QUIZ ON CROSS-BORDER LITIGATION ISSUES

Quiz on cross -border litigation issues provided by WeirFoulds LLP partner, Greg Richards.

1 You have recently been hired as in-house counsel for a Canadian corporation. Soon after arriving, you are advised of a judgment awarded against the company in the state of Texas where it does a modest amount of sales. The company did not appear in the case or mount a defence. The case was tried by a jury that awarded compensatory damages of $410,000 and punitive damages of $1 million. The Texas plaintiff is now seeking to enforce the judgment in Canada. Your mind races through the possibilities. Which outcome is most likely?

A) Canadian courts will not recognize the excessive judgment of a Texas jury and you are entitled to require the plaintiff to prove its case in Canada.

B) An action of this sort, involving a complex commercial dispute, would not be heard by a jury in Canadian courts and, therefore, Canadian courts will not recognize this particular Texas judgment.

C) Punitive damages were clearly not warranted, it being a standard commercial case, and punitive damages of this size would not be awarded in Canada – therefore, at least the company will not have to pay the punitive damages.

D) Canadian courts are likely to give effect to the Texas judgment.

2 You are in-house counsel to a company in Canada that has a long-standing dispute with a competitor that also operates in Canada. As well, both companies conduct business in the U.S. To date, you have enjoyed some success in litigation against your competitor in one of the Canadian provinces, but your competitor then commences litigation on the same or similar issues in the state of Delaware where both companies do business. To avoid fighting similar lawsuits in two jurisdictions, you seek a stay in the Delaware court but lose the motion. A colleague tells you that you're out of luck and now have to fight both actions.

TRUE or FALSE?

3 You are general counsel for an importer of goods from Europe. One of your suppliers is based in Portugal. A dispute arises with respect to the most recent shipment of goods. The Portuguese company's bill of lading stipulates that all disputes arising under or in connection with the goods sold under it would be submitted to the courts of Portugal. Your company sues the supplier in the courts of a Canadian province and, when the supplier brings a motion to stay the proceedings, you are planning to argue that the supplier has fundamentally breached the agreement by delivering goods that are effectively worthless. Your CEO is confident that a Canadian court will review and confirm that the contract has been fundamentally breached and refuse to enforce the forum selection clause in the bill of lading.

TRUE or FALSE?

4 You are general counsel to a subsidiary of a U.S. corporation. The general counsel of the parent company asks whether a class action brought in the U.S. has the potential to bind potential class members in Ontario. You tell her off the top of your head that, even though the class actions legislation in Ontario differs from that south of the border, a class action probably does not have to be commenced in the province in order to bind Ontario residents who are potential class plaintiffs.

RIGHT or WRONG?

WeirFoulds LLP

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ANSWERS

1 (D). Get the chequebook ready. In the seminal case of *Beals v. Saldanha,* [2003] 3 S.C.R. 416, the Supreme Court of Canada held that, absent fraud going to jurisdiction or the applicability of a public policy defence showing the foreign judgment is contrary to the Canadian concept of justice, a foreign money judgment will be enforced if there was a "real and substantial connection" between the cause of action and the foreign court. If the company was doing business in Texas, or otherwise had a sufficient connection to that jurisdiction, the courts of our Canadian provinces will give effect to the judgment. In *Beals v. Saldanha*, what began as the purchase of a lot in Florida for US$4,000, went to a jury trial in that state, then ended up costing the Canadian defendants (who did not defend the case in Florida) US$210,000 in compensatory damages and US$50,000 in punitive damages. By the time of the first Canadian hearing in 1998, the judgment, with interest, had grown to approximately C$800,000. Ouch! For the principles that are applicable to the enforcement of foreign non-money judgments, see *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612.

2 False. Another option is to bring an anti-suit injunction in the Canadian jurisdiction in which you are already proceeding. On the authority of the Supreme Court of Canada's decision in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, you would seek an *in personam* remedy against your competitor to restrain it from resorting to the judicial system of another jurisdiction (in this case, Delaware) to prosecute litigation that you will argue is nothing more than an attempt to relitigate decisions made in the proceedings in Canada, where the dispute has the greatest connection. To succeed, you must demonstrate that the court of the Canadian province is the more appropriate forum for the airing of the dispute and that the Delaware court failed to properly decline jurisdiction applying the *forum non conveniens* test.

3 False. The Supreme Court of Canada's decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 establishes that where the "strong cause" test is met, and there is a validly concluded bill of lading, a forum selection clause will generally be enforced. The court will not delve into whether one party has deviated from, or fundamentally breached, an otherwise validly-formed contract because this type of inquiry would render forum selection clauses illusory. Issues respecting an alleged fundamental breach of contract or deviation from the contract terms will, generally speaking, be determined under the law and by the court chosen by the parties in the contract document.

4 Right. Although the Ontario Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.) declined to order that the settlement in that particular case bound unreceptive Canadian class members, the court held that, in appropriate circumstances, there could be such binding effect. The court held that, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of the non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, Canadian class members who do not opt out may be bound by a foreign judgment or settlement. For a recent application of *Currie*, see *Wong v. TJX Companies Inc.*, [2008] CanLII 3421 (Ont. Sup. Ct.).

YOUR RANKING?

1 or fewer correct: Might be time to brush up.

2-3 correct: Not bad, but could do better.

4 correct: Impressive.