THE ENFORCEMENT OF FOREIGN JUDGMENTS
AND FOREIGN PUBLIC LAW

by

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Abstract

In Canadian conflict of laws there is a long-standing rule that foreign penal and tax judgments are excluded from enforcement within Canada (treaties and conventions aside). It is uncertain whether this "penal and tax rule" also extends to "other public law" as pronounced by some English judgments and scholars. Under Swiss law there is a similar rule; however, it extends, with certain limitations, to the whole body of foreign public law. In view of the ongoing trend towards internationalization and globalization, which will require courts to deal more and more with judgment enforcement, the uncertainties that go along with the concept of the exclusionary rule are problematic. Furthermore, the increasing interrelation between private and public law creates considerable doubts with respect to the scope of the exclusionary rule.

In the introduction, I discuss the general requirements of judgment enforcement and put some emphasis on the concept of public policy (ordre public). In the following chapters this thesis undertakes a comparative analysis of Canadian and Swiss law with regard to the enforcement of foreign judgments which are based on foreign penal, tax and other public law. Although the legal roots of the "exclusionary rule" of the two jurisdictions are quite different, the analysis shows that there are striking similarities with respect to the results in individual cases.

Several justifications for the exclusionary rule have been given. Mostly, courts have simply stated that the rule is about 200 years old and therefore so well-
established that it cannot be given up. Another explanation for the exclusionary rule holds that the flat refusal to enforce certain categories of judgments causes less embarrassment at the international level than scrutinizing the foreign judgment under the public policy doctrine. Some judges and scholars argue that the enforcement of penal, tax and other public law is prohibited under the principle of territorial sovereignty. After critically reviewing the different justifications, I conclude that none of them is actually convincing.

Given the lack of an adequate justification for the exclusionary rule, I attempt to outline how the scope of enforceable judgments could be expanded, considering the peculiarities of both the Canadian and the Swiss legal systems. With respect to Canadian law, I conclude that the principle of comity can serve as an apt basis for a more generous attitude towards foreign tax claims and judgments. With regard to Swiss law, I am of the opinion that the exclusion of all public law judgments is much too broad. However, in the field of enforcement of tax judgments, Swiss courts would have to be empowered by either a treaty or domestic legislation.
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Chapter 1: Introduction

A. Introduction to the Thesis Topic

Where a conflict of laws rule designates a foreign law as the applicable law, this law is generally recognized and applied as a whole in order to determine the rights and obligations of the parties involved in a dispute. This hospitality encounters a certain reserve if the foreign law takes a "public law" character. Indeed, in the absence of an international treaty or a convention, courts in Canada, Switzerland and other countries will not give effect to foreign tax, penal and other laws that may be characterized as of "public" or "political" nature.

This general refusal, which has been described as the "public law tabu", finds its application in enforcement proceedings since the enforcement of such judgments would imply giving effect to such foreign laws.

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1 With the terms "Canadian courts" or "Canadian law" it is referred to the Canadian common law provinces or territories. The law of the Province of Quebec is not subject to investigation in this thesis.


However, two developments, which demand a clarification and a re-evaluation of the rule of non-enforcement of (certain) foreign public laws, have taken place over the last decades. Firstly, even if it could be assumed that there once was a clear distinction between private and public law, this distinction has become obscured by modern legislation and by courts awarding “punitive civil sanctions”. Secondly, the ongoing trend towards internationalization and globalization has forced courts to deal with international matters more frequently. In the following, I will briefly touch on these two developments.

The state’s concern for public welfare and the economic order has extended to relations between private parties and led to interference using the instruments of public law. It is true to say that even western-style “capitalist” countries regulate, license, tax, and punish more and more activities of all kinds. In areas such as environmental law, securities law, and competition law, legislatures have determined that the complex issues involved require positive state intervention, and have therefore enacted statutory and regulatory regimes, which provide for civil and administrative remedies to be initiated and enforced by state agencies. In addition, states - especially the U.S.A - have been

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4 The term “punitive civil sanctions” was introduced by K. Mann, “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law” (1992) 101 Yale L.J. 1795.

5 F. Vischer, “General Course on Private International Law”, Recueil des cours 1992-I 9 at 150, who, for instance, refers to the developments in labour law, the law of tenants, and the whole field of economic law.

6 Lowenfeld, supra note 3 at 325.

innovative in creating 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". At least in the U.S.A., civil courts increasingly tend to grant "punitive civil sanctions", and thus are creating a trend by which civil law becomes more punitive, leaving its traditionally compensatory alignment. Caused by this ongoing development the traditional rule of private international law, that no state enforces the penal laws of another state, is subject to considerable uncertainties. Furthermore, states have increasingly engaged in commercial activities, and by doing so, have become a player 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 distinction can hardly be maintained. I am of the opinion that a modern conflicts system must deal with those developments which demand a re-assessment of the rule that foreign penal and (certain) public laws are not enforceable internationally.

Parallel with these "internal" developments which blur the distinction between public and private law, there is a strong trend towards globalization: More and more activities are carried on across national boundaries - not only trade, but investment,

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


11 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.
communications, transport, financial transactions, and so on. This 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 concern themselves with foreign public law.

Switzerland is highly exposed to this trend for two reasons: Firstly, given that Switzerland is one of the leading countries in asset management, it means that there are assets in Switzerland to seize in many cases. Secondly, Swiss law provides for jurisdiction in its courts at the place of attachment of assets, even though there may be no further connections with Switzerland. The courts of the place where a judgment debtor’s assets are located is thus a very inviting forum for a judgment creditor to seek enforcement of his or her judgment. It violates no confidence to say that it is often U.S. judgments which are sought to be enforced in Switzerland.

Therefore, the Canadian approach regarding the enforcement of foreign judgments is very interesting because Canada, with the exception of Quebec, is (as is the U.S.A.) a common law jurisdiction, and due to its geographical location its courts have frequently to

12 Lowenfeld, supra note 3 at 325.

13 A recent study estimated that Swiss banks manage assets on behalf of (national and international) clients of over 2,300 billion Swiss francs (approx. Can$ 2,530 billion).

deal with U.S. law and U.S. judgments. How does Canada deal with this invasion of U.S. law within its territory?

A person can systematically evade the enforcement of tax laws, simply by transferring the funds needed to enforce such a judgment out of the court’s jurisdiction.\footnote{See, for instance, \textit{Government of India v. Taylor}, [1955] 1 All E.R. 292 (H.L.): 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.} Even though most countries collect taxes in one way or another, the enforcement of such a judgment will be refused, even though the foreign tax law might be perfectly reasonable and even less rigid than the laws of the state who’s courts are asked to enforce it. In fact, the judgment debtor will not have to pay any taxes at all. Therefore, it has been stated that the non-enforcement rule facilitates “fraudulent practices which damage all states and benefit no state”\footnote{\textit{Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.}, [1986] A.C. 368 (H.L.) at 428.}.

The customary explanation for the non-enforcement of foreign public rights (including collecting taxes) is that claiming public rights is an exercise of sovereign power, which is \textit{per definitionem} limited to a state’s territory. And no state will tolerate a foreign state’s exercise of sovereign power within its territory.\footnote{See, for instance, F.A. Mann, \textit{Further Studies in International Law} (Oxford: Clarendon Press, 1990) at 358-361.} As a matter of fact, unscrupulous
individuals and corporations take advantage of this sovereignty argument in order to avoid paying debts.

Finally, it should be noted that, based on international treaties and conventions but also on domestic law, Canada as well as Switzerland assist foreign states in enforcing their criminal laws by extraditing persons to foreign authorities for trials under alien procedures and alien laws. Therefore, it can hardly be said that enforcing foreign public law is contrary to all principles of territorial sovereignty. But, the question is, to what extent can and 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, and how far can and should states go in order to help each other enforcing their laws and judgments? The answers to these questions must be found by determining a policy with respect to the enforcement of foreign public law by weighing up the interests involved.

I am of the opinion that an a priori exclusion of foreign public law from enforcement is entirely inappropriate and should therefore be abolished. I want to examine how the “penal rule” operates with respect to the punitive civil sanctions. Furthermore, I will re-assess the “tax rule”.

B. Scope of Analysis

Discourses with respect to the enforcement of foreign judgments usually focus on issues of international jurisdiction, i.e., the question as to whether the court which rendered the judgment had properly assumed its jurisdiction. In this thesis, however, I will examine why certain categories of judgments are excluded from international enforcement, solely on the grounds that they deal with a specific subject matter.

After defining the terminology I am using in this thesis and after presenting the methodological framework, I will provide for an overview of the different requirements under which Canadian and Swiss law recognize and enforce foreign judgments.

Chapter 2 and 3 will give a comparative analysis of the Canadian and the Swiss law with regard to the enforcement of foreign judgments that are based on foreign revenue, penal and other public law. This will be the descriptive part of the thesis. I will try to provide for an objective investigation on this theme and explain what the law is.

In Chapter 4, I will sift out the rationale for the refusal to enforce certain judgments due to the subject matter they are dealing with. I will criticize the various explanations given by courts for excluding foreign public law and try to re-define the exclusion rule.

18 See F., II., below.
Chapter 5 ends this investigation with a conclusion.

C. Methodological Basis

There are two rather obvious methodological approaches which I will be applying in my thesis. Firstly, I will be applying a comparative law approach. Secondly, I will be examining the extent to which the achievements of public international law can contribute to my analysis of a modern regime of enforcement rules.

I. Comparative Law

Judging from its literal meaning, comparative law can be described as the setting against each other of different legal orders, extending both to the spirit and style of entire legal systems ("macro-comparison") and to the solutions of specific problems ("micro-comparison"). After having described the basic structure and the general requirements of the Canadian and the Swiss law concerning enforcement of foreign judgments, I will be comparing doctrine and cases with regard to the question as to how Canadian and Swiss law treat foreign judgments that are based on foreign penal, tax and other public law. However, also judgments from other jurisdictions will be considered, where appropriate.

With regard to its aims and functions, comparative law is above all a method of gaining knowledge.\textsuperscript{20} Comparative law enlarges the number of possible solutions to a specific problem and so makes it possible to find a “better solution” to a concrete problem. Comparative law is of great importance for private international law, “... indeed so indispensable for its development that the methods of private international law today are essentially those of comparative law.”\textsuperscript{21} Probably the most important function of comparative law is the preparation of a transnational unification of the law.\textsuperscript{22} The unification of laws is most desirable in private international law, since the unification of conflicts rules would lead to the application of the same national law regardless of the court that assumes jurisdiction. Furthermore, uniformity of the rules concerning enforcement of foreign judgments is of crucial importance as long as courts require reciprocity when asked to enforce a foreign judgment.\textsuperscript{23}

\textsuperscript{20} \textit{Ibid.} at 15.
\textsuperscript{21} \textit{Ibid.} at 6.
\textsuperscript{22} \textit{Ibid.} at 23.
\textsuperscript{23} A comprehensive comparative law discourse with regard to the requirement of reciprocity in international enforcement of judgments can be found by K.H. Nadelmann, “Non-Recognition of American Money Judgments” (1957) 42 Iowa L. Rev. 236 at 249ff. However, the requirement of reciprocity is, although still existing in several national laws, more and more disappearing. For a more recent study see F.K. Juenger, “The Recognition of Money Judgments in Civil and Commercial Matters” (1988) 36 Am. J. Comp. L. 1.
II. Public International Law

My topic deals with international law. It is situated at the border line between private and public international law. The enforcement of foreign judgments is about the effects of a foreign act *jure imperii* (the foreign judgment), and thus, it can be said that it deals with the relations between states (public international law). Therefore, in my opinion it seems compulsory to explore those principles of public international law which are connected with my topic.

Every discourse in the field of enforcement of foreign judgments and foreign public law necessarily deals with the concept of sovereignty of states and the principle of territoriality of laws in general. I will try to ascertain what conclusions can be drawn from an analysis of those principles with respect to the enforcement of judgments that are based on foreign public law.

On the other hand, I am interested in the question of whether the principles of international co-operation, solidarity and comity require a more generous attitude towards the enforcement of foreign judgments. With regard to recent developments in Canada, it seems that the answer is yes. In *Morguard Investments Ltd. v. De Savoye*\(^{24}\) the Supreme

Court explicitly referred to the principle of comity in order to grant the enforcement of an extraprovincial judgment.\(^{25}\)

D. Terminology

I. "Enforcement"

The term "enforcement" or "to enforce" will be used to mean to act of issuing a writ or an other judicial directive upon application of a plaintiff which empowers and directs a state official to actually seize a debtor’s assets in order to satisfy the judgment previously given to the plaintiff.\(^{26}\) In this sense, enforcement is part of the execution process which consists of the actual seizure, the sale, and the distribution of the proceeds in the amount of the judgment to the judgment creditor.\(^{27}\)

\(^{25}\) At issue was whether the original court had properly assumed its jurisdiction. However, the Supreme Court's reasoning with regard to comity was not limited to jurisdictional issues, but was in favour of enforcement of foreign judgments in general.


\(^{27}\) *Ibid*. under the headword "execution".
II. "Money Judgment"

In this thesis, the term "money judgment" includes every kind of order, decree or judgment of a judicial or an administrative authority by which a defendant is required to pay a sum of money in contrast to a decree or judgment in which the court orders some other type of relief (e.g., injunction or specific performance).

III. "Civil Matter", "Private Law" and "Public Law"28

In the understanding of the common law, the term "civil matter" is usually used to describe anything that is not a "criminal matter".29 In civil law jurisdictions, on the other hand, the term "civil matter"30 is used synonymously with a "matter governed by private law" as opposed to administrative and criminal law. The term "public law", however, seems to be used in both legal systems in the same way. It is all the law dealing with relations between an individual and the state or between states and the organization of

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30 German: "Zivilsache"; French: "Matière civile".
government.\textsuperscript{31} "Public law" includes (public) international, constitutional, criminal, and administrative law.\textsuperscript{32} Given the general definition of the term "public law", tax law can be considered as included in that category.

E. Manifestation of Foreign Public Law in Conflict of Laws

A court can be asked to apply foreign public law to a preliminary or incidental question.\textsuperscript{33} This is the case, for instance, if a conflict of law rule refers to the nationality of a person. S. 22 of the \textit{PIL Statute} states a rule of universal applicability in providing that the nationality of a person is determined by the law of the state which is in issue. The consequence is that a Swiss court, determining a person's nationality, applies foreign public law. Another example would be if, in a tort claim in connection with a car accident, the applicable conflicts rule points to the (foreign) \textit{lex loci delicti} and, in order to determine whether there was negligent conduct, rules of the road must be considered. In this constellation, probably no court would see a problem in applying those typical

\textsuperscript{31} \textit{The Dictionary of Canadian Law}, \textit{supra} note 29 under the headword "public law". 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.

\textsuperscript{32} \textit{Ibid}.

\textsuperscript{33} See, in general, Castel, \textit{supra} note 2 at 157-160. \textit{IPRG Kommentar}, \textit{supra} note 2 at 108, where it is held that there is no problem with applying foreign public law to a preliminary question in connection with a private law issue.
administrative (foreign) rules. Likewise, foreign tax laws are not denied effect if the enforcement of a contract, which was concluded solely to evade foreign taxes, is at issue.\(^{34}\) However, in such cases the courts are free to argue that it is domestic rules of public morality that renders such a contract void.

The actual problem with foreign public law arises if the *lex causae*, the law on which a claim is founded, is of public nature.

A second distinction with respect to the operation of foreign public law can be made by distinguishing cases where an action is commenced before a domestic court and one of the parties asks for direct application of foreign law as opposed to cases where the enforcement of a judgment is at issue. In both cases the court is asked to give effect to the foreign law. With regard the enforcement of judgments, the plaintiff asks the court to extend the effect of *res judicata* to its jurisdiction, and this implies that the court gives effect to the foreign law on which the decision is based. Under Swiss law a less rigid standard is applied if the rights und duties already have been determined by a foreign court. In an enforcement procedure as opposed to direct application of foreign law a less strict attitude governs.\(^{35}\) It seems that Canadian law applies the same standard in both cases.

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\(^{35}\) Adopting the French doctrine of “ordre public atténué de la reconnaissance”, see F., III., below. BGE 103 Ia 531 (1977), 103 Ia 204 (1977). Vischer, *supra* note 5 at 198 (with regard to the jurisdiction [indirect competence] of the original court).
constellations.\textsuperscript{36} However, 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 the public policy or with the exclusion of foreign public law. In this thesis, I will primarily focus on the enforcement of judgments.

\textbf{F. Common Requirements of Enforcement of Foreign Judgments\textsuperscript{37}}

\textbf{I. General Remarks}

There are three basic approaches to the question whether judgments rendered abroad should be given the effect of \textit{res judicata} locally: (1) the forum may simply disregard foreign adjudications; (2) it may recognize only those rendered in jurisdictions that honour the forum’s judgments; (3) it may recognize any foreign judgment that meets certain procedural and substantive standards.\textsuperscript{38} Both Canada’s common law provinces and

\textsuperscript{36} See Castel, \textit{supra} note 2 at 275, but see \textit{ibid.} at 164.

\textsuperscript{37} Despite its practical relevance no effort will be made to distinguish between prerequisites and defences, but each requirement will be discussed on its merits.

\textsuperscript{38} Juenger, \textit{supra} note 23 at 5.
Switzerland have chosen the third approach. Both countries do not allow the re-litigation (révision au fond) of the dispute's merits\(^{39}\) and waive the reciprocity requirement.\(^{40}\)

Generally speaking, both the law of the Canadian common law provinces as well as Swiss law enforce foreign judgments, if those judgments were rendered by a competent court (jurisdiction in the international sense), after due notice to the defendant,\(^{41}\) proceedings in accordance with natural justice, and if the foreign judgment does not violate the enforcing forum's public policy.\(^{42}\)

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\(^{39}\) Canada: Castel, *supra* note 2 at 268-269. Switzerland: S. 27(3) of the *PIL Statute*; *IPRG Kommentar*, *supra* note 2 at 293-294.

\(^{40}\) Until 1989, when the *PIL Statute* came into force, the enforcement of foreign judgments was governed by cantonal law, and most cantons required reciprocity. Under the *PIL Statute* the reciprocity requirement still exists in the recognition of foreign bankruptcy decrees; see Chapter 3, D., IV., below.

\(^{41}\) For obvious reasons, the due notice requirement is only relevant for default judgments, see s. 27(2)(a) of the *PIL Statute*.

\(^{42}\) 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 the Canadian law, see: *Nouvion v. Freeman* (1889), 15 App. Cas. 1 (H.L.), and R.J. Sharpe, "The Enforcement of Foreign Judgments", in: *Debtor-Creditor Law: Practice and Doctrine*, ed. by M.A. Springman & E. Gertner (Toronto: Butterworths, 1985) at 668; P. J.M. Lown, "Conflict of Laws", in: *Creditor-Debtor Law in Canada*, 2nd ed. by C.R.B. Dunlop (Scarborough: Carswell, 1995) at 686. For Swiss law see: S. 25(b) of the *PIL Statute* and *IPRG Kommentar*, *supra* note 2 at 260.
II. Jurisdiction in the International Sense

There is a pronounced difference between the regulation of jurisdiction in the Continental European tradition and the Anglo-American system. The latter is mainly concerned with providing an adequate solution in each single case, whereas the former's concern of certainty of the law led to prefixed rules stating the conditions under which courts may (and have to) assume jurisdiction.

With regard to the enforcement of foreign judgments by far the most important requirement is related to the question as to whether the original court had assumed properly its jurisdiction in the eyes of the enforcing court. Under both legal systems, for the purposes of recognition and enforcement of foreign judgments, the defendant's presence (for the Swiss law: "Domicile") within the jurisdiction or his or her

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43 Vischer, supra note 5 at 204.

44 Ibid. at 205. The doctrine of *forum non conveniens* is unknown in Continental Europe.

45 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 s. 20(1)(a) of the *PIL Statute*). If a person has no domicile in this sense, s. 20(2) of the *PIL Statute* provides that his or her habitual residence serves to replace domicile (and not the domicile of origin which 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 (s. 20(1)(b) of the *PIL Statute*). 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.
submission\textsuperscript{46} to the court’s jurisdiction are considered to be the natural basis for an appropriate assumption of jurisdiction.\textsuperscript{47}

However, the most complex jurisdictional issues are to be resolved with regard to default judgments, where the defendant resides outside the jurisdiction of the original court and did not submit to its jurisdiction. With \textit{Morguard Investments Ltd. v. De Savoye}\textsuperscript{48} the Supreme Court of Canada expanded the obligation to recognize extra-provincial judgments within Canada. Referring to comity as the “the informing principle of private international law”\textsuperscript{49} and to the constitutional framework the court held that the original court’s jurisdiction over a non-resident and non-submitting defendant was justified by the real and substantial connection between the case and the forum.\textsuperscript{50} In \textit{Moses v. Shore Boat Builders Ltd.},\textsuperscript{51} the B.C. Court of Appeal applied the real and substantial connection test to a non-Canadian judgment and granted enforcement of an Alaskan judgment on the basis that the original court had sufficient connections with the litigation.

\textsuperscript{46} By consent (before or after the dispute arose: \textit{forum prorogatum}); by unconditional appearance (e. g., by arguing the merits of the case); see Castel, \textit{supra} note 2 at 260ff.

\textsuperscript{47} See Juenger, \textit{supra} note 23 at 13-20.

\textsuperscript{48} \textit{Supra} note 24.

\textsuperscript{49} \textit{Ibid.} at 1095.


\textsuperscript{51} (1993), 106 D.L.R. (4th) 654 (B.C.C.A.)
(real and substantial connection) and therefore had properly ascertained jurisdiction in the matter. In *Hunt v. T & N plc.* the Supreme Court of Canada confirmed the constitutional dimension of the rules set forth in Morguard. However, even though Morguard and Hunt leave many questions open, especially in the context of international enforcement, there is a distinct trend towards the acceptance of a foreign court’s jurisdiction on the basis of comity, as long as the assumption of jurisdiction by the foreign court seems reasonable in the eyes of the enforcing court.

In Switzerland, the legislature enacted a conclusive set of jurisdictional provisions in the *PIL Statute* for the purpose of recognition and enforcement of foreign judgments for each field of law regulated by the *PIL Statute*. In addition to these special provisions, there are the general rules accepting a foreign court’s jurisdiction based on the defendant’s domicile, his or her submission, or, in the case of a counterclaim, on the basis that the

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55 S. 26(a) of the *PIL Statute*.

56 S. 26(b) and (c) of the *PIL Statute*.
foreign court had jurisdiction over the principal claim, and the two claims are materially connected.⁵⁷

Without getting deeper into the comparative analysis with respect to the acceptance of foreign court’s jurisdiction in the international context, it seems that Canadian and Swiss law share a great deal of conformity. However, the common law practice of basing jurisdiction solely on the service of process within the forum state ("transient rule")⁵⁸ would, in the eyes of a Swiss court, presumably not be accepted as a basis for an appropriate assumption of jurisdiction in the international context. On the other hand, the assumption of jurisdiction for a lawsuit in validation of attachment at the place where assets were attached⁵⁹ would probably be considered as exorbitant under Canadian law, if there are no further connections with the Swiss forum.

However, this thesis intends to investigate and develop the law where the international jurisdiction of the original court is not questionable.

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⁵⁷ S. 26(d) of the PIL Statute.


⁵⁹ S. 4 of the PIL Statute (forum arresti).
III. Public Policy

Even though the foreign court's jurisdiction is beyond doubt, courts will refuse recognition and enforcement of the judgment if it violates their public policy. The public policy exception in private international law has been described as a safety valve which allows the courts to refuse recognition of a foreign judgment where to do so would be at odds with fundamental concepts of justice held by the forum. The public policy exception can be seen as a necessary consequence of a system of choice of law rules which generally do not involve an examination of how fair and just the designated foreign law is in the view of the domestic forum. If the application of a foreign law or the enforcement of a foreign judgment would lead to an unacceptable result, the public policy exception comes into play. Public policy aims to protect fundamental values and principles of a state. According to Mosconi the public policy exception is, as far as its legal nature is concerned, rooted in the body of the international law rules which define and safeguard state sovereignty.

60 In Switzerland the French term "ordre public" is common, see s. 27(1) of the PIL Statute. For a comparison of the two expressions see F. Mosconi, "Exceptions to the Operation of Choice of Law Rules", Recueil des cours 1989-V 13 at 23-25. In this thesis, however, I will use the expression "public policy".

61 Sharpe, supra note 42 at 685.

62 Or, to use other descriptions: contrary to "essential public or moral interest", contrary to the "conception of essential justice and morality". Quotations in Castel, supra note 2 at 163, who rightly states that it is almost impossible to give a precise definition of public policy (ibid.).

63 Supra note 60 at 20.
The public policy test focuses on the result of the litigation. For a violation of public policy it is not enough that the foreign procedural, substantive or conflicts rules on which the decision is made are at odds with the respective rules of the recognition state. It is required that the outcome of the litigation violates fundamental notions of justice and fairness so that the recognition state cannot grant any assistance to uphold this injustice created by the foreign judgment. In the international context and with respect to the enforcement of foreign judgments, the defence of public policy is usually interpreted very narrowly. Again, on grounds of public policy, a foreign judgment’s enforcement should only be refused if it is “contrary to our conceptions of essential justice and morality.”

Besides these references to morality, fairness and justice, the public policy exception has been recognized as a means to protect domestic economic interests against egoistic, coercive measures of foreign states. Public policy considerations also express

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64 An illustrative example of an incorrect application of the principle can be found in BGE 88 I 48 (1962): The Swiss Supreme Court refused to recognize a divorce based on “talak”. “Talak” is the repudiation of a wife under Islamic law, where it is considered as a valid ground for a divorce. The Swiss court denied the wife’s request to transcribe the divorce into Swiss public records, after the Egyptian consul in Moscow had performed the divorce. The Swiss court held that a divorce on such grounds is contrary to public policy. As a result, the husband was divorced under Egyptian law, whereas the wife, a Swiss citizen, had to initiate new divorce proceedings. The court evaluated the foreign law abstractly instead of looking at the actual result; see Vischer, supra note 5 at 101.

65 National Surety Co. v. Larsen (1929), 4 D.L.R. 918 at 920.

66 Switzerland: BGE 64 II 98 (1938), IPRG Kommentar, supra note 2 at 181.
themselves in specific legislation\textsuperscript{67} or specific statutory provisions\textsuperscript{68}, which deal with the enforcement of foreign judgments or limit the application of foreign law.\textsuperscript{69}

Under Swiss law it is well recognized that there should be a difference of intensity in the application of the public policy exception, depending upon local or personal connections between the case and Switzerland.\textsuperscript{70} The more distant is the connection of a

\textsuperscript{67} Canada: \textit{Foreign Extraterritorial Measures Act}, R.S.C. 1985, c. F-29. S. 8(1) reads as follows:

8. (1) 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.

Switzerland: See for example, \textit{Federal Statute on the Acquisition of Real Property by Persons Domiciled Abroad}, of 16 December 1983 (SR 211.412.4).


\textsuperscript{69} Switzerland: S. 135(2) of the \textit{PIL Statute}: “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.” S. 137(2) provides a similar rule with regard to claims out of restraint of competition if foreign law applies. See \textit{IPRG Kommentar}, \textit{supra} note 2 at 285.

\textsuperscript{70} This principle is called “\textit{Binnenbeziehung}”; \textit{IPRG Kommentar}, \textit{supra} note 2 at 186ff.; Mosconi, \textit{supra} note 60 at 98ff.
case to the Swiss forum, the narrower is the application of the public policy exception. Furthermore, the public policy rule applies differently, depending on whether the case deals with the direct application of foreign law, or with the recognition and/or enforcement of a foreign judgment. In the latter case, the court is asked to apply the public policy doctrine with more restraint,\textsuperscript{71} since the matter has already been authoritatively decided by a (foreign) court. Non-recognition would disregard the \textit{res judicata} effect created by the foreign judgment and lead to a “limping” legal relation.\textsuperscript{72} Accordingly, the Federal Supreme Court of Switzerland held:

\begin{quote}
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 reconnaissance constitue la règle, dont il ne faut pas s’écarter sans de bonnes raisons. [footnotes omitted]\textsuperscript{73}
\end{quote}

\textsuperscript{71} Adopting the French doctrine of “ordre public atténué de la reconnaissance”, see IPRG \textit{Kommentar}, supra note 2 at 188. But see also Y. Schwander, \textit{Einführung in das Internationale Privatrecht}, AT 2nd ed. (St. Gallen, 1990) at 333.

\textsuperscript{72} Note that s. 27(1) of the \textit{PIL Statute} (enforcement of foreign judgments) requires that the foreign judgment must be \textit{clearly} incompatible with Swiss public policy, whereas the public policy exception of s. 17 of the \textit{PIL Statute} (direct application of foreign law) lacks this special qualification.

\textsuperscript{73} BGE 116 II 625 (1990) at 630.
Under Canadian law, the rule of non-enforcement of foreign penal and tax laws is sometimes also considered to fall within the public policy exception.\(^7\) In Swiss law, the Federal Supreme Court considered the non-enforcement of foreign public law sometimes as being a rule directly applicable out of the principle of territoriality, sometimes as being an application of the public policy exception.\(^7\) A clear distinction was never made.

If, however, and this is true for Canadian as well as Swiss law, the rule is considered to be covered by public policy, it is a rather atypical application of the principle because the rule applies irrespective of the result of the case. With regard to the non-enforcement rule there is no moral judgment or interest analysis involved.

IV. Natural Justice

Under Swiss law, the principle of public policy, besides its substantive dimension, also allows the court to refuse enforcement if the procedure that led to the judgment was rendered in violation of essential principles of Swiss procedural law (procedural ordre public).\(^7\) From the Swiss perspective the right to be heard is of crucial importance. The right to be heard has its basis in s. 4 of the Swiss Constitution and in Article 6(1) of the

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\(^7\) See, for instance, *Van deMark v. Toronto-Dominion Bank* (1989), 68 O.R. 379 (H.C.J.); Sharpe, *supra* note 42 at 684-689, who discusses enforcement of foreign penal and tax laws under the title "Public Policy".


\(^7\) S. 27(2)(b) of the *PIL Statute*. 
European Convention of Human Rights. The defence of violation of the procedural public policy is often invoked but very rarely succeeds.\textsuperscript{77}

The pendant in Canadian law for this requirement is the test as to whether the foreign proceedings fail to be in accordance with natural justice.\textsuperscript{78} Again, the question is not whether the foreign procedural rules are different from the local ones, or that the foreign rules have been applied incorrectly. The question is whether the party relying on the defence had the opportunity to present his case, whether he or she could set up a proper defence in the original proceedings.

\textsuperscript{77} See IPRG Kommentar, supra note 2 at 290.

\textsuperscript{78} In general, see Castel, supra note 2 at 272-273; Sharpe, supra note 42 at 677-684. For a recent case, where the natural justice argument was (unsuccessfully) invoked by the defendant, see United States of America v. Ivey, supra note 7 at 550-553.
Chapter 2: Enforcement of Foreign Judgments which are Based on Foreign Public Law: Canadian 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.\(^{79}\)

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.\(^{80}\)

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.\(^{81}\)

*Dicey and Morris*\(^{82}\) declares 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.

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\(^{79}\) Castel, *supra* note 2 at 161.

\(^{80}\) *Ibid.* at 163 (footnotes omitted).

\(^{81}\) *Ibid.* at 275 (footnotes omitted).

\(^{82}\) *Supra* note 2.
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);

A. Non-Enforcement of Foreign Penal Judgments

The principle according to which foreign judgments that are based on foreign penal
laws will not be enforced in domestic courts was stated as early as 1789.\textsuperscript{83} In Folliott v. Ogden\textsuperscript{84} 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”.\textsuperscript{85}

\textit{Huntington v. Attrill} is the leading authority for the non-enforcement of foreign
penal judgments\textsuperscript{86}. In this case an individual plaintiff had recovered a final judgment by a
New York court, ordering the defendant to pay $100,240. The claim was based on a New
York statute which imposed personal liability on directors and officers for company debts
where they had made false representations. The defendant opposed enforcement of the
judgment, arguing that the judgment sued on was for a penalty inflicted by a foreign

\textsuperscript{83} Sharpe, \textit{supra} note 42 at 688 (note 209).

\textsuperscript{84} (1789), 126 E.R. 75.

\textsuperscript{85} \textit{Ibid.} at 82.

\textsuperscript{86} [1893] A.C. 150 (P.C.).
jurisdiction; and that since the action was of a penal character, it ought not to be entertained by the courts of a foreign state.

It was true, that under the law of the State of New York the statute in question was considered to be of a penal nature. However, the court held that the characterization of the foreign law must be done in accordance to the principles of *lex fori*. The Court appealed to must determine 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.

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

The rule [of non-enforcement of foreign penal laws] has its foundation in the well-recognised 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

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

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

89 *Huntington v. Attrill*, *supra* note 86 at 155.
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.\(^{90}\)

The court further held that the phrase “penal actions” did not afford 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; 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.\(^{91}\)

The Privy Council made clear that a penal suit in this sense must be a suit in favour of the State for the recovery of pecuniary penalties.\(^{92}\) Therefore, the conclusion can be drawn that the term penal law does not include a statutory remedy conferred upon individuals,\(^{93}\) and it actually describes nothing else than substantive criminal law. A penal judgment in this sense is the result of proceedings initiated by a state under criminal

\(^{90}\) Ibid. at 156.

\(^{91}\) Ibid.

\(^{92}\) Ibid. at 157, adopting a definition given by the Supreme Court of the United States in Wisconsin v. the Pelican Company, 127 U.S. 265 (1888).

\(^{93}\) Sharpe, supra note 42 at 688.
procedural rules with the goal of punishing a wrongdoer by imprisonment or fine payable to the state.

Therefore, it seems that punitive or multiple damages awarded to private litigants in civil proceedings would be held enforceable under Canadian law.94 This view gets endorsed by the fact that Canadian courts also award punitive damages for despicable conduct, although under very narrow prerequisites.95

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94 However, I have not found a Canadian case explicitly confirming this opinion. In *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551, 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 (at 574). In the English case *Raulin v. Fischer*, [1911] 2 K.B. 93 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.*, [1978] Q.B. 279 (C.A.), the court enforced a French judgment including Ffr 10,000 damages for “résistance abusive” (unjustifiable opposition) and Lord Denning M.R. held that there is “... nothing contrary to English public policy in enforcing a claim for exemplary damages ...” (at 300). See F.A. Mann, *supra* note 17 at 364: “Penalizing 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.”

95 See *Vorvis v. Insurance Corp. of British Columbia* (1989), 58 D.L.R. (4th) 193 (B.C.S.C.) at 208:

[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.
However, it is submitted that an analysis of the purpose of punitive damages might lead to another result. By definition, punitive damages go beyond compensation and aim to punish the wrongdoer.\textsuperscript{96} In addition to the function of punishment, the other basis for the justification of awarding punitive damages is deterrence. Deterrence is both specific (to prevent the defendant from repeating the offence) and general (to prevent others from committing similar offences).\textsuperscript{97} Punishment and deterrence are the main features of criminal law and thus, arguably, based on this functional approach punitive damages could be regarded as part of the penal law. However, despite those penal aspects of punitive damages, I am of the opinion that the penal law rule should not be applied to judgments awarding punitive damages.\textsuperscript{98}


\textsuperscript{97} 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, reimbursement of plaintiff's attorney's fees, see D. Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 S.Cal.L.Rev. 1 at 3.

\textsuperscript{98} However, if the punitive damages have been assessed in an outrageous manner, the punitive damages portion of a judgment could be regarded as against fundamental notions of justice and fairness, and thus violate Canada's public policy. But courts are very reluctant to apply the public policy doctrine, even though the foreign judgment may exceed many times the limits of an award in Canada, see, for instance, \textit{Stoddard v. Accurpress Manufacturing Ltd.} (1993), 84 B.C.L.R. (2d) 194 at 204-205 (S.C.). A recent example for what seems to be an outrageous assessment: A Mississippi jury awarded US$ 500 Mio. in punitive damages against Burnaby based Loewen Group Inc. Reportedly, the actual claim for compensation was below 10 million US$. See The Vancouver Sun, January 30, 1996.
In the United States, statutes like the *Clayton Act* (anti-trust)\(^99\) and the *Racketeer Influenced Corrupt Organisations Act* ("RICO")\(^100\) expressly provide multiple damages for individual plaintiffs. With regard to treble damages in connection with U.S. anti-trust judgments, Canada has by its *Foreign Extraterritorial Measurements Act* the means to prevent the enforcement of such a decision under the conditions set forth in this Act.\(^101\) In the following let us briefly discuss treble damages under *RICO*.

In 1970 the U.S. Congress enacted *RICO*\(^102\) to eradicate organized crime in America. The statute identifies some acts as predicates that, when they occur in a pattern relationship, give raise to liability.\(^103\) *RICO* defines predicate acts broadly. They include, for example, the federal mail and wire fraud statutes. This leads to a potentially very broad application of *RICO*. Additionally, *RICO* grants a private right of action to anyone injured by a "*RICO*-violation". Plaintiffs may recover treble damages, costs, and attorney's fees.\(^104\) *RICO's* legislative history reveals that the treble damages provisions were intended to encourage citizens to supplement state enforcement measures with private suits. This is

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101 See *supra* note 67. However, I could not find a case, where the Attorney General made an order pursuant to the Act.

102 See *supra* note 100.


the so-called "private Attorney General" role of civil RICO plaintiffs.\textsuperscript{105} Now, if a private plaintiff seeks to enforce the punitive portion of a judgment based on RICO, it seems rather formalistic to deny the defence of non-enforcement of foreign penal laws just because the plaintiff is not a foreign state. In essence, it is the foreign state enforcing its rights, although the state has chosen to create a statutory incentive for private plaintiffs to enforce public interests.

As a conclusion, it can be noted that the rule of non-enforcement of foreign penal judgments is clear and firmly established as long as a foreign state is the plaintiff. In cases, where an individual plaintiff demands the enforcement of a civil judgment including a penal award, courts have granted enforcement.\textsuperscript{106} However, in other cases, where a plaintiff acts as a "private attorney-general who protects the public interests"\textsuperscript{107} of a foreign state, the enforcement could be refused on the grounds that it is actually a state - acting via a private person (or corporation) - that is trying to enforce its penal laws within the territory of a foreign state. This view by which the formalistic approach (who is the plaintiff?) is rejected would allow the enforcement of the penal portion of the award to be precluded on a case to case basis.

\textsuperscript{105} Ibid. at 155.

\textsuperscript{106} See supra note 94.

\textsuperscript{107} Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc., supra note 8 at 460.
B. Non-Enforcement of Foreign Tax Judgments

In *United States v. Harden*\(^{108}\) the Canadian Supreme Court held that the courts of B.C. had no jurisdiction to entertain an action for the recovery of foreign taxes, and no jurisdiction to enforce a foreign tax judgment, even if it is a consent judgment which bears the characteristics of an agreement. About 15 years later the roles were reversed: The province of B.C. sought to enforce logging taxes against U.S. residents.\(^{109}\) The court held that the non-enforcement rule was still in effect, and in any event, there was no reciprocity between B.C. and the U.S.A as demonstrated by *United States v. Harden*.\(^{110}\) The rule regarding non-enforcement of foreign tax laws is well-established by authority, but has been severely criticized,\(^{111}\) especially with respect to its application in the interprovincial context.

Furthermore, Canadian courts will not enforce foreign tax claims indirectly. An illustrative example for this rule is the case *Van deMark v. Toronto-Dominion Bank*.\(^{112}\) In


\(^{109}\) *R. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1983).

\(^{110}\) *Ibid.* at 1166. It should be noted that since January 1996 Canada and the U.S.A. mutually enforce revenue claims that are finally determined by the other country. See Article XXVI A ("Assistance in Collection") of the Third Protocol, Amending the Convention between Canada and the United States of America with respect to taxes on Income and on Capital (signed on September 26, 1980). However, *United States v. Harden* still expresses the state of law with respect to foreign tax judgments if there is no international arrangement to this effect.

\(^{111}\) See J.-G. Castel, "Tax Claims", *supra* note 34 at 277ff.

\(^{112}\) *Supra* note 74.
this case, the American Internal Revenue Service had served notices of levy upon the New York offices of the defendant bank, alleging that the plaintiff held funds as a nominee of his parents who were indebted to the U.S.A. for tax arrears. Subsequently, the bank “froze” the plaintiff’s assets at two Toronto branches. The plaintiff brought an application for an order requiring the bank to pay the moneys held by the bank on his behalf. The court held that

[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.113

In Re Reid114 the court held that a trustee was entitled to indemnification for tax already paid by him, even though it was a foreign tax that would not have been enforceable under Canadian law. The court was right to hold that what was at issue was the determination of a private suit and not the indirect enforcement of a foreign tax, and that granting the indemnification would not enrich the foreign treasury. On the other hand, in the English case Peter Buchanan Ltd. v. McVey115 the court considered the claim of a liquidator of a company against a director or shareholder for the recovery of sums

113 Ibid.


exclusively required for the payment of foreign taxes to be a form of indirect enforcement of foreign tax laws. Kingsmill Moore J. held that

[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.\textsuperscript{116}

It seems that Kingsmill Moore J. put much weight on the fact that the sole object of the suit was the collection of foreign taxes. There were no other unpaid creditors and the liquidator worked exclusively for the tax authorities, assigned to “chase the tax”.\textsuperscript{117} However, the tax rule seems to be applied less strict, if liquidators ask for transfer of assets, even though part of the assets will be used to pay taxes.\textsuperscript{118}

However, the exclusion of foreign tax law is not as absolute as Lord Mansfield stated it in 1775, when he said by way of dictum, that “no country ever takes notice of the revenue laws of another”.\textsuperscript{119} Canadian courts would probably take notice of foreign tax

\textsuperscript{116} \textit{Ibid.} at 529 (Appeal to the Supreme Court dismisseed, \textit{ibid.} at 530).

\textsuperscript{117} Compare F.A. Mann, \textit{supra} note 17 at 375, who considers \textit{Peter Buchanan Ltd. v. McVey} as an obvious case of indirect enforcement of foreign tax laws, which must be disallowed.

\textsuperscript{118} See Baade, \textit{supra} note 28 at 44, pointing out that there exists a great deal of uncertainty in this regard.

\textsuperscript{119} \textit{Holman v. Johnson} (1775), 98 E.R. 1120.
law if the contract was governed by the foreign law and the law rendered the contract void under specific tax provisions. In such a case the claim or the 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.

In *Re Sefel Geophysical Ltd.* the trustee in bankruptcy made an application for advice with regard to the administration of the estate. The issue was:

"Whether United States claims and United Kingdom claims, similar in nature to Canadian Crown claims, are to be considered preferred, unsecured, or disallowed."

The claims included, *inter alia*, tax claims. The court noted that

there is the hurdle created by the cases of Government of *India v. Taylor* [1955] A.C. 491 (H.L.) and *U.S.A. v. Harden* [1963] S.C.R. 366 which hold that the courts will not enforce foreign revenue claims.

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* (1922) 3 C.B.R. 114 (Sask.K.B.) 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

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122 *Ibid.* at 52

the principle that foreign revenue claims are not provable in a liquidation setting. However, given the present trends of international comity in the recognition of foreign bankruptcy proceedings, I am not certain that the Government of India case is compatible with the current judicial climate.\textsuperscript{124}

Forsyth J. went on to say:

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.\textsuperscript{125}

The court therefore allowed the foreign tax claims in the liquidation proceedings and by doing so, enforced foreign tax claims. With regard to the United States claims, the court held that because of the fact that the estate had been enriched by assets from the United States, equity demanded the recognition of the foreign creditors as preferred.

\textsuperscript{124} Ibid. at 57-58.

\textsuperscript{125} Ibid. at 58.
Concerning the United Kingdom claims, where no assets had been recovered, the court found that these claims should be recognized as claims of general creditors.\(^{126}\)

The court expressly stated that its opinion would be restricted to the special case of liquidation proceedings, where the underlying considerations are significantly different from those where the action is simply one on a tax judgment. However, Forsyth J. omitted to point out what those significant differences were. I can see no reason why a less stringent application of the tax rule should be allowed in liquidation proceedings. What is most interesting in this case, is the fact that the court relied on comity as the basis for a more generous attitude towards the recognition and enforcement of foreign claims.\(^{127}\) Without expressly mentioning it, the court heavily relied on the principle of reciprocity. Furthermore, 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.”\(^{128}\)

With regard to foreign tax judgments the following conclusion can be drawn: The rule is indeed well-established and its application does not bear great uncertainties. There is no “middleground” discernible as there is regarding penal matters. Arguably, the Canadian-U.S.A. tax convention shows that an international treaty is necessary to allow

\(^{126}\) *Ibid.* at 59-60 (U.S. claims) and 60-61 (U.K. claims).

\(^{127}\) See Chapter 4, D., I., below.

\(^{128}\) *Re Sefel Geophysical Ltd.*, *supra* note 121 at 58.
the enforcement of foreign tax judgments. The case Re Sefel Geophysical Ltd. opened the way to a more favourable enforcement practice. However, it must be kept in mind that the facts of this case were unusual. The assets of the bankrupt company had been transferred from the U.S.A. to Canada by a U.S. court order. In these circumstances, it would have been most offensive to disallow the U.S. revenue claims.

C. Non-Enforcement of “Other Public Law”?

Whereas the law regarding the non-enforcement of foreign judgments that are based on penal and tax laws is more or less settled, it is uncertain whether this rule should extend to the whole body of law which can be characterized as public law. In some cases, there is a trend towards employing the words “penal” and “revenue” laws as generic terms into which every “suspicious” public right has to be pressed.

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129 Supra note 121.

130 See the discussion in Dicey and Morris, supra note 2 at 106-109; Cheshire and North, supra note 120 regard the “public law” category as “firmly established” although “difficult to define” (at 121, but see also 122, 381-382). R. v. Pentonville Prison Governor, ex parte Budlong, [1980] 1 W.L.R. 1110 at 1125: “It is a well established rule that our courts will not enforce a foreign revenue, penal or public law.” Kerr L.J. characterized the principle as “of general international acceptation (In re State of Norway’s Application, [1987] Q.B. 433 at 478). However, it seems that Canadian law has never adopted the public law exception; see, for instance, Castel’s statements, supra notes 79-81, avoiding the term “public law”.

131 See, for instance, Weir v. Lohr, infra note 143, and Schemmer v. Property Resources Ltd., infra note 154; F.A. Mann, supra note 17 at 358.
The public law exception was pronounced by Denning M.R. in *New Zealand (Attorney General) v. Ortiz.* The case 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. Denning M.R. concluded that the asserted rights under the statute were an exercise of sovereignty beyond the territory of New Zealand and therefore fell in the category of non-enforceable public law.

In the following, I intend to examine the various fields of the law which are generally considered public law. I will also consider cases from other common law jurisdictions, since Canadian authority on the point is sparse.

I. Recognition of Bankruptcy Decrees

The *Bankruptcy and Insolvency Act* does not contain any provisions dealing with the effect in Canada of a foreign bankruptcy as an assignment of property. In the

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132 [1984] A.C. 1 (C.A.). Denning M.R. described the the principle of non-enforcement of foreign public law as a rule "no one has ever doubted".

133 Ibid., at 24. The House of Lords affirmed the decision of the Court of Appeal ([1982] A.C. 35), but solely on the ground that the New Zealand had not become owner of the article, because the forfeiture is not complete until seizure (which had never happened). 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 (at 46). Further 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), 165 C.L.R. 30 (H.C. of Australia) and *Attorney-General for the United Kingdom v. Wellington Newspapers Ltd.* [1988] 1 N.Z.L.R. 129 (C.A.); see VII., below.


135 Castel, *supra* note 2 at 530.
common law provinces, in the absence of Canadian bankruptcy proceedings, a foreign trustee's title (which is based on the foreign bankruptcy law) is recognized with respect to movables, if, in the eyes of Canadian law, the foreign court has properly assumed international jurisdiction.\textsuperscript{136}

Thus, with regard to movables situated in Canada, Canadian law recognizes the appointment and the powers of a foreign trustee or representative which are based on foreign bankruptcy laws. It should be noted that bankruptcy laws are a typical example of a state's exercise of the "monopoly of legitimate coercive power"\textsuperscript{137}. In their mode of operation and their effect on the debtor's assets, bankruptcy laws are comparable to confiscation laws. However, judging from their purpose, bankruptcy laws are better understood as a means to satisfy unpaid debts than as an assertion of foreign sovereign power.

II. Judgments for Costs

In \textit{Deutsche Nemectron GmbH v. Dolker},\textsuperscript{138} the plaintiff sought to enforce a German court order which granted him indemnification for hearing costs he had paid in Germany. The plaintiff company had obtained this order after the defendant had

\textsuperscript{136} \textit{Ibid.}


\textsuperscript{138} (1984), 51 B.C.L.R. 162 (S.C.).
unsuccessfully initiated proceedings against the plaintiff in Germany. The tax argument was considered but rejected. The court held that those costs are “certainly not tantamount to taxation by a foreign state.” 139 Although the German court order was based on German public law (civil procedural law), the public law argument was not considered. Mcdonald J. found that the German court order was within the definition of “judgment” under the Court Order Enforcement Act 140 and granted the plaintiff’s application.

I believe the outcome of the case is correct. However, I am of the opinion that the compensatory nature of the German court order is decisive regardless of the reasoning of the court, the most decisive consideration should be the granting of compensation in the foreign judgment.

III. Subrogation Claims in Social Security Matters 141

In Weir v. Lohr, 142 the plaintiff had been injured in a car accident and his hospital bill had been paid according to the Manitoba Hospitalization Act by the Minister of Public Health. Under this Act the plaintiff had to pay any compensation he received from the tortfeasor to the Minister of Public Health. Furthermore, the Act provided that the

139 Ibid. at 165.

140 R.S.B.C. 1979, c. 75, s. 30(1): “judgment’ means a judgment or order of a court in a civil proceeding, where money is made payable .”

141 I could not find a case dealing with the enforcement of a social security judgment or where the direct application of a foreign social security law as the lex causae was at issue.

Minister of Public Health shall be subrogated to all rights of recovery. The plaintiff brought an action against the defendant in Manitoba (where the latter was domiciled) for the hospitalization costs. The defendant argued that this suit was an attempt to enforce a "foreign" (i.e., extra-provincial) revenue claim. The court was obviously right in characterizing the claim as not being a tax claim,143 but felt it necessary to put the denial of the defence on a second basis by holding that sister provinces of Canada are not foreign states.144 The public law argument was not considered, but would have been rejected due to the second argument of the court.

IV. Enforcement of Securities Laws

The U.S. securities laws are of primary interest because the financial markets of the U.S.A. are the largest in the world and probably the most highly regulated.145 They comprise six federal statutes, of which the Securities Act of 1933146 and the Securities Exchange Act of 1934 (the "1934 Act" or the "Act of 1934")147 are of greatest significance. The 1934 Act prohibits fraud in the purchase and sale of securities, demands corporations listed on the U.S. stock exchanges to file periodic reports to the Securities and Exchange Commission ("SEC"), and states certain requirements with which broker-

143 Ibid. at 720.
144 Ibid. at 721-723.
145 Lowenfeld, supra note 3 at 344.
dealers must comply. The SEC is an independent agency established by s. 4(a) of the 1934 Act. Its duty is to administer the federal securities laws and to enforce their widely applicable anti-fraud provisions. The SEC is vested with the primary responsibility for protecting investors in securities and the public interest generally. 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.

The SEC has three types of powers concerning the imposition of sanctions. Firstly, it may itself decide to impose administrative sanctions. Secondly, it may apply to the U.S. federal courts for civil sanctions to be imposed. Thirdly, it may forward to the Attorney General information that could be of relevance in a criminal prosecution.

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149 Ibid. at § 243 (footnotes omitted).

150 Such as issuing injunctive orders (15 U.S.C. § 78u-3), or requiring administrative disgorgement (15 U.S.C. §§ 78u-2(e) and 78u-3(e)).

151 For instance, disgorgement of profits. The enforceability of disgorgement judgments will be dealt with in Chapter 3, D., VII., below.

In the English case *Schemmer v. Property Resources Ltd.*,\(^{153}\) Goulding J. 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 provides 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.\(^{154}\)

Because the plaintiff acted as a receiver appointed by a U.S. District Court upon motion of the SEC, the court held that he was in effect a public officer of a foreign state, who tried to enforce foreign criminal law. Therefore, his claim was held unenforceable in England.\(^{155}\) However, Goulding J. left the door open for private law claims brought by private plaintiffs under the 1934 Act.\(^{156}\)

\(^{153}\) [1975] Ch. 273.


\(^{155}\) *Ibid.* The reasons given are convincing in view of the existing framework. However, I am of the opinion that it would have been more convincing to use the term public laws instead of penal laws, since the plaintiff did not try to enforce a punishment of any sort, but rather tried to "reduce the London funds into possession in order to prevent the commission or continuation of offences against [U.S.] federal law" (*ibid.*). See also F.A. Mann, *supra* note 17 at 358.

\(^{156}\) See the last sentence of his statement quoted above.
In order to prevent unfair insider trading, s. 16(b) of the 1934 Act provides that an officer of a corporation must account to the corporation for profits made within six months on a purchase and sale of the corporation's shares. In *McIntyre Porcupine Mines Ltd. v. Hammond*\(^\text{157}\) the plaintiff company, of which the shares were listed on the Toronto Stock Exchange as well as on the New York Stock Exchange, tried to enforce this provision against the defendant officer, who had sold stocks of the company on the Toronto Stock Exchange during the critical period. The defendant was a Canadian citizen, who had lived in Canada all his life, and who had no business or assets in the U.S.A. The plaintiff company recovered a default judgment against the defendant before a New York court and tried to enforce the judgment, and to directly sue the defendant based on s. 16(b) of the 1934 Act in the Toronto court. The court held that the New York court did not have jurisdiction over the defendant, and that New York judgment was therefore not enforceable in Canada.\(^\text{158}\) It further held that the 1934 Act had no extraterritorial effect and consequently, that the plaintiff had no cause of action.\(^\text{159}\) The court then went on to say that

\[\text{[i]t is unnecessary to decide whether the United States legislation is, in fact, a penal statute. Prima facie it has at least some of the characteristics of a penal statute. If it in fact is, that would be a further reason to refuse to}\]

\(^\text{157}\) (1975), 31 O.R. (2d) 452 (H.C.).

\(^\text{158}\) Ibid. at 461. Lack of jurisdiction in the international sense, see Chapter 1, F., II., above.

\(^\text{159}\) Ibid. However, it seems not quite clear whether the court referred to legislative jurisdiction, in the sense that the 1934 Act could not be applied to a conduct exclusively performed in Canada (according Canadian choice of law rules), or that the 1934 Act could in general not be applied because its application is *per se* limited to the U.S. courts.
countenance it in this jurisdiction [reference made to Schemmer v. Property Resources Ltd., supra note 153].

According to Castel, based on the quote given 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.” I am of the opinion that this statement is too broad. As it stands, it includes civil litigation between private parties for damages which the Schemmer case distinguishes.

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.

V. Judgments Based on Environmental Laws

In United States of America v. Ivey the plaintiff brought action to enforce two judgments it obtained against the defendants in Michigan pursuant to the Comprehensive

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160 Ibid.


162 See the quotation supra note 155.

163 Supra note 7.
Environmental Response, Compensation and Liability Act ("C.E.R.C.L.A."). The plaintiff had sued for reimbursement of the cost of measures undertaken by the Environmental Protection Agency ("E.P.A.") in relation to a waste disposal site in Michigan. Liquid Disposal Inc. ("L.D.I."), a Michigan corporation, conducted the waste disposal business on the site. The defendant Ivey, an Ontario resident, had a controlling interest in L.D.I. and oversaw its management and operations. C.E.R.C.L.A. provides for recovery of clean-up costs from a variety of parties deemed by the legislation to be responsible for the contamination. These include "owner and operator" which has been interpreted by the U.S. courts to include individuals (and corporations) who exercise control even if title to the site is held by a distinct corporation. The liability under C.E.R.C.L.A. is strict and defences are very limited.

In the proceedings for the enforcement of the U.S. judgments before the Ontario court, the defendant Ivey raised the following defences: (1) that the U.S. court did not have jurisdiction; (2) that the U.S. judgments were non-enforceable because they were based on the "penal, revenue or other public law" of a foreign state; (3) that the U.S. judgments were obtained in violation of the rules of natural justice; and (4) that the U.S. judgments are contrary to public policy.


165 United States of America v. Ivey, supra note 7 at 538-539.

166 Ibid. at 536.
Applying the real and substantial connection test established in *Morguard Investments Ltd. v. De Savoye*, the court rejected defence (1).\(^{167}\) The court also rejected defences (3)\(^{168}\) and (4)\(^{169}\), but it is worthwhile to examine more closely the courts reasoning with respect to defence (2).

The court refused to characterize the C.E.R.C.L.A. provisions imposing liability as penal. After having stated that the measure of recovery is directly tied to the cost of the clean-up of the site, the court held that the liability “[... is restitutionary in nature and is not imposed with a view to punishment of the party responsible.”\(^{170}\) For similar reasons the court rejected the revenue law argument\(^{171}\). The court then went on dealing with the public law argument. It referred to, *inter alia, New Zealand (Attorney General) v. Ortiz*,\(^{172}\) *Attorney General v. Heinemann Publishers Australia Pty. Ltd.*\(^{173}\) and *Attorney

\(^{167}\) *Ibid.* at 541-543. See *supra*, Chapter 1, F., II.

\(^{168}\) *Ibid.* at 550-552. See *supra*, Chapter 1, F., III.

\(^{169}\) *Ibid.* at 553-554. See *supra*, Chapter 1, F., III.


\(^{171}\) *Ibid* at 544-545. However, I assume counsel for the defendant had to plead those to defences because he or she could not be sure that the court would consider the public law argument at all, since there is no Canadian precedent dealing with it.

\(^{172}\) [1984] A.C. 1. Sharpe J. 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 (*ibid.* at 546 and 545).

\(^{173}\) *Infra* note 188. Noting that the court did not approve of a general rule excluding the enforcement of foreign public law.
General v. Wellington Newspaper Ltd. Having stated that Canadian authority on the point is sparse, and after quoting Castel’s statement on the issue, Sharpe J. held that

[i]n 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.

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.

As the second reason Sharpe J. held that “[... ] it would be highly undesirable in principle to interpret and expand the ‘public law’ defence to encompass the circumstances of the case at bar.” He referred to the fact that Ontario also has established regulatory regimes which encompass the imposition of civil liability for such clean-up costs, and went on to say:

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174 *Infra* note 192.

175 See *supra* note 80.

176 *United States of America v. Ivey*, *supra* note 7 at 548.


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.\footnote{Ibid.}

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, that considerations of comity strongly favoured enforcement. Finally, the court noted that the U.S.A. enforces foreign judgments for environmental clean-up costs. The court considered this to be significant with respect to the principle of comity which entails an element of reciprocity.\footnote{Ibid. at 549-550.}

The judgment is impressive for its careful reasoning. It should be emphasized that Sharpe J. did not pass judgment as to whether the public law exception doctrine ever applies in Canada. Nevertheless, he carefully examined the case under this doctrine. He finally concluded, that in the case at bar, even if the doctrine were applied, it would not lead to the non-enforcement of the U.S. judgments. It seems that Sharpe J. considered the fact that the statutory basis for the claim was purely remedial and clearly distinguishable from a penal sanction to be decisive, even though the plaintiff was a foreign state agency claiming public rights. Furthermore, it should be noted that Sharpe J. characterized the efforts of the U.S.A. to recover the costs as "not an illegitimate attempt to assert..."
sovereignty beyond its borders." 181 We are left with the question whether some assertion of sovereignty beyond the borders of a foreign state may be tolerated. 182

Finally, the court referred to the concept of comity and its relation to the reciprocity principle. 183

VI. Judgments Based on Competition and Anti-Trust Laws

Attempts to enforce competition and anti-trust laws internationally face hurdles on several levels. Firstly, the question might arise whether a legislature had legislative jurisdiction with regard to conduct performed outside the jurisdiction, which had effects inside the jurisdiction. 184 Secondly, the personal jurisdiction over a defendant for the purposes of anti-trust litigation might be at issue. Thirdly, in proceedings that aim to enforce foreign anti-trust judgments including multiple damages the penal rule might be invoked. 185 Finally and related to the third category, issues of public policy and national interests are at stake, which found its legal basis in the so-called blocking statutes. 186

181 Ibid. at 549 (emphasis added).

182 See Chapter 4, C., below.

183 With respect to comity, see Chapter 4, D., I, below.

184 Castel, Extraterritoriality, supra note 161, at 170; Lowenfeld, supra note 3 at 326-329.

185 See A., above.

186 See supra note 67.
Given all those special considerations with respect to competition and anti-trust laws in the international context, this field of the law has produced its own rules and the public law exception is, if at all, of secondary significance.

VII. National Security Matters

The cases discussed below do not concern the enforcement of a judgment, and the claims are not brought in order to recover a certain sum of money. Nevertheless, these cases are of considerable importance for this investigation, because they concern themselves thoroughly with this public law exception.

In *Attorney General v. Heinemann Publishers Australia Pty. Ltd.* the United Kingdom sought an injunction to restrain the publication of a book containing information obtained by the author while 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. 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”. After having reviewed the authorities with regard to

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187 Castel, Extraterritoriality, *supra* note 161; for the U.S. point of view, see, for instance, ABA Antitrust Section, Monograph No. 20, *Special Defenses in International Antitrust Litigation* (1995).


the public law exception, the court stated that the expression “public laws” had no accepted meaning in Australian law and held that it would be more apt to refer to “public interests” or, even better, “governmental interests” in order to describe the non-enforceable foreign claims.\textsuperscript{190} The court held that

\begin{quote}
the 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 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.\textsuperscript{191}
\end{quote}

It is interesting to note that the New Zealand Court of Appeal faced with exactly the same issue, took a different approach.\textsuperscript{192} 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.”\textsuperscript{193} This was, however, subject to the qualification that such a claim could be entertained only if not contrary to the interests of

\begin{footnotes}
\textsuperscript{190} \textit{Ibid.} at 42.

\textsuperscript{191} \textit{Ibid.} at 46-47. See the severe critique of the concept of “governmental interests” by F.A. Mann, \textit{supra} note 17 at 358-359, holding that this concept would preclude any state claim of whatsoever nature in a foreign court.


\textsuperscript{193} \textit{Ibid.} at 173-174.
\end{footnotes}
the New Zealand Government as articulated by the competent political authorities.\textsuperscript{194} The attempt to restrain the publication of the book failed in New Zealand as well, since the local publication of the author’s revelations was held to be in New Zealand’s public interest.\textsuperscript{195}

\textbf{VIII. Conclusion}

There exist no precedents stating that foreign public laws may not be enforced in Canada. In \textit{United States of America v. Ivey} the court left open whether the “public law rule” as pronounced in some English cases is law in Canada. Judgments based on foreign public law (as the \textit{lex causae}) have been enforced in Canada,\textsuperscript{196} even if a foreign state acted as plaintiff pursuing public interests.\textsuperscript{197} The common feature in these cases was that they turned upon judgments which were compensatory in nature.

\textsuperscript{194} \textit{Ibid.} at 174.


\textsuperscript{196} \textit{Deutsche Nemectron GmbH v. Dolker, supra} note 139.

\textsuperscript{197} \textit{United States of America v. Ivey, supra} note 7.
Chapter 3: Enforcement of Foreign Judgments which are Based on Foreign Public Law: Swiss 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")\(^{198}\), which came into force in January 1989. The PIL Statute replaced the cantonal rules and established uniform 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 regulates the recognition and enforcement of foreign judgments, bankruptcy and composition agreements, and international arbitration.\(^{199}\)

S. 1(2) of the PIL Statute provides that international treaties take precedence over the PIL Statute.\(^{200}\) With regard to the enforcement of foreign judgments, the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of April 15, 1973 (Lugano Convention) and the Brussels Convention of July 25, 1963 (Brussels Convention) are the most important.

\(^{198}\) Supra note 14. See the translated excerpts of the PIL Statute in Appendix 1.

\(^{199}\) S. 1 of the PIL Statute; D. Hochstrasser & N.P. Vogt, Commercial Litigation and Enforcement of Foreign Judgments in Switzerland (Basel, 1995) at 80.

\(^{200}\) 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 of April 15, 1968; The Hague Convention on the Recognition and Enforcement of Maintenance Orders of October 2, 1973.
Matters ("Lugano Convention") is of great importance, and I will therefore briefly discuss the scope of the Lugano Convention before I explain the scope of the PIL Statute.

B. The Scope of the Lugano Convention

In 1988, the Member States of the EU and the Member States of the EFTA concluded a convention in Lugano, Switzerland on jurisdiction and on the enforcement of judgments in civil and commercial matters. The Lugano Convention is based substantially on the Brussels Convention and the two conventions share many identical provisions. The purpose of the Lugano Convention is to extend the principles of the Brussels Convention of the EU to other European countries, which are not member of the EU.

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204 As of July 1995, the Lugano Convention is applicable between 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.
An important common feature of the *Lugano Convention* and the *Brussels Convention* (the "Conventions") is that in enforcement proceedings the courts of Member States may not, except in very limited circumstances, question the jurisdiction of the original court.\(^{205}\) Instead, the Conventions contain rules of international jurisdiction and in this regard the enforcing court is bound by the findings of fact of the original court. The jurisdiction of the original court may only be reviewed under the provisions contained in the Conventions themselves.\(^{206}\)

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;
3. social security;
4. arbitration.

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\(^{205}\) See Article 28(2) of the *Brussels* and the *Lugano* Conventions.

\(^{206}\) See article 28(3) of the Conventions. Further (very limited) grounds for challenging the original court’s jurisdiction are stated in article 27(2) of the *Lugano Convention*. 
Article 1 of the Conventions raises the following questions which are pertinent to my discussion. Why is the scope limited to “civil and commercial matters”? According to which legal system has the characterization to be done? What exactly constitutes a “civil” or a “commercial matter”? Finally, what are the reasons to exclude the fields of the law enumerated in para 2 of article 1?

The limitation to “civil and commercial matters” is explained in article 220 of the EEC Treaty which states:

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.

Therefore, state claims and related matters were not the goal of the mutual enforcement treaty, and the authors of the Brussels Convention, presumably, made the assumption that the limitation of the scope of the Brussels Convention to “civil and commercial matters” would cover the assignment as formulated in Article 220 of the EEC Treaty. Furthermore, judgments other than civil and commercial judgments fall outside

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207 See supra notes 87-89 and accompanying text.


209 It should be noted that neither the original text of the Brussels Convention (of 1968) nor the accompanying Report by Jenard included a definition of “civil and commercial matters” (as opposed to “public law”). With the accession of Ireland and the United Kingdom to the Brussels Convention it was realized that in Ireland and the United Kingdom the distinction between private law and public law is hardly known, see Report
the the scope of the economic union (such as criminal judgments), or relate to public administration of economic matters, the regime for which is set up by Community laws.

With regard to the question of characterization of what a "civil and commercial matter" is, the case Eurocontrol\textsuperscript{210} sheds some light. In this case, the public organization Eurocontrol which provided air navigation safety services, brought an action in Brussels against a German company, alleging that there was a certain amount of money owed by the German company. Rejecting the defendant's argument that the matter was one of public law, the Belgium court ruled for Eurocontrol and entered judgment accordingly.\textsuperscript{211} Subsequently, Eurocontrol sought to enforce the judgment in Germany. The German court, however, requested from the European Court of Justice a preliminary ruling with respect to the meaning of "civil and commercial matters", i.e., whether the Brussels Convention was applicable at all.

\textsuperscript{210} L.T.U. v. Eurocontrol, Case 29/76 [1976] E.C.R. 1541. This case was decided under the Brussels Convention, which is not applicable in Switzerland. However, since the scope of the Lugano Convention is worded identically, 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 Protocol No. 2 on the Uniform Interpretation of the Convention, annexed to the Lugano Convention).

\textsuperscript{211} Ibid. at 1542.
The European Court ruled that the expression "civil and commercial matters" had to be regarded as being independent and was to be 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". 212 Indeed, the characterization of "civil and commercial matter" according to an independent Community definition was the only possibility to secure an equal and uniform interpretation of the expression within all Member States. 213 Applying this new standard the court stated that, though 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 is acting in the exercise of its powers are excluded. 214 The court found that where the use of such services as provided by Eurocontrol was obligatory and the scale of charges and the procedures for their collection are fixed unilaterally by the public authority, this was a strong indication of an exercise of governmental power. Consequently, the judgment was not enforceable under the Brussels Convention. 215

212 Ibid. at 1551-1552.

213 For a deeper analysis of this "independent Community interpretation", see P. Kaye, Civil Jurisdiction and Enforcement of Foreign Judgments (Abingdon: Professional Books, 1987) at 62-84.

214 It should be noted that the court rendering its decision in German used the phrase "hoheitliche Befugnisse", which may be best translated into "sovereign power". In French the term "puissance publique" is common.

215 Ibid. at 590. However, in Bavaria Fluggesellschaft Schwabe and Germanair v. Eurocontrol, Cases 9, 10/77 [1977] E.C.R. 1517, a case in which the facts were the same, Eurocontrol was successful 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, but under the practice existing in Germany prior to the Eurocontrol
A second case dealing with the interpretation of what constitutes a “civil and commercial matter” is *Netherlands v. Rüffer*. In this case a German-owned vessel sunk in the Bight of Watum. According to a treaty between Germany and The Netherlands, the Netherlands were responsible for “river-police functions” regarding the bight. As the German vessel was a danger to other ships, the Dutch Government had it raised and disposed of. It then brought an action in the Dutch courts against the German owner to recover the costs. The question arose whether the Dutch courts had jurisdiction under the *Brussels Convention*. This would be the case if the matter could be considered to be a “civil” or “commercial” matter as opposed to a public-law proceeding. According to Dutch law, the right to recover the costs is based on the ordinary law of tort. The court considered the removal of the wreck to be an exercise of the Dutch Government’s “governmental” or “sovereign” powers. It concluded that the claim for the cost must also be regarded as being made in the exercise of “governmental” or “sovereign” powers, and therefore denied the jurisdiction of the Dutch courts. The court failed to distinguish case it was recognized that the judgment had to be classified according to the law of the judgment-granting country, see Hartley, *supra* note 208 at 13.

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218 English text of the judgment: “Where the public authority acts in the exercise of its powers as such”; see *supra* note 214.
The act of removal of the wreck (which may be considered to be a governmental act) from the compensatory claim aiming to recover the costs.\textsuperscript{219}

The reasons for the exclusion catalogue set forth in para 2 of article 1 vary. Arbitration was exempted because there were several international treaties in force and the Committee of Experts did not see fit to add to the existing body of law.\textsuperscript{220} Bankruptcy and related matters were excluded because it was thought better to have a separate convention on this complex matter.\textsuperscript{221}

The exclusion of matters concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, and wills and succession are founded on the wide disparity on these matters between the various systems of the laws of the Member States. This disparity concerned the substantive laws, and jurisdictional rules as well as conflicts rules. Therefore, it was feared that the courts would apply the public policy exception too frequently\textsuperscript{222} and would be tempted to re-examine the judgment-granting jurisdiction in enforcement proceedings. Thus, rather than risking disruption of


\textsuperscript{220} Kaye, \textit{supra} note 213 at 146-150; Hartley, \textit{supra} note 208 at 23; Reuland, \textit{supra} note 203 at 588.

\textsuperscript{221} Kaye, \textit{supra} note 213 at 129-144; Hartley, \textit{supra} note 208 at 20-21; Reuland, \textit{supra} note 203 at 586-587.

\textsuperscript{222} As provided in article 27(1) of the Conventions.
the Convention's effectiveness, the Committee of Experts drafting the Convention excluded such matters altogether.\textsuperscript{223}

There seem to be two reasons for the exclusion of social security matters. Firstly, some countries treated these matters as a matter of public law,\textsuperscript{224} which would create difficulties in view of article 1, para. 1 of the Conventions and the \textit{Eurocontrol} decision. In addition, there were efforts to regulate this specialist legal area and therefore, the Commission of Experts excluded social security matters from the scope of the convention.\textsuperscript{225} However, it seems a matter of general agreement amongst commentators that the Convention applies with respect to subrogation claims brought by the social security authority against a tortfeasor.\textsuperscript{226}

As a conclusion it may be said that the exclusions were either based on the fact that there was a separate convention in preparation dealing with the specific branch of law, or based on the fear that the defences of violation of public policy\textsuperscript{227} or lack of

\begin{footnotesize}
\begin{enumerate}
\item Reuland, \textit{supra} note 203 at 583-587; Hartley, \textit{supra} note 208 at 16; Kaye, \textit{supra} note 213 at 85-129.
\item Or partly as a matter of tax law.
\item Kaye, \textit{supra} note 213 at 144-145.
\item Kaye, \textit{ibid.} at 145-146; Hartley, \textit{supra} note 208 at 21-22. See Chapter 1, C., III., above and D., VI., below.
\item See Chapter 1, F., III., above.
\end{enumerate}
\end{footnotesize}
international jurisdiction\textsuperscript{228} would be invoked too often, which would jeopardize the effectiveness of the Conventions.

C. Enforceable Judgments under the PIL Statute

I. Introduction

Generally speaking, foreign judgments may be enforced if they qualify as a "decision in a civil matter" synonymously used\textsuperscript{229} as a "private law matter".\textsuperscript{230} Therefore, it is generally held that judgments based on foreign private law are enforceable, and judgments based on foreign public law are excluded from enforcement.\textsuperscript{231}

In 1980 the Federal Supreme Court of Switzerland held:

\begin{quote}
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.\textsuperscript{232}
\end{quote}

\textsuperscript{228} See Chapter I, F., II., above

\textsuperscript{229} See Chapter I, D., III., above.

\textsuperscript{230} German: "Entscheid in Zivilsachen", French: "Décision en matière civile".

\textsuperscript{231} M. Guldener, Das internationale und interkantonale Zivilprozessrecht der Schweiz (Zürich, 1951) at 97; T.S. Stojan, Die Anerkennung ausländischer Zivilurteile in Handelssachen (Zürich, 1986) at 60-63; H.-U. Walder, Einführung in das internationale Zivilprozessrecht in der Schweiz (Zürich, 1989) at 30; R. Hauser, "Zur Vollstreckbarerklärung ausländischer Leistungsurteile in der Schweiz", in: FS Keller (Zürich, 1989) at 589ff.

\textsuperscript{232} Judgment of the II. Civil Chamber of the Federal Supreme Court of Switzerland, 26 June 1980 (unpublished).
The characterization of what is a civil matter will be done according to Swiss law.\(^{233}\) In Swiss law, there are theories which aim to distinguish private law from public law.\(^{234}\) However, since the application of these theories poses great difficulties even within the domestic context for which they were developed, it can be imagined that these theories might meet even greater difficulties when applied to foreign law.

The general rule of non-application and non-enforcement of foreign public law is very broad and formalistic in its application. The issue to be decided by the courts is whether the foreign judgment sought to be enforced is based on public or private law. In the former case the courts must refuse enforcement. The courts have not attempted to answer the important question of whether the sovereignty of Switzerland is at stake.

In the case Ammon v. Royal Dutch,\(^{235}\) the Federal Supreme Court of Switzerland narrowed the scope of the public law rule. The case turned upon measures adopted by the

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\(^{233}\) Explicit: BGE 79 II 87 (1953); see further Stojan, supra note 231 at 61; IPRG Kommentar, supra note 2 at 256, where it is pointed out that a re-examination with regard to the nature of the claim must be allowed despite the prohibition of the révision au fond.

\(^{234}\) See R. Fleiner, Grundzüge des allgemeinen und schweizerischen Verwaltungsrechts (Zürich, 1977) at 37ff; F. Gygi, Verwaltungsrecht (Bern, 1986) at 36ff. According to the "theory of interests" all the law which serves the public interest belongs to the public law, whereas all law which serves private interests belongs to the private law. The "theory of subjects" looks at the parties involved. If at least one of the parties is a public authority the legal relation is likely to be of public nature. The "theory of subordination" finally, distinguishes private from public law by determining whether the parties are legally equal and act as partners as opposed to a legal relation which is characterized by subordination of one of the parties vis-à-vis the other.

\(^{235}\) BGE 80 II 53 (1954).
Dutch Government directed to counteract 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 that Ammon had bought at the Zurich Stock Exchange, because the Dutch authorities had identified these shares as part of the confiscated goods formerly belonging to Dutch inhabitants.\textsuperscript{236} Ammon brought an action for damages against Royal Dutch before Swiss courts. On appeal, the Federal Supreme Court of Switzerland characterized the issue as a question of company law and therefore held Dutch law to be applicable.\textsuperscript{237} Ammon argued that the Dutch legislation designed to counteract confiscation falls within the category of non-applicable foreign public law. The Supreme Court followed Ammon’s argument insofar as the Dutch legislation was foreign public law, but distinguished between foreign public law serving primarily “egoistic” interests of the state and foreign public law which strengthens or protects the interests of individuals.\textsuperscript{238} With respect to the latter category of public law, the “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.

\textsuperscript{236} \textit{Ibid.} at 53-55; Vischer, \textit{supra} note 5 at 183.

\textsuperscript{237} BGE 80 II 53 (1954) at 58-61.

\textsuperscript{238} \textit{Ibid.} at 62; Vischer, \textit{supra} note 5 at 183. See the harsh critique of this distinction by F.A. Mann, “Conflict of Laws and Public Law”, \textit{Recueil des cours} 1971-I 107 [hereinafter F.A. Mann, “Public Law”] at 190-191.
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 to a more favourable attitude towards the application of foreign public law in Switzerland.

Another case where the Federal Supreme Court of Switzerland chose a more imaginative approach than provided by the public law rule, is BGE 75 II 125 (1949). In this case the State of Hungary brought an action against a former employee who withheld the key to a safe deposit 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 since 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 but also became subject to the general principles of private law once the public service relationship was terminated. The defendant was, therefore, obliged to surrender the key, since the termination of his public office suspended the right to retain the instrumentum possessionis, which had on the basis of his employment status, been entrusted to him.239

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

239 See Vischer, supra note 5 at 189.
consideration, the court granted the plaintiff's application. By doing this the court avoided embarrassing the foreign state, which would have happened if the claim had been denied for the sole reason that the *lex causae* was foreign public law.

II. The Operation of Foreign Public Law in the *PIL Statute*

The general rule of the non-application and non-enforcement of foreign public law has been expressed in several decisions of the Federal Supreme Court of Switzerland.\(^{240}\) However, it is open for debate whether this rule is still valid under the regime of the *PIL Statute*. Although the *PIL Statute* provides for a conclusive set of rules with regard to recognition and enforcement of foreign judgments,\(^{241}\) it does not contain any provisions actually defining the scope of enforceable judgments. But Sentence two of s. 13 of the *PIL Statute* deals with the application of foreign public law. It reads: "A foreign provision is not inapplicable for the sole reason that it is characterized as public law."\(^{242}\)

\(^{240}\) BGE 42 II 183 (1916), 50 II 58 (1924), 74 II 279 (1948), and last repeated (although toned down) by the Federal Supreme Court of Switzerland in BGE 107 II 489 (1981) at 492.

\(^{241}\) See the Appendix 1, s. 25 - s. 32 of the *PIL Statute*.

\(^{242}\) Cf. 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. (Quotation in Baade, *supra* note 28 at 50)
However, there has not been a Supreme Court judgment confirming the public law rule in accordance with the cases rendered before the PIL Statute came into force. The IPRG-Kommentar, which probably is the most influential commentary on the PIL Statute, refers to the cases decided before the new statute came into force.

S. 13 of the PIL Statute, however, raises many questions. First of all, it is not entirely clear whether this provision should also operate with respect to the enforcement of judgments, since s. 13 deals with the (direct) application of foreign law. But 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 which are at odds with Swiss concepts.

The more difficult question is whether foreign public law may be applied if it is the lex causae of a case or whether this provision is simply meant to incorporate the existing case law, which allows for the preliminary or incidental application of foreign law or the application of "private-law-friendly" public law into the new PIL Statute. What may be said is that s. 13 of the PIL Statute intends to set a less rigid exclusion of foreign public law in enforcement proceedings.

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243 In BGE 118 II 353 (1992) 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]

244 IPRG Kommentar, supra note 2 at 256.

245 See supra note 35 and accompanying text.

246 Question left open by IPRG Kommentar, supra note 2 at 107-108.
law. This view seems to be the opinion of the Federal Supreme Court of Switzerland in BGE 118 II 353 (1992), when it stated that the law before the introduction of the PIL Statute was more restrictive with respect to foreign public intervention law.\textsuperscript{247}

\textbf{D. Specific Branches of Public Law}

\textbf{I. Non-Enforcement of Foreign Criminal Judgments}

Based on what has been said in the foregoing chapter, it is obvious that foreign criminal judgments are considered to be unenforceable under the \textit{PIL Statute}.\textsuperscript{248} But Swiss authorities grant judicial assistance in criminal matters according to international treaties and according to the \textit{Federal Statute on International Legal Assistance in Criminal Matters}.\textsuperscript{249}

\textsuperscript{247} See the quotation \textit{supra} note 243.

\textsuperscript{248} Stojan, \textit{supra} note 231 at 66-67; A.D. Bessenich, \textit{supra} note 219 at 190-191. \textit{E contrario IPRG Kommentar, supra} note 2 at 256.

\textsuperscript{249} Of 20 March 1981 (SR 351.1). S. 74(2) provides for the seizure and transfer of proceeds of crime (\textit{producta sceleris}) to the requesting state for the purposes of forfeiture and/or restitution; see Bessenich, \textit{ibid.} at 216ff. Furthermore, according to s. 94 foreign criminal judgments may be enforced under certain conditions, see Bessenich, \textit{ibid.} at 198-199.
II. Enforcement of Judgments Awarding Punitive Damages

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

The first case involved the attempt to enforce a Texas State Court judgment in the Canton of St. Gallen, Switzerland. The Texas judgment awarded the plaintiffs exemplary damages of three times the amount of the actual damages, on the basis of the defendant’s misrepresentation in connection with the sale of real estate in Texas. In its decision rendered in 1982, the Swiss District Court held that the Texas judgment violated Swiss public policy because it disregarded the fundamental principle of Bereicherungsverbot, according to which damages must 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

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250 In the following and for the sake of brevity I will only refer to “punitive” damages. However, I will indicate whenever other considerations seem to be relevant with regard to multiple damages.

251 Compare supra note 94ff. and accompanying text.

252 With regard to the Bereicherungsverbot, see infra notes 274-275 and accompanying text.

held that the purpose of the exemplary damages (deterrence, punishment) showed that the exemplary damages lacked "civil" character which was a further reason not to enforce the Texas judgment.\textsuperscript{254} The decision was apparently not appealed.

In the second case, the Civil Court of the Town-Canton of Basle enforced a U.S. judgment awarding punitive damages.\textsuperscript{255} The facts were as follows: The Swiss \textit{T.C.S. AG} conducted transportation services for the Californian \textit{S.F. Inc}. \textit{S.F. Inc}. provided containers for this job. The parties had stipulated English law to be applicable. After a dispute arose between the two parties, \textit{T.C.S. AG} brought an action before a Californian District Court claiming outstanding fees for the services. \textit{S.F. Inc}. filed a counterclaim for damages out of illegal appropriation of containers and for punitive damages for fraudulent behaviour on behalf of \textit{T.C.S. AG}. The court ended up giving judgment for \textit{T.C.S. AG} in the amount of US$70,800.19, but also for \textit{S.F. Inc}. US$120,060 (damages) and US$50,000 (punitive damages). \textit{S.F. Inc}. was successful in enforcing the outstanding balance of US$99,259.81 at \textit{T.C.S. AG}'s domicile in Basle.\textsuperscript{256}

\textsuperscript{254} M. Bernet & N.C. Ulmer, \textit{ibid}. at 273.


\textsuperscript{256} I will refer to the court's reasoning below.
From the Swiss point of view, there are three basic questions to be considered with respect to the enforcement of punitive damages:\(^{257}\)

(i) Is a judgment awarding punitive damages 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, could there be a partial enforcement of the judgment?

With regard to the first point, it can be noted 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.\(^{258}\) Indeed, under Swiss law punitive damages may not be awarded, as they fulfil to a large extent the functions reserved for criminal law, namely punishment and deterrence.\(^{259}\)

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\(^{257}\) See Ch. Lenz, *Amerikanische Punitive Damages vor dem Schweizer Richter* (Zürich, 1992) at 133.


\(^{259}\) See *supra* notes 96-97 and accompanying text.
More recent authors point out that judgments which include punitive damages awarded in litigation between private parties do not fall within the category of criminal judgments in the sense of the Federal Statute on International Legal Assistance in Criminal Matters.\textsuperscript{260} Therefore, it has been argued that such judgments fall within the scope of the PIL Statute.\textsuperscript{261}

Furthermore, it should be noted that Swiss civil law also employs penal sanctions. Contractual penalties ("\textit{peine conventionnelle}" or "\textit{clause pénale}") are well known to Swiss law\textsuperscript{262} and the punitive purpose of this legal institution can hardly be denied. However, it must be admitted that they are founded on a contractual basis which involves the consent of the contracting parties to the imposition of a penalty in case of a breach of contract. This latter argument, however, is not valid with respect to the statutorily provided "compensation"\textsuperscript{263} owed by the employer to the employee in case of abusively giving notice of termination of the employment relationship.\textsuperscript{264} There is a similar provision

\textsuperscript{260} Lenz, \textit{supra} note 257 at 137. In BGE 116 II 378 (1990), the Federal Supreme Court of Switzerland held that a foreign judgment awarding punitive damages is not a criminal judgment in the sense of the Federal Statute on International Legal Assistance in Criminal Matters. However, the court did not say that judgments including punitive damages fall within the scope of the PIL Statute.

\textsuperscript{261} IPRG \textit{Kommentar, supra} note 2 at 1200.

\textsuperscript{262} S. 160 of the Federal Statute on Obligations (of 30 March 1911, SR 220, "CO").

\textsuperscript{263} The word "compensation" is not accurate in this context, since the employee is entitled to a certain sum of money irrespective of whether he or she suffers a financial loss.

\textsuperscript{264} S. 336a(2) CO: "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."
concerning unjustified dismissal of an employee. These provisions are designated to punish the wrongdoer and prevent other’s from repeating such a malicious behaviour. It can therefore be noted that there exists in Swiss civil law, although under very limited conditions, claims featuring penal elements and claims which may over-compensate an aggrieved party. I am therefore of the opinion that judgments awarding punitive damages should be considered as a private law matter in the sense of the *PIL Statute*.267

Following these considerations, the Appeal Court of Basle in *S.F. Inc. v. T.C.S. AG* decided that a judgment awarding punitive damages has to be characterized as a “civil matter” in the sense of the *PIL Statute*. The court was aware of the penal element in the Californian judgment in question but drew a distinction between “criminal law punishments” (“*kriminalrechtliche Strafe*”) and “private law punishments” (“*privatrechtliche Strafe*”). The court held:

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.

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265 See s. 337c CO.

266 See Lenz, *supra* note 257 at 99-105.

267 However, with regard to multiple damages under the U.S. *RICO* legislation, where private parties act as “private attorney generals”, I would apply the penal rule, see *supra* note 99ff.

268 *Supra* note 255 at 33.

269 Even though Swiss law does not know punitive damages, see BGE 57 I 204 (1931): “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 contrevient comme le ferait une sanction de droit public. Cette fonction pratique ne la fait pas sortir juridiquement du domaine du droit privé.”
The fact that they [private law punishments] serve *(inter alia)* a penal function, does not alter anything 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.\(^{270}\) [footnotes omitted, author’s translation]

The second issue to be discussed here relates to the public policy exception.\(^{271}\) In the field of product liability, s. 135(2) of the *PIL Statute* limits the amount of damages recoverable before Swiss courts with regard to cases where the plaintiff would be entitled to ask for punitive or multiple damages according to the applicable foreign *lex causae*.\(^{272}\) Assuming that this provision is also applicable in enforcement proceedings, it disallows the enforcement the penal portion of an award, but permits the enforcement of the award that corresponds to the actual damages suffered by the plaintiff.\(^{273}\)

In other fields of the law, where punitive damages might be awarded, the courts will have to 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 over-compensated by damages *(Bereicherungsverbot)*.\(^{274}\) The Swiss law of

\(^{270}\) *S.F. Inc. v. T.C.S. AG*, supra note 255 at 32-33.

\(^{271}\) See (ii), above.

\(^{272}\) See *supra* note 69.

\(^{273}\) The amount of these actual damages must be determined by the applicable foreign law as the *lex causae*, even if the *lex causae* considers the actual damage higher than the domestic law would consider them. The limitation set forth in s. 135(2) of the *PIL Statute* just tries to exclude categories of damages not known to Swiss law, see *IPRG Kommentar, supra* note 2 at 1179.

\(^{274}\) With the exceptions stated *supra* note 262ff. and accompanying text.
damages basically allows claims for two types of damages: compensatory damages and damages for pain and suffering. Compensatory damages are limited to the actual economic damage which the tortuous act or the breach of contract causes. Damages for pain and suffering are only awarded in tort law and aim to compensate non-economic damages, such as pain or other psychological or physical stress. Under these types of damages, there is no room for actually punishing a wrongdoer by ordering him to pay a certain amount of money to the aggrieved party. The prohibition of over-compensation of an aggrieved party is generally considered to be part of Swiss public policy.275 If punitive damages are awarded in order to reimburse a party's lawyer's fees,276 there is no over-compensation perceivable, since Swiss courts ex officio award the winning party (to some extent) the fees he had to pay to his or her lawyer. Therefore, it may be said that Swiss public policy does not disallow punitive damages designed to compensate a party for lawyer's fees.

In addition to compensatory claims, the Swiss Code on Obligations provides for claims for unjust enrichment.277 Therefore, punitive damages serving the restitution to the

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276 See *supra* note 97 concerning purposes of punitive damages.

277 See s. 62 *CO*. 
plaintiff of the profit unjustly realized by the defendant could also be considered enforceable under Swiss law. 278

As pointed out above, under Swiss law penal elements in civil law are not entirely unknown. From the Swiss point of view, what is disturbing about punitive damages is their broad application and the sometimes excessive amount in which they are awarded. The public policy test should therefore focus on the amount in which a party gets overcompensated, and the reasons why punitive damages were awarded. All of this requires a thorough examination on the merits of the case, which however is permitted according to s. 27(3) of the PIL Statute where the incompatibility with public policy is at issue.

Furthermore, the doctrine of the restrained application of the public policy exception in enforcement proceedings (ordre public atténué) 279 and the doctrine of “Binnenbeziehung” 280 direct the court to be more tolerant with foreign judgments which seem to offend fundamental principles of Swiss law.

Turning to the third question regarding the partial enforcement of punitive damages, I am of the opinion that courts should be allowed actually to review the merits of a case in order to determine the decisive factors with respect to the enforcement of punitive damages. 279 In S.F. Inc. v. T.C.S. AG, supra note 255 at 36, the court emphasized that in the case at bar the punitive damages were designed to prevent unjust enrichment rather than as a means to deter. 278

See supra notes 71-73 and accompanying text.

See supra note 70 and accompanying text.
judgments awarding punitive damages, and feel free to award the whole amount, a partial amount or none of the punitive damages.  

As decisive factors I would mention:

- Closeness of the case to the Swiss forum;

- Nature of the punitive damages (compensatory, restitutionary or truly penal?);

- Amount of punitive damages designated to actually punish.

As a conclusion it can be noted that there is still no definite authority with regard to the enforcement of punitive damages. However, it can be said that punitive damages

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281 See Bernet & Ulmer, supra note 253 at 274;

282 For instance, domicile or residence of the parties in Switzerland; With regard to torts: Were the place of the wrong or the effects of it in Switzerland? With respect to contractual claims: Had the contract to be performed in Switzerland? Does the contract have any other close contacts to Switzerland? Did the parties agree on Swiss law to be applicable? The more connecting factors there are, the less tolerant should a Swiss court apply the public policy exception. The least connecting factors exist in a case where only the assets are located within Switzerland.

283 It is almost impossible to come up with figures. However, truly punitive damages (designed to punish and deter) exceeding 50% of the actual damages awarded seem to me outrageous, even if there are only minimal contacts with Switzerland.
judgments are neither per se outside the scope of the PIL Statute because of their penal features, nor are they per se incompatible with Swiss public policy.\textsuperscript{284}

III. Non-Enforcement of Foreign Tax Judgments

According to the Swiss view, tax law is, besides criminal law, a typical public law matter, enforced ex officio by each state based on its constitutional power over its people. Therefore, Swiss courts will not enforce foreign tax claims, neither directly nor indirectly.\textsuperscript{285} Generally speaking, there seem to be no differences between Canadian and Swiss law in this area.\textsuperscript{286}

IV. Recognition of Bankruptcy Decrees

According to s. 166 of the PIL Statute, a foreign bankruptcy decree that was issued in the country of the debtor's domicile is recognized upon motion by the foreign

\textsuperscript{284} The German Supreme Court (Bundesgerichtshof), in its decision of June 4, 1992, held that foreign judgments encompassing damage awards that exceed compensation for the damages suffered are not enforceable in Germany 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 have awarded in the case. See A.R. Fiebig, "The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments" (1992) 22 Ga. J. Int'l & Comp. L. 635 at 648; P.J. Nettesheim & H. Stahl, "Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award" (1993) 28 Texas Int'l L. J. 415.

\textsuperscript{285} Stojan, supra note 231 at 65; M. Keller & K. Siehr, Allgemeine Lehren des IPR (Zürich, 1986) at 162.

\textsuperscript{286} But note the handling of foreign tax claims in international bankruptcy cases, IV., below.
trustee/receiver in bankruptcy or by one of the creditors, if the country where the decree was made grants reciprocity. Such a motion must be brought before the competent court at the location of the assets in Switzerland.287

Once a foreign bankruptcy decree is recognized, the debtor’s assets in Switzerland are subject to Swiss bankruptcy law and Swiss rules concerning priority of payments are applicable.288 Secured creditors are paid equally irrespective of their domicile.289 On the other hand, with regard to claims not secured by pledge, only preferred creditors domiciled in Switzerland are satisfied.290 After satisfaction of the secured creditors (of any domicile) and the preferred creditors domiciled in Switzerland, the balance is made available to the foreign trustee/receiver or to the empowered creditors in bankruptcy.291 This balance, however, may be made available only after the foreign schedule of claims has been recognized by the competent Swiss court.292 The fact that a foreign schedule of

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287 Lex fori; s. 167(1) of the PIL Statute. Claims of the debtor in bankruptcy are deemed to be located at the domicile of his or her debtor (s. 167(3) of the PIL Statute).

288 S. 170(1) of the PIL Statute.

289 Foreign tax claims are not permitted, see Bessenich, supra 219 at 215.

290 S 172 of the PIL Statute.

291 S. 173(1) of the PIL Statute. Therefore, preferred creditors domiciled in Switzerland have to claim their rights directly in the foreign bankruptcy proceedings.

292 S. 173(2) of the PIL Statute.
claims includes tax claims or social security claims is no reason for refusing the recognition of the schedule.\textsuperscript{293}

V. Judgments for Costs

Under Swiss law, there are two different kinds of costs to be considered. The first category is actual court costs to be paid by the losing party to the court or the state treasury. In the absence of an international agreement, claims for such costs are held unenforceable.\textsuperscript{294}

On the other hand, costs, that are pronounced by the court in order to reimburse the winning party for his or her lawyer’s fees are enforceable, if the main subject matter of the judgment is enforceable within Switzerland.\textsuperscript{295} A court order which grants a winning party indemnification for court costs, the party had to pay in advance, would probably be treated in the same way, i.e., held enforceable if the main point of the underlying judgment is enforceable.\textsuperscript{296}

\textsuperscript{293} See Bessenich, \textit{supra} note 219 at 216, with further references.

\textsuperscript{294} \textit{Ibid}, at 205.

\textsuperscript{295} \textit{Ibid}; Stojan, \textit{supra} note 231 at 50.

\textsuperscript{296} Compare \textit{Deutsche Nemectron GmbH v. Dolker}, \textit{supra} note 138 and accompanying text.
VI. Social Security Matters

Under the PIL Statute judgments concerning social security matters are not enforceable, if membership in the insurance in question is mandatory. If however, a foreign court has ruled that premiums out of a voluntary insurance are owed, Swiss courts would enforce the judgment.

A foreign provision providing for the subrogation to the rights of recovery would be applied by a Swiss court irrespective of whether the norm providing for subrogation would be qualified as of public nature. Similarly a judgment granted to an insurer would be enforced despite the classification of underlying the subrogation norm.

VII. Enforcement of Securities Laws

In this section, I intend to examine the enforceability of U.S. judgments ordering the disgorgement of profits on behalf of a U.S. court and/or the SEC for the violation of U.S. Securities laws. In order to accomplish this task, I will briefly outline the legal

297 See Stojan, supra note 231 at 65ff.

298 Ibid.

299 IPRG Kommentar, supra note 2 at 1238, with reference to s. 13(2) of the PIL Statute. The Federal Supreme Court of Switzerland applied foreign public law subrogation provisions already before the PIL Statute, if they were not fundamentally different from Swiss subrogation norms (sic!), see BGE 107 II 489 (1981) at 492-493.

300 Compare Chapter 1, C., IV., above.
nature of disgorgement before I will turn to characterizing disgorgement judgments under Swiss law.

Disgorgement is an equitable remedy which has been introduced in 1971 by the case SEC v. Texas Gulf Sulphur Co.\(^{301}\) Prerequisite for a judgment ordering disgorgement is a violation of the securities legislation.\(^{302}\) Disgorgement is a form of civil restitutionary remedy for unjust enrichment. The U.S. Second Circuit Court of Appeals has stated that disgorgement “is a method of forcing a defendant to give up the amount by which he was unjustly enriched.”\(^{303}\) When ordering disgorgement, “the court is not awarding damages ... but is exercising ... discretion to prevent unjust enrichment.”\(^{304}\)

Disgorgement is always available wherever it is proven to the court that the defendant has drawn profit from illegal conduct. Although it is foreseen that these profits should be returned to injured parties, this is not an indispensable part of the claim for disgorgement.\(^{305}\) Disgorgement always involves the reversal of unjust enrichment, but does not necessarily involve the restorative element of the remedy of restitution. Thus, disgorgement claims are distinguishable from the traditional remedy of restitution.

\(^{301}\) 446 F.2d 1301 (U.S. 2d Cir. C.A.) at 1307-1308.

\(^{302}\) SEC v. Unifund SAL, 910 F.2d 1028 (U.S. 2d Cir. C.A. 1990) at 1041.

\(^{303}\) SEC v. Commonwealth Chemical Securities Inc., 574 F.2d 90 (2d Cir. N.Y. 1978) at 102.

\(^{304}\) Ibid. at 95.

whereby the defendant is obliged to return to the plaintiff the sum which the defendant had wrongfully obtained from the plaintiff.\footnote{306}

A disgorgement order does not depend on proof that any parties are injured by the illegal conduct.\footnote{307} But, as previously mentioned, the courts will use the funds in accordance with a distribution plan\footnote{308} in order to compensate injured parties.\footnote{309} Where the proceeds of the disgorgement cannot be distributed to injured parties, they are paid out to the U.S. Treasury.\footnote{310} If the proceeds of disgorgement have exceeded the sum of legitimate claims of entitled persons, the excess may be transferred to the general revenue.\footnote{311} A claim by a person, whose profits had been disgorged, aiming to recover the moneys not needed for compensation of injured parties has been dismissed by a U.S. District Court. 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,

\footnote{306} With regard to the traditional remedy of disgorgement and its distinction from compensation and restitution, see L.D. Smith, case comment on Ontex Rexources Ltd. v. Metalore Resources Ltd. (1994) 73 Can. Bar Rev. 259ff.

\footnote{307} It is simply assumed that if a participant at a securities exchange makes profits by violating the law, other people, maybe not even aware of it, make losses or, at least did not make profits as they would have if there were no violation of the securities laws.

\footnote{308} Approved by the court ordering the digorgement.

\footnote{309} Although this is not the primary objective of disgorgement, see Flynn, supra note 305 at 121.

\footnote{310} \textit{Ibid}.

would impair the full impact of the deterrent force that is essential if the adequate enforcement of the securities acts is to be achieved.  

Turning to the Swiss law, it shall be assumed that the illegal profits are within the Swiss jurisdiction, and the SEC tries to enforce a disgorgement judgment at the Swiss forum arresti. First of all, there should be noted that the U.S. characterization of SEC disgorgement claims as civil is not decisive, since this only says it is not criminal. Disgorgement claims aim to deprive the defendant of the illegal profit made in violation of securities laws. In addition, it is a method by which “ill-gotten gains” may be obtained and transferred to the U.S. court’s jurisdiction where they will be distributed according to the U.S. court’s discretion under a distribution plan. The disgorgement judgment does not, however, finally determine the obligations between private parties, but rather is intended to secure and re-patriate the funds. The 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.

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313 See supra note 29.

314 Which it would be if it dealt with compensatory claims of injured parties or if it ordered disgorgement to a party as a means of restitution in the traditional sense.
The same conclusion can be reached by an analysis of the ends 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 are characterized as laws designed for public ends. The SEC is a powerful state agency vested with a unique kind of disgorgement right which is not available to any other private person. 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.

There is no need to characterize U.S. legislation as penal. Under Swiss law, the non-enforcement disgorgement judgments derives out of their administrative nature, which is, according to Swiss law, reason enough to refuse enforcement under the PIL Statute.

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315 Compare the “theory of interests”, supra note 234.

316 Compare the “theory of subjects”, ibid.

317 Compare the “theory of subordination”, ibid.

318 See also Namus Asia Co. v. Standard Chartered Bank, (1990) 1 H.K.L.R. 396, where the Hong Kong Court held: “The 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.” Quoted in L. Collins, “Provisional and Protective Measures in International Litigation”, Recueil des cours 1992-III 1 at 133.

319 Compare Schemmer v. Property Resources Ltd., supra note 153.
VIII. Judgments Based on Environmental Laws

To my knowledge, there is no case where the enforcement of a foreign judgment based on environmental law was at issue. However, it seems highly doubtful that Swiss courts would enforce a foreign judgment awarding clean-up costs to a foreign administrative authority. Although the substance of the claim could clearly be considered to be compensatory in nature, the administrative character of such a judgment would endanger the enforcement in Switzerland. The party seeking enforcement of such a judgment would be well-advised to refer to the Hungarian case and argue that according to “general principles of private international law” a tortfeasor is obliged to pay compensation for the damages he has caused.

IX. Judgments Based on Competition and Anti-Trust Laws

The PIL Statute seems to consider claims regarding restraint of competition to fall within the field of application of the PIL Statute, since s. 137(2) expressly deals with the application of restraint of competition law. S. 137(2) states that even if foreign law is

320 But see Netherlands v. Rüffer, supra note 216.
321 Compare United States of America v. Ivey, supra note 7.
322 BGE 75 II 125 (1949), see C., I. (in fine), above.
applicable, no damages may be awarded beyond those that would be awarded under Swiss law. 323

It seems that the majority of Swiss scholars characterize treble damages under U.S. anti-trust legislation as penal or administrative matters and therefore as falling within the public law rule. 324 Again, a partial enforcement of the actual damages suffered by the plaintiff should be allowed.

X. Conclusion

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

Exceptions to the rule that Swiss courts will not enforce foreign public law have been introduced by the Swiss Federal Supreme Court, actually limiting the scope of the public law rule to a considerable extent. Ammon v. Royal Dutch opened the door for the enforcement of foreign public law which was enacted to protect and strengthen the

323 See supra note 69.

324 Kaufmann-Koller, supra note 258 at 242-244; Stojan, supra note 231 at 74; contra: Lenz, supra note 257 at 136ff., but Lenz does not distinguish between punitive and treble damages.
interests of private parties. In the Hungarian case the Swiss Federal Supreme Court managed to enforce a claim, which actually had its basis in foreign public law, by applying general principles of private law. Finally, the PIL Statute contains rules for the recognition of foreign bankruptcy decrees, which, under the conditions set forth in the PIL Statute, allows the transfer of assets to another jurisdiction irrespective of as to whether these assets will be used for satisfying tax or social security claims.

Uncertainties exist with regard to punitive and treble damages, mainly due to the fact that this legal institution is not known to Swiss law. However, according to my opinion, judgments awarding punitive damages should be dealt with under the PIL Statute, but subject to a thorough examination under the public policy doctrine.

E. Comparative Analysis

Canadian law started with a “tax and penal rule” which has been expanded by some English judgments and scholars to the non-enforcement of “other public law” as a third category of non-enforceable judgments. However, as stated previously the public law rule was never approved by the House of Lords or any Supreme Court of a common law jurisdiction. Switzerland’s starting point on the other hand, was the premise that any

325 *Supra* note 235 and accompanying text.

326 BGE 75 II 125 (1949), see C., I. (*in fine*), above.
foreign public law may not be enforced in Switzerland. Therefrom, Swiss law has begun to
develop exceptions to the public law rule.

Despite those different starting points, a comparison between Canadian and Swiss
law shows a remarkable conformity with regard to the results, the effective outcome, of
cases tried before Swiss and Canadian courts dealing with comparable issues. Although
the legal roots with regard to a “non-enforcement of specific judgments”-rule of the two
jurisdictions are quite different, both jurisdiction independently evolved their law in a way
that led to striking similarities concerning the results in individual cases. In fact, there is
reciprocity to a very great extent.

Now, what does it mean that there is reciprocity between Canadian and Swiss law
in the investigated matter? It can either mean that the two legal systems have arrived at
“natural frontiers” of voluntarily enforcing each other’s judgments, and no further
development is possible. But it could also mean that, in view of the extent of reciprocity, it
is time to mutually evolve the law in a direction which allows the courts to enforce
judgments which are traditionally excluded from enforcement due to the specific subject
matter they are dealing with. In Chapter 4, I will sift out the rationale for the “non-
enforcement rule”, critique the reasons given for its existence, and try to answer the
question just posed above.
Chapter 4: Rationale For Refusing the Enforcement of Foreign Public Law Judgments

A. Introduction

Several justifications for the rule that foreign penal, tax and certain other public laws must not be enforced internationally have been given. Some of the reasons presented might be valid with regard to the direct application of foreign public law, but are of no significance in the context of judgment enforcement. However, in *United States of America v. Harden* Cartwright J. held that the general rule of non-application of foreign tax laws also applies in the context of judgment enforcement. He said:

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327 For the sake of brevity, I will use the term “public law” as a generic term consisting of the specific field of foreign laws that are held unenforceable under Canadian or Swiss law (See Chapters 2 and 3, above).

328 See the references in F.A. Mann, *supra* note 17 at 360 (footnote 34).

329 For instance, lack of legitimacy of domestic authorities to deal with foreign public law (Keller & Siehr, *supra* note 285 at 160), and difficulties concerning the correct application of the foreign procedural and substantive law (*ibid.* at 161; F.A. Mann, “Public Law”, *supra* note 238 at 170; Baade, *supra* note 28 at 41). Furthermore, let us assume that state A sues a person before the courts of state B based on the original tax claim. If the courts of state B denied state A’s claim, logic requires that state A would be bound by state B’s decision (*res judicata*). However in practice, it seems unlikely that state A would accept state B’s decision. Finally, assuming that the foreign law violated the public policy of the forum, should (and could) the court apply its own public law? This seems at least problematic.
In my opinion, 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.\textsuperscript{330}

Further reasons commonly given in order to justify the rule of non-enforcement of foreign public law judgments are covered by other prerequisites of enforcement as outlined in Chapter 1, F. Problems of "long-arm jurisdiction", unfair proceedings, and morally offending foreign legislation are covered by the requirements of jurisdiction in the international sense,\textsuperscript{331} natural justice, and public policy. What we are concerned with in this Chapter is "judgment enforcement jurisdiction" or "admissibility of judgment enforcement".\textsuperscript{332} The only reason for not enforcing the judgment or the tax assessment would be the penal or the tax rule respectively.

After having excluded reasons which do not provide for an appropriate explanation in the context of judgment enforcement,\textsuperscript{333} there remain two explanations which merit a

\begin{itemize}
\item \textsuperscript{330} United States of America v. Harden, supra note 108 at 371.
\item \textsuperscript{331} Or "jurisdictional competence", see I. Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990) at 298ff. Further see International Law Chiefly as Interpreted and Applied in Canada, 5th ed. by H.M. Kindred et al. (Edmond Montgomery, 1993) at 423ff.
\item \textsuperscript{332} Canadian courts refuse jurisdiction in cases where the public law rule applies (see, for instance, United States of America v. Harden, supra note 108 at 373 (quoting Kingsmill Moore J. in Peter Buchanan v. McVey, supra note 115). Swiss courts hold foreign public law claims or judgments as "inadmissible", see Bessenich, supra note 219 at 41ff.
\item \textsuperscript{333} See supra note 329.
\end{itemize}
more thorough examination. Firstly, it has been argued that, since the public policy test always applies in proceedings for the enforcement of foreign judgments, it could cause political embarrassment if the enforcing court held a foreign public law as offending against domestic notions of fundamental justice. Secondly, it has been reasoned that public law is territorially limited to the boundaries of the enacting state and the international enforcement of such laws would violate the enforcing state's sovereignty.

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

In United States of America v. Harden Cartwright J. quoted a passage of Lord Keith of Avonholm's speech in Government of India v. Taylor, which reads:

Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of Moore v. Mitchell, in a passage, quoted also by Kingsmill Moore J. in the case of Peter Buchanen Ld 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

334 See B., below.

335 See C., below.
temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any 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 intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. 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.

Judge Learned Hand, in the passage quoted by Lord Keith of Avonholm, relies on an exaggerated effect of the act of state doctrine. This view suggests that rather than expressing an opinion on foreign legislation and foreign judgments, a domestic court should generally deny judicial enforcement of foreign public law judgments.

However, the “courtesy argument” ignores the fact that the foreign state submits itself voluntarily 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 not convincing at all. The reasoning as put forth by Judge Hand assumes that the flat refusal to even consider the foreign tax law or judgments based thereupon causes less embarrassment to another state than an examination of the foreign tax law under the

\[336\] Supra note 15 at 370-371.

\[337\] F.A. Mann, supra note 17 at 361. With regard to the act of state doctrine, see Brownlie, supra note 331 at 507-508; Kindred, supra note 331 at 280ff. (State immunities).
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, but the possibility of rejection in some cases should not be urged in favour of
total disregard of all revenue laws.

I am therefore of the opinion that the rationale as outlined above is an
unconvincing explanation and does not justify the exclusion of foreign public law
judgments.

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338 This point was raised by Kingsmill Moore J. in Peter Buchanan v. McVey, supra note 115 at 517: “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.” However, Kingsmill Moore J. dismissed the action based on the exclusionary rule and not on the ground that the foreign law violated domestic public policy.

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

I. Cases and Doctrine

In *Government of India v. Taylor*, Lord Keith of Avonholm gave another, more convincing explanation for the exclusionary rule. Again, the relevant sentences of that speech were adopted and quoted by Cartwright J. 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.

In *Huntington v. Attrill* Lord Watson spoke four times of an “international rule” requiring the unenforceability of foreign penal laws and of those actions (which

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340 *Supra* note 15. It should be noted, however, that Forsyth J. stated in *Re Sefel Geophysical Ltd.*, that he found no Canadian authority that would bind him to the holding of *Government of India v. Taylor*.

341 Quoted in *United States of America v. Harden*, *supra* note 108 at 370. After this statement there follows the statement quoted in B., above.

342 *Supra* note 86.

include "penal actions") which "by the law of nations are exclusively assigned to their domestic forum".\textsuperscript{344}

Therefore, it has been argued that 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 \textit{jus imperii} of a state and the enforcement of a state’s imperium is territorially limited to the state’s boundaries.\textsuperscript{345} The enforcement of such \textit{jure imperii} claims or sovereign powers within the territory of another state would infringe the enforcing state’s sovereignty and thus violate public international law.\textsuperscript{346}

\begin{flushleft}
\footnotesize
\textsuperscript{344} \textit{Ibid.} at 156.

\textsuperscript{345} With regard to the \textit{acta jure imperii} and \textit{acta jure gestionis}, see Kindred, supra note 331 at 284 and 289ff., where it is rightly pointed out that a precise distinction of the two categories may be impossible (at 290 with references). F.A. Mann, \textit{Studies in International Law} (Oxford: Clarendon Press, 1973) at 499ff. [hereinafter \textit{International Law}] also admits the difficulties to determine \textit{acta jure imperii}.

\textsuperscript{346} F.A. Mann, \textit{International Law, supra} note 345 at 495ff. F.A. Mann, “Public Law”, \textit{supra} note 238 at 168 says:

The State which tries to recover penalties or taxes within the territory of another 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.
\end{flushleft}
Similarly, the Federal Supreme Court of Switzerland considered all of what is characterized as public law as territorially limited to the state which enacted the public law in question. Therefore, it has been held that foreign public laws *per se* cannot have any impact outside that very state.\(^{347}\) Judgments based on a body of law which, according to Swiss standards, was considered as of a public law nature would not be enforced. The underlying assumption is that all public law is implemented with 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.\(^{348}\)

The question to be asked is whether there is indeed a rule of public international law which actually prohibits the enforcement of foreign public law judgments. And, related to this question, whether a state enforcing another state's public law judgments would endanger the enforcing state's independence and sovereignty. In order to answer those questions, I will briefly outline the principle of territorial sovereignty.

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\(^{347}\) See the Judgment of the II. Civil Chamber of the Federal Supreme Court of Switzerland, 26 June 1980 (unpublished) and the quotation *supra* note 232.

\(^{348}\) See Vischer, *supra* note 5 at 151.
II. 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.\(^{349}\) This rule reflects the definition of statehood in terms of three essential prerequisites: the exercise of undelegated governmental power over a definite population in a defined territory.\(^{350}\) Therefore, the argument can be made that 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 its essential prerequisites of statehood.\(^{351}\) This seems to be the true rationale underlying the exclusionary rule.

There cannot be any doubt that there is no obligation of any state to enforce a foreign judgment (treaty or convention aside). Before domestic courts, a foreign judgment must be considered in any case as an acta jure imperii. A judgment has no legal force whatsoever outside the jurisdiction of the rendering court except where the enforcing state’s law lays down rules to that effect. But the rule of “no effect per se” of foreign

\(^{349}\) The Steamship Lotus (France v. Turkey, 1927), P.C.I.J. Ser. A., No. 10 at 18: “the 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.” Baade, supra note 28 at 10; H.M. Kindred, supra note 331 at 426ff.

\(^{350}\) Baade, supra note 28 at 10; see further Brownlie, supra note 331 at 72ff; Kindred, supra note 331 at 12ff.

\(^{351}\) Baade, supra note 28 at 10. It is interesting to note that Baade is probably the only author who addresses this issue that clear and succinct.
judgments equally applies to all foreign judgments, private law judgments as well as public law judgments. The specific problem we are facing with regard to foreign public law is that public law is about the organization of a state’s relations with the people in its territory.

Does public international law, therefore, oblige states to protect tax dodgers and other individuals and corporations, that try to escape the enforcement of public law judgments, under the threat that a state would lose its sovereignty and its status as a legal person in international law if it enforced foreign public laws? Would Canada or Switzerland really jeopardize their independence and sovereignty if they enforced tax judgments?

III. Critique

The most profound critique of a rule in public international law rule, which prohibits the enforcement of foreign public law, has been formulated by Frank. He holds 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

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the event of it being rejected, the realm of domestic sovereignty likewise remains intact. 353

Frank argues that the decisive issue is under what circumstances and conditions a jurisdiction is ready to put its courts at the disposition of a foreign claimant state. 354 Frank concludes that if a state refuses to enforce foreign public law, the reasons for this refusal must be found within the refusing state’s domestic law and not because there is a public international law rule actually prohibiting the enforcement. 355

I am of the opinion that those statements are convincing. 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. Against F.A. Mann’s opinion, 356 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 give judgment for the foreign state, or to grant enforcement of a foreign judgment, 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 to its own

353 Ibid. at 64 (translation by F.A. Mann, “Public Law”, supra note 238 at 169).

354 Ibid.


356 Supra note 346.
It is a matter of the internal law of each state whether, and to what extent, the courts have the power to enforce foreign public law judgments.

IV. Conclusion

In the absence of treaty obligations, there is no duty to enforce foreign judgments of any kind. On the other hand, there is no rule of public international law which actually prohibits enforcement of public law judgments rendered in a foreign country. It is entirely up to each state as to what extent it wants its courts to enforce foreign public law judgments.

As Castel points out with respect to foreign tax laws, the non-enforcement rule was simply repeated by the courts and given a scope which greatly exceeds the anticipation of Lord Mansfield's statement, when, in a case involving a contractual claim, he uttered that "no country ever takes notice of the revenue laws of another".

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357 Bessenich, supra note 219 at 63.

358 See D., below.

359 However, I am of the opinion that the direct application of foreign public law in domestic courts poses indeed that many additional problems which renders the direct application of foreign law impracticable.

360 Holman v. Johnson, supra note 119. Castel, "Tax Claims", supra note 34 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." (ibid.)
Despite the fact that there is no intrinsic justification for the *a priori* exclusion of foreign public law judgments from enforcement in a domestic court, it must be noted that there seems to be an international consensus of the notion that legal assistance in criminal and tax matters can only be performed based on treaties and/or legislation.\(^{361}\) Without such a basis courts feel that they have no power to enforce such judgments.\(^ {362}\)

What I am therefore advocating is that, due to the lack of a convincing explanation of the public law rule, this dogma should be restricted to criminal and revenue matters. And even 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. Articulating what exactly causes the distinct discomfort, which renders a foreign judgment unenforceable under the public policy doctrine, may sometimes embarrass another state. However, it certainly opens the door towards a justice-oriented case law instead of a mechanical application of a exclusionary rule, for which no adequate justification has been found.

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\(^{361}\) See, for instance, F.A. Mann, *supra* note 17 at 361ff.

\(^{362}\) However, see D., I., below.
D. Outlook

Public international law does not prohibit the enforcement of foreign public law judgments. The whole matter of the “exclusionary rule” falls in the competence of domestic law. This means that further developments must consider the peculiarities of Canadian and Swiss law with regard to the division of powers between legislature and courts. Therefore, there will be different solutions to be sought in either jurisdiction for a further development in this area.

I. Canadian Law

Having pointed out that there is no 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.

It seems that the principle of comity may present a adequate basis for a more favourable attitude towards judgment enforcement. In *Morguard Investments Ltd. v. De Savoye*, La Forest J. 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:

“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 ... 363

Cases such as Re Sefel Geophysics Ltd. and United States of America v. Ivey expressly relied on comity principles in order to accept foreign tax claims in domestic liquidation proceedings364 and in order to enforce foreign judgments awarded to a foreign state agency which serves foreign public interests.365

I therefore conclude that under Canadian law, the principle of comity provides for a practicable foundation to cope with the enforcement of foreign public law judgments on a case to case basis. In this sense, the rather elusive shape of comity366 reveals itself as an

363 Morguard Investments Ltd. v. De Savoye, supra note 24 at 1096. With respect to the principle of comity, see M.W. Janis, An Introduction to International Law, 2nd ed. (Boston etc.: Little, Brown, 1993) at 331ff. For a more thorough but rather critical investigation regarding comity, see J.R. Paul, “Comity in International Law” (1991) 32 Harv. Int’l L. J. 1, holding: “My 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.” (ibid at 5)

364 Re Sefel Geophysics Ltd., supra note 121 at 55ff.

365 United States of America v. Ivey, supra note 7 at 549-550.

366 Paul, supra note 363 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.”
advantage, because it allows the necessary flexibility needed in the context of enforcing judgments where governmental or sovereignty issues are involved.\textsuperscript{367}

II. Swiss Law

Although the word “comity” (or any translation thereof) does not appear once in the over 1,170 pages of the IPRG \textit{Kommentar},\textsuperscript{368} it could not be said that the principle of comity is unknown to Switzerland. However, it is understood as a guideline for policy makers and the legislature rather than a discretionary rule directly applicable by courts. Therefore courts feel that a statutory basis, including treaties and conventions,\textsuperscript{369} is a mandatory prerequisite for expanding the scope of enforceable judgments.

Assuming that the public law rule would be abandoned it is submitted herein that this would not lead to a fundamental change with respect to the enforcement of foreign criminal and tax judgments. Foreign criminal and tax matters are exclusively to be dealt with based by domestic legislation and international treaties respectively, which pre-empt the use of the \textit{PIL Statute} as \textit{leges speciales}. These laws designate the competent

\textsuperscript{367} \textit{Contra}: Paul, \textit{ibid.} 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.”

\textsuperscript{368} \textit{Supra} note 2.

\textsuperscript{369} According to Swiss constitutional law treaties and conventions are applicable immediately upon ratification; there is no further implementation by way of legislation needed. See also s. 1(2) of the \textit{PIL Statute}. 
authorities, provide for specific proceedings and determine to what extent foreign proceedings may be assisted or foreign judgments may be enforced.

With regard to the enforcement of foreign criminal judgments, the *Federal Statute on International Legal Assistance in Criminal Matters*\(^{370}\) is of crucial importance since it allows the enforcement of foreign criminal judgments under the conditions set forth in this Statute.\(^{371}\) In the field of tax law, it can be noted that Switzerland has concluded a large amount of tax treaties with other countries, mainly aiming to prevent double taxation. All of these international agreements, however, fail to provide for the enforcement of tax claims and tax judgments.\(^{372}\) 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 have assets managed by Swiss banks.\(^{373}\)

\(^{370}\) *Supra* note 249.

\(^{371}\) See Chapter 3, D., I., above.

\(^{372}\) Lack of actual enforcement mechanisms, however, seems to be the rule in modern double taxation treaties, see Baade, supra note 28 at 41. J.M. Mössner, Taxation, *International: Encyclopedia of Public International Law*, vol. 8 (Amsterdam: Elsevier, 1985) at 502 points 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.

\(^{373}\) However, note the treatment of foreign tax claims in international bankruptcy proceedings, Chapter 3, D., IV., above.
Based on a broad interpretation of s. 13 of the PIL Statute, courts could develop a more favourable enforcement practice in fields other than criminal and tax law. Judgments that are restitutionary or compensatory in nature could be held enforceable, irrespective of whether they are founded on foreign public law or not, by referring to the “general principle of private law”, that says that whoever causes damage to another person is obliged to restore the status ante or to compensate the aggrieved party.

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

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374 See Chapter 3, C., II., above.

375 See BGE 75 II 125 (1949), supra note 239 and accompanying text.
Chapter 5: Conclusion

Canadian and Swiss law developed independently an advanced regime of rules in the field of judgment enforcement. Indeed, the different requirements stipulated in Canadian and in Swiss law are congruent to a considerable extent. In both legal systems a certain reserve arises if the foreign judgment is founded on foreign public law (mostly penal and tax matters). “Punitive civil sanctions” awarded by foreign courts pose new questions with respect to the scope of the rule that foreign penal judgments may not be enforced in Canada and in Switzerland. In this thesis, it is argued 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. An extension of this rule to other foreign public laws has so far not been adopted by Canadian courts and indeed, it seems superfluous to do so. Swiss law on the other hand started with the dogma that no foreign public law (including criminal and tax laws) may be enforced within Switzerland. Therefrom, the Federal Supreme Court of Switzerland has begun to introduce exceptions to this dogma, because it was realized that the broad application of this dogma would create injustice in some cases. Despite these different starting points, a comparative analysis between Canadian and Swiss law with respect to the enforcement of foreign public law shows, surprisingly, a great deal of
conformity with respect to the results of cases tried before Canadian and Swiss courts dealing with comparable issues.

There is no rule in public international law actually prohibiting the enforcement of foreign penal, tax and other public law judgments. However, courts feel that they have no power to enforce such judgments, if there is no international agreement and/or domestic legislation to this effect. Courts feel bound by an old rule, the justification of which has hardly been questioned. Indeed, there seems to be no adequate justification to flatly exclude foreign judgments from enforcement solely on the ground that they deal with tax or other public law.

Given this weaknesses and lack of an adequate justification of the "public law rule", this rule must be re-considered. I am of the opinion that its scope should be limited to foreign criminal judgments, where international agreements and/or domestic legislation seem to be the only foundation on which criminal judgments may be enforced internationally. With respect to foreign tax claims, both legal systems show a certain obliging attitude, limited so far to liquidation proceedings. Being aware of the weak justification of the "tax rule", Canadian courts should enforce foreign tax judgments where appropriate, i.e., where comity principles require it. 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. Furthermore, comity would favour enforcing foreign

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376 See Re Sefel Geophysics Ltd., supra note 121.
tax judgments when the connections between a case and the court asked to enforce a judgment are only minimal. 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 far-reaching basis as comity grants to Canadian courts for a more generous attitude with respect to tax judgments. Swiss courts have to consider treaties, conventions, and internal legislation as leges speciales and there is no way to enforce tax laws under the PIL Statute. If there is no specific legislation or treaty applicable, courts have no power to enforce foreign tax laws or judgments. However, I am of the opinion that in other than criminal and law, Swiss courts should abandon the general rule of non-enforceability of foreign public law judgments.

The public policy exception (ordre public) as elaborated by the courts provides a sufficient basis to refuse to enforce foreign judgments which actually violate conceptions of essential justice and morality, a state's sovereignty, and even 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 which benefits both citizens and states.

See supra note 70 with regard to the doctrine of “Binnenbeziehung” and public policy.
Bibliography

Books and Articles

**ABA Antitrust Section**, Monograph No. 20, *Special Defences in International Antitrust Litigation* (1995)


**Bessenich, A.D.**, *Der ausländische Staat als Kläger* (Basel and Frankfurt, 1993)


**Castel, J.-G.**, *Extraterritoriality in International Trade* (Toronto and Vancouver: Butterworth, 1988)


**Collins, L.**, “Provisional and Protective Measures in International Litigation”, *Recueil des cours* 1992-III 1

Dictionary of Canadian Law, 2nd ed. by D.A. Dukelow & B. Nuse (Toronto: Carswell, 1995)


Fleiner, R., Grundzüge des allgemeinen und schweizerischen Verwaltungsrechts (Zürich, 1977)


Guhl, Th., Merz, H., & Kummer, M., Das Schweizerische Obligationenrecht, 7th ed. (Zürich, 1980)

Guldener, M., Das internationale und interkantonale Zivilprozessrecht der Schweiz (Zürich, 1951)

Gygi, F., Verwaltungsrecht (Bern, 1986)

Hartley, T.C., Civil Jurisdiction and Judgments (London: Sweet & Maxwell, 1984)

Hochstrasser, D., & Vogt, N.P., Commercial Litigation and Enforcement of Foreign Judgments in Switzerland (Basel, 1995)

Honegger, P.C., Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten (Zürich, 1986)

International Law Chiefly as Interpreted and Applied in Canada, 5th ed. by H.M. Kindred et al. (Edmond Montgomery, 1993)

IPRG Kommentar, ed. A. Heini et al. (Zürich, 1993)

Janis, M.W., An Introduction to International Law, 2nd ed. (Boston: Little, Brown, 1993)


Karrer, P.A., Arnold, K.W., & Patocchi, P.M., Switzerland's Private International Law, 2nd ed. (Boston and Zürich, 1994)


Kaye, P., Civil Jurisdiction and Enforcement of Foreign Judgments (Abingdon: Professional Books, 1987)

Keller, M., & Siehr, K., Allgemeine Lehren des IPR (Zürich, 1986)


Lenz, Ch., Amerikanische Punitive Damages vor dem Schweizer Richter (Zürich, 1992)

Lowenfeld, A.F., “Public Law in the International Arena: Conflict of Laws, International Law, and some Suggestions for their Interaction", Recueil des cours 1979-II 311


Nadelmann, K.H., “Non-Recognition of American Money Judgments” (1957) 42 Iowa L. Rev. 236


Owens, R.J., (ed. in chief), *Corpus Juris Secundum* (St. Paul, Minnesotta), vol. 79A, Title “Securities Regulation and Commodity Futures Trading Regulation”


Stojan, T.S., *Die Anerkennung ausländischer Zivilurteile in Handelssachen* (Zürich, 1986)


Cases

*Ammon v. Royal Dutch*, BGE 80 II 53 (1954)


BGE 42 II 179 (1916)

BGE 50 II 58 (1924)

BGE 57 I 204 (1931)

BGE 60 II 294 (1934)

BGE 64 II 88 (1938)

BGE 64 II 98 (1938)

BGE 74 II 279 (1948)

BGE 75 II 125 (1949)
BGE 79 II 87 (1953)
BGE 80 II 53 (1954)
BGE 81 I 196 (1955)
BGE 88 I 48 (1962)
BGE 95 II 209 (1969)
BGE 103 Ia 204 (1977)
BGE 103 Ia 531 (1977)
BGE 107 II 489 (1981)
BGE 116 II 376 (1990)
BGE 116 II 625 (1990)
BGE 118 II 353 (1992)


Folliot v. Ogyden (1789), 126 E.R. 75

Forbes v. Simmons (1914), 8 Alta. L.R. 87 (Alta. S.C.)


Holman v. Johnson (1775), 98 E.R. 1120 (K.B.)


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

In re State of Norways Application, [1987] Q.B. 433

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


Morguard Investments Ltd v. De Savoye, [1990] 3 S.C.R 1077

Mc Intyre Porcupine Mines Ltd. v. Hammond (1975), 31 O.R. (2d) 452 (H.C.)
National Surety Co. v. Larsen (1929), 4 D.L.R. 918
Nouvion v. Freeman (1889), 15 App. Cas. 1 (H.L.)
Peter Buchanan Ltd. v. McVey (1950), [1955] A.C. 516 (H.L.)
Raulin v. Fischer, [1911] 2 K.B. 93
Re Reid (1970), 17 D.L.R. (3d) 199 (B.C.C.A)
R. v. Gilbertson, 597 F.2d 1161 (9th Cir. 1983)
Schemmer v. Property Resources Ltd., [1975] Ch. 273
SEC v. Commonwealth Chemical Securities Inc., 574 F.2d 90 (2d Cir. N.Y. 1978)
SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (U.S. 2d Cir. C.A.)
SEC v. Unifund SAL, 910 F.2d 1028 (U.S. 2d Cir. C.A. 1990)
S.F. Inc. v. T.C.S. AG (1989), BJM 1991 31 (Civil Court of Town-Canton of Basle)
Stoddard v. Accurpress Manufacturing Ltd. (1993), 84 B.C.L.R. (2d) 194 (S.C.)
The Steamship Lotus (France v. Turkey, 1927), P.C.I.J. Ser. A., No. 10


Van deMark v. Toronto-Dominion Bank (1989), 68 O.R. 379 (H.C.)


Weir v. Lohr (1967), 65 D.L.R. (2d) 717 (Man.Q.B.)


Wisconsin v. the Pelican Company, 127 U.S. 265 (1888)
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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 authorities;
   
   (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.

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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.

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 depends 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 judgement.

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.