What Does it Mean to Submit to a Foreign Forum?

The meaning of submission was the central question, though by no means the only one, in the Supreme Court of Canada's decision in *Barer v Knight Brothers LLC*, 2019 SCC 13 (available here). Knight sought enforcement of a Utah default judgment against Barer in Quebec. The issue was governed by Quebec's law on the recognition and enforcement of foreign judgments, which is set out in various provisions of the Civil Code of Quebec (so much statutory interpretation analysis ensued). Aspects of the decision may be of interest to those in other countries that have similar provisions in their own codes.

The court held that the Utah decision was enforceable in Quebec. Seven judges (Gascon J writing the majority decision) held that Barer had submitted to the Utah court's jurisdiction. Two judges held that he had not. One of them (Brown J) held that the Utah court had jurisdiction on another basis, and so concurred in the result, while the other (Cote J) held it did not, and so dissented.

The majority held that in his efforts to challenge the Utah's court's jurisdiction, Barer had presented substantive arguments going to the merits of the dispute (para 6). It analysed various possible steps in a foreign proceeding that either would or would not constitute submission (paras 59-63). It was invited by Barer to consider the "save your skin" approach to submission, which would recognize that a defendant who both challenged jurisdiction and raised substantive arguments would not be taken to have submitted. It rejected that approach (para 68). Its core concern was to protect "the plaintiff's legitimate interest in knowing at some point in the proceedings, whether or not the defendant has submitted to the jurisdiction" (para 62). It added that

“plaintiffs who invest time and resources in judicial proceedings in a jurisdiction are entitled to some certainty regarding whether or not the defendants have submitted to the court’s jurisdiction” (para 67).

The majority acknowledged that in a case in which the process of the foreign forum required the raising of a substantive argument alongside a jurisdictional challenge, this could affect the determination of whether the defendant had submitted (para 75). But this was not such a case: the defendant had not established, as a factual matter, that this was such a feature of the Utah procedure (paras 75 and 78). Accordingly, the fact that Barer had raised a defence on the merits – that a pure economic loss rule barred the claim against him – amounted to submission (para 71).

In dissent, Justice Cote finds the majority’s test for submission to be “too strict” (para 212). She urged a “more flexible approach” which would allow a defendant to raise substantive arguments alongside a jurisdictional challenge (para 213). In her view, if “a broad range of arguments may convince a Utah court that it lacks jurisdiction over a matter … A defendant must be allowed to present those arguments” (para 219). While Gascon J put the onus of showing that the Utah process required raising substantive arguments at a particular time on the defendant, Cote J put that onus on the plaintiff, the party seeking to enforce the foreign judgment (para 223).

Brown J’s concurring decision did not comment at any length on the test for submission. He held that “I agree with my colleague Cote J. that Mr. Barer has not submitted to the jurisdiction of the Utah court merely by presenting *one* argument pertaining to the merits of the action in his Motion to Dismiss” (para 146; emphasis in original). This is consistent with Cote J’s approach to the meaning of submission.

There is a further interesting dimension to the reasons. Cote J held, in the alternative, that even if Barer had submitted, the plaintiff also had to show a real and substantial connection between the dispute and Utah before the judgment could be enforced (para 234). This engaged her in a complex argument about the scheme and wording of the Civil Code. Having identified this additional legal requirement, she held this was a case in which the submission itself (if established) was not a sufficiently strong connection to Utah and so the decision should nonetheless not be enforced (para 268). In contrast, Brown J held that there was no separate requirement to show such a connection to Utah (paras 135 and 141-42). Showing the submission was all that was required. The majority refused to resolve this interpretive dispute (para 88), holding only that on the facts of this case Barer's submission "clearly establishes a substantial connection between the dispute and the Utah court" (para 88).

The judges disagreed about several other aspects of the case. Put briefly and at the risk of oversimplification, Brown J relied primarily on the notion that all parties and aspects of the dispute should have been before the Utah court. Barer was sufficiently connected with various aspects of the dispute, over which Utah clearly did have jurisdiction, that its jurisdiction over him was proper (see paras 99, 154 and 161-62). Neither Cote J nor Gascon J agreed with that approach. There are also disputes about what types of evidence are proper for establishing the requirements for recognition and enforcement and what law applies to various aspects of the analysis.

In a small tangent, the majority decision criticized the "presumption of similarity" doctrine for cases in which the content of foreign law is not properly proven and it offered a more modern explanation of why forum law is applied in such cases (para 76).