Foreign Judgments - Common Law 1996

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I. INTRODUCTION

A. General Considerations and Assumptions

[1] This discussion paper has been prepared for the meeting of the Uniform Law Conference of Canada to be held in Ottawa in August 1996. Its purpose is to focus debate on the possible content and direction of a uniform act dealing with enforcement of judgments from courts (and possibly other tribunals) of foreign countries. Throughout this paper we will refer to those simply as "foreign judgments", a term which we use in distinction to "extraprovincial judgments", which denotes judgments emanating from other Canadian provinces.

[2] The final communiqué of the meeting of the Ministers of Justice in May 1996 urged the ULCC to embark on the drafting of a uniform act dealing with the recognition and enforcement of foreign judgments. We understand such a request to be founded on three considerations: (1) the present law on this matter is not uniform across the country, and it should be; (2) the present law is perceived to be insufficiently certain; and (3) existing rules may be disadvantageous to Canadian defendants in comparison to defendants from other countries. In light of those considerations, the goal of this paper is to set out the major factors which might influence the scope and content of the uniform act requested by the Ministers of Justice.

[3] This report should be considered against the background of the Department of Justice Canada's "Study Concerning Possible Law Reform on Recognition and Enforcement of Foreign Judgments in Canada". For the purposes of that study we prepared a report (1995) on the current law of the common law provinces and the problems it raises. We will not repeat in this report the detailed survey of the current law that we endeavoured to give there. The Department of Justice itself produced a Report (July 1995) as the conclusion of the Study. This was based on the common law and civil law background papers, and on consultations that the Department undertook across Canada with representatives of the practising legal profession. The Department's Report highlighted the uncertainty that Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 had created with respect to the enforcement of judgments, especially those from outside Canada. It also noted that further study was needed to provide more precise information about the day-to-day operation of the current system, and about the competitive disadvantage, if any, raised by Canada's more liberal approach to the enforcement of foreign judgments compared with other nations. The present paper is not the result of such a study, which we think would still be worthwhile pursuing.

[4] Our mandate is limited to the common law provinces and the territories. A parallel discussion paper by Professors Jeffrey Talpis and Gerald Goldstein of the University of Montréal will take account of the Québec point of view. We have benefitted from reading a preliminary draft of that paper, and we make reference to it in this report. Although our mandate is limited to the common law jurisdictions, at a couple of points we make mention of the Québec position. We do this because in its recent revision of its Civil Code Québec updated its law dealing with foreign judgments. From the point of view of harmonization of provincial law this seems to us to be significant in two respects. First, having very recently revised its law on this matter, Québec may be less inclined than the other provinces to change that law by adopting a uniform act which significantly altered that law. The easiest route toward uniformity may be for the common-law jurisdictions to move closer to the Québec position. Secondly, and more importantly for our purposes, the common law provinces and the ULC may have much to learn from the Québec revisions. The Québec legislature is the only one to have examined the subject of enforcement of foreign judgments in recent years, and it may be the case that the provisions of Québec's new Civil Code provide good models for a new uniform act. Detailed analysis of that question is best left to the discussion paper from Québec, but where recent amendments to the Québec Civil Code seem to reinforce or cast light on points we make in our paper, we make mention of that fact.

B. Possible Courses of Legislative Action

[5] Before discussing the content of a uniform statute it may be helpful to review the broad categories of the available courses of legislative action, along with some of the advantages and disadvantages of each.

1. Legislation based on bilateral treaties negotiated by the Federal Government

[6] The provinces already have uniform legislation based on a treaty between Canada and the United Kingdom. Canada has just completed negotiating a comparable agreement with France (not yet implemented), and other bilateral discussions may be in the offing. It would be possible to draft and implement uniform provincial legislation piecemeal as such treaties are concluded at the international level. An advantage of this approach is that the negotiation process might elicit the easier enforcement of judgments from Canadian courts in those countries. This would respond to the perception that Canadian residents may be at a disadvantage in that, as things presently stand, Canada enforces foreign judgments more readily than most foreign countries enforce Canadian ones. The main disadvantage is that a bilateral treaty-making processes will proceed slowly and incompletely, so that the perceived deficiencies of the status quo would persist for some time.

2. Legislation based on a multilateral convention negotiated by the federal government

[7] Canada has been involved in preliminary discussions at the Hague Conference on Private International Law exploring the possibility of a new, potentially world-wide, convention on the enforcement of judgments in civil and commercial matters. It would be possible to delay any law reform until such a treaty was concluded. A uniform statute could then simply implement the convention, as several ULC uniform acts do for other conventions. This would have the advantage of focussing law reform efforts in this country on the negotiation of that convention. In addition, as with option # 1, this route might gain concessions from foreign countries which would lead to easier enforcement of Canadian judgments abroad. As with the previous option there are disadvantages resulting from the fact that negotiation of an internationally acceptable convention (which is far from certain to succeed) will take a number of years, during which the status quo would persist.

3. Enactment of federal legislation dealing with foreign judgments

[8] Apart from divorce and some peripheral matters the federal government has not viewed the enforcement of foreign judgments as within its legislative mandate. There are obiter dicta in recent decisions of the Supreme Court of Canada that such legislation might be valid. However, these dicta are almost certainly too frail a foundation to undertake such a large and controversial federal intervention in an area that has until now been regarded as one of provincial responsibility.

4. Uniform provincial legislative action in pursuit of reform and uniformity

[9] The substantive rules for the recognition and enforcement of foreign judgments in Canada are not uniform. Two provinces - New Brunswick and Saskatchewan - have legislation codifying the common law rules as they stood many years ago. Québec deals with the matter in its Civil Code. The other seven and the two territories deal with it through the common law. (In each common law province the Uniform Reciprocal Enforcement of Judgments Act provides, as an alternative to bringing a common law action, a registration procedure for judgments from designated reciprocating states. The conditions for registrability again reflect the common law enforcement rules of some years ago.) This lack of uniformity is considered to be unhelpful and could be eliminated if the provincial legislative régimes were made uniform. An advantage of doing this in advance of and apart from the treaty process described in options 1 and 2, is that it could be done quickly, or at least without the pre-condition of concluding international negotiations. A disadvantage is that this process will not attract concessions from foreign countries, though it does not necessarily stand in the way of the treaty negotiation process. It might, however, divert energy and attention which would otherwise be focussed on those avenues.

[10] Uniformity might be achieved in either of two ways:

[11] (a) The three provinces with distinct legislative schemes might abandon them by repealing their legislation. This would produce uniformity, at least among the common law provinces, by bringing into effect the judge-made law that currently prevails in the other seven provinces. It would not, however, address the concerns inherent in the common law approach, namely, that it (1) is not certain enough and (2) puts Canadian defendants at a disadvantage compared with their counterparts from other countries. We note as well that it is highly unlikely that Québec would be interested in amending its new Civil Code for this purpose.

[12] (b) A model provincial statute could be adopted which would (1) replace the common law rules in the seven provinces and two territories which currently employ them, and (2) supersede the statutory régimes which presently exist in Saskatchewan and New Brunswick, and possibly also the Civil Code's rules in Québec. This would have the advantages of achieving uniformity - assuming, of course, that all jurisdictions adopted it - and addressing the perceived deficiencies in the common law approach. Unlike options 1 and 2, it would not operate to secure the easier enforcement of Canadian judgments in foreign countries. On the other hand, such a uniform act could employ a "tiered" approach using differentiated sets of rules. Judgments from certain countries, with which Canada had negotiated reciprocal arrangements or concessions, would be entitled to a more expeditious or unqualified enforcement in Canada than judgments from other countries. We refer to this possibility again later.

5. No action could be taken at this time

[13] This would have the advantage, at least in the seven provinces and two territories that continue to be governed by the common law in this area, of the continuing flexibility of judge-made law. The disadvantages are continued lack of uniformity, concerns over the high amounts of some foreign (i.e. American) awards, and persistence of the disadvantageous situation which seems to exist between Canadian residents and foreign ones with regard to the mutual enforcement of foreign judgments. This last-mentioned consideration should not be over-estimated, as Canada's largest trading partner, the United States, enforces Canadian judgments as readily as we enforce American ones.

[14] It is not the goal of this paper to discuss all the pros and cons of the foregoing five courses of action. Our reason for not entering into a detailed discussion of this matter is that it does not seem to lie within our terms of reference. As noted in the introduction, this paper addresses the issues bearing on the content and scope of a new uniform act -- i.e. option 4 (b). It appears that the Ministers of Justice have weighed the options and have decided that that is the route which should be followed. Nevertheless we think it helpful to place option 4 (b) in the context of other possible actions, since they might have some bearing on the assessment of what should go into a uniform provincial statute dealing with enforcement of foreign judgments. The remainder of this discussion paper is devoted to that subject.

II. SCOPE AND CONTENT OF A MODEL ACT

A. General Considerations

[15] An initial question is which types of judgments should be dealt with in a model act. We deal with that in section B. The next issue is how the relevant foreign judgments should be treated, and that occupies sections C, D and E.

[16] Statutes dealing with the recognition and enforcement of foreign judgments generally deal with either or both of two broad categories of issues. The first may be labelled conditions for recognition and enforcement. This denotes the various requirements that a foreign judgment must have before it will be eligible for recognition or enforcement in the courts of a Canadian province. "Recognition" would include recognition of the judgment as res judicata so as to bar a subsequent, inconsistent claim against a party to the judgment by another party to it. The second category of issues concerns mechanisms for enforcement: what steps must be taken to render enforceable a foreign judgment which meets the conditions for enforcement, and what effects does a judgment have when those steps are taken? A statute need not deal with both of these matters. For example, in the United States the Uniform Foreign Money-Judgments Recognition Act - which, it should be noted, has not been uniformly adopted by all states - deals with conditions for recognition. It does not, however, address the manner of enforcement. Rather it leaves that up to the individual states. Conversely, in Canada it would be possible (though not very useful) to have a statute which addressed the manner of enforcement but which said nothing about the conditions for enforcement. We say nothing at this stage about whether a uniform model act should address both conditions for recognition and manner of enforcement. We make the distinction only so that we might deal with them separately, on the understanding that they are not necessarily linked.

B. Scope of a Model Act

1. General

[17] To what sort of foreign judgments should a uniform act apply? Presumably, it should apply to final money judgments in in personam suit in most civil and commercial matters. Equally, it should presumably not deal with recognition of (1) foreign divorces (a matter which is addressed in the Divorce Act), (2) child custody orders (which are already subject to existing statutory régimes), or (3) declarations of personal status (the rules for the recognition of which have always been treated as different from the rules for recognizing in personam judgments). There are also compelling reasons to exclude (4) foreign judgments in rem (because they create rights in property, and territorial competence turns on the location of the property) and (5) foreign judgments in bankruptcy and insolvency proceedings (the recognition of which is usually not a matter of absolute obligation but of

discretion based on comity, by means of which a judge can take account of the interplay between the orders of courts in different jurisdictions). Between those two relative certainties lie some more debatable matters.

2. Penal Judgments

[18] The Uniform Enforcement of Canadian Judgments Act (1992 ULCC Proceedings) does not permit enforcement of an extraprovincial judgment "for the payment of money as a penalty or fine for committing an offence" (s. 2 (1)(b)). It is difficult to imagine why we would want to be any more generous to foreign judgments in such matters, and we think there will be little debate that an act for foreign judgments should contain a comparable provision. The terms "penalty" and "fine" are not defined in the UECJA, but that does not appear to present a problem.

3. Taxes

[19] Common law courts never used to enforce foreign judgments for taxes. Recently, however, some courts have carved out exceptions to that rule and others have construed "taxes" narrowly. Some foreign taxes, such as municipal water rates, are akin to a fee for service, and it is not clear what the justification for refusing to enforce such a judgment would be. This is an issue which should be examined closely. It may be the case that some -- probably most -- foreign tax judgments should be excluded from the operation of a model foreign judgments act. It is not clear, however, that there is any reason to reverse the effect of recent court decisions which have enforced some foreign tax (or tax-like) judgments.

4. Public law judgments

[20] There is some authority for the proposition that common law courts will not enforce foreign judgments in respect of "public laws". This bar was thought to be related to that for foreign revenue and penal laws. This question should be examined with respect to any model statute. We note that a recent, well-reasoned decision of the Ontario General Division rejected the "public law" bar to enforcement of a foreign country judgment: United States of America v. Ivey (1995), 130 D.L.R. (4th) 674. The reasons for judgment in that case provide a convincing argument for rejecting the public law bar in Canadian law.

5. Maintenance Orders

[21] It is common, both in Canada and elsewhere, to see court orders for maintenance as raising issues sufficiently distinct from those of general civil judgments as to justify excluding them from general statutes and treating them separately. Maintenance orders are excluded from the Uniform Enforcement of Canadian Judgments Act (by s. 2 (1)(a)) and dealt with in the Reciprocal Enforcement of Maintenance Orders Act. While it is undeniable that maintenance orders present some special concerns, it is not clear that those concerns

are so special as to justify the ghettoization of maintenance orders in a special statute. That arguably has the affect of harming women, who are the overwhelming majority of judgment creditors in maintenance action.

[22] The main problem with maintenance orders at common law was that, as periodic orders subject to variation in the court which originally issued them, they were classed as "not final". Since only final orders could be recognized at common law, maintenance orders were denied enforcement. That problem has been overcome in the Reciprocal Enforcement Maintenance Orders Act. It will be noted, however, that the problem is only addressed if a Canadian province chooses to reciprocate with another jurisdiction. The provinces reciprocate among themselves. For this reason there was little problem in excluding maintenance orders from the Uniform Enforcement of Canadian Judgments Act -- the well-developed scheme in the Reciprocal Enforcement of Maintenance Orders Acts was already applicable throughout Canada. Some provinces also reciprocate with a variety of foreign jurisdictions respecting enforcement of maintenance orders. But reciprocation is far from universal, and to the extent that it is not maintenance creditors in non-reciprocating jurisdictions face enormous hurdles if the maintenance debtor is located in Canada.

[23] It is quite possible to address this issue in a general model act. Such an act could adopt a provision like that in the Civil Code of Québec:

Art. 3160.A decision rendered outside Québec awarding periodic payments of support may be recognized and declared enforceable in respect both of payments due and payments to become due.

A maintenance judgment would still have to meet the general conditions for enforceability, dealt with below, but would face no additional hurdles. We see two principal problems with including such a provision in a general model act. The first is that, since the existing Reciprocal Enforcement of Maintenance Orders Acts (REMO) are likely to continue, there will be the problem of potentially inconsistent régimes. Maintenance creditors with judgments from reciprocating jurisdictions would appear to have the option of proceeding either under the REMO scheme or under the new model act.

[24] Secondly, the continuing exclusion of maintenance orders from general foreign judgment legislation preserves the possibility for Canadian jurisdictions to negotiate with foreign states for improved treatment of Canadian maintenance creditors. This is part of the recent Canada-France Convention, and it can also take place as individual provinces undertake discussions with potential reciprocating states under the REMO scheme. If maintenance judgments are included in a general statute that may result in the loss of one inducement for foreign states to agree to give improved treatments to Canadian maintenance creditors.

[25] We are not convinced that either of considerations provide sufficient justification for the ongoing exclusion of support orders from a general statute. Accordingly we suggest that

the ULC give consideration to the inclusion of maintenance orders in any general model act dealing with the enforcement of foreign judgments. We recognize, however, that problems of variation of maintenance orders tend to complicate matters and may militate in favour of dealing with them, as they are dealt with now, in a separate reciprocal enforcement statute.

6. Non-Money Judgments and Provisional Measures

[26] The terms of reference for this report leave open the question of whether a model statute should deal with the enforcement of (1) final orders other than those for the payment of money, such as specific performance or an injunction, and (2) orders of a provisional or protective nature, such as interlocutory injunctions (including orders in the nature of a Mareva injunction) and disclosure orders. No Canadian legislation has dealt with these matters, but they are addressed in the Brussels and Lugano Conventions which deal with judgment enforcement within the European Union.

[27] One problem with enforcement of interlocutory orders of foreign courts is that, by definition, they do not meet the common law criterion of finality. As mentioned in the previous section with respect to maintenance orders, at common law only those foreign judgments which were deemed final were enforceable. This criterion, however, was developed before the invention of such modern provisional measures as Mareva injunctions, Anton Piller orders, and related disclosure and receivership orders. It is arguable that the finality criterion was never intended to prevent recognition of such orders, and that the general considerations in favour of enforcement of foreign money judgments argue in favour of enforcement of at least some provisional and protective measures. Arguably Canadian courts should at least be given the discretion to enforce some foreign provisional orders. There has been little discussion of this matter in Canada, and there is not a great deal in the way of instructive case law. It may be the case then, that drafting provisions on this subject would be a difficult and contentious process and that, since it does not seem crucial it should be omitted. We think, however, that this is a matter that is likely to be of increasing importance in the future, and that the process of developing a model act should at least consider the possibility of including in such a statute provisions dealing with the recognition of protective and provisional measures of foreign courts.

[28] We understand that at its August 1996 meeting the ULCC will be considering a proposed uniform act on this subject for domestic purposes (Interprovincial Enforcement of Non-Money Judgments Act). Discussions around that act may help decide whether it would be worthwhile making similar provision in a statute dealing with foreign judgments.

7. Judgments of Administrative Tribunals

[29] In addition to applying to judgments from courts, s. 1 (b) of the Uniform Enforcement of Canadian Judgments Act states that it applies to a final order that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of

unlimited trial jurisdiction in that province or territory . . . .

It is not clear that this same generous approach should be taken with respect to decisions of administrative tribunals of foreign countries. The fact that we have confidence in a foreign state's judiciary does not necessarily entail equal deference to such a state's administrative system. A solution would be to require that the foreign administrative award actually be converted into a court judgment, so that we are now simply dealing with a court judgment. Professors Talpis and Goldstein suggest in their report that this is unnecessary and that the UECJA approach to intra-Canadian administrative judgments should be extended to foreign ones. We think this may be overly generous to foreign administrative judgments, but certainly there are good arguments on either side and the ULCC should consider this point.

C. Conditions for recognition and enforcement General

[30] Once the scope of applicability of a uniform act is determined the next question to address is that of the general criteria for recognition and enforceability of foreign judgments in order to allow for their enforcement, i.e. conditions for recognition and enforcement. This will be the most important part of any uniform statute. It will determine which foreign judgments will be recognized or enforced in a Canadian province and which will be denied such recognition or enforcement.

[31] A primary concern of the common law rules on the recognition and enforcement of foreign judgments has been the territorial competence of the foreign court. This rests on the assumption that the original court must have a legitimate claim to subject the defendant to its jurisdiction. A defendant's assets here should not be exposed to the enforcement of a foreign judgment where it was unfair under the circumstances to expect the defendant to defend the action in the foreign country. The common law approach has been to define certain connections with the original court (presence of the defendant, consent by the defendant, or real and substantial connection with the original court's jurisdiction) as making its assertion of jurisdiction legitimate. It is possible by statute or treaty to dispense with territorial criteria and to give blanket recognition to all of a country's judgments, if the jurisdictional practices of that country are regarded as bound in every case to be compatible with Canadian notions of fairness. In the domestic context, this is in part the approach of the Uniform Enforcement of Canadian Judgments Act, because that statute was linked to the assumption that other provinces would adopt the Uniform Court Jurisdiction and Tranfer of Proceedings Act (1994 ULCC Proceedings) and so harmonize their jurisdictional practices.

[32] Even if the foreign court was a suitable place to hear the original action we might be reluctant to enforce a resulting judgment in Canada if the procedures followed by that court failed to conform to our notions of due process. To offer three examples, if the foreign court failed to give the defendant notice of the original action and proceeded on an ex parte basis, or if the foreign court refused to give one of the parties a chance to present its case, or if

the foreign court was biased between the parties we would be reluctant to enforce a resulting judgment. This concern is dealt with under the heading of defences to enforcement.

[33] Even if the foreign court were an appropriate place to hear the original action and employed unobjectionable procedures, we might be reluctant to enforce a resulting judgment if the foreign court applied a rule or standard of substantive law which we found deeply objectionable. This, too, is dealt with under the heading of defences to enforcement.

[34] Sections 2, 3 and 4 which follow deal in more detail with the concerns in the preceding three paragraphs. Section 5 addresses some residual issues.

2. The foreign court's territorial competence

(a) Where the defendant consents to the foreign court's jurisdiction

[35] The common law has always regarded the territorial limits on a foreign court's jurisdiction as irrelevant if the defendant consented to its exercise of jurisdiction. Consent could be by appearing in the proceeding, by the defendant's having initiated the litigation as plaintiff in the same court, or by the defendant's previously having made a genuine agreement to submit to that court's jurisdiction. A defendant who did any of these things, and thus attorned to the foreign court's jurisdiction, could not afterwards dispute the foreign court's right to impose liability on the defendant.

[36] We think there will be little dispute that a future statute should likewise treat consent as sufficient to justify recognition or enforcement. The only point on which the common law is unsettled is what degree of participation in a foreign legal proceeding constitutes attornment. The English courts regard the defendant as having submitted, even if all the defendant did was to apply to the court to decline jurisdiction (Henry v. Geoprosco Int'l Ltd., [1976] Q.B. 726). Canadian courts have on the whole rejected this view and treat the making of any type of jurisdictional argument to the foreign court as falling outside the category of attornment (Dovenmuehle v. Rocca Group Ltd. (1981), 34 N.B.R. (2d) 444 (C.A.), aff'd, [1982] 2 S.C.R. 53; Re McCain Foods Ltd. (1979), 103 D.L.R. (3d) 724 (Ont. H.C), aff'd, 103 D.L.R. (3d) 724 at 734 (Ont. C.A.), leave to appeal refused, 31 N.R 449n (S.C.C.)). We favour the latter view for incorporation in a statute. It is in the interests of the international legal order that defendants not be discouraged from trying to resolve jurisdictional disputes at the outset, before the foreign court. If they do so, then lose the jurisdictional argument and withdraw, they should not be treated worse than if they had never appeared at all.

(b) Where the defendant does not consent to the foreign court's jurisdiction

[37] As far as extraprovincial judgments are concerned, the Canadian common law regards a defendant who did not consent to the other province's exercise of judicial jurisdiction as

nevertheless bound by it in two circumstances: (1) if the defendant was served with process in the territory of the other province, or (2) if a real and substantial connection existed between the facts giving rise to the action and the other province (Morguard). Judgments in default of appearance can be enforced against the defendant if either of these circumstances was present. It is clear that (1) also applies to foreign judgments, but it is not altogether whether, or to what extent, (2) does. The Morguard decision, and the subsequent Supreme Court of Canada decisions that considered it, were all concerned with Canadian judgments. However, lower courts have almost unanimously extended the Morguard principle to judgments from other countries. Therefore, we assume for the present purpose that condition (2) is also a ground for recognizing and enforcing a foreign judgment where the defendant has not consented to the foreign court's jurisdiction.

[38] The question with respect to a foreign judgments statute is how closely to stick to the common law criteria for recognition, where the judgment is a default judgment against a non-consenting defendant.

- (i) Preliminary question 1: territorial criteria or blanket recognition?

[39] A first choice to be made is as to whether the recognition of default judgments should be subject to any territorial criteria at the recognition end. The Enforcement of Canadian Judgments Act takes the approach that any jurisdictional issue ought to be sorted out in the original (Canadian) court. Therefore, the statute provides simply that any judgment from another Canadian jurisdiction must be enforced, without any jurisdictional test being applied by the recognizing court. It is assumed that the original court's jurisdiction is consistent with appropriate constitutional standards and with fair process. As already noted, this is premised on the adoption by other provinces of the CJTPA. Such an approach would certainly not be possible in relation to judgments from outside Canada generally, since jurisdictional practices in other countries vary enormously. However, there is no reason why legislation could not provide two grounds for recognition: (1) the country of origin is on a list of countries, whose judgments are recognized without any question as to territorial competence; (2) the judgment is from a country not on the list, but meets the statute's criteria for territorial competence. A list as suggested in (1) might include, for example, all the European Union countries, because their jurisdictional practice is well known, uniform and (we assume) acceptable to Canadian standards. (Judgments based on the "exorbitant" grounds permitted by the Brussels Convention would presumably be excepted.)

[40] One advantage of having a list of countries whose judgments (either with defined exceptions or without exception) would be recognized without any question of territorial competence would be predictability. Another would be that it opens up the possibility, adverted to earlier, of a two-tiered statutory scheme whereby countries that are prepared to enforce Canadian judgments to a particular standard will be entitled to a readier enforcement of their judgments in Canada. In fact, if such a two-tier system were adopted, there are probably compelling reasons for tying it to a system of bilateral treaties, or perhaps less formal agreements, between Canada and the foreign country in question rather than a decision by each enacting province. The latter could lead to a system of differential enforcement from one province to another, with a foreign country being on the "A list" in

some provinces but not others. Lack of uniformity is one of the things the proposed model Act is supposed to correct. We note also that some commentators have suggested to us that in their view a two-tiered system has serious disadvantages, namely, that it erects what might be seen as invidious distinctions between some countries and others, to the detriment of Canada's foreign relations. At the very least that is a further argument for tying any such system to decisions by Canada rather than by provinces.

- (ii) Preliminary question 2: specific territorial criteria or general criterion?

[41] Assuming territorial criteria are used in the statute, the next issue is whether to work with a list of territorial connections with the original country that are sufficient for recognition, or with a general criterion paralleling the one the Canadian common law has developed, "real and substantial connection", also put more broadly as compatibility with "order and fairness". We will consider how a general or omnibus criterion could be framed, and then discuss the reasons that can be argued for and against it as compared with a closed list of territorial criteria.

[42] The matter is complicated because the requirement for order and fairness may have constitutional status, so that any statute which attempted to specify what was meant by order and fairness would run the risk of being found unconstitutional if the courts came to a different view than the statute's drafters did about how that requirement should be made specific. Even if the order-and-fairness requirement, as applied to foreign judgments, does not have full constitutional status, it certainly does have that status for extraprovincial judgments. And there seems good reason to ensure that the standard applied to foreign judgments as at least as stringent as in the intra-Canadian context.

[43] In our view, if a general criterion is adopted, the approach of an existing uniform statute of the Uniform Law Conference strikes an acceptable balance between specificity and open-endedness. The Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA) addresses this question within Canada. The territorial competence of a Canadian court, as defined in s. 1 of the Act, is established by the presence of any of the listed jurisdictional bases in s. 3, the final one of which is:

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.

The Act then goes on, in s. 10, to provide:

s. 10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed if . . . .

There then follows a list of examples which we do not reproduce here. The opening words of s. 10 show that the examples listed in the remainder of that section operate only as non-conclusive presumptions. Their presence in a given case does not preclude the party

opposing enforcement from arguing that no substantial connection exists. Likewise their absence does not prevent the party seeking enforcement from arguing that such a connection does exist.

[44] The UCJPTA strikes a good balance between specificity and open-endedness, and it probably conforms to the requirements of the constitution. Subject to one concern which we mention below, there is no reason why the approach to territorial competence should differ depending on whether the judgment is a foreign or merely an extra-provincial one. In addition there are obvious benefits if the approach to territorial competence for intra-Canadian judgements is identical that for foreign ones: case law developed under one statute can inform that developed under the other. For that matter, the link between the two could be made explicit by providing simply in the foreign judgments statute that a foreign judgment is entitled to recognition if the foreign court had territorial competence as defined in the UCJPTA.

[45] There is one aspect of territorial competence which is not directly touched on in the UCJPTA but which might be addressed in legislation dealing with foreign judgments. The foreign court might have had territorial competence according to the "real and substantial connection" type of criteria, but still have been a seriously inconvenient forum for litigation of the original action. In a Canadian court this would normally be resolved by a motion to decline jurisdiction on the basis of forum non conveniens, but a foreign court might not accept arguments of forum non conveniens, or, if the defendant did not appear before the foreign court, the issue of forum conveniens would not have been raised at all. Should a defendant be able to resist the enforcement of a foreign judgment on the ground that the foreign court was a seriously inconvenient forum? The UECJA did not need to address this issue in the context of intra-Canadian judgments, since all Canadian provinces employ the doctrine of forum non conveniens and it is part of the UCJPTA. However, not all foreign courts follow the same approach.

[46] In the United States the Uniform Foreign Money-Judgments Recognition Act recognizes this factor as a discretionary ground for non-recognition. S. 4 of that model statute authorizes refusal of recognition where the U.S. court "believes the original action should have been dismissed by the court in that foreign country on grounds of forum non conveniens." This ground for denying enforcement operates solely where the foreign court took jurisdiction "only on the basis of personal service". Since mere personal service does not meet the UCJPTA's initial test for territorial competence, there may be less need for a provision of this sort on Canada. We see no overwhelming argument in favour of a provision like s. 4 of the American Uniform Foreign Money-Judgments Act. Nevertheless this issue does not seem to have been considered in Canada, and, if the broader approach is taken, we recommend that consideration be given to including in any uniform act a discretionary right to preclude enforcement where a foreign court which had territorial competence was nevertheless a seriously inconvenient place to litigate the original action.

[47] The reasons in favour of a single omnibus criterion, albeit with listed presumptively

adequate connections, have already been indicated. It would allow non-Canadian judgments to be recognized on the same criterion as Canadian judgments are recognized at common law, subject only to the forum non conveniens point just mentioned. It would avoid creating a third regime for the recognition of judgments by Canadian courts, one for the common law recognition and enforcement of Canadian judgments, a second for enforcement of Canadian judgments under the UECJA (assuming that Act comes to be broadly accepted), and a third, quite distinct, for the enforcement of non-Canadian judgments under the statute being discussed in this paper.

[48] Probably the major reason that can be argued against a single omnibus criterion, and in favour of a closed list of territorial criteria, is greater predictability of result. One of the main problems with the Morguard approach, possibly exaggerated by some but nevertheless significant, is its uncertainty. The UCJPTA technique of a list of presumptively valid territorial grounds lessens the uncertainty but does not eliminate it, since the listed grounds are neither exhaustive nor conclusively valid. It can also be said that if a recognition and enforcement statute does little more than restate the Morguard test, why not just leave things as they are?

[49] A secondary reason that can be argued against a single criterion paralleling the Morguard test is that it is too generous in comparison to the rules that most countries apply to the recognition of Canadian judgments. We do not have empirical grounds for saying whether this is in fact true, but it is widely believed that Canada is now at the liberal end of the spectrum when it comes to the recognition and enforcement of judgments from other countries.

[50] The choice between an omnibus criterion and a closed list of territorial criteria therefore involves a number of rather complex pros and cons. We ourselves are in two (separate) minds on the issue. For the purposes of this discussion paper, we present the two options: (1) an omnibus criterion with presumptions, and (2) a closed list of specific territorial criteria, as equally viable.

[51] There is also a third option that strikes a compromise between the two: (3) a list of specific territorial criteria that are conclusively sufficient (unlike the UCJPTA model, where they are only presumptively so), plus an additional, open-ended criterion - in effect, any case where, despite the lack of one of the listed territorial criteria, the court is satisfied that the "order and fairness" standard is met.

[52] We now turn to some specific territorial criteria that might form part of a foreign judgments statute. We compare them to the existing law, and indicate whether we think they could be treated as conclusively or presumptively sufficient to entitle the foreign judgment to recognition in Canada.

- (iii) Specific criteria based on the place of service

[53] At common law, a foreign court was traditionally regarded as having jurisdiction if the defendant was served with process while present in the foreign country. An artificial person

was considered present if it carried on business there at a definite and reasonably permanent place.

[54] We do not think that the place of service should be a criterion for territorial competence. In the case of natural persons, it was unclear whether the fact of service was enough if the person's presence in the foreign country was only transitory (Carrick Estates Ltd. v. Young (1987), 43 D.L.R. (4th) 461 (Sask. C.A.)). The Morguard principle makes it doubtful whether a natural person's presence in the jurisdiction, without any real and substantial connection, is even a constitutionally viable basis for territorial competence. In the case of artificial persons, it was the carrying on of business, not the place of service, that was the real justification for taking jurisdiction. Moreover, the UCJPTA adopts criteria for territorial competence of Canadian courts based, not on the place of service, but on actual territorial connections. So, for the most part, does the new Canada-France Convention.

- (iv) Specific criteria based on the defendant's personal or continuing business connection with the foreign country.

[55] A natural or artificial person with a strong and continuing connection with the foreign country cannot complain if it is made subject to the jurisdiction of that country's courts. However, the positions of the two types of defendant are somewhat different.

[56] For natural persons, this kind of connection could be defined by a number of terms: ordinary residence (used in the UCJPTA), habitual residence, or domicile (used - but not in the Anglo-Canadian meaning - in the Brussels and Lugano Conventions, and in the Civil Code of Quebec). In the Canadian common law context, ordinary residence is probably the most appropriate term.

[57] For artificial persons, the traditional criterion of carrying on business in the foreign country through a definite and reasonably permanent place has proved workable and is a familiar concept. It, too, is used in the UCJPTA (s. 7(c)) for defining the "ordinary residence" of a corporation. However, for the purposes of the recognition and enforcement of foreign judgments, we think that a corporation that is "present" or "ordinarily resident" in this sense in country X should not thereby be subject to the jurisdiction of X's courts in respect of litigation that has nothing to do with the business actually done in X. For the purpose of enforcing foreign judgments, we suggest the criterion for artificial persons should be that if the corporation carries on business in the foreign country it is bound by any judgment in a dispute arising out of the business carried on in that country. This qualification is used in the Brussels and Lugano Conventions, and also appears in the new Canada-France Convention .

[58] In relation to artificial persons, the suggested criterion would be narrower than the territorial competence claimed in the UCJPTA, which is not limited by the origin of the dispute. Our own courts' jurisdiction, however, can be tempered with forum non conveniens. It must be remembered that criteria for the jurisdiction of a foreign court, for the purposes of recognition of the court's judgments, must be defined so that the enforcement of a

default judgment would be fair. It is only in respect of default judgments that these criteria matter. If the judgment is in a defended proceeding, the basis for recognition is consent.

- (v) Specific criteria based on the connection with the foreign country of the facts giving rise to the litigation

[59] Aside from the non-consenting defendant's presence in the foreign country, it is the connection between the foreign country and the subject matter of the proceeding that may justify recognition of the judgment. The common law gives guidance here only to the extent that cases applying the Morguard principle have established a pattern. Before Morguard a non-consenting defendant, who was not present in the foreign country, was not bound by any judgment. For the purposes of this discussion paper, we suggest the following four criteria as territorial connections that could be regarded as sufficient to warrant recognizing a money judgment. They are taken in part from the territorial connections that the UCJPTA lists in s. 10 (as presumed real and substantial connections), and in part from the decided cases on Morguard. No doubt more could be suggested, but these seem to us to cover most of the ground.

[60] The judgment is in respect of obligations arising out of a contract that, to a substantial extent, was to be performed in the foreign country (cf. UCJPTA s. 8(e)(i); Moses v. Shore Boat Builders Ltd. (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal refused, [1994] 1 S.C.R. xi.

[61] The judgment is in respect of obligations arising out of the defendant's business activities in the foreign country and the defendant was ordinarily resident or had a fixed place of business in the foreign country at the time those activities were carried on. (This was the situation in a large number of the Morguard cases, such as Federal Deposit Ins. Corp. v. Vanstone (1992), 88 D.L.R. (4th) 448 (B.C.S.C.).) (This ground is distinct from the presence or ordinary residence of a corporation, which is a test applied at the time the proceedings are commenced, not at the time the facts giving rise to the action occurred. Also, this ground would apply to natural persons as well as artificial ones.)

[62] The judgment is in respect of a consumer transaction, and consumer is entitled to the protection of the law of his or her own jurisdiction. For example, the rule could refer to obligations arising out of the sale of property, services, or both to a person in the foreign country, for use other than in the course of the purchaser's trade or profession, and the defendant solicited that person's business in that country (cf. UCJPTA s. 8(e)(iv); McMickle v. Van Straaten (1992), 93 D.L.R. (4th) 74 (B.C.S.C.)).

[63] The judgment is in respect of a tort committed by the defendant in the foreign country. (Cf. UCJPTA s. 8(g); Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393.) This would be a broad criterion with a lot of room for argument, but Canadian courts are relatively familiar with the Moran v. Pyle approach to determining the locus of a tort.

3. Unfair Process: natural justice

[64] As mentioned above, there is little debate over the fact that certain serious and fundamental defects in the process of the original foreign court give rise to a legitimate independent reason for refusing to enforce a judgment of that court. The Enforcement of Canadian Judgments Act provides that this is not a ground for refusing to enforce a Canadian judgment (s. 6(2)(c)). The reason for excluding this as ground for non-recognition of extraprovincial judgments is that unfair process is not a problem within Canada. Of course Canadian courts may fall prey to procedural irregularities, but any defect in the process of the original court may be dealt with on appeal in that original province, and, at least in theory, by the Supreme Court of Canada. No one suggests, however, that this rationale extends to foreign judgments.

[65] The Civil Code of Québec precludes enforcement of a foreign judgment if "the decision was rendered in contradiction of the fundamental rules of procedure" (Art. 3155 (3)). This parallels common-law rules which preclude enforcement. Those common law rules adopt a number of labels, the most common being natural justice, fundamental justice and fraud. In addition to those general labels, some procedural issues are sometimes seen to stand on their own -- the best example here being the requirement that the judgment debtor must at least have received reasonable notice of the foreign proceeding.

[66] In our view the question here is not whether procedural unfairness should be grounds for denial of recognition, but in how much detail the requirements of fair process should be expressed. We are aware that one of the charges against the common-law rules is that they are uncertain. That would suggest that a uniform statute attempt some more specific definition of procedural unfairness. Nevertheless it is not clear that this particular aspect of the common law rules (as opposed to some others) is one which has given rise to charges of uncertainty and vagueness. If it is not, then there would seem to be some advantage of including in any uniform act only a general requirement similar or even identical to art. 3155 of the Civil Code of Québec.

[67] On the other hand, if this is perceived to be too uncertain it may preferable to be more specific by listing a number of grounds here: fundamental rules of procedure, fraud, insufficient notice to defendant. It is, of course, possible to get more specific than that: a model act could, for example, stipulate that the foreign judgment would not be enforceable if the defendant were denied the right to cross-examine witnesses or to make closing argument. We suggest that that level of specificity is unnecessary and unhelpful. It will never be possible to predict in advance all the types of procedural irregularities that the courts of all the countries in the world might indulge in. Something that, taken alone, looks like a procedural defect, might not be one if examined in context. But it seems unlikely that a statute could ever anticipate all such contexts. Accordingly we recommend that any uniform act address the issue of unfair process with a provision similar to art 3155 of the Civil Code of Québec, with the possible addition, should greater specificity seem necessary, of additional defences relating to fraud and lack of notice.

4. Offensive Substantive Law: public policy

(a) General

[68] It should hardly require mentioning that the right to decline to enforce a foreign judgment that applied an offensive substantive law does not mean a right to decline any foreign judgment which applied a law different from that which the Canadian province in which recognition is sought would have applied. Before this requirement is met the foreign substantive law in question must be deeply offensive. We note that the public policy provision from the Enforcement of Canadian Judgments Act simply provides that an otherwise enforceable judgment may be denied enforceable where "the judgment is contrary to public policy in [the enacting province or territory]." (s. 6(1)(d)) The corresponding provision in the Reciprocal of Judgments Act is somewhat more expansive. It precludes enforcement where "the judgment was in respect of a cause of action which for reasons of public policy or for some similar reason would not have been entertained by the registering court . . . ." (s. 3 (f))

[69] Neither of these statutes attempts to give greater specificity to the concept of public policy, and in that respect they parallel the approach to this subject in the Brussels and Lugano Conventions and in a a variety of comparable statutes in other jurisdictions. They also parallel the corresponding provision in the Québec Civil Code:

Art. 3155 A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases: . . .

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations . . . .

[70] We think this general approach is correct. Despite the fact that declining to define this term means that, in this respect the model statute will not significantly alter the existing judge-made test, we think that (1) this is not an area in which existing uncertainty is a problem and (2) further specificity is impossible to achieve. We see no need for the phrase in the Reciprocal of Judgments Act, "would not have been entertained by the registering court . . . ." In our view the question is not whether the action would have been entertained, but rather where the foreign judgment in question would have been granted. In this respect the focus of the Québec Civil Code on "the outcome" is correct. Accordingly we prefer the formulation in the Enforcement of Canadian Judgments Act. Thus we recommend that any uniform statute on enforcement of foreign judgments contain a public policy defence parallel to that in the Uniform Enforcement of Canadian Judgments Act.

[71] One commentator on a draft of this report suggested that the concern dealt with in the previous section (unfair process, denial of natural justice) could be dealt with under the public policy heading, and that judges might feel more comfortable in assessing alleged

defects in foreign procedure if the issue were characterized as one of public policy. Although that is not our recommendation, it would certainly be possible to approach matters in this way, perhaps by defining public policy so as to make it clear that it embraces both substantive and procedural concerns.

(b) Punitive damages and damages for pain and suffering

[72] A significant sub-category of offensive foreign law concerns the extraordinarily high awards under the categories of (1) punitive damages and (2) damages for pain and suffering that are issued by some courts, particularly the courts of some American states. These can exceed by several orders of magnitude the damages that might be awarded under those heads in a comparable action in this country. To the extent that we view such awards as inappropriate then, although we may view the substantive law which was applied in the original proceeding as inoffensive, we may view the remedial law in that proceeding as offensive.

[73] One commentator on a draft of this report suggested that punitive damages in foreign judgments should be treated as penalties, with their enforcement in Canada prohibited entirely. Such a proposal would represent a considerable change in the existing law, but certainly merits discussion. In our view, given the fact that Canadian courts award punitive damages, there is insufficient justification for a blanket refusal to enforce foreign judgments containing punitive damages awards. We recommend a more restrained approach which we set out in the following paragraphs.

[74] A possible deficiency of the common law here is that, for the most part, courts have seen themselves as required to deal with such awards on an all-or-nothing basis. Although the common law permits courts to examine separately various heads of damage -- possibly enforcing some head of damage which declining to enforce others -- it does not appear to permit adjustment or scaling down within individual heads of damage. Thus, either the high foreign award for punitive damages will be unenforceable on grounds public policy, or it will not be against public policy, in which case the entire amount of the award must be recognized. There is no middle ground. Most commonly such awards are recognized in their entirely, and it is this fact which contributes to the perception, mentioned in the terms of reference, that Canadian defendants are at risk and that our attitude to foreign judgements is too lenient.

[75] A possible avenue for statutory reform is to permit courts to recognize part but not all of an excessively high punitive damages or pain and suffering award. A precedent here is a provision from a proposed (but now abandoned) bilateral judgments enforcement treaty between the United States and the United Kingdom. Article 8A of the draft convention was inserted to please the U.K.

Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the

findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognize and enforce the judgment in a lesser amount.

[76] We do not set out the foregoing provision as a proposed model for a Canadian uniform act, merely as an example of a statutory provision which would permit a Canadian court to scale down certain foreign court awards with rejecting them entirely.

[77] Should such a provision be considered there are several points which should be noted. First it is important to consider the putatively excessive foreign judgment in its entirety. For example, one explanation for some high American awards for punitive damages or for pain and suffering may be the fact American awards for court costs, unlike ours, do not generally award costs to the victorious party. In the U.S.A. even the winners must pay their own lawyer. Perhaps punitive damages are an attempt to compensate victorious plaintiffs for this arguably unfair costs rule. Presumably that is why the quoted provision from the draft U.K.-U.S.A. convention employed the words "including costs". More generally it is important, if an enforcing court is to be permitted to scale down one head of damage of a foreign award, that the enforcing court be directed to consider the alleged excessiveness in light of the entire award, including costs.

[78] Secondly, we suggest that any such power to scale down excessive awards for punitive damages or pain and suffering should be exercised in light of the parties' residence and place of acting. While the parties' residence and place or acting are not relevant with respect to matters which are genuine public policy concerns, as we have noted above, we do not think that punitive damage awards fall into this category. They are matters of local economic policy, properly applicable to activities which take place within a jurisdiction, but (like antitrust matters) not necessarily properly extended to activities which take place elsewhere. For example, in the case of two American residents who are parties to an original action in an American court, we would presumably have little reason to refuse to enforce the full amount of the American award in this country. Our main concern is presumably with Canadian residents who are subject to excessive American damages awards. In addition it may be the case that we only seek to protect Canadian residents in respect of their actions which take place largely in this country. In short, unlike the provision above from the U.K.-U.S.A. draft treaty, any such provision should direct a Canadian court which is considering scaling back an excessive foreign award for pain and suffering or punitive damages, to find that in the light of the defendant's residence and the relationship of the defendant's activities to the foreign country, it is manifestly unjust that the defendant be exposed to damages on such a scale. This issue is a complex one and we acknowledge that it is not explored in detail here. To give courts such a discretion is to undermine significantly the certainty that a particular foreign judgment will be enforced. It is, however, a concern that is often raised in discussions of the current liberal approach to enforcing foreign, and especially United States, judgments. We suggest it merits further consideration and in that connection we note that the question of punitive damages is being

explored in the discussions going on at the Hague Conference on Private International Law. Developments on this issue at the Hague Conference may provide a helpful model for a uniform Canadian act.

[79] We note that, although there has been some voicing of concerns regarding high awards for punitive damages and for pain and suffering, particularly in American courts, there has as yet been no discussion of the sort of response we are discussing here. To our knowledge this sort of proposal is being advanced in Canada for the first time here. In light of that we do not feel confident in making a firm recommendation either way on this issue. Nevertheless we think it this may be a plausible and measured response to an acknowledged concern. In consequence, we recommend that the ULC give consideration to including in its uniform act a provision which would permit courts to scale back, without rejecting entirely, heads of damage which, by Canadian standards are so excessive as to offend our sense of fundamental justice.

5. Residual Matters

[80] There are a couple of residual matters that are relatively uncontroversial. At common law no foreign judgment could be granted recognition unless it was final, and this common law rule was incorporated in the Reciprocal Enforcement of Judgements Act. This requirement is also explicitly included in the Civil Code of Québec (art. 3155 (2)) and the American Uniform Foreign Money-Judgments Act, and it is a ground for making an order staying enforcement under the UECJA. Subject to possible modification to take account of provisional measures and orders subject to variation, like maintenance orders, there seems little question that this should be a part of any uniform Canadian statute.

[81] A related issue concerns foreign judgments which, while technically final, are being appealed or with respect to which the period for launching an appeal has not yet expired. Although this was not, strictly speaking, a bar to enforcement at common law, it was added as a defence to enforcement in both the Reciprocal Enforcement of Judgments Act and the Uniform Enforcement of Canadian Judgments Act. Again this requirement seems uncontroversial.

[82] In addition, there are questions which arise when there is more than one court proceeding in respect of a single underlying matter. The Civil Code of Québec (art. 3155 (4) deals with that matter by precluding enforcement of a foreign judgment where a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (res judicata) or not, or is pending before a Québec authority, in the first instance, or has been decided in a third country and the decision meets the necessary conditions for enforcement in Québec . . . .

A comparable provision appears in the new Canada-France Convention (not yet implemented), in the Brussels Convention (art. 27) and, as a discretionary ground for non-

recognition, in the U.S. Uniform Foreign Money-Judgements Recognition Act. Again it seems relatively uncontroversial that a uniform act for enforcement of foreign judgment should contain a provision making this at least a discretionary ground for non-recognition.

D. Mechanisms for Enforcement

[83] The meeting should consider two questions: (1) whether a uniform statute should deal with mechanisms of enforcement, and (2), if so, what mechanism it should adopt. We note here that if the issue is recognition, as distinct from enforcement, the questions of mechanism probably does not arise. Recognition is simply treating a cause of action or an issue in the foreign judgment as res judicata. If a foreign judgment meets the criteria for recognition discussed above, there seems to be no value in requiring some form of registration or other procedure as a further condition of giving the judgment the standing of res judicata. Any dispute between the parties as to whether the foreign judgment is recognized in Canada is bound to come before a court in any event, either in the course of a Canadian proceeding that attempts to relitigate the same issue, or in an application by one of the parties for a declaration that the judgment is or is not effective in Canada.

1. Should a uniform statute deal with mechanisms of enforcement?

[84] As noted above, it is not necessary for a uniform statute to deal with this question. The equivalent American statute does not. The question of enforcement mechanisms can be left to the individual provinces and territories, which might then choose to deal with it in different ways. To the extent they did so, that would result in a lack of uniformity, but it is far from clear that uniformity on this issue is crucial. Certainly it is far less important than the question of which judgments should be enforceable (dealt with in B. Conditions for Enforcement). In our view an ideal model act would deal with this issue. However, if there are differences in opinion as to how this matter should be dealt with it those might result in a reluctance of some provinces to adopt any part of the uniform act. That would produce a lack of uniformity which would be worse than the failure of the act to deal with the question of mechanisms of enforcement. Accordingly we suggest that a uniform act should contain provisions dealing with mechanisms of enforcement if substantial agreement can be reached on what those mechanisms should be; otherwise the matter need not be deal with in a uniform act.

2. The appropriate enforcement mechanism.

[85] Assuming a foreign judgment meets the conditions for recognition the question arises of how enforcement is to be achieved. The traditional common law method was to bring an action on the foreign judgment. The foreign judgment was treated as a debt upon which the successful plaintiff must bring suit in the court in which enforcement was sought. This did not mean that all of the defences to the original cause of action were available; rather the

available defences were the various conditions for enforcement.

[86] There is an alternative method to consider. The enforcement mechanism chosen by the ULC in the Reciprocal Enforcement of Judgments Act (REJA) and the Uniform Enforcement of Canadian Judgments Act (UECJA) was registration. Rather than force the successful plaintiff to bring an action on the original judgment, the plaintiff might simply be permitted to register the judgment. This replaced a judicial process with a largely administrative one, with attendant savings in time and money.

[87] There are a variety of considerations which bear on the question of whether a uniform foreign judgments enforcement act should duplicate the REJA and UECJA initiatives and supplant the common-law suit procedure by a simpler registration procedure. In favour of the move to registration is that, assuming (as we must in this section) that the foreign judgment meets the conditions for recognition, the judgment creditor should have the benefit of the cheapest, quickest procedures to secure enforcement. Enforcing a foreign judgment by bringing suit on it may be unnecessarily cumbersome.

[88] On the other hand, permitting the foreign judgment creditor merely to register

the judgment has the effect of putting on the defendant the onus of taking positive steps to raise the issue of whether the conditions of enforcement have been met. This may be appropriate under the REJA scheme, where a province has made a positive decision to reciprocate with the foreign jurisdiction in question (presumably in return for some quid pro quo which would provide comparable or identical advantages to judgment creditors in actions before its own courts). It may also be appropriate in the UECJA scheme, where the "foreign" jurisdiction is by definition another Canadian province. It is far from clear that comparable advantages should be extended to plaintiffs in foreign countries, at least where no reciprocal arrangement is in place. In addition we note that declining to extend the cheaper, more advantageous registration scheme to non-reciprocating foreign jurisdictions would preserve an appropriate carrot for future bilateral negotiations. That is, Canadian negotiators would be able to offer the concession of a registration (as opposed to law suit) enforcement mechanism, in return for comparable treatment of Canadian judgments in the foreign jurisdiction.

[89] In conclusion we note that it is far from obvious that the registration scheme we have adopted in the Reciprocal Enforcement of Judgments Act and the Uniform Enforcement of Canadian Judgments Act should be replicated in a uniform statute for enforcement of foreign judgments. We suggest that, unless good arguments to the contrary are forthcoming, any model statute for enforcement of foreign judgments should continue to require than enforcement by means of bringing suit on the foreign judgment.

E. Subsidiary Issues Related to Enforcement Mechanisms

[90] There are several subsidiary issues to be discussed.

1. Effect of the Foreign Judgment.

[91] The Enforcement of Canadian Judgments Act provides that, once a foreign judgment becomes enforceable it has the same effect as if it were a judgment of the superior court of unlimited trial jurisdiction in the enforcing territory (s. 4). We know of no good argument why the law on this point should be otherwise. This issue seems uncontroversial.

2. Limitation period.

[92] The Uniform Enforcement of Canadian Judgments Act addresses this issue for intra-Canadian judgments. Section 5 of the UECJA provides that the applicable limitation period is the shorter of the limitation period in the original jurisdiction and that in the jurisdiction in which recognition is sought. Interestingly this does not provide complete uniformity, since different provinces have different limitation periods. Uniformity in this area is to be preferred, but we note that the ULCC has already addressed this issue in its Uniform Limitations Act. Section 7 (2)(g) of the ULA provides a limitation period of 6 years for actions on foreign judgments.

However Canadian provinces have been slow to modernize their laws in this area and consequently uniformity does not prevail. In light of that the approach in s. 5 of UECJA provides the best model. Depending on the different types of judgment covered by the act, it may be appropriate to provide for different limitation periods, as is done in the draft Canada-France Convention.

3. Conversion rate for foreign currency.

[93] The question here is selection of the date for ascertaining the rate at which a foreign judgment granted in a currency other than Canadian dollars should be converted to Canadian dollars. A statutory provision selecting such a date has not heretofore been a part of Canadian uniform legislation dealing with foreign judgments. Canadian courts have not been consistent in developing a common law rule on this point. Most courts convert at the date of the second (i.e. the Canadian) judgment, but some convert at the date of the original foreign judgment. In addition we note that Québec's Civil Code has a provision on this issue (art. 3161 -- convert as of the date of the original decision). Furthermore a bill currently before Parliament (Bill C-5, 35th Parl., 2nd Sess.) would amend the Bankruptcy and Insolvency Act to add a new provision to deal with this issue in respect of foreign bankruptcy claims (s. 275 - convert to Canadian currency as of the date of filing of the notice, the proposal, or the bankruptcy, depending on a range of factors). The same bill would amend the Companies' Creditors Arrangement Act by adding a new section dealing with the same issue in respect of corporate reorganizations (s. 18.6(8) - convert as of the

date of the initial application to court).

[94] The Uniform Foreign Money Claims Act, promulgated six years ago, deals with this issue, and arguably a uniform act dealing with foreign judgments should not duplicate that. We think there are good arguments for dealing with this issue in a uniform act on foreign judgments. First, some provinces might adopt the foreign judgments act but not adopt the Foreign Money Claims Act (which deals with a range of other issues). Such provinces would then lack a statutory provision dealing with this issue, and that would produce a lack of uniformity. Secondly, even if a province enacted both the UFMCA and a uniform act on foreign judgments, it is not certain that a court would necessarily see the conversion-date rule in the UFMCA as applying to the enforcement of foreign judgments. Ontario courts, who have a provision similar to the UFMCA in s. 121 of the Courts of Justice Act, have not always applied it to actions on foreign judgments. We accept the payment-date conversion rule in the UFMCA, but we think there are good reasons for including that rule, to be of mandatory application, in a uniform foreign judgments act. If the decision is made to include periodic payments for maintenance (see above, par. 21-25) then some other mechanism might have to be selected, since calculating the conversion rate every month or so might prove to be a hardship.

4. Post-judgment interest.

[95] Section 7 of UECJA addresses post-judgment interest for extraprovincial judgments but it does not provide a complete model for a statute dealing with foreign judgments. This is so because with foreign judgments (most of which are presumably in foreign currency) the issue is tied to the foregoing one -- the date for the conversion from the foreign to Canadian currency. There is an argument to be made that the applicable post-judgment interest rate should be the rate applicable in the foreign jurisdiction up until the time chosen for conversion into Canadian currency; thereafter it should be the rate in the enforcing jurisdiction. If a payment-date conversion is selected, then the foreign rate should be applicable until that time. This is the rule in English case law, and we understand that it will also be the rule selected by British Columbia in the regulations to its Foreign Money Claims Act. We support that rule, and if a uniform statute on foreign judgments includes a foreign currency conversion rule it should also include a provision on interest.

III. Effect of a Uniform Act on Existing Legislation

[96] Mention should be made of the existing provincial legislation based on the 1933 Uniform Foreign Judgments Act of the Conference of Commissioners on Uniformity of Legislation in Canada. That model statute roughly codified the common law as of 1933. Saskatchewan adopted it the following year, and New Brunswick in 1950. Because the judge-made rules respecting foreign judgments have changed considerably since 1933, and

in particular since 1990, those statutes now operate to provide those provinces with rules which are far different from those obtaining in the other seven common law provinces and the territories. They are the most significant source of lack of uniformity in the existing system, and we note that the ULCC no longer recommends the Foreign Judgments Act for adoption. It goes without saying that the promulgation of any new uniform uniform act on this subject would entail the repeal of the Foreign Judgments Acts of Saskatchewan and New Brunswick. In addition it should be noted that repeal of those statutes need not by delayed until a new uniform act is prepared and promulgated. They appear to be performing a function they were never intended to fulfill; viz. setting barriers to enforcement of foreign judgments that are higher than those currently deemed appropriate by the common law. Considerable gain in uniformity could be achieved by their repeal at the earliest opportunity.

[97] Ideally a new uniform act on foreign judgments would also replace the Reciprocal Enforcement of Judgments Acts in all the common law provinces in which the list of reciprocating states includes non-Canadian jurisdictions. However it must be remembered that the REJA contains enforcement machinery that may be of importance to the non-Canadian jurisdiction, viz. the system whereby judgments may be registered rather than enforced by bringing an action. If a new uniform statute on foreign judgments permitted registration (see section II, D. 2) this would not be a problem and the REJA could be repealed. However if it did not then it might not be advisable simply to repeal the REJA. A possible solution would be that where a foreign judgment (1) is acceptable for enforcement accordin to the tests set out in a new uniform foreign judgments acts and (2) is from a jurisdiction formerly listed as a reciprocating jurisdiction for the purposes of a given province's REJA, then it could be registered in that province under the applicable UECJA (assuming, of course, that the province in question had adopted UECJA).

[98] To the extent that Canada has entered into bilateral treaties for the recognition of judgments, as currently with the U.K. and France, (though the latter has not yet been implemented) there would be an issue of co-ordination. If the uniform act was more restrictive, in any respect, than the existing treaty rules, it would have to be made subject to the treaty. If the uniform act was more generous on some points than the existing treaty rules, it could still be extended to treaty countries without, we assume, causing a problem in terms of violating Canada's treaty obligations. The U.K. treaty certainly contemplates that each country may be more generous in recognizing judgments than the treaty requires. (Extending the uniform act to treaty countries might, however, mean the loss of an opportunity to negotiate a quid pro quo with our treaty partners in respect of this liberalization.) As far as future bilateral treaties are concerned, we have already mentioned the possibility of a "two-tiered" structure, with the more favourable set of recognition and enforcement rules extending to those countries with which Canada has negotiated appropriate treatment for Canadian judgments.

IV. Conclusion

[99] We think the possibility of a uniform act on the enforcement of foreign judgments is well worth pursuing. Ultimately, the decision for or against such a statute depends on, first, how seriously the current common law rules are seen as deficient and, second, how far Canada's participation in internationally negotiated regimes (such as a future Hague Convention on the enforcement of judgments) may push Canada's jurisdictions into modifying the existing law in any event. We have highlighted some of the policy choices and drafting difficulties that a uniform ct would involve, but we can see no reason why, as far as the common law jurisdictions are concerned, a uniform act should not be feasible.

[100] We attach, as an Appendix to this paper, a draft statute. We emphasize that this is a very rough draft, whose purpose is to highlight the main issues and the choices that we have discussed in this paper. Where we could we have used terminology consistent with that in the Uniform Enforcement of Canadian Judgments Act, but the structure has had to be quite different. We also emphasize that discussion at the ULCC meeting should centre on the issues as raised in the text of this paper, not on the provisions of the draft statute. There are difficult and controversial points that the draft statute either takes sides on, or glosses over. The draft statute is to give a general idea of what a statute could look like. We include it only because we were asked to do so. Those who work towards a proper draft statute after this meeting will in effect be starting from scratch, because many issues will have been resolved at the meeting in a way that is inconsistent with the attached draft.

Appendix: Draft Uniform Foreign Judgments Act Definitions

1. In this Act,

"country" means a state or a subdivision of a state;

"court", in relation to a foreign judgment, includes a tribunal of a country outside Canada that makes an order that is enforceable as a judgment of the superior court of unlimited trial jurisdiction of that country [see para. 29];

"foreign judgment" means

(a) a final judgment or order made in a civil proceeding by a court of a country outside Canada [see para. 17],

(b) an interlocutory order made in a civil proceeding by a court of a country outside Canada [see paras. 27-28], and

(c) an order by a court of a country outside Canada for the payment of maintenance or

support for a spouse or child, whether or not that order is subject to variation by the original court [see paras. 21-25], but does not include

(d) an order by a court as a penalty or fine for committing an offence, or any other order arising out of a penal proceeding [see para. 18],

(e) an order by a court for the payment of money as taxes, or any other order arising out of a proceeding relating to taxes [see para. 19];

(f) a divorce, custody order, or declaration by a court of a person's status by reason of birth or marriage [see para. 17];

(g) a judgment in rem [see para. 17], or

(h) a judgment in a bankruptcy or insolvency proceeding [see para. 17];

"judgment creditor" means a person entitled to enforce a foreign judgment in the original country;

"judgment debtor" means a person liable under a foreign judgment;

"original", in relation to a court or country, means the court that gave a foreign judgment or the country under whose law that court was established; and

"parties", in relation to a foreign judgment, means the parties that according to the law of the original country are bound by the judgment.

Consent to the jurisdiction of the original court

2. For the purposes of this Act, a judgment debtor consented to the jurisdiction of the original court if the judgment debtor

(a) commenced the proceeding that led to the foreign judgment,

(b) took a step to defend the proceeding that led to the foreign judgment, or

(c) agreed with the judgment creditor to be bound by the outcome of the proceeding that led to the foreign judgment, but a judgment debtor did not consent to the jurisdiction of the original court solely by arguing before the original court that the court did not have jurisdiction or should decline jurisdiction in the proceeding [see paras. 35-36].

When a foreign judgment must be recognized

3. A foreign judgment is recognized in [enacting province or territory] if

(a) the judgment is from a country included in Schedule A and is a judgment as described in that Schedule [see paras. 39-40]; or

(b) the judgment is not from a country included in Schedule A and any of the following criteria is satisfied:

- (i) the judgment debtor consented to the jurisdiction of the original court [see paras. 35-36];
- (ii) the judgment debtor is a natural person who was ordinarily resident in the original country when the proceeding that led to the judgment was commenced [see para.53-56];
- (iii) the judgment debtor is an artificial person that carried on a business in the original country and the judgment relates to the business carried on in that country [see para. 57-58];
- (iv) the judgment is in respect of obligations arising out of a contract that to a substantial extent was to be performed by the judgment debtor in the original country [see para. 60];
- (v) the judgment is in respect of obligations arising out of business activities that to a substantial extent were carried on by the judgment debtor in the original country, and the judgment debtor was either a natural person ordinarily resident in the country or an artificial person with a fixed place of business in the country at the time the obligations are said to have arisen [see para. 61];
- (vi) the judgment is in respect of obligations arising out of the sale of property, services, or both to the judgment creditor in the original country, for use other than in the judgment creditor's trade or profession, and the judgment debtor solicited the judgment creditor's business in that country [see para. 62];
- (vii) the judgment is in respect of a tort committed by the judgment debtor in the original country [see para. 63]; or
- (viii) there was otherwise a real and substantial connection between the original jurisdiction and the facts on which the proceeding that led to the judgment was based.

[Note: This drafting reflects the "third option" of those described in paras. 41-51. These are: Option 1 (paras. 41-47): Use the "real and substantial" criterion in (viii) as the basic test, listing the more specific criteria in (ii) to (vii) as cases where the real and substantial connection is presumed to be present. . Option 2 (paras. 48-49): Include the specific criteria in (ii) to (vii) as conclusively valid grounds for enforcement and omit the open-ended criterion in (viii). Option 3 (para. 51): Include the specific criteria in (ii) to (vii) as conclusively valid grounds for enforcement but include the "real and substantial" test to allow for cases falling outside the specific criteria in (ii) to (vii).]

Exception to recognition of a foreign judgment

4. A foreign judgment that is otherwise entitled to be recognized in [enacting province or territory] must not be recognized to the extent that it is contrary to an earlier judgment of a court of [enacting province or territory] or an earlier judgment of a foreign court that is binding on the parties for the purposes of a legal proceeding in [enacting province or

territory].

Enforcement of an order in a foreign judgment

5.(1) If a foreign judgment is recognized under this Act, the judgment creditor has the right to enforce an order in the foreign judgment in the following manner:

(a) if the order is for the payment of money, the judgment creditor may bring an action on the order as a debt; and

(b) if the the order is that the judgment debtor must do an act other than pay money, or refrain from doing an act, the judgment creditor may bring an action on the order as if it were a cause of action that entitled the judgment creditor to the same order made by the [superior court of general trial jurisdiction of enacting province or territory].

[Note: Another option would be to provide for a registration procedure, at least for money judgments, as does the Uniform Enforcement of Canadian Judgments Act; see paras. 85-89. A similar option with respect to non-money judgments would be to allow a summary application to obtain a declaration of recognition of the foreign order.]

(2) In a proceeding brought by a judgment creditor to enforce an order in a foreign judgment, the [superior court of general trial jurisdiction of enacting province or territory] may make an order staying the proceeding, subject to any terms and for any period the court considers appropriate in the circumstances, if

(a) the judgment debtor has brought, or intends to bring, in the original country a proceeding to set aside, vary or obtain other relief in respect of the judgment [cf. UECJA s. 2(b)],

(b) the judgment was rendered in contradiction of fundamental rules of procedure [see paras. 65-67],

(c) the judgment is contrary to public policy in [enacting province or territory] [see paras. 68-71], or

(d) the judgment is for damages greatly in excess of the amount, including costs, that would have been awarded under the law of [enacting province or territory] on the basis of the findings of law and fact established in the original court, and, in the light of the relationship of the judgment debtor and the judgment debtor's activities to the original country, it is manifestly unjust that the judgment debtor be liable for damages on such a scale [see paras. 72-81].

(3) If a judgment creditor has brought a proceeding to enforce an order in a foreign judgment, the [superior court of general trial jurisdiction of enacting province or territory]

may make an order

(a) staying or limiting the enforcement in [enacting province or territory] of an order against the judgment debtor [Cf. UECJA, s. 2(a)],

(b) varying an obligation of the judgment debtor to make future payments of maintenance or support [see paras. 21-25], or

(c) varying or discharging an obligation of the judgment debtor to do an act other than pay money or refrain from doing an act, on the same grounds and on the same terms as it could have done if the order in the foreign judgment had been made by the [superior court of general trial jurisdiction of enacting province or territory].

(4) The [superior court of general trial jurisdiction of enacting province or territory] must not make an order varying or discharging the obligations of a judgment debtor, or staying or limiting the enforcement of the obligations, on the grounds that

(a) the original court lacked jurisdiction over the subject matter of the proceeding that led to the judgment or over the judgment debtor under

- (i) principles of private international law not included in this Act, or
- (ii) the domestic law of the province or territory where the judgment was made

(b) the [superior court of general trial jurisdiction of enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the original court, or

(c) a defect existed in the process or proceeding leading to the judgment.

Foreign judgment as res judicata

6. If a foreign judgment is recognized under this Act, any final decision that one of the parties does or does not have a cause of action against another of the parties, and any issue or law that was or could have been raised as part of the basis for such a decision, is binding on those parties for the purposes of a subsequent legal proceeding in [enacting province or territory].

Foreign judgment that is not recognized

7. If a foreign judgment is not recognized under this Act, it confers no rights on the parties in [enacting province or territory].

Time limits for proceedings to enforce an order in a foreign judgment

8. No proceeding to enforce an order in a foreign judgment shall be brought

(a) in the case of an order to pay money, later than [xxx] years after the day on which the

judgment became enforceable in the country where it was made,

(b) in the case of a final order to do an act other than pay money or refrain from doing an act, later than [xxx] years after the day on which the judgment became enforceable in the country where it was made, or

(c) in the case of an interlocutory order, later than [xxx] months after the day on which the judgment became enforceable in the country where it was made. [See para. 92.]

Orders for payment of foreign currency

9. If a judgment creditor brings an action on an order in a foreign judgment to pay money and any amount to be paid is expressed by the foreign judgment in the currency of a country other than Canada, the [superior court of general trial jurisdiction of enacting province or territory] must

(a) give the judgment debtor the option of paying an equivalent amount in Canadian currency, calculated at the rate of exchange on the date payment is made [see paras. 93-94.], and

(b) unless the court finds that another rate would be more appropriate, order the judgment debtor to pay interest, running from the date of the foreign judgment until the date the judgment debtor pays the amount, at the prime rate prevailing in the country in whose currency the amount was expressed [see para. 95].

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