



Who Are Those Guys?





ENNIO MORRICONE



**THE GOOD,
THE BAD &
THE UGLY**

DIGITALLY REMASTERED

You can run, but you can't hide!

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Fact Pattern

Butch and Sarah Cassidy have been married for 25 years with adult children who are all working and living around the world. Butch has enjoyed enormous success, in particular he sold his business in online bank security for close to a billion dollars. They have homes, business interests and assets all over the world, but Butch has kept tight control of the finances insisting on all properties and investments being held in his name. They have managed to assert tax residency in Switzerland, but they continually travel, and do not spend an appreciable amount of time in any particular country. Through one of their corporations they purchased a yacht, “Sundance”, which they have used regularly for both business and personal purposes. Butch has always had the role of directing where the yacht would go.

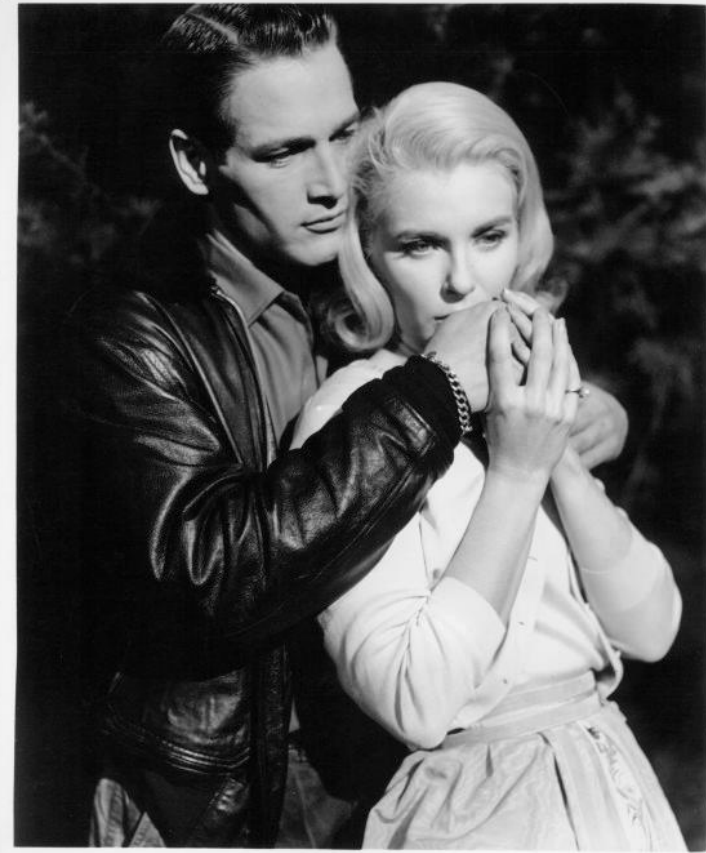
Unfortunately, Butch failed to pay the same level of attention to the security of his mobile phone to that of the banking software system he masterminded, as a result of which Sarah has discovered a string of illicit extra marital affairs. She is poised to issue a divorce petition.

Sarah now feels vindicated in never having mentioned to Butch that she is a beneficiary of multi-generational, discretionary family trust governed by Guernsey law through which she receives periodic distributions of income and capital, which is administered and tax resident in Guernsey.

Butch believes he is one step ahead having squirrelled off substantial business profits into a number of bank accounts around the world that are in his name only. Butch and Sarah do not however have a pre or post-nuptial agreement or marriage agreement.

Butch, sensing trouble is coming, immediately orders the yacht to embark from Bolivia, where it was last in port. He continues a pattern of directing it to various jurisdictions around the world where he hopes it will not be seized.





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Question #1

What are the advantages / inconveniences of your jurisdiction should Sarah present her divorce petition, presuming she has a choice of all those represented by the panelists?

Conversely what are the advantages / inconveniences of your jurisdiction for Butch - where should he present a petition, if he wants to steal a march?

Canada



Divorce Act – federal legislation – Canada has no fault divorce

Grounds: separation for one year, adultery, physical or mental cruelty

Jurisdiction of Court to grant Canadian divorce – must meet *all* of the following:

- legally married under the laws of Canada or the laws of another country and the marriage is recognized in Canada;
- marriage has broken down;
- you and/or spouse lived in the province or territory where apply for divorce for at least one full year prior to making application

Jurisdiction of Nova Scotia court – 1+ year residency for either/both spouse(s) in Nova Scotia



Canada



Matrimonial Assets = all property of either spouse *acquired before or after their marriage**
**Province/territory-specific*

Formula = equal division of matrimonial assets

Exceptions:

- gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children (advantage Sarah/ inconvenience Butch)

- business assets (advantage Butch/ inconvenience Sarah)
 - o Exceptions where:
 - Spouse made contribution
 - Asset is passive as opposed to active business asset (potential inconvenience Butch)

- Note that “intermingling” may be an issue for both



England and Wales



- Jurisdictional requirements for divorce relatively complex BUT NOW NO FAULT = NO DEFENCE
- One or both parties need UK domicile or habitual residence at time of filing
- Jurisdiction for divorce determines jurisdiction for finances – no divorce settlement under English law if no divorce under English law

ADVANTAGES

- Extensive financial disclosure requirements and powers re worldwide assets
- English court can make orders against trustees and vary trusts



England and Wales



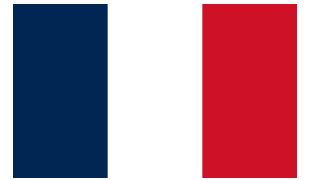
- Contempt of court and ultimately committal (prison) for breaches of disclosure / failure to pay
- Usually most generous jurisdiction in the world for weaker financial party
- Court has very wide discretion on how it achieves fairness
- No statutory limit on how long maintenance / alimony can be paid

DISADVANTAGES

- An unfavourable jurisdiction for the wealthier party
- Post-Brexit difficulties on enforcement / recognition in Europe
- Post-Brexit arguments about jurisdiction – *forum conveniens* replaces “first past the post”
- Lack of certainty – no formula or property regime



France



JURISDICTION IN FRANCE FOR DIVORCE AND ITS FINANCIAL CONSEQUENCES

- (1) Habitual residence in France (**!! important !! If only the petitioner to the divorce is habitually resident in France, there will be no jurisdiction in France for the division of assets, unless the defendant to the divorce agrees**)
- (2) Joint French nationality

LEGAL PARAMETERS TO TAKE INTO CONSIDERATION

-FINANCIAL CONSEQUENCES OF THE DIVORCE

FRANCE HAS COMPLEX INTERNATIONAL PRIVATE LAW RULES – **!! FRENCH JURISDICTION ≠ DOES NOT MEAN FRENCH LAW !!**

- (1) Law applicable to the spouses' matrimonial regime (division of assets) in the absence of pre-/post-nuptial agreement
- (2) Validity of all provisions of a pre-/post nuptial agreement if there is one (for instance, validity of a waiver to spousal support)
- (3) Law applicable to the issue of spousal support/alimony/ maintenance obligations

- COMPULSORY POWER OF THE COURTS FOR THE FINANCIAL DISCLOSURE

Obligation of financial disclosure in French divorce proceedings, but sanctions are unfortunately not very significant in France. No Contempt of Court. Main sanction is that the Court can accept as “true allegations” the allegations from the claiming spouse.

- SITUATION OF THE MAIN ASSETS – how to enforce a French judgment in the country where the assets are located?
- IMPACT OF GROUND OF THE DIVORCE – “fault v. no fault divorce” and the impact of the existence of a fault (adultery for instance) for the financial consequences of the divorce
- REQUIREMENT TO BE ABLE TO FILE FOR DIVORCE - Mandatory separation period ? Important factor when determining the jurisdiction where to file the case, since a more favorable jurisdiction is not always immediately available (for instance, in Switzerland, need to have a 2 years separation period to file for divorce)



Switzerland



JURISDICTION FOR DIVORCE AND ITS FINANCIAL CONSEQUENCES

- Residence in Switzerland: (i) of defendant in Switzerland or (ii) of claimant in Switzerland, if **1 year resident** (stay must not be uninterrupted!) or **Swiss** national.
 - No residence in Switzerland: (i) one spouse is Swiss citizen at the place or origin or (ii) if none is Swiss at the place of conclusion of marriage and it is impossible to file at the court of residence of spouses.
- Note: For maintenance obligations various treaties such as art. 5 para. 2 of Lugano Convention apply.

APPLICABLE LAW

On **divorce**: Swiss law (exceptionally set aside if case has much closer connection with another legal system, art. 15 PILA).

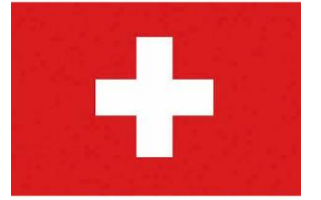
On **matrimonial property regime**:

- *choice of law*: (i) Residence of both spouses at the same time or (ii) nationality of one of the spouses.
- *Statutory rules*: (i) Law of state in which both spouses reside or resided at the same time, (ii) otherwise: common nationality of spouses or (iv) otherwise: **separation of goods**

On **spousal support**: Hague Convention of 2 October 1973 (erga-omnes effect)

On **pension fund**: Swiss law

Switzerland



REQUIREMENT TO BE ABLE TO FILE FOR DIVORCE

- **Joint request** for divorce (art. 111 et seq. CC): complete settlement.
- **Claim after 2 years separation period** to file for divorce (art. 114 CC).
 - After the required separation period has expired, the ***breakdown of the marriage is irrefutably presumed***. The burden of proof for living separately for at least two years lies with the plaintiff.
- Divorce claim on **divorce ground of "unreasonableness"** (art. 115 CC): Emergency valve for hardship cases.

BURDEN OF PROOF

- Strict evidence rules if it is disputed whether or not a particular asset was present at the time of divorce.
- Proof of ownership and proof of mass affiliation lies with the spouse claiming the asset (art. 200 (1) CC). If ownership cannot be proven, the **law assumes joint ownership** (art. 200 (2) CC). If separate property cannot be proven, **legal presumption in favor of the acquired property** applies (art. 200 (3) CC).

CHANGE OF RESIDENCE (ART. 55 PILA) "Convertibility of property status"

If spouses transfer residence, the law of the new state of residence shall apply retroactively to the date of the marriage.

→ The retroactive effect may be excluded by written agreement and convertibility does not occur if the parties have agreed in writing that the previous law shall continue to apply or if a marriage contract exists between them.



Guernsey



Requires at least one party to the marriage to be either:

- a) permanently resident in the Bailiwick of Guernsey; or
- b) to have lived in the Bailiwick of Guernsey for at least one year ending with the date the petition is filed with the Matrimonial Causes Court (referred to as habitually resident).

Whilst new legislation is due to come into force permitting “no fault” divorces, for the time being a marriage can only end in divorce if it is demonstrated that the marriage has irretrievably broken down due to: adultery (that is intolerable to the petitioner spouse), the spouse has behaved unreasonably (to the point where the petitioner spouse cannot live with them), desertion for at least 2 years, separation of two years and the spouse consents or separation for 5 years and the spouse does or does not consent.

Advantages:

- No minimum period during which parties have to have been married.
- Relatively quick process and access to Court.
- Based on Guernsey and English law and precedent and so generally relatively favourable to less wealthy party/wife.
- Court has discretion and flexibility in deciding financial provision based on principles of fairness, but generally takes into account similar factors to English law.

Disadvantages:

- No application for financial provision may be issued until divorce petition has been filed as the application is ancillary to the divorce proceedings.
- How the Court decides applications for financial provision is not set in stone.



Guernsey



In deciding financial provision, the Court will generally look at all of the couple's property. Property is interpreted widely, including personal property, real property, interests in property (including contingent interests), business interests, insurance policies, investments, pensions and other retirement benefits, the matrimonial home and its contents – even livestock! This includes assets owned in ones own name or jointly.

In terms of the wealth of the divorcing parties the Court will likely take into account, amongst other things:

- capital and income
 - future potential generation of wealth
 - bonuses or commissions
 - benefits
 - the provision of support by another party (e.g. new partner)
- but is unlikely to take into account future inheritances.

Legislation:

- Matrimonial Causes Law (Guernsey), 1939, as amended
- The Matrimonial Causes (Bailiwick of Guernsey) Law, 2022 (not yet in force)



Question #2

If Butch gets a whiff of Sarah's family trust interest, will he be able to get an order for disclosure from the Guernsey court?

Would the answer change if the trust had been resident in, say, a Caribbean jurisdiction?



Guernsey



Taking trusts into account in divorce proceedings:

1. Off-setting
2. Judicious encouragement
3. Variation of a nuptial settlement
4. Attack the trust

Sarah's relationship to Guernsey trust:

- discretionary beneficiary
- trust not created by Sarah
- assume she has not settled any assets into the trust
- assume she has not brought any of the distributions into the marital assets
- unlikely a nuptial settlement
- not capable of being varied by the foreign Court

Factors considered as to whether trust is a **resource**:

- what kind of interest Sarah has (discretionary)
- the history of distributions to her
- whether she has requested distributions in the past and they have been made and the likelihood of this in future (Charman factor)
- the class of beneficiaries and the multi-generational aspect of the trust
- does Sarah need distribution to live etc.



Guernsey



Considering request for disclosure:

1. Is beneficiary obligated to disclose?
2. If provided, could this breach trustee's duty of confidentiality?
3. If not provided, could the Court draw adverse inferences?
4. General disclosure provisions and rules: Schmidt v Rosewood
5. Sensitive classes of documents – e.g. letters of wishes
6. What is information being used for?
7. Use of a privacy order, redactions of documents, inspection only
8. Should the local Court's blessing be sought?

Generally, it can be advisable for trustees to aim to give the Court an accurate picture whilst maintaining confidentiality of the trust and related parties.

Guernsey



From Butch's perspective, he will want to know what he can do to oblige the trustees to **disclose**:

- Request
- Joinder
- Submission to the jurisdiction

Enforcement

- Foreign Court orders are not automatically enforceable against a Guernsey trust
- Firewall provisions – foreign Court orders made other than by applying Guernsey law are unenforceable
- Application to implement a foreign order can be made to the Royal Court of Guernsey
- A and C v PQ, RS and T Trustees Limited [2019] GRC013

Directions or blessing application

- Trustee can apply to Royal Court of Guernsey



England and Wales



- English court can and will make disclosure orders against off-shore trustees and join trustees to proceedings
- BUT trustees may choose not to submit to jurisdiction and if no assets in the jurisdiction, English court has limited recourse
- English court can make orders giving more or all of non-trust assets to the other party to balance out, or can make orders on the basis the trustees will step in to prevent a beneficiary becoming bankrupt or in contempt
- Disclosure rules require disclosure of trust interests (even if no funds ever received)
- *Sharland v Sharland* and *Gohil v Gohil* - failure to disclose accurately all financial assets can result in divorce order being set aside or settlement to be renegotiated



Guernsey, UK and other countries

APPLICATION BETWEEN GUERNSEY AND MANY COUNTRIES WORLDWIDE OF THE 18 MARCH 1970 INTERNATIONAL CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

66 COUNTRIES IN TOTAL WHICH ARE PARTIES TO THE CONVENTION

This Convention applies in Guernsey and all other 17 countries (including the UK, France and Switzerland) which have ratified the Convention. **Automatic application only between countries which have ratified the Convention.**

As regards the remaining countries which are parties to the Convention, **they have accessed but not ratified the Convention.** For each accessing country, it is necessary to check on a case-by-case basis whether the Convention applies.

-PRINCIPLE

A judicial authority of one Contracting Party may request another Contracting Party to obtain evidence, or perform some other judicial act, using a Letter of Request sent to the Central Authority of the other Contracting Party. The request must relate to evidence for use in judicial proceedings that are commenced or contemplated (Art. 1).

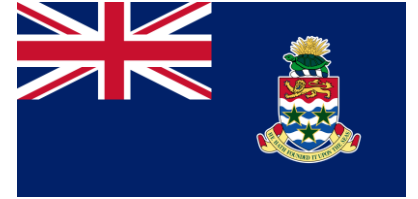
The judicial authority which executes a Letter of Request shall apply its own law to the methods and procedures to be followed (Art. 9), including in relation to the use of any appropriate measures of compulsion (Art. 10). However, the requesting authority may ask that a special method or procedure be followed (Art. 9).

- PRACTICAL USE OF THIS CONVENTION

Very rarely used so difficult to use and often difficult to convince judges to issue such request. Difficult also to obtain the implementation locally even if a Letter of Request is issued.



Cayman Islands



What if the trust were a Cayman law trust administered and tax resident in the Cayman Islands?

- Common law considerations
- Confidential Information Disclosure Law, 2016
- Firewall provisions



Question #3

If Sarah suspects that Butch has diverted assets to a bank account in your jurisdiction, will she be able to obtain an order for disclosure from the court in your jurisdiction?

How about an injunction to freeze the bank accounts?

Canada



Order for disclosure:

Assuming an order from a foreign court, as long as meets tests in Pro Swing Inc. v Elta Golf Inc., 2006 SCC 52, yes:

- ensure jurisdiction properly taken by the issuing court and there are no general fairness considerations that should require the court to hesitate before enforcing the foreign judgment;
- finality and clarity (*of the order*);
- is not an order with respect to a foreign penal law

Pro Swing a real development in Canadian reciprocity law – prior to *Pro Swing* courts would only reciprocally enforce monetary judgements – now both monetary and non-monetary.

Canada



Order for disclosure, con't:

Assuming litigation de novo:

Sarah would need to commence an action in Canadian court in order to get disclosure order

Can do so as long as meet tests in *Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2nd Sess.), c. 2, s. 6.)*

- real and substantial connection between the Province and the facts on which the proceeding ...is based
- bank account meets test for real and substantial connection

Canada



Injunction:

Reciprocal enforcement of judgement from foreign court:

Yes, as long as *Pro Swing* tests met

Injunction de novo:

Yes, Sarah could start an action in Canada to obtain a temporary and permanent injunction as long as the rules set out in the *Court Jurisdiction and Proceedings Transfer Act* are met (“real and substantial connection”)

Must meet test for injunctive relief:

- (1) The applicant must demonstrate a *strong prima facie case* that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that *irreparable harm* will result if the relief is not granted; and
- (3) The applicant must show that the *balance of convenience* favours granting the injunction.

England and Wales



- If Sarah has a judgment which Butch has not paid, and she suspects he has assets in England, she can get her foreign judgment recognised (the route depends on the originating country) and seek enforcement in England as if it were an English order. Butch will have to disclose all his resources.
- If proceedings are in progress in another country, at pre-judgment stage, interim measures are available in England which include freezing injunctions, injunctions generally, stop notices, disclosure orders etc. Test varies depending on which remedy sought (freezing injunctions generally hardest and will require evidence of real risk of dissipation and usually also cross-undertaking in damages)

France



A. ORDER OF DISCLOSURE TO OBTAIN INFORMATION ABOUT FRENCH BANK ACCOUNTS

FREEZING OF BANK ACCOUNTS TO GUARANTEE THE ENFORCEMENT OF A MONETARY JUDGMENT (≠"MAREVA" INJUNCTIONS)

1. DIVORCE PROCEEDINGS IN FRANCE

When a spouse refuses to disclose his or her bank statements during the divorce proceedings, the family court judge may obtain information on bank accounts through the FICOBA (organism in charge of a database containing a list of bank accounts in France over a three-year period), or EVAFISC (organism in charge of a database containing a list of foreign bank accounts). To do this, the divorce judge, in application of article 255 al. 9 and 10 of the civil code, will contact either the director in charge of these public organisms, or a qualified professional (usually a Notaire) appointed by him or her to obtain such information (provided the judge authorizes the Notaire to obtain such information).

2. DIVORCE PROCEEDINGS IN A FOREIGN JURIDICTION

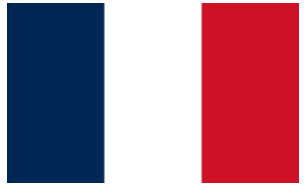
- If there is a foreign monetary judgment, not declared enforceable yet in France

- Possibility to seize French banks accounts, only if the party has information and the exact references of the bank account
- In the absence of such information, necessity to request authorization from a judge to consult the FICOBA but there is a need to demonstrate (i) the existence of a financial claim which seems grounded in its principle and (ii) circumstances threatening the recovery of such financial claim

- if there is a foreign monetary judgment which has been declared enforceable in France (through exequatur or/ simplified process for European countries or Switzerland (*Lugano Convention*)), possibility for a bailiff to consult FICOBA (and to obtain information on all French bank accounts) and to freeze and enforce foreign monetary judgment against such bank accounts.



France



B. RECOGNITION AND ENFORCEMENT IN FRANCE OF FOREIGN FREEZING INJUNCTIONS ("MAREVA INJUNCTION")

MAREVA INJUNCTIONS CAN BE RECOGNIZED IN FRANCE AND ARE NOT CONSIDERED AGAINST FRENCH PUBLIC ORDER (FRENCH SUPREME COURT, 30 JUNE 2004, STOLZENBERG).

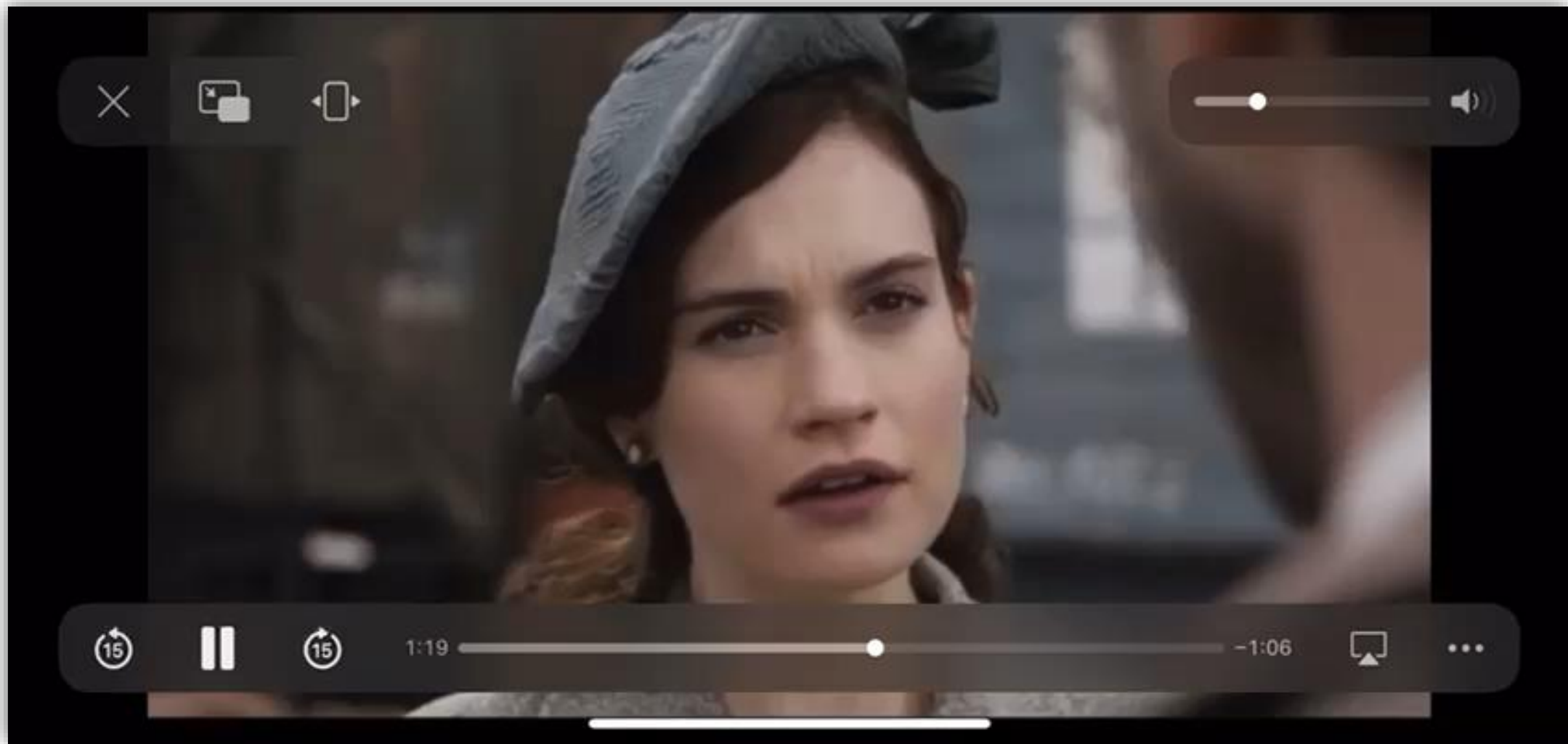
CONDITIONS OF RECOGNITION

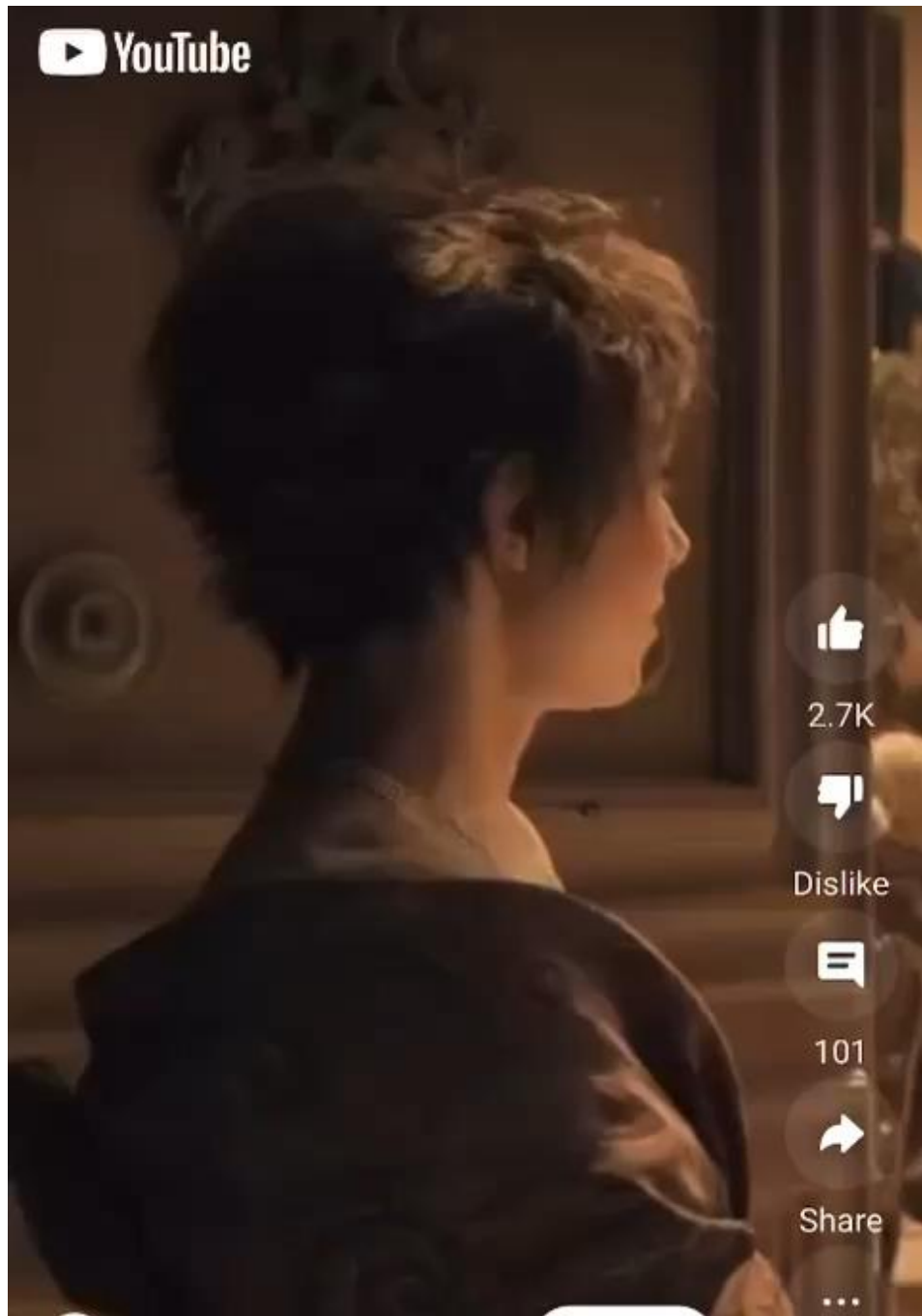
In the absence of an international Convention or outside the EU, Cornelissen principle (*landmark decision of 2007 from the French Supreme Court*) : to grant an exequatur, French courts must ensure that three conditions are met, namely (1) the indirect jurisdiction of the foreign court, based on the connection of the dispute to the court that was seized, (2) compliance with substantive international public order, and (3) absence of fraud.

IMPLEMENTATION OF A FREEZING INJUNCTION

- **French Supreme Court, 3 October 2018** : *“a freezing injunction has the effect of preventing a party to sell and dissipate his or her assets, failing which criminal and civil penalties could be incurred. This must be distinguished from a provisional French measure of seizure (‘saisie-conservatoire’), whose purpose is to guarantee the effective payment of a financial claim”*. Very different scope: a freezing injunction is a *“in personam”* measure, whereas “French provisional measures” are considered as a *“in rem”* measure.
- Potential possibility to enforce a freezing injunction on real estate, through publication of the freezing injunction with French land registry (publication with the assistance of French notaire will be mandatory).
- For bank accounts, absence of « Contempt of Court » → potential alternative would be to obtain a French order imposing a financial penalty (‘astreinte’) in the event of violation but difficult to obtain



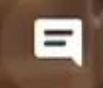




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Dislike



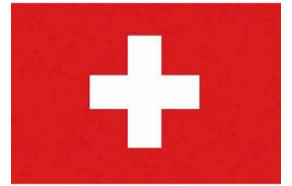
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Share



Switzerland



MARRIAGE PROTECTION MEASURES

- **Marriage protection measures** can be requested if Swiss courts have jurisdiction (art. 46 PILA).
 - Numerus clausus of measures: e.g.: **right of information (art. 170 CC)**, **judicial restrictions on disposal (art. 178 CC)**

PRECAUTIONARY MEASURES

- If divorce is pending abroad (art. 10 lit. b PILA): (i) rulings of the foreign divorce court cannot be enforced at the Swiss domicile, (ii) measures are to be ordered **to secure future enforcement** against property in Switzerland, (iii) there is **imminent danger** or (iv) it cannot be expected that the foreign court will rule within a reasonable period of time.
 - Existence and scope of claim must be demonstrated and need for security must be made credible
- ❖ The spouses may **request information from each other** at any time (art. 170 CC)
 - Assessment of financial circumstances of the other spouse: **No fishing expedition!**
 - Exemption for holder of professional secrets (lawyers, notaries, doctors and clergy, but **not banks**)
 - Order of penalties
- ❖ The **attachment order** causes a temporary **freezing of assets** in respect of a **money claim** only
- ❖ Private law equivalent in the area of matrimonial law: **restriction on disposal pursuant to Art. 178 CC**
 - Prove of (i) existence of a claim and (ii) its endangerment through unauthorized action by the other spouse.
 - Restriction of power of the other spouse and order appropriate security measures (**blocking bank account**)
 - BGer 5A_259/2010 (Rybolevlev vs. Rybolevlev): **Even if assets are located abroad!**

Switzerland



CRIMINAL PROCEEDING

- The state attorney will *ex officio* establish the relevant facts, seek and **freeze criminally acquired assets** in favor of the harmed person.

NOTIFICATION OF BANK “**de facto freezing of assets**”

- Written notice to bank: Swiss law criminalizes money laundering (art. 305bis SCC). Bank must in case of suspicion of money laundering or another felony notify the Money Laundering Reporting Office (MROS), who will involve the criminal authorities.

Guernsey



Freezing orders

- The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987
- Worldwide freezing orders?
- Use in overseas proceedings
- Garnet case

Guernsey



Norwich Pharmacal orders

- Third party disclosure order
- Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133
- Systems Design Limited v. Equatorial Guinea (President) C.A. 2005-06 GLR 65
 - Eight principles
 - Interests of justice and necessary
 - Last resort
 - Not a phishing expedition
- Gagging orders
- Costs



Question #4

If the yacht shows up in your jurisdiction and Sarah has an order that the yacht be seized from another jurisdiction, will that order be enforced by your country's courts?

Would Sarah be able to get an injunction to freeze the yacht in your jurisdiction?







Canada



Statutory or traditional maritime law claim:

If a statutory or traditional maritime law claim *Sundance* can be arrested to provide security for claims, via Federal Court procedure. However unless Sarah is a co-owner of *Sundance*, her claim likely doesn't fall into this category

All other claims:

Assuming not a maritime law claim, Canadian courts have jurisdiction to seize the vessel while in Canadian waters in the same way as any other asset of a foreign judgment debtor or defendant based on ordinary non-maritime legal principles



Canada



Reciprocal Enforcement of seizure order:

Yes, *Pro Swing* tests

Application for permanent and interlocutory injunction:

(*Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess.), c. 2, s. 6.)

“A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in the Province.”

Must meet test for injunctive relief:

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction.



Control bar with three icons: a close button (X), a screen sharing icon, and a mobile device icon.

Volume control bar with a slider and a speaker icon.

Main playback control bar containing: a 15-second rewind button, a play button, a 15-second fast forward button, a progress indicator showing 0:00, a progress slider, a total duration of -1:30, a screen sharing icon, and a menu icon (three dots).

England and Wales

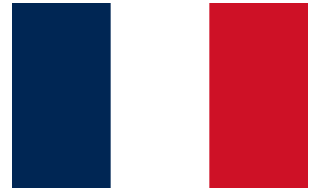


- Yes – provided she can get her foreign order recognised and the freezing injunction made before the yacht leaves
- Advance warning better!
- Needs to show real risk of dissipation **and** that the order is just and fair on the balance of convenience
- Very high stakes – undertaking in damages likely to be required, i.e. that applicant will cover respondent's losses if order subsequently set aside. Ship charter fees / costs can be very high, especially in combination with legal costs. Need to be very sure.



F FANDANGO
MOVIECLIPS

France



ABSENCE OF RECOGNITION OF A FREEZING INJUNCTION (PER SE) FROM A FOREIGN COURT

As explained above, a freezing injunction is considered a “in personam” measure and it is difficult to implement in France, especially on a yacht. Only option to freeze the yacht is to obtain a provisional seizure (*‘saisie-conservatoire’*) of the yacht.

HOW TO OBTAIN A PROVISIONAL SEIZURE OF A YACHT IN FRANCE?

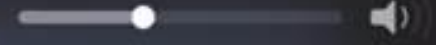
Seizure of a vessel flying the flag of a Contracting State: potential application of the 1952 Brussels Convention relating to the arrest of seagoing ships (Convention applicable in France, UK, Guernsey, Switzerland, but not Canada). Specific procedure, but applicable only for maritime claims and otherwise, this Convention provides that the normal rules for local provisional measures apply, even if the vessel is registered in a Contracting State

1. NECESSITY TO OBTAIN AUTHORIZATION FROM THE COURT (the “enforcement judge” -*‘juge de l’exécution’*)

- the authorization is mandatory, even if there is a foreign monetary judgement - difference with a bank account
- need to demonstrate a financial claim which seems legitimate in its principle
- no need to demonstrate urgency
- no need to demonstrate that there are circumstances threatening the recovery of the financial claim – difference with a normal “conservatory measure”

2. ISSUE OF OWNERSHIP OF THE BOAT

Normally the yacht must be owned by the debtor directly, unless there is a possibility to prove a very close link between the debtor and the official legal owner of the yacht (for instance, that that the debtor has incorporated the company owning the yacht and he is the sole director and shareholder of the company).



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Switzerland



RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES

- **Maintenance claims:**
 - Both the Hague Convention on the Enforcement of Maintenance Decisions of 1973 and the Lugano Convention permit the enforcement of provisionally enforceable maintenance decisions and provisional measures (e.g. worldwide freezing orders).
- **Property Regime claims:**
 - Recognition and enforcement of foreign interim measures under the PILA is **controversial**.
 - Any decision *must be final* (not subject to appeal).

AUTONOMOUS INTERIM MEASURES IN SWITZERLAND

- Instead of seeking (uncertain) enforcement of foreign interim measures, a claimant should file an application for **autonomous interim measures** (art. 10(b) of the PILA).
- Foreign interim order is not binding but Swiss judge will generally rely on it.
 - The applicant seeking an interim measure has to **credibly demonstrate** to the court that:
 - (i) the applicant is entitled in the underlying substantive right, (ii) the respondent violates such right, or threatens to violate it, (iii) such violation is likely to cause the applicant a prejudice which is not or not easily repairable, (iv) there is urgency and (v) the requested measure complies with the principle of proportionality.
 - Court issues an **ex parte measure** in circumstances of imminent danger.
 - Applicant may request the attachment of assets located in CH (art 271 para 1 (4) Debt Collection and Bankruptcy Act





Guernsey



The position in Guernsey is the same as the position in France as a result of the application of the 1952 Brussels Convention relating to the Arrest of Sea-going Ships relating to the arrest of seagoing ships in Guernsey.

It is also possible to enforce a salvor's maritime lien under any international convention or national law but this will require some form of service or debt directly related to the vessel to have been provided, not simply that the vessel was in Guernsey waters.

Assuming no services were provided to Sundance in Guernsey and there is no Guernsey debt against the vessel, a maritime lien would not arise.



Cayman Islands



What is Sundance had set sail for sunnier climes to the Cayman Islands?

- Action against or in relation to the corporation which owns the yacht
- Mareva or "freezing" injunction
- Arrest



Questions & Discussion





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