4

Godard v Gray and *Schibsby v Westenholz* (1870)

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THIS CHAPTER CONSIDERS the recognition and enforcement of foreign judgments, and specifically the 'obligation theory' underpinning the common law rules which clearly emerged in the nineteenth century in the twin cases of *Godard v Gray* and *Schibsby v Westenholz*.[1] The chapter is structured as follows: (I) we first address the decisions in *Godard* and *Schibsby* and the obligation theory itself; (II) we then put the domestic common law in context and consider developments in other jurisdictions (including most notably Canada), which have diverged from the English approach; (III) we argue that the obligation theory struggles to explain the current positive law of England and Wales; and (IV) we draw the threads together by way of conclusion and draw on our survey of the foreign jurisprudence to reinforce our conclusions on *Godard* and *Schibsby*.

I. GODARD, SCHIBSBY AND THE OBLIGATION THEORY

In the mid-nineteenth century, two merchants with French citizenship[2] or residence[3] concluded contracts with English[4] or English-resident[5] merchants. The first French merchant was Mr Charles Godard, who in September 1865 chartered the steamer *Como* from the English Messrs Gray Brothers to transport coal from Cardiff to St Nazaire.[6] The second merchant is believed to have

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[1] *Godard v Gray* (1870–71) LR 6 QB 139 (QB) and *Schibsby v Westenholz* (1879–71) LR 6 QB 155 (QB).

[2] *Godard* (n 1) 147.

[3] *Schibsby* (n 1) 157.

[4] *Godard* (n 1) 147.

[5] *Schibsby* (n 1) 157.

[6] *Godard* (n 1) 140 and 147.

been Mr Peter-Michelson Schibsby, a Dane resident at Caen in Normandy.[7] Mr Schibsby concluded an FOB contract for the shipment of Swedish oats to Caen with Westenholz Brothers, a firm of London merchants.[8] Disputes arose in relation to both contracts.

Mr Godard[9] and Mr Schibsby[10] both obtained judgments in their favour from the French courts. As for Mr Godard, his charterparty had included the term: 'Penalty for non-performance of this agreement, estimated amount of freight.'[11] The first-instance French court awarded him damages in the amount of freight on two voyages, subsequently reduced by the Imperial Court of Rennes to the estimated freight for one voyage (8,921 French francs).[12] Messrs Gray Brothers had appeared unsuccessfully before both the French first-instance and superior courts.[13] Mr Schibsby was awarded 11,537 French francs by the Tribunal of Commerce at Caen for short delivery.[14] Although Westenholz Brothers were served with a copy of proceedings by the French consulate in London, they made no appearance in the French proceedings.[15] Despite the English jury's subsequent conclusion that they had sufficient notice and knowledge of the summons and the pendency of the French proceedings to have appeared,[16] that decision turned out to have been a good one. Both Mr Godard and Mr Schibsby sought (in modern terminology) to have the French judgments recognised and enforced in England.

Mr Schibsby's trial came on during Hilary Term 1870.[17] The hearing appeared to have gone well for him, with Blackburn J expressing the (qualified) opinion that he was entitled to a verdict in his favour.[18] Unfortunately for Mr Schibsby, however, Blackburn J (also with Hannen and Mellor JJ) heard argument in Mr Godard's case on 6 May 1870.[19] Blackburn J held that he 'had consequently occasion to consider the whole subject of the law of England as to enforcing foreign judgments', and had therefore 'changed' his opinion on Mr Schibsby's case.[20] Judgments in both *Godard* and *Schibsby* were handed down on 10 December 1870. The judgment was given in *Godard* by: (i) Blackburn and Mellor JJ (albeit delivered by Blackburn J); and (ii) Hannen J. In *Schibsby*,

[7] A Dickinson, '*Schibsby v Westenholz* and the recognition and enforcement of judgments in England' (2018) 134 *Law Quarterly Review* 426, 426 and n 5.
[8] ibid, 426 and n 6.
[9] *Godard* (n 1) 147.
[10] *Schibsby* (n 1) 158.
[11] *Godard* (n 1) 147.
[12] ibid, 139, 142–43 and 147.
[13] ibid, 141–42.
[14] *Schibsby* (n 1) 155 and 158.
[15] ibid, 155 and 158.
[16] ibid, 158.
[17] ibid, 155.
[18] ibid, 158.
[19] *Godard* (n 1) 144.
[20] *Schibsby* (n 1) 158.

Blackburn J gave the judgment of the entire Court (Blackburn, Mellor, Hannen and Lush JJ). His Lordship stated that although Lush J had not been party to the discussions in *Godard*, he had nevertheless 'perused' and 'approved' the judgment in that case.[21]

Ultimately, in *Schibsby* Westenholz Brothers' application for a non-suit was successful. In modern terms, Mr Schibsby was unable to obtain recognition or enforcement of his French judgment. This result was reached on the basis that 'there existed nothing in the present case imposing on [Westenholz Brothers] any duty to obey the judgment of a French tribunal'.[22] Mr Godard had more luck. His judgment against Messrs Gray Brothers was recognised and enforced on the basis of the principle (per Blackburn and Mellor JJ) that '[w]here a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained'.[23] That was despite Blackburn J's conclusion that the French courts had erred in English law by concluding that the clause cited above operated to fix a contract-breaker's liability.[24] This rationale has become known as the obligation theory.

Before turning to the Commonwealth and other modern authorities, it is useful to distinguish the obligation theory from other potential explanations which were rejected in *Godard* and *Schibsby*. First, Blackburn J in *Godard* contrasted the English approach to the enforcement of judgments at common law with those of continental nations (including France) which 'do not enforce the judgments of other countries, unless there are reciprocal treaties to that effect'. Since the touchstone for recognition and enforcement at common law was the obligation theory, this did not require reciprocity.[25] Second, Blackburn J also contrasted the obligation-based approach of the common law with an approach that would enforce foreign judgments 'out of politeness and courtesy to the tribunals of other countries', ie which was founded on comity-based considerations.[26] Third, consistent with the obligation theory, the foreign judgment was not merely to be considered 'evidence of the original cause of action' which could be met by 'any counter evidence negativing the existence of that

[21] ibid, 159.

[22] ibid, 163.

[23] *Godard* (n 1) 148, citing the earlier judgment of Parke B in *Williams v Jones* (1845) 13 M & W 628, 633 (which concerned a domestic judgment from the county court).

[24] *Godard* (n 1) 147.

[25] ibid, 148. For a modern case recognising that reciprocity is not relevant outside the sphere of matrimonial proceedings at common law, see *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [127] (Lord Collins).

[26] *Godard* (n 1) 152. See also *Schibsby* (n 1) 159: 'if the principle on which foreign judgments were enforced was that which is loosely called 'comity', we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down [ie the obligation theory]'.

original cause of action'.[27] As noted above, the Court held that the obligation to obey the judgment was not affected by the fact the foreign court made an error of law which appears on the face of the judgment.[28]

II. COMMONWEALTH AND OTHER COMMON LAW AUTHORITIES

Godard and *Schibsby* are 'landmark'[29] cases, in the sense that they set the direction of travel of English law and the recognition and enforcement of judgments for more than a century, and firmly embedded the obligation theory in English jurisprudence. Those cases are, however, 'landmarks' in a broader sense, namely by virtue of the influence they have had on the development of rules concerning the recognition and enforcement of judgments in the Commonwealth and other jurisdictions.

The jurisprudence elsewhere in the common law world adopts to a greater or lesser extent divergent approaches to the enforcement of foreign judgments. Canada has gone the furthest in developing an alternative approach, which is more permissive than the English cases such as *Godard* and *Schibsby* underpinned by the obligation theory. The obligation theory has also been the subject of recent criticism by the Court of Appeal of Singapore, which appeared receptive to the Canadian approach. By contrast, the Supreme Court of Ireland has declined to follow the Canadian authorities and has maintained the approach set out in *Dicey, Morris & Collins*.

This section will first examine the Canadian developments, before turning to consider how they have been received elsewhere. We will consider in turn Ireland, Hong Kong, Singapore, New Zealand and Australia.

A. Canada[30]

In *Morguard Investments Ltd v De Savoye*,[31] the Supreme Court of Canada applied a modified approach to the enforcement of judgments between different Canadian provinces. The claimant sought to enforce a judgment obtained

[27] *Godard* (n 1) 150.

[28] ibid, 151. This remains good law today: L Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws,* 15th edn (London, Sweet & Maxwell, 2012) para 14R-118, rule 48 (concerning the inability to impeach a foreign judgment for an error of fact or law).

[29] We are grateful to Stephen Pitel and Andrew Dickinson for their very helpful comments on an earlier draft of this chapter at the conference, concerning the various possible meanings of the term 'landmark'.

[30] We are grateful to Stephen Pitel for a very helpful and illuminating discussion on the Canadian law position at the conference.

[31] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (SCC). This case and the Canadian jurisprudence is discussed in detail in ch 13 in this volume.

in Alberta for mortgage arrears after foreclosure where the mortgagor, Mr De Savoye (although residing in Alberta at the time of the mortgage) had subsequently moved to British Columbia. He was accordingly not present in Alberta at the time of the commencement of the action for the purposes of the traditional common law rules. The Supreme Court of Canada held the Albertan judgment was enforceable in British Columbia nonetheless.

La Forest J, giving the judgment of the Court, noted that the common law regarding the recognition and enforcement of foreign judgments was firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the nineteenth century. This had been 'unthinkingly adopted' by the Canadian courts, even in relation to judgments given in sister-provinces.[32] The Court held that the world had changed since the English rules were developed, including in light of modern means of travel and communication, and the rules on judgment enforcement appeared ripe for reappraisal. A broader conception of comity was appropriate in this context, which was not based simply on respect for decisions of a foreign sovereign but convenience and necessity given the division of legal authority among sovereign states. In any case, there was no comparison between modern interprovincial relationships and those between foreign countries in the nineteenth century and it was inappropriate to apply the English rules within the single country of Canada.[33] Where a defendant is outside the province of the court exercising jurisdiction, La Forest J suggested there would need to be a 'real and substantial connection with the action' before that province's judgment would be enforceable in another province (which he held was plainly satisfied in respect of Alberta on the facts of the case at issue).[34] Prior to the Canadian Supreme Court's judgment (in an article published in 1987), Professor Briggs had advocated a similar approach be adopted in England. Specifically, Professor Briggs contended that – in light of recent developments to the English law of *forum non conveniens* in the jurisdiction context and the House of Lords' seminal decision in *Spiliada*[35] – foreign judgments given by the natural forum for the action should now be recognised in England.[36]

In *Beals v Saldanha*,[37] the Supreme Court of Canada took the analysis in *Morguard* a stage further and applied the 'real and substantial connection' test established for interprovincial judgments to foreign judgments. It held that a Florida judgment in relation to the sale of land in Florida for US$8,000 (which in the event was for over US$200,000 in compensatory damages and US$50,000

[32] ibid, 1095 and see also 1087 and 1091–92.
[33] ibid, 1095–03.
[34] ibid, 1108 and see also 1104.
[35] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) which is addressed in detail in ch 11 in this volume.
[36] A Briggs, 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 *International & Comparative Law Quarterly* 240.
[37] *Beals v Saldanha* [2003] 3 SCR 416 (SCC).

in punitive damages) was enforceable in Canada against two Ontario residents. Major J, giving the judgment for the majority, held that there were compelling reasons for applying the approach in *Morguard* in this context and no principled reason to decline to do so.[38] He opined that the notions of comity and reciprocity considered in *Morguard* were equally applicable to judgments made by courts outside Canada and '[i]n the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a 'real and substantial connection' test'.[39] A 'real and substantial' connection was now to be regarded as the 'overriding factor in the determination of jurisdiction', albeit subject to the caveat that the presence of the 'traditional indicia of jurisdiction' would serve to bolster the real and substantial connection to the action or parties.[40]

Consistent with Professor Briggs' 1987 article, he initially welcomed the approach to international jurisdiction in *Morguard*[41] and *Beals*,[42] observing that in the latter case the Supreme Court of Canada was 'right to do as it did in widening the grounds of acceptable international jurisdictional competence', albeit it was necessary to consider how the defences allowed by Canadian common law needed to respond to the change.[43] More recently, Professor Briggs has been more circumspect, criticising the decision in *Beals* on both principled and practical grounds, including because of the uncertainty and consequent difficulties it can create for a defendant in deciding whether to defend a claim brought in the foreign forum.[44] By contrast, Professor Dickinson has advocated that *Schibsby* be put to one side and the English court should adopt a more flexible approach to questions of recognition and enforcement by reference to natural justice questions and in a manner broadly consistent with the underlying principles in *Beals*.[45]

Subsequently, in the context of determining the jurisdictional requirements to bring an action in Canada to enforce a foreign judgment, the Supreme Court of Canada held in *Chevron Corporation v Yaiguaje* that there is no need to show a real and substantial connection between the enforcing forum – ie Canada – and the judgment debtor or dispute.[46] It observed that the foreign court needs to

[38] ibid, [19].

[39] ibid, [29] and [27]–[28].

[40] ibid, [37]. Major J described these indicia as 'attornment [ie submission to the jurisdiction], agreement to submit, residence and presence in the foreign jurisdiction'. The logic of this approach was questioned by LeBel J ([207]: who dissented on natural justice grounds). See also [23] (requiring a 'real and substantial connection with either the subject matter of the action or the defendant …').

[41] A Briggs, 'Foreign Judgments: More Surprises' (1992) 108 *Law Quarterly Review* 549.

[42] A Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 *Singapore Year Book of International Law* 1.

[43] ibid, 22.

[44] A Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 *Law Quarterly Review* 87, 95.

[45] Dickinson (n 7) 448–49.

[46] *Chevron Corporation v Yaiguaje* [2015] 3 SCR 69 (SCC).

have a 'real and substantial connection' with the litigants or the subject matter of the dispute or the traditional bases of jurisdiction may be satisfied as the prerequisite to enforcing a foreign judgment in Canada.[47]

The effect of the above authorities is to produce a more permissive, flexible and 'soft-edged' regime to the enforcement of foreign judgments in Canada.

B. Ireland

The Irish Supreme Court declined to follow the Supreme Court of Canada's approach in *Beals* in *Re Flightlease (Ireland) Ltd*.[48] The liquidators of an Irish company sought directions ex ante from the Irish courts as to whether any judgment in a claim brought against the company by a Swiss counterparty in the Swiss courts would be recognised and enforced in Ireland.

Finnegan J's leading judgment upheld the trial judge's reasons for refusing to follow the Canadian jurisprudence. They can broadly be divided into four categories. First, the absence of other common law authority following the Canadian approach and the lack of consensus in the common law world as to the reasons for the change. Second, certain academic commentary cautioning against the Canadian approach. This included commentary from Professor Briggs that the approach in *Beals* 'does not focus on whether the party to be bound has assumed an obligation, but on whether the Canadian court should impose one for reasons of its own' which represents a 'fundamental reorientation of the law of foreign judgments …'.[49] Third, the prospect of injustice if a person made a decision as to whether to participate in foreign proceedings on the basis of a view as to what the common law was, and this is later changed. Fourth, that the change would in reality amount to legislation, as opposed to an orderly evolution of common law principles.

O'Donnell J gave a short concurring judgment joining in the result, but with nuances to his reasoning.[50] He indicated that he did so with no particular enthusiasm for an outcome where (what is now) *Dicey*'s rule 43 applied to determine the enforceability of a foreign judgment in Ireland, which had 'little to recommend it at the level of legal theory'.[51] He opined that the principal merit of the Dicey rule was its 'certainty and therefore predictability', but the 'real and substantial connection' test offered substantially more in terms of inherent merit, albeit with a 'much heavier price in terms of uncertainty

[47] ibid, [27].
[48] *Re Flightlease (Ireland) Ltd* [2012] IESC 12, [2012] 1 IR 722.
[49] ibid, [55].
[50] For academic support for O'Donnell J's concurring judgment, see D Kenny, 'Re Flightlease: The 'Real and Substantial Connection' Test for Recognition and Enforcement of Foreign Judgments Failure to Take Flight in Ireland' [2014] *International & Comparative Law Quarterly* 197.
[51] *Re Flightlease* (n 48) [74].

and unpredictability'.[52] O'Donnell J ultimately concluded that the adoption of the Canadian approach would not produce any measurable improvement in Irish law, even if it could be achieved by judicial decision alone (which he doubted).[53]

The Irish Supreme Court's decision has subsequently been referred to with apparent approval by the UK Supreme Court in *Rubin v Eurofinance SA*,[54] when declining to adopt more liberal rules to the enforcement of foreign judgments in the insolvency context in the absence of legislation.[55]

C. Hong Kong

There is first instance authority in Hong Kong declining to follow *Beals* for the purposes of an interlocutory application.[56] The deputy judge saw force in the submission that 'in the absence of exceptional justification, the Hong Kong court should and would not see fit to even start considering the application of the Canadian approach in place of the well-established approach [ie that set out in *Dicey*]'.[57] The consequence was that an English default judgment given against certain defendants who were served out of the jurisdiction with the English court's permission was not enforceable in Hong Kong such as to provide the claimant with a good arguable case to continue a Hong Kong freezing order.

D. Singapore

In *Merck Sharp & Dohme Corp v Merck KGaA*, Singapore's highest court, the Court of Appeal of Singapore, expressed real doubt about the utility of the obligation theory at common law.[58] The Court's observations were made in the context of a different but related issue, namely the operation of issue estoppel in Singapore from foreign judgments. The Court cited Blackburn J's

[52] ibid, [83].
[53] ibid, [90].
[54] *Rubin* (n 25).
[55] No challenge on the appeal was made to the general *Dicey* rule, only its application to foreign insolvency orders: *Rubin* (n 25) [113]. The Privy Council has also remarked on the differing paths taken now taken by English and Canadian law: *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, [2016] 3 All ER 181 [54] n 1.
[56] *Islamic Republic of Iran Shipping Lines v Phiniqia International Shipping LLC* [2014] HKCU 1697 [26]–[35]. See also the first instance decision in *Fabiano Hotels Ltd v Profitmax Holdings Inc* [2017] HKCU 2354 [17], citing amongst others *Godard* and *Schibsby* and observing that 'Recognition and enforcement of a foreign judgment is founded on the doctrine of obligation …'.
[57] *Phiniqia* (n 56) [34]–[35].
[58] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14.

explanation of the obligation theory in *Schibsby* and observed that the doctrine has been 'criticised for presupposing what it is supposed to explain, and for being unable to account for the recognition of foreign judgments that impose no obligations but instead make declarations of status'.[59] It referred with apparent approval to the Supreme Court of Canada's analysis of comity in *Beals* and the extension of the 'jurisdictional bases of recognising foreign judgments beyond presence, residence and submission, to the foreign court having a "real and substantial connection" to the action or to the parties to the litigation'. It concluded that considerations of 'transnational comity and reciprocal respect among courts of independent jurisdictions have come to undergird the recognition of foreign judgments at common law and by extension, the doctrine of transnational issue estoppel'.[60] Consistent with these observations (and in contrast to the traditional English approach based on the obligation theory), the Court of Appeal of Singapore specifically left open for consideration in a future case whether reciprocity should be a precondition to the recognition of foreign judgments at common law.[61] Although the implications of *Merck* remain to be seen, academic commentary recognises that it signals possible fundamental changes to Singapore common law on foreign judgments.[62]

E. New Zealand

The New Zealand Court of Appeal has recently re-affirmed, in *Almarzooqi v Salih*, the general proposition that judgments are not enforced at common law in New Zealand on the basis of reciprocity, but because of an obligation to comply with the judgment owing to the foreign court having international jurisdiction in accordance with New Zealand's private international law rules,[63] which approves the UK Supreme Court's decision in *Rubin*.[64] The case concerned an attempt by a wife following divorce to seek a marriage dowry from the husband in the New Zealand courts inter alia by enforcing a Dubai judgment in the wife's favour at common law.[65] On the wife's further application for leave to appeal to

[59] ibid, [30].

[60] ibid, [31] and [33]; compare the earlier consideration of comity and the obligation theory in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] SGCA 18 [31].

[61] *Merck* (n 58) [39].

[62] Y Ming, 'The Changing Global Landscape for Foreign Judgments', Yong Pung How Professorship of Law Lecture 2021 (6 May 2021).

[63] *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501 [31]–[36].

[64] ibid, n 26: as the Court noted, the position is otherwise for New Zealand statutory regimes such as the Reciprocal Enforcement of Judgments Act 1934. For earlier recognition of the obligation theory in New Zealand, see also *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA) 420.

[65] The Court of Appeal also rejected a further argument that the principle of reciprocity could apply given the matrimonial context: *Almarzooqi* (n 63) [39]–[59].

New Zealand's highest court (the Supreme Court of New Zealand), the wife invited it to re-consider the conditions under which New Zealand enforces the judgments of foreign courts, on the basis it is inflexible and inconsistent with access to justice considerations.[66] She asked the Court to follow the lead of the Supreme Court of Canada in *Beals* and adopt the 'real and substantial' connection test. This was resisted by the husband on the basis that the Canadian approach is an outlier (citing *Flightlease*). The Supreme Court refused to grant leave, observing that on its facts the proposed appeal was not a good vehicle to address *Beals* and that the current law in New Zealand is 'clear'. The Court also observed that 'at least as matters stand, it is preferable for any development of the New Zealand position to be by international agreement rather than by this Court'.[67]

F. Australia

The Australian common law has not departed from the traditional English approach to determining a foreign court's international jurisdiction by adopting the Canadian jurisprudence.[68] A leading Australian text on conflict of laws opines that it is 'unlikely that Australian courts will be bold enough to adopt [the Canadian] 'real and substantial test' for recognition and enforcement of foreign judgments …'. It generally summarises the position in terms consonant with the English commentaries.[69]

III. SOUND THEORETICAL BASIS FOR THE MODERN LAW?

This section will argue that, despite the status of *Schibsby* and *Godard* as 'landmark' cases in the sense outlined above, the obligation theory which clearly emerged from those cases struggles to explain the current, positive law on the recognition and enforcement of judgments at common law in England and Wales.

The methodology adopted in this section will be two-fold. First, it will be considered that any theory seeking to explain the basis for recognition and enforcement of judgments must explain the current law in a normative, rather than a merely doctrinal, sense. The obligation theory posits that the making

[66] *Almarzooqi v Salih* [2021] NZSC 161 [9]–[10].

[67] ibid, [11], which also refers to the Hague Judgments Convention 2019 (which has not yet entered into force, as to which see below).

[68] Briggs (n 42) 12 and see, eg, *Martyn v Graham* [2003] QDC 447 [21]–[26]; *Maleski v Hampson* [2013] NSWSC 1794 [4]–[8]; and *Macquarie Bank Ltd v Juno Holdings S.a.r.l.* [2015] NSWSC 1260 [23]–[26].

[69] M Davies, A Bell, P Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* 10th edn (Melbourne, Lexis Nexis Australia, 2019) para 40.9. See also paras 40.2–40.3, 40.44 and 40.46.

of a foreign judgment creates an obligation on the party against whom that judgment is given, independent of the substantive obligations or cause(s) of action which gave rise to that judgment.[70] In order to provide a satisfactory explanation of the current law, though, any such theory must explain *why* that secondary, independent obligation arises.[71] In *Rubin v Eurofinance SA*, Lord Collins referred to the obligation theory as 'a purely theoretical and historical basis for the enforcement of foreign judgments at common law'.[72] If that is all the obligation theory amounts to, it is submitted that this is insufficient to provide a sound basis for the current rules on the recognition and enforcement of judgments. Equally, a conclusory statement that in certain circumstances a defendant will be taken to have accepted the foreign court's jurisdiction is, without more, insufficient.

Second, in terms of methodology this section will assess the obligation theory by reference not only to the question of whether the foreign court is held to have had 'international jurisdiction' over the English defendant or respondent, but also to what is generally termed the 'defences' to recognition and enforcement.[73] Traditionally the analysis as to whether a foreign judgment should be recognised and enforced has been divided into two steps, in the terminology of *Dicey*'s rules: first, whether the foreign judgment has been given 'by the court of a foreign country with jurisdiction to give that judgment' (ie international jurisdiction);[74] and, second, whether that judgment can be 'impeached',[75] including whether it is 'impeachable for fraud'.[76] This dichotomy derives to an extent from *Godard* and *Schibsby* themselves. In *Godard*, Blackburn J stated that 'We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling.'[77] His Lordship stated similarly in *Schibsby* that:

> the true principle on which the judgments of foreign tribunals are enforced in England is that … the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

[70] P Rogerson, *Collier's Conflict of Laws,* 4th edn (Cambridge, CUP, 2013) 219–21.

[71] Ho expresses this point by dismissing theories which cannot explain why judgments are enforced as 'question begging': Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 *International & Comparative Law Quarterly* 443, 445.

[72] *Rubin* (n 25) [9]. A position criticised in Briggs (n 44) 100.

[73] See, eg, *Collier* (n 70) 253.

[74] *Dicey, Morris & Collins*, 15th edn (n 28) para 14R-020, rule 42.

[75] ibid, para 14R-128, rule 49.

[76] ibid, para 14R-137, rule 50. See, to similar effect: *Collier* (n 70) 237 and 253 and A Briggs, *Civil Jurisdiction and Judgments,* 7th edn (London, Routledge, 2021) para 34.02.

[77] *Godard* (n 1) 158. See also 148–49: 'it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action'.

It has increasingly been recognised by academics, however, that in assessing the recognition and enforcement of judgments it is important to have regard to both 'stages' of the traditional analysis. As Professor Briggs stated in commenting on the Supreme Court of Canada's decision in *Beals v Saldanha*,[78] 'Jurisdiction and defence are, in this corner of the law, indissociable. It cannot be right to make radical changes to one while supposing that this has no impact on the other. The recognition of foreign judgments is a machine. It is not a box of unconnected bits and pieces.'[79]

As for definitions, the obligation theory is often said to be normatively justified by concepts of 'sovereignty' and allegiance to a 'sovereign'.[80] Whilst disputed concepts, this section will adopt Ho's two-dimensional definition of 'sovereignty'.[81] The first, 'internal' dimension connotes being a 'supreme authority within a political community'.[82] The second, 'external' dimension means 'in the context of relations between States' 'independence … freedom from unwanted external intervention, including interference by a foreign judicial authority'.[83] It is submitted that it is the first, internal dimension which is most relevant to this discussion (as explained further below).

Against that methodology and definition, there are several difficulties in trying to use the obligation theory to explain the current, positive law on the recognition and enforcement of judgments at common law.[84] This section will focus on three: (1) residence or citizenship not constituting a central, or general, ground of international jurisdiction; (2) fleeting presence being held sufficient to found international jurisdiction; and (3) the tension between the fraud exception and the obligation theory. Each of these will be considered in turn.

A. Residence or Citizenship not Central/General Ground of International Jurisdiction

As Dickinson has convincingly argued,[85] if allegiance to the sovereign authority pursuant to which the foreign judgment was promulgated were the normative basis for recognition and enforcement of judgments, one would expect a defendant or respondent's citizenship or residence in relation to that foreign state to be

[78] *Beals* (n 37).
[79] Briggs (n 42) 22.
[80] See, eg, Briggs (n 44) 93.
[81] Ho (n 71) 447–48.
[82] ibid 447.
[83] ibid 447–48.
[84] Other significant difficulties highlighted in the literature include the principle that a cause of action does not, at common law, merge in the foreign judgment (reversed by statute in the UK by s 34 of the Civil Jurisdiction and Judgments Act 1982) and explaining why foreign judgments on status are recognised notwithstanding that they do not impose obligations: see Ho (n 71) 445.
[85] Dickinson (n 7) 437.

a central, or general, ground of international jurisdiction. If a foreign judgment gives rise to secondary, independent obligation(s) by virtue of the fact that they are promulgated under the 'supreme authority within a political community',[86] surely the defendant or respondent's citizenship of, or residence in, that community would be the 'focal meaning', or 'ideal type'[87] of such allegiance?

Consistently, although somewhat ironically given that *Schibsby* is seen as (at least one of the) foundations of the modern law, this appeared to be what Blackburn J thought in that case. When listing the circumstances in which international jurisdiction would be held to be established, his Lordship stated that:[88]

> If [Westenholz and others] had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if [Westenholz and others] had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

This imprint was still evident in the Edwardian Court of Appeal's frequently cited decision in *Emanuel v Symon*, in which Buckley LJ held that:[89]

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

The residence-based part of this approach was fossilised in two inter-war statutory regimes relating to the recognition and enforcement of judgments, both of which were intended to reflect what was then (understood to be) the common law position.[90] Section 9(2) of the Administration of Justice Act 1920 barred registration of a foreign judgment if 'the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court'. To similar effect, section 4(2) of the

[86] Ho (n 71) 447.

[87] For a record of the origin of these terms, see J Finnis, *Natural Law & Natural Rights*, 2nd edn (Oxford, OUP, 2011) 9–10.

[88] *Schibsby* (n 1) 163.

[89] *Emanuel v Symon* [1908] 1 KB 302 (CA) 309–10. See, to similar effect, Lord Alverstone CJ at 309 and Kennedy LJ, at 313. See also the subsequent approval of *Emanuel v Symon* in *In re Trepca Mines Ltd* [1960] 1 WLR 1273 (CA) 1281–82, rejecting an earlier dictum of Denning LJ suggesting the English court should recognise a foreign judgment where it is exercising a jurisdiction that corresponds to the English rules on service out.

[90] Briggs (n 76) para 35.01.

Foreign Judgments (Reciprocal Enforcement) Act 1933 provided that 'the courts of the country of the original court shall … be deemed to have had jurisdiction' where (inter alia) 'the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court'.

As late as 1 January 1987, what was then *Dicey*'s rule 37, First Case was framed in terms of residence, stating that:[91]

> … a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition in the following cases … If the judgment debtor was, at the time the proceedings were instituted, resident (or, perhaps, present) in the foreign country.

In 1990, however, 120 years of logical consistency was called into question with the decision in *Adams v Cape Industries plc*.[92] In that case, the Court of Appeal turned the historic case law on its head, confirming that the mere presence of a defendant or respondent would suffice and leaving open the question of whether residence without presence was sufficient.[93] Slade LJ, giving the judgment of the Court, concluded as follows after consideration of three authorities:[94]

> in the absence of any form of submission to the foreign court, such competence [ie international jurisdiction] depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice.)

Commentators are divided as to how the question left open by the Court of Appeal in *Adams v Cape* would be resolved in a decided case. *Dicey*'s rule 43, First Case has been amended to refer only to presence.[95] *Collier's Conflict of Laws* states that citizenship has been 'discredited' and residence 'replaced with presence'.[96] Briggs states that 'notwithstanding abstract arguments to the contrary' 'The nationality or domicile of the parties is quite irrelevant.'[97] *Cheshire, North & Fawcett* appears to keep the flame alive, relying on the passage of *Schibsby* cited above for the proposition that, although no English authority contains an 'actual decision' that 'Political nationality' would be sufficient to found international jurisdiction 'the suggestion that this is enough has been affirmed *obiter* in several cases'.[98]

[91] L Collins, *Dicey and Morris on The Conflict of Laws,* 11th edn (London, Stevens & Sons, 1987) 436.

[92] *Adams v Cape Industries plc* [1990] 1 Ch 433 (CA).

[93] ibid, 518.

[94] ibid, 517–18. Namely (in reverse chronological order): *Employers Liability Assurance Corp Ltd v Sedgwick Collins & Co Ltd* [1927] AC 95 (HL); *Carrick v Hancock* (1895) 12 TLR 59 (HL); and *Singh v Rajah of Faridkote* [1894] AC 670 (PC).

[95] *Dicey, Morris & Collins*, 15th edn (n 28) para 14R-057, rule 43.

[96] *Collier* (n 70) 237–38.

[97] Briggs (n 76) para 34.18.

[98] P Torremans et al, *Cheshire, North & Fawcett: Private International Law,* 15th edn (Oxford, OUP, 2017) 540.

It is true[99] that in *Rubin* Lord Collins (with whom Lords Walker and Sumption agreed) noted – perhaps unsurprisingly – without dissent that following *Adams v Cape* he had amended what is now *Dicey*'s rule 43 to 'substantially its present form'.[100] However this question would ultimately be decided as a matter of *ratio*, though, it is clear that neither citizenship nor residence are the 'focal meaning' or 'ideal type' of the allegiance to sovereign authority said to give rise to international jurisdiction. We return to the significance of this below.

B. Fleeting Presence

The flip-side of the point made above is the (to some, notorious) acceptance by the modern law of international jurisdiction established by fleeting presence of the defendant or respondent in the foreign jurisdiction. This head of international jurisdiction is sometimes referred to as 'tag' jurisdiction.[101] As noted above, *Schibsby* spoke in terms of the defendant or respondent being 'subjects of the country whose judgment is sought to be enforced against them' and 'resident in the country', as opposed to being present (and, certainly not, fleetingly present).[102]

Whilst it is often said that this acceptance mostly (or only) affects individuals, that is not necessarily the case. Although not a recognition/enforcement of foreign judgments case, *Dunlop Pneumatic Tyre Co Ltd v AG Cudwell & Co* provides a good example.[103] In that case, two representatives of a German company worked a 'stand' at the National Cycle Show at Crystal Palace for nine days.[104] On the seventh day, the company's junior representative was served at the show with a writ. Lord Collins MR held that the German company had been conducting its own business at some fixed place within the jurisdiction for a sufficient period of time, noting that in 'the case of an exhibition … as much business in the kind of goods exhibited might probably be done in nine days as in as many months in an ordinary town'.[105]

Many commentators have criticised the 'fleeting presence' rule on the basis that it is 'overinclusive'.[106] In the very recent edition of his book *Civil Jurisdiction & Judgments*, Professor Briggs has, however, maintained a staunch defence of 'tag' jurisdiction on two bases: one from principle; the other from practicality.[107]

[99] As pointed out in Briggs (n 76) para 34.05.
[100] *Rubin* (n 25) [8] (Lord Collins)
[101] See, eg, Briggs (n 76) para 34.05 and 34.19, n 132.
[102] *Schibsby* (n 1) 163.
[103] *Dunlop Pneumatic Tyre Co Ltd v AG Cudwell & Co* [1902] 1 KB 342 (CA).
[104] ibid, 348 (Collins MR).
[105] ibid, 347.
[106] Kenny (n 50) 200.
[107] Briggs (n 76) para 34.05.

Whilst there is much to be said for his practical arguments we are here concerned with the former, namely that:[108]

> In terms of principle, the doctrine of comity, according to which the rules of private international law respect and give effect to exercises of sovereignty, easily accepts that if a person is present within the territorial jurisdiction of a foreign sovereign, exercises of that authority over him should be respected and, within limits, given effect afterwards: what is true for things is also true for persons.

It is submitted that there are two difficulties with this justification. First, it focuses on what Ho and this section has termed the 'external' dimension of sovereignty. It does not, however, provide any reason why the act of service on a foreigner fleetingly present makes them part, in any meaningful sense, of the 'political community' over which sovereign authority is exercised (ie the 'internal' dimension of sovereignty referred to above).

Second, it is suggested that the justification proves too much. Although caveated by the term 'within limits', it would seem to apply notwithstanding the lack of any voluntarily assumed allegiance to a sovereign. The literature discusses circumstances such as where 'the judgment debtor had been tricked or kidnapped into setting foot on that territory'.[109] Whilst it is obviously correct that such conduct would not found international jurisdiction, it is unclear why any involuntary presence,[110] or presence intended for limited purposes such as a connecting flight,[111] or even a holiday[112] could provide any normative basis for secondary, independent obligation(s) on the defendant or respondent to obey judgments which arise as a result of that presence. As noted by the Court of Appeal in *Adams v Cape* (apparently referring to the facts of *Dunlop Pneumatic v AG Cudwell*), 'the idea that … a foreign company of manufacturers, present in the United Kingdom for a few days only through having set up a stall at an exhibition, thereby incurred a duty of fealty to the King-Emperor is surely fanciful'.[113]

Schibsby advanced both a normative foundation for, and grounds of, international jurisdiction which were logically reconcilable with one another. As outlined above in respect of both residence/citizenship and fleeting presence, those grounds have since changed but the foundation is said to have stayed the same the same. It is submitted that the foundation no longer fits the grounds.

[108] ibid.
[109] *Collier's* (n 70) 239.
[110] Dickinson (n 7) 436 gives the example of a defendant or respondent 'flying over the Isle of Wight'.
[111] ibid 436.
[112] See the personal anecdote recorded at *Collier's* (n 70) 239.
[113] *Adams* (n 92) 553.

C. The Fraud Exception

In addition to the above, in assessing the obligation theory this chapter also as a matter of methodology considers what are often considered 'defences' to the recognition and the enforcement of judgments, in particular the fraud exception. It is necessary at the outset, however, to be clear as to the scope of the fraud exception, also known as the '*Abouloff v Oppenheimer* rule'.[114] *Collier's Conflict of Laws* sub-categorises the fraud exception as follows:[115]

> A judgment which has been obtained by tricking the foreign court, for example, by perjury or bribing a witness, is not recognisable due to fraud ('a fraud on the court'). Nor is the judgment recognisable or enforceable if the foreign court itself acted fraudulently, for example, if the judge was biased ('a fraud by the court'). However, fraud goes further than these clear examples. If the substantive case in the foreign court raises an allegation of fraud, a judgment on that matter may not be recognised or enforced ('fraud on the merits'). A foreign judgment will not be recognised or enforced if the judgment debtor was coerced or threatened with violence in the course of the case ('collateral fraud'). In any of these cases, it does not generally matter that the foreign court investigated the possibility of fraud and rejected it.

Thus, *Collier's Conflict of Laws* appears to suggest that there is a (sub-)category of fraud separate to 'a fraud on the court', and aside from the general caveat that 'it does not generally matter that the foreign court investigated the possibility of fraud and rejected it'.[116] This is described as a situation in which 'the substantive case in the foreign court raises an allegation of fraud'.[117] If correct, this would give the fraud exception a very wide scope because it would apply whenever the proceedings giving rise to the foreign judgment involved any allegation of fraud. Such a broad interpretation of the fraud exception does not appear to be accepted by other private international law textbooks. *Dicey* states that a foreign judgment is 'impeachable by fraud' 'if obtained by fraud'.[118] *Briggs* refers to the situation where 'a judgment has been obtained by fraud'.[119] *Cheshire* says that 'a foreign judgment is impeachable for fraud in the sense that upon proof of operative … fraud without which the judgment would not have been obtained to a high degree of probability by the person alleging it the judgment cannot be given effect'.[120]

The only authority cited by *Collier's Conflict of Laws* for the apparently freestanding 'fraud on the merits' category is *Vadala v Lawes*.[121] The allegations

[114] After the decision in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 which is addressed in detail in ch 6 in this volume.
[115] *Collier's* (n 70) 254–45.
[116] ibid, 255.
[117] ibid, 254.
[118] *Dicey, Morris & Collins*, 15th edn (n 28) paras 14R-137, rule 50, and 14-138.
[119] Briggs (n 76) para 34.28.
[120] *Cheshire* (n 98) 569.
[121] *Vadala v Lawes* [1890] 25 QBD 310 (CA).

made in *Vadala v Lawes*, however, appear to have been that 'the judgment of the Italian Court was obtained by fraud'.[122] In particular, the defendant or respondent alleged: 'a shuffling of bills … in the Italian Courts, a substitution of some genuine ones for some forged ones', such that 'by that shuffle and fraud the Italian Courts were imposed upon';[123] and 'the plaintiff in Italy fraudulently represent[ing] these bills as commercial bills when he knew they were not', 'thereby impos[ing] on the Courts and obtain[ing] his judgment'.[124] It therefore appears that *Vadala v Lawes* was (in the *Collier's* terminology) 'a fraud on the court' case. Moreover, the reasoning in *Vadala v Lawes* does not seem to support a broader rendering of the exception. Lindley LJ's rationale was that: 'I cannot read the judgments [in *Abouloff v Oppenheimer*] without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case ….'[125] His Lordship was not saying that any substantive fraud case can be re-opened.

What *Vadala v Lawes* did decide, however, is that the fraud exception can apply even where the fraud alleged by the defendant or respondent was raised before, but rejected by, the foreign court.[126] Despite appellate challenges to this proposition over the years,[127] this remains the position.[128] In *AK Investment v Kyrgyz Mobil Tel Ltd*, the Privy Council confirmed specifically that 'a foreign judgment may be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been produced, or even was produced and rejected, in the foreign court'.[129]

There appear only to be two relevant limitations on the fraud exception. First, there must be prima facie evidence of fraud,[130] failing which it would amount to an abuse of process to relitigate the matter: *Owens Bank Ltd v Étoile Commerciale S.A.*[131] Second, where the issue of fraud has already been

[122] ibid, 314–15.
[123] ibid.
[124] ibid, 315.
[125] ibid, 317.
[126] ibid.
[127] For example, *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (CA and HL), which ended unsuccessfully with Lord Bridge stating (at 489) that 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it'.
[128] See, by contrast, the public policy exception where it is alleged that a judgment enforces a contract which furthers an act to be performed where it is illegal under the law of the place where it is to be performed. In such a case, fresh evidence of the illegality must be adduced: *Collier's* (n 70) 253.
[129] *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 [109] (Lord Collins).
[130] It is unclear whether this threshold is consistent with that Blackburn J suggested in *Godard* (n 1). In that case the Court held (at 149) that 'Probably the defendant may shew that the judgment was obtained by the fraud of the plaintiff, for that would shew that the defendant was excused from the performance of an obligation thus obtained.'
[131] *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44 (PC). Lord Templeman stated (at 51) that: 'Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible

(re-)litigated for a second time in the foreign court (for example, on a subsequent application to set aside the original judgment), the losing party is not entitled to mount a third challenge in England and Wales: *House of Spring Gardens Ltd v Waite*.[132] The decision by a foreign court that a judgment from the courts of that country was (or was not) obtained by fraud can create an estoppel in the English proceedings.

Standing back, what the fraud exception means practically is that whenever: (1) Party A in foreign proceedings denies any allegation made against them which must have been within their own knowledge; (2) the foreign court accepts that denial; (3) the other party (Party B) can adduce prima facie evidence that Party A knew their denial was wrong (despite the foreign court accepting it) the foreign court's judgment can be reviewed *de novo*. Empirically, this is a common factual situation. It is in once sense wider than *Collier's* proposed 'fraud on the merits' category, since it extends to every cause of action or substantive allegation (and not just allegations of fraud).

It has been noted by many commentators that the fraud exception constitutes a significant in-road into the principle of the finality of judgments.[133] It is submitted here, however, that there is at least a significant tension between the low bar for the fraud exception and the obligation theory. If there is an obligation at all in such cases, at best it must be a very weak one. Where prima facie evidence is adduced, there is not even any meaningful obligation because the English court will embark on a *de novo* review of the foreign judgment. Supporters of the obligation theory argue that there is a prima facie obligation which is overridden by a counter-veiling policy to prevent fraud.[134] Where international jurisdiction is founded on voluntary submission to the jurisdiction (whether by contract or appearance), the normative basis for denial of any free-standing obligation to comply with the foreign judgment is not hard to seek: the fraud undermines any such consent.[135] It is more difficult to explain the position, though, where international jurisdiction is established by mere presence.[136]

In terms of the possible future development of the law, the Privy Council has stated that 'a nuanced approach might be required' to the fraud exception 'depending on the reliability of the foreign legal system, the scope for challenge in the foreign court and the type of fraud alleged'.[137] If this is the future

evidence disclosing at least a *prima facie* case of fraud. No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment.'

[132] *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 (CA).

[133] *Collier's* (n 70) 255.

[134] Briggs (n 76) para 34.28.

[135] Briggs (n 44) 97.

[136] ibid, 97.

[137] *AK Investment* (n 129) [116] (Lord Collins).

direction of travel, it is doubtful that such a 'nuanced approach' is consistent with the notion that all judgments create secondary, independent obligations for the defendant or respondent to comply with them.

IV. CONCLUSION

There are several senses in which two cases from 1870 could be said to be 'landmarks'. In one sense, a theory of the recognition and enforcement of judgments clearly emerged from *Godard* and *Schibsby* which has since been adopted in numerous Commonwealth and common law countries, in particular Ireland, Hong Kong, Australia and New Zealand.

However, it is apparent from an analysis of the fit between the obligation theory and English law and modern appellate authorities (such as the United Kingdom Supreme Court decision in *Rubin* or the recent Court of Appeal of Singapore decision in *Merck*) that the obligation theory espoused in *Godard* and *Schibsby* does not meaningfully assist in explaining the current, positive law on the recognition and enforcement of foreign judgments. The obligation theory has become de-tethered over time from the positive law it is supposed to justify. This can be illustrated by the English Court of Appeal's decision in *Adams v Cape*. This pushed the grounds of international jurisdiction in England set out in *Godard* and *Schibsby* from residence to presence, but nevertheless purported to uphold the obligation theory as the foundation for the recognition and enforcement of judgments. Merely stating that a person is under an obligation to obey a foreign judgment does not explain *why* they are under that obligation, or provide a justification for the criteria that the common law uses in a particular jurisdiction to determine when such an obligation arises.

The divergent approaches to the enforcement of foreign judgments now emerging across the common law world give rise to a familiar tension between the advantages of hard-edged but more inflexible rules on the one hand, and an approach relying on a more holistic, multi-factorial assessment on the other.[138] Even for jurisdictions such as Ireland which have rejected the Canadian 'real and substantial connection' approach, reservations were expressed by O'Donnell J in *Flightlease* about the intrinsic merit of the traditional rules. It is submitted that in this context, there is much to be said in policy terms for an approach that prioritises certainty, given the difficulties a 'soft-edged' approach may create in determining ex ante whether a foreign judgment will be enforced in England. Naturally, this is of particular importance for a defendant who needs to decide in short order whether to defend a claim brought against them abroad, but it is important too for a claimant in being advised at the outset on jurisdiction and

[138] See, eg, in the context of illegality, *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [81]–[83] (Lord Toulson).

the prospect of enforcing a judgment from the jurisdiction where the claimant intends to issue proceedings in the defendant's home jurisdiction, or where they have assets.

There is a separate issue exemplified by the contrasting decisions in *Beals* and *Flightlease* as regards how far appellate courts can and should go in making substantial changes to the common law rules on the enforcement of foreign judgments, or how far any reform is now a matter for legislation (for example, through the development of multi-lateral instruments to supplement the common law rules where that is thought necessary).[139] As regards the latter, prior to the UK's departure from the European Union much of the ground on the recognition and enforcement of foreign judgments was covered by the Brussels and Lugano jurisdictional regimes. This regime is based on reciprocity rather than the obligation theory espoused in *Godard* and *Schibsby*. As matters stand, these European regimes no longer apply following the end of the Brexit transition/implementation period but there are other multi-lateral instruments either in force or on the horizon. In particular, the UK has acceded in own right to the Hague Convention of 30 June 2005 on Choice of Court Agreements, albeit that its material scope (focussed on exclusive choice of court agreements concluded in civil and commercial matters after its entry into force) and geographic scope[140] remain relatively limited. There is also the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, with a much broader ambit and scope. It has not yet entered into force, but the Council of the European Union recently decided to accede. Whatever the future may bring, for the time being at least travellers from an increased number of jurisdictions are finding *Godard* and *Schibsby* in seeking their way.

[139] See, eg, *Rubin* (n 25) [129] (Lord Collins).

[140] As matters stand, save for the UK only the European Union (on behalf of all its Member States other than Denmark), Denmark, Mexico, Montenegro and Singapore have ratified the Choice of Court Convention. The US and China are among the countries who have signed but not ratified it.