

COURT OF APPEAL FOR ONTARIO

CITATION: Hilmer Motorsport GmbH v. Mason, 2025 ONCA 875

DATE: 20251217

DOCKET: COA-24-CV-1329

Pepall, Lauwers and Dawe JJ.A.

BETWEEN

Hilmer Motorsport GmbH

Plaintiff (Respondent)

and

Jay Mason and Nelson Mason

Defendants (Appellants)

Arian Monadjem, for the appellants

Nedko Petkov, for the respondent

Heard: September 12, 2025

On appeal from the judgment of Justice R. Lee Akazaki of the Superior Court of Justice, dated October 23, 2024.

Pepall J.A.:

Introduction

[1] This appeal addresses the enforcement and recognition of a foreign default judgment. The respondent obtained a judgment against the appellants in the Federal Republic of Germany for breach of an agreement. The respondent then brought an action in Ontario for recognition and enforcement of the German

judgment and subsequently moved for summary judgment against the appellants.

The motion judge granted summary judgment in the respondent's favour.

[2] The agreement provided that any dispute between the parties was to be resolved by arbitration. The appellants' principal submission on appeal is that public policy prohibits the enforcement and recognition of a foreign judgment that is based on an agreement that contains such an arbitral provision.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

[4] The appellant, Nelson Mason ("Nelson"), is a professional racing car driver. The respondent, Hilmer Motorsport GmbH, is incorporated pursuant to the laws of Germany and operated a car racing team competing in the GP3 Series car racing series.

[5] In April 2014, the respondent and Nelson entered into a Driver Agreement (the "Agreement") in which Nelson was to represent the respondent's car racing team for the 2014 season in consideration of payment by Nelson of €460,000. The Agreement provided that (i) it was to be governed by and construed in all respects in accordance with German law, (ii) the place of jurisdiction was Munich, and (iii) "[a]ny dispute, controversy or claim arising out of or in relation to [the] Agreement, including the validity, invalidity, breach or termination thereof, [was to be] settled

by arbitration on law settled under the Rules of Arbitration of the International Chamber of Commerce.”

[6] The appellant, Jay Mason, is Nelson Mason’s father and manager. He provided a guarantee of Nelson’s debt to the extent of €409,512.13. The guarantee provided that (i) it was subject to German law and (ii) the jurisdictional venue was Munich. It did not contain an arbitration provision.

[7] Both appellants reside in Ontario. The nine car race events that were the subject matter of the Agreement were largely to take place in Europe including in Germany. None were in Ontario or North America.

[8] In October 2015, the respondent commenced proceedings in the Regional Court Munich I, Munich, Germany. It asserted a claim against the appellants for breach of contract and for payment of the amount due under the Agreement and the guarantee.

[9] The appellants were served but did not defend. The appellants state that they failed to defend the action due to their understanding that arbitration was the agreed upon method of resolving disputes. On February 25, 2016, the respondent obtained default judgment in the amount of €409,512.13 plus interest and costs. The respondent states that a copy of the judgment was served on the appellants on March 21, 2017. The appellants did not move to set aside or appeal the judgment in Germany.

[10] The respondent then brought an action in Ontario for recognition and enforcement of the German judgment and subsequently moved for summary judgment against the appellants.

Motion Judge's Reasons on Issues Relevant to this Appeal

[11] The motion judge granted summary judgment in favour of the respondent. He noted that the appellants argued that there was no real and substantial connection between the German court and the subject matter of the German proceeding or the appellants. The appellants also opposed the recognition and enforcement of the judgment on the ground that the Agreement contained an enforceable arbitration provision and therefore the granting of judgment was contrary to public policy. They submitted that judicial proceedings should be stayed in the face of such a provision.

[12] The motion judge found that the German proceeding was instituted and served on the appellants in a faultless manner. He rejected the appellants' argument on the absence of any real and substantial connection. The Agreement and the guarantee expressed the parties' intention to address issues in Munich and to be governed by German law. The parties bargained on Germany as the venue, even for interpretation of the arbitration provision. Furthermore, the funds were to be paid to a German entity and, according to the motion judge, the races were to take place in Germany.

[13] As for the argument that the German judgment offended public policy in light of the arbitration provision in the Agreement, the motion judge agreed with the appellants that the trend of Canadian case law has been to stay court proceedings in the face of an arbitration provision. However, it was for the German court to address that issue. He stated that the appropriate response to being sued in the Munich court would have been to object to the proceeding on the basis of the arbitration provision. The parties had agreed to the German court as their venue, and he concluded that they should be held to their bargain.

Position of the Appellants

[14] In brief, the appellants submit that the motion judge erred in recognizing and enforcing the German judgment because the Agreement with Nelson contained a provision that any dispute between the parties was to be resolved by arbitration. They state that the guarantee cannot be read as a separate document from the Agreement and submit that it is subject to arbitration as well.

[15] They argue that no court had jurisdiction to decide a dispute that was subject to an arbitration provision, and accordingly, the judgment of the Munich court was invalid. The appellants' failure to defend the German proceedings did not create jurisdiction where it did not previously exist. Among other things, the appellants rely on the United Nations ("UN") *Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, June 10, 1958, 330 U.N.T.S. 3, Can. T.S. 1986 No. 43 (the "Convention"), and on the *International Commercial Arbitrations Act, 2017*,

S.O. 2017, c. 2, Sched. 5. They advance arguments based on the defences of natural justice and public policy.

Analysis

[16] Although I have provided a brief outline of the appellants' submissions, at their core, they raise two related issues. First, did the German court lack jurisdiction over the parties' dispute, and second, were the defences of natural justice and public policy available to the appellants?

(a) Jurisdiction of German Court

[17] In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 34, Gascon J. explained that a court asked to enforce a foreign judgment must determine whether the foreign court properly assumed jurisdiction over the dispute. The foreign court must have had a real and substantial connection to the parties or the subject matter of the dispute, or the traditional bases of jurisdiction must have been satisfied: *Chevron*, at para. 27. Once the real and substantial connection test is found to apply to a foreign judgment, the defendant must then prove that one of the defences to a claim for recognition and enforcement applies: *Chevron*, at para. 34. These are breach of natural justice, public policy and fraud: *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 35. As Gascon J. described in *Chevron*, at para. 42, the crucial difference between an action at first

instance and an action for recognition and enforcement is that, with the latter, the only purpose of the action is to allow a pre-existing obligation to be fulfilled.

[18] Traditionally, to be recognized and enforced, a foreign judgment had to be for a debt or definite sum of money and final and conclusive. In *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, the Supreme Court of Canada extended these parameters to include non-monetary foreign judgments. Although it has no bearing on this appeal, the motion judge's reasons should not be interpreted as limiting enforcement of foreign judgments to a debt or definite sum of money.

[19] Underpinning the law on recognition and enforcement of foreign judgments is the principle of comity. As Gascon J. explained in *Chevron*, "the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity": at para. 52, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 74.

[20] Applying these principles to this appeal, the motion judge properly concluded that the German court had jurisdiction. There was no issue about the judgment being final and for a definite sum of money and there clearly was a real and substantial connection between the German court, the parties and the subject

matter of the proceeding. The Agreement and the guarantee both provided that the place of jurisdiction was Munich and were subject to German law, and the money was to be paid to a German entity. While I acknowledge that the motion judge erred in stating that the races took place in Germany when not all of them did, I am not persuaded that this detracts from his findings. There is no basis to the appellants' claim that the German court lacked jurisdiction.

[21] Furthermore, the arbitration provision in the Agreement did not operate to automatically negate the German court's jurisdiction as the appellants assert. As German law was neither pleaded nor proved by the appellants, the only law available to be applied was Ontario law: Janet Walker, *Canadian Conflict of Laws*, 7th ed. (Toronto: LexisNexis Canada, 2005) (loose-leaf updated 2025, release 111), vol. 2 at p. 16-11. In Ontario, an arbitration agreement is not self-enforcing. Rather, in the face of an agreement to arbitrate, a party may seek a stay of court proceedings. See for example r. 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7. If neither party seeks a stay in favour of arbitration, there is no barrier to a court hearing the dispute. As I will discuss in further detail, assuming that a stay might have been available from the German court, the appellants took no steps to seek such relief. In these circumstances, the presence of the arbitration provision in the Agreement did not dictate a lack of jurisdiction in the German court.

(b) Defences

[22] First, natural justice is not a bar to recognition and enforcement of the judgment in this case. The appellants were properly served with the German proceedings but opted not to participate. They also were properly served with the German judgment and the motion for recognition and enforcement of that judgment. The motion judge was obliged to ensure that the appellants were granted a fair process: *Beals*, at para. 62. There is nothing in the submissions of the appellants that would suggest any violation of natural justice.

[23] Second, the defence of public policy prevents Canadian courts from enforcing “a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality”: *Beals*, at para. 71 (emphasis omitted). In this appeal, the appellants rely on various arguments. They start by turning to the UN *Convention on the Recognition and Enforcement of Foreign Arbitration Awards*. This Convention principally addresses recognition and enforcement of foreign arbitral awards. Even if the Convention is applicable, art. II, s. 3, states:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [Emphasis added].

[24] The appellants also rely on the *International Commercial Arbitrations Act, 2017*, which requires referral to arbitration by a court when presented with an agreement to arbitrate. Their argument in this regard also fails as, subject to the law of the forum, a party must request a referral to arbitration. See the *UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006*, UNGA, 40th Sess., UN Doc. A/40/17 (1985), Annex I, 61st Sess., UN Doc. A/61/17 (2006), Annex I, which has the force of law in Ontario: s. 5 of the *International Commercial Arbitrations Act, 2017*.

[25] On being served with the German proceeding, the appellants did not act or make any request of the German court. There was no reasonable basis for the appellants not to respond to the German proceeding. Consistent with the terms of the Agreement and the guarantee that provided that the place of jurisdiction was Munich and that German law applied, it was open to them to appear before the Munich court and advance the argument that the proceeding should be stayed and the dispute referred to arbitration. As the motion judge noted, this was a matter to be addressed by the Munich court, not the Superior Court of Justice in Ontario. It is not for the Ontario Superior Court to assume that the German court did not properly take jurisdiction when faced with the Agreement and the guarantee, the latter of which did not even contain an arbitration provision. In these circumstances, it cannot be said that recognition and enforcement of the German judgment is contrary to public policy.

Disposition

[26] For these reasons, I would dismiss the appeal. The appellants are to pay the respondent the agreed upon sum of \$13,000 inclusive of applicable disbursements and tax.

Released: December 17, 2025 "S.E.P."

"S.E. Pepall J.A."
"I agree. P. Lauwers J.A."
"I agree. J. Dawe J.A."