risk in emerging markets. Moreover a comprehensive legal audit of forum selection clauses may be warranted for businesses whose dealings involve the typical range of ancillary and related contracts with forum selection clauses that have not been given as much attention as the main contracts in the dealings between the parties.