Foreign Judgments - Quebec Law 1996

1996 Ottawa, ON
Civil Section Documents - Foreign Judgments - Quebec Law

INTRODUCTION

Having had the opportunity to read a preliminary version of the excellent report by our colleagues V. Black and J. Blom, we decided to make it easier for the Department of Justice to co-ordinate the research of the two teams by adopting the outline of our colleagues' report in our own and referring to their report in our own where necessary, inter alia, to state our point of view on its recommendations.

We will begin by briefly noting the objectives that modern legislation on this subject should in our opinion fulfil:

- Respect for the sovereignty of foreign states (internationalist perspective, based in theory on the comity of nations, or in practical terms on Canada's need for openness) and
- (counterpart of the first) Recognition abroad of Quebec or Canadian judgments rendered in compliance with those conditions (interests of the administration of justice and of individuals).
- Respect for the expectations of individuals in international trade matters, except where there is a policy to protect a weak party (perspective of individuals). This objective also includes the need to avoid miscarriages of justice.
- Recognition of a principle against multiple proceedings and adoption of measures to effectively discourage this practice (perspective of individuals and more effective administration of justice in the forum state). This implies a sub-objective of ensuring that there is a real and substantial connection between the court and the jurisdictional facts (interprovincial and international perspective, but also the final interest of individuals, which is to avoid forum shopping). It also implies that due to the excessive uncertainty concerning our rules of indirect jurisdiction, it is necessary to ensure that defendants domiciled in Quebec (or another province) will not be required to go abroad to defend themselves or to institute proceedings as quickly as possible in the court of the forum state.
- Respect for needs related to the federal nature of Canada. This means facilitating the circulation of judgments in Canada. According to the interpretation taken from the cases (Hunt), it could mean a constitutional duty to adopt (or comply with) a principle equivalent to full faith and credit.

1 - Possible strategies, appropriateness of a uniform Act

In light of these objectives, we agree with our colleagues that it would be preferable to

focus our efforts on negotiating a multilateral convention rather than passing a uniform Act that might, once passed, not come into force because the proposed convention contains different rules.

We nevertheless feel that this multilateral convention could coexist with the uniform Act, although the result would be complications related to the existence of a double system.

Thus, we consider the uniform Act approach a priori useful for attaining the above objectives and share the opinion expressed by our colleagues V. Black and J. Blom in their point 4b (report, par. 12).

We agree with our colleagues that the passage of a uniform Act on the recognition of foreign judgments should be considered in parallel with the passage of similar legislation on Canadian judgments, which would include conditions more favourable to the latter type of judgments (for example, it would be fairly easy to do without the condition of consistency with public order (s. 6(1) of the Uniform Enforcement of Canadian Judgments Act)).

Furthermore, from the federalist perspective adopted by the Supreme Court of Canada in Hunt and Morguard, the circulation of judgments in Canada is clearly a goal to be pursued, and it is clear that the multiplicity of conditions for recognition due to variations in legislation from province to province is harmful to such circulation. It is entirely desirable that a single case of the same type or between the same parties be dealt with in the same way throughout Canada, as that would reinforce the concept of a unified legal area and would have a direct effect on the promotion of a real federation. Such uniformity would reduce the costs of creditors seeking to have their judgments enforced in several provinces where property belonging to the debtor is located and would promote the free economic distribution of transactions between the provinces.

In addition, as things now stand, the variation of conditions of recognition from province to province means that creditors can bring proceedings in every province in which there is a real and substantial connection between the court and the facts, inter alia to take advantage of different conflict rules, ascertain the effectiveness of an action in each court in advance, intentionally increase the adverse party's costs or maximize their chances of succeeding. This encourages forum shopping and results in the multiplication of parallel actions intended to take advantage of these differences.

A uniform Act should counter such conduct in part by (1) favouring the obtaining of a single judgment and (2) facilitating recognition of the judgment in all the other provinces.

However, this strategy requires us to ask whether jurisdiction should be limited to the Canadian court considered to have the closest connection with the case or whether it would be preferable to confer jurisdiction on every court that has a close connection with the case. This question presupposes that the court with the closest connection can be determined in every case and requires us to consider the meaning to be given to uniformity.

Meaning of uniformity and impact on the content of the strategies

Uniformity can be understood in two ways: uniformity in the designation of a single court (solution 1) or uniformity in the designation of two or more courts, each of which has a close connection with the case (solution 2). In the first case, a transfer procedure and discretionary measures like those related to the forum non conveniens, lis pendens and injunctions not to sue elsewhere might be adopted.

In the second case, the forum non conveniens doctrine should not be extended or used with excessive frequency.

The first solution is that preferred by the American Uniform Act (Conflict of Jurisdiction Model Act). The Canadian Uniform Acts of 1991, the Unfirom Enforcement of Canadian Judgments Act, and 1994, the Uniform Court Jurisdiction and Transfer of Proceedings Act, also seem to lean toward this solution of identifying the court with the closest connection, whose judgment will then be recognized everywhere without being reviewed. This approach is questionable. First of all, it is inconsistent with Morguard, which requires the selection of a court with a close connection, not the court with the closest connection.

What is more, the possibility that this choice of a single court will be natural and evident is far from obvious. How will the same selection criteria be interpreted everywhere?[1] Thus, the American model Act lays down no fewer than fourteen factors to be considered to determine which court will have the "honour" to rule on the merits and have its judgment enforced elsewhere. They include the interests of justice, the interests of countries with jurisdiction over the case and the law applicable to the subject-matter. The limits of uniformity are quickly reached.

It must therefore be asked how appropriate it would be to adopt a rule that, although uniform, is vague or discretionary. Uniformity would then be at the level of general principles rather than of specific rules, which would limit the impact of this effort significantly. As a result, it is necessary to agree how specific the rules will be, and to try to make them as specific as possible without making them too inflexible.

Furthermore, if the direction being taken is that of uniformity of provincial legislation, it is in our view essential to delete certain provisions of the model Acts that permit a party to ignore these rules and continue to apply non-uniform provincial rules (s. 9 UECJA; s. 12 CJPTA). Otherwise, the impact of the standardization process would be limited accordingly. Thus, s. 12 CJPTA permits the Quebec rules of exclusive jurisdiction (arts. 3151 and 3165 C.C.Q.[2]) to be maintained. The same is true of the special rules of international jurisdiction in respect of such matters as consumer and employment contracts (arts. 3149, 3150[3] and 3168(5) C.C.Q.), although we consider this appropriate, as they concern individual contracts.

It was necessary to make these general comments before discussing the scope and actual content of a uniform Act.

2 - Scope of the model Act

A number of points must be discussed on this topic.

2.1. Public law judgments ordering the payment of money

From the perspective of Quebec civil law, there is no fundamental reason for dealing differently with administrative, tax or even criminal law judgments ordering the payment of money. Provided that the condition of consistency with public order (to be defined more fully by including, for example, statutes of immediate application or such statutes as the Foreign Extraterritorial Measures Act, S.R.C., c.F. 29, as suggested in the second paragraph of art. 3520 of the draft Quebec Civil Code [4]) or certain rules pertaining to the exclusive jurisdiction of the recognizing court are retained, it is conceivable that the proposed model Act would also cover public law judgments, which would be in keeping with USA v. Ivey (1995), 130 D.L.R. (4th) 674. Such a decision would clearly require an amendment of s. 2(1)(b) of the UECJA. We therefore disagree with our colleagues on this point (report, par. 18-20).

On this subject, as our colleagues mention (report, para. 29), we do not consider it essential to require that an administrative tribunal's decision be converted into a court judgment to be recognized: it is enough that the tribunal act in the exercise of a judicial function (characterization issue), as provided for in s. 1(b) of the UECJA.

2.2. Provisional measures: injunctions, etc.

Like our colleagues (report, para. 26-28), we consider it appropriate for the Canadian courts to have the authority to give effect to foreign provisional measures. The Conference should therefore also consider the possibility of including provisions to this effect in the model Act (the CJPTA includes such injunctions, according to the comments).

2.3. Final judgments ordering to do or refrain from doing an act

The concept of an order for the payment of money is not broad enough, at least not from the civil law perspective. More generally, the UECJA, unlike the CJPTA, does not recognize final judgments ordering someone to do or refrain from doing an act in estate matters, such as a judgment ordering someone to sell something: we consider it necessary to deal with this in a model Act on foreign judgments and to expand the scope of the UECJA.

2.4. Maintenance orders

For the excellent reasons given by our colleagues (report, par. 21-25), with which we agree, it is our opinion that the Uniform Law Conference should consider including such foreign judgments in a model Act.

2.5. Patrimonial effects of marriage (matrimonial regime, primary regime, etc.)

It seems to us that certain judgments concerning the patrimonial aspects of the family could be dealt with in the model Act, as in the CJPTA (s. 9(1)). This would include judgments dealing with the patrimonial effects of marriage upon dissolution of marriage or otherwise.

2.6. Transactions and notarial acts

In most civil law countries, a judgment is not necessary to enforce an authentic act, and it would be quite appropriate to provide for this in the model Act, as in the Lugano Convention. Such a provision could be based on the following proposition:

[translation] Transactions and authentic acts enforceable in the place of origin shall be considered foreign court judgments in so far as these conditions are applicable to them.

We will now give more thorough consideration to the content of the rules a model Act might contain.

3 - Content of the model Act

3.1. - Conditions of recognition

3.1.1. Criteria of direct and indirect international jurisdiction

For the sake of clarification, we will use in the following paragraphs the terminology of civil law: the direct international jurisdiction refers to the jurisdiction of the court originally seized of the action. The indirect international jurisdiction refers to the jurisdiction of the foreign court as determined by the rules of the state in which recognition and enforcement of the foreign court's judgment are sought (in other words, these rules are those used to verify the jurisdiction exercised by the court that has rendered the judgment to be recognized and enforced).

3.1.1.1. General

It seems that s. 3 of the UECJA should be applied to the indirect jurisdiction of foreign courts, especially if the intention is to extend the principle of full faith and credit to foreign

judgments.

We consider the model Act a solid basis for indirect jurisdiction, subject to a few clarifications.

As we mentioned above, s. 12 of the CJPTA has the potential to totally destroy the value of uniformity by providing that a provincial Act will prevail over the uniform jurisdiction criteria even if it is inconsistent therewith. This may be necessary to protect certain exceptional legislative rules of the common law provinces, but for Quebec all rules are legislative and do not generally correspond with the criteria proposed in the uniform Act. This provision accordingly seems to us to be prejudicial to the uniformity of statues.

3.1.1.2. Real and substantial connection

At the recognition of foreign judgments stage, a control over indirect jurisdiction that takes forum shopping and the existence of multiple procedures into account involves the requirement of a real and substantial connection between the court and the case.

Ideally, it seems to us that the presumption in s. 10 of the CJPTA should not be found in a model Act and that it would be best for this provision to establish definite rules. However, in view of the vagueness and limited nature of some of these rules if the presumption were deleted, other factors of jurisdiction should be added, as the selected criteria are not the only ones that can represent a real and substantial connection.

However, if it is decided to retain the system proposed in the CJPTA, the presumption established in s. 10 of the CJPTA would be acceptable.

As we noted in our last report, certain rules would have to be improved, including s. 3(d) of the CJPTA on jurisdiction based on the defendant's habitual residence. That jurisdiction is found in art. 3148(1) C.C.Q.[5], which also includes the defendant's domicile (although domicile theoretically includes habitual residence). However, s. 7(b) of the CJPTA, which is broader than art. 3148(2) C.C.Q., is satisfied with an address, and therefore an election of domicile. This jurisdiction could accordingly result in use of the forum non conveniens.

Some examples of differences between the uniform Act's rules of jurisdiction -- from ss. 3(e) and 4 of the CJPTA, which are completed by s. 10 and are accordingly

presumed to meet the real and substantial connection test -- and the Quebec provisions can be found in ss. 10(b) (administration of estates), (d) (trusts), and (j) (injunctions), which should be adopted in Quebec law due to their quality.

3.1.1.3. Forum non conveniens

From the perspective of a uniform Act, it seems to us that the use of this doctrine should be

conditional on actual assumption of jurisdiction by the court concerned.

The possibility of applying the forum non conveniens doctrine to foreign judgments is too uncertain and could either be rejected in its entirety or accepted on a far more restrictive basis than in s. 11 of the CJPTA. For example, the factors to be taken into account in this respect could be specified and the number of factors limited, or the use of the doctrine could be made most exceptional in a manner similar to that adopted by the Australian courts.

At any rate, it would be necessary to refuse to apply this doctrine in cases involving choice of forum, and perhaps those involving exclusive jurisdiction (if any).

This last solution would be in keeping with the objective of respecting the parties' expectations.

3.1.1.4. Lis pendens

The uniform Act should specify the conditions of lis pendens so that all states that pass it can in fact use it. In this respect, the condition of identity of cause of action would have to be dealt with thoroughly in an international context.

As for the types of lis pendens, we feel that a uniform Act should contemplate the adoption of a rule similar to that in art. 3155 C.C.Q.[6], which provides that a judgment rendered in a third country that meets the necessary conditions for recognition in Quebec bars the recognition of another judgment. However, the operation of such a rule should not be based on the authority of the first court applied to, as that would encourage forum shopping; on the contrary, preference should be given to out-of-court settlements.

3.1.1.5. Regulation of injunctions

Permitting multiple suits seems a priori to promote respect for state sovereignty, although it could result in a war of injunctions, [7] which is less respectful of state sovereignty even if the order is directed to the parties and not to the foreign courts. The adoption of relatively liberal conditions of international effectiveness of injunctions would therefore promote this objective. However, in so far as the states agree on criteria of direct jurisdiction (respect for the requirement of a real and substantial connection between the court and the case), the use of such injunctions should decline.

At any rate, a uniform Act should take this increasingly important aspect of international proceedings into account to determine the conditions specific to judgments of this type.

3.1.1.6. Incidental matters

As for jurisdiction over incidental or related matters (as provided for in art. 3139 C.C.Q. [8]), it might be asked whether it should be found in the model Act. It should be noted that the

CJPTA does not include it directly, as it does in the case of counterclaims (s. 3(a)), although it could be considered to flow from s. 3(e)) -- if the presumptive nature of that rule is retained -- because the cases in s. 10 are not exhaustive, according to the comments (10.2). It is possible that an action in warranty could be a basis for the court's jurisdiction.

3.1.2. Compliance with principles of procedure

We agree with our colleagues on the subject of compliance with the principles of procedure (report, par. 64-67): the model Act should contain a provision similar to art. 3155(3) together which clarifications similar to those in art. 3156 C.C.Q. [9] (non-recognition of a decision rendered by default if not served on the defaulting party in accordance with the law of the place where the decision was rendered or if the defaulting party was unaware of the proceedings or was not given sufficient time to offer his or her defence), which would be preceded by the words [translation] "including, without restricting the generality of the foregoing" to provide for other violations. However, this could also be included in a provision on inconsistency with public order.

3.1.3. Solution of a judgment not contrary to public order

As Professors Black and Blom suggest (report, par. 70), we consider that the provision on consistency of the foreign judgment with public order must be flexible, as flexibility is the very essence of the concept.

However, as we mentioned above, it would be necessary to ensure that this rule also applies to a judgment the result of which would be inconsistent with a policy implemented by means of legislation passed to protect the vital interests of the jurisdiction of the recognizing court. One example of this would be the provisions recently added to the Foreign Extraterritorial Measures Act in February 1996 to counter the U.S. legislation on foreign companies dealing with Cuba. To do this, the model Act's provision could be based on the article from the draft Civil Code quoted above.

In the specific case of the inconsistency with public order of a decision awarding excessive punitive damages, the question comes down to whether the reasons for a judgment can be severed from its disposition. Where excessive exemplary damages are awarded, the problem faced by the recognizing court is clearly related not to the reasons for the judgment, which it is prepared to accept in all good faith, but to the disposition, which it finds exaggerated in the circumstances (either objectively or due to a local interest in not condemning the party against whom damages are awarded too harshly). In such a case, it is justifiable to ask whether it would not be more equitable or more appropriate to review the amount of the damages on the merits rather than purely and simply refusing the judgment on the basis of public order. It is easy to understand that a court oriented toward what is practical would prefer the first solution: this bending of the theoretical prohibition on reviewing the merits is more equitable for both parties. We are prepared to agree that this solution should be given serious consideration in a uniform Act.

As for the position to take on this subject, we accordingly agree with our colleagues (report, par. 72-79), especially on limiting such a review to cases in which the solution has an impact on the legal order of the receiving court. Thus, the place where the persons acted and their residence will be taken into account in particular (report, par. 78).

3.2. - Other issues

3.2.1. Finality of the foreign judgment

We agree with our colleagues (report, par. 80-81) on the issue of the finality of foreign judgments.

3.2.2. Legislative jurisdiction and review on the merits

Refusal to review foreign or Canadian judgments on the merits and abandonment of the verification of legislative jurisdiction are consistent with respect for state sovereignty.

A uniform Act should therefore abolish review on the merits in all forms. In this respect, a specific problem concerns foreign judgments awarding excessive damages (see supra).

3.2.3. Judgment from a third state

We also consider that a provision should be added to the model Act similar to article IV of the Canada-U.K. Convention (R.S.C., c. C-30, Schedule):

Registration of a judgment shall be refused or set aside if . . . (f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court.

3.2.4. Effect of foreign judgments

Our opinion is similar to that of our colleagues (report, par. 91).

3.2.5. Limitation period

We agree with our colleagues that s. 5 of the UECJA could be used as the basis for a provision on a limitation period for foreign judgments, although we feel that a uniform period should be adopted (e.g. six years).

3.2.6. Conversion date for foreign judgments in foreign currency

The uniform Act should definitely deal with this issue.

3.2.7. Post-judgment interest

Likewise, this issue, which is related to the preceding one, should be dealt with in a uniform Act. To do so, the second paragraph of art. 3161, par. 2, C.C.Q.[10] could be used as the basis for a rule that the rate of interest will be governed by the law of the authority that rendered the judgment until the date of recognition of the judgment, at which time the rate will be that of the recognizing court.

3.3 - Enforcement mechanisms

The best enforcement method would not require application to a court and the resulting involvement of lawyers, as such a method would place responsibility on the parties to international transactions and reduce the costs of extraprovincial or foreign judgment creditors, as our colleagues mention in their arguments (report, par. 83-89). The registration system provided for in the UECJA, as in the system for mutual enforcement of maintenance orders, is therefore a good solution along these lines.

In Canada, the registration system is entirely appropriate, as our colleagues also mention, but it seems to us that in the case of foreign judgments, it must be based on reciprocal treatment of Canadian judgments abroad, in the absence of which the mechanism would have to be that of the general law of each province. Otherwise, the recognition of foreign judgments in Canada would be promoted without promoting the recognition of Canadian judgments abroad.

Finally, concerning the CJPTA, Part III, which the ULCC has proposed to make it applicable to foreign judgments, the following comments can be made, inter alia:

1. These mechanisms give judges greater discretion, which reduces the quality or degree of uniformity of the law;

2. They presuppose extensive co-operation between foreign courts: this implies great physical and intellectual capacity for communication, which is easier to attain in a federation than between countries with very different legal cultures.

3. In essence, these mechanisms represent a means to remedy the disadvantages of applying the forum non conveniens doctrine that would not depend on the certainty that the court considered the most suitable to hear the case will in fact assume jurisdiction. To avoid a possible miscarriage of justice, we could simply adopt a forum non conveniens doctrine that will be applied only if the court in question actually assumes jurisdiction, in which case the proposed mechanisms would no longer be necessary, at least not from this perspective.

4. Finally, these mechanisms may increase the costs of litigation, as the parties can, in addition to arguing jurisdiction, also argue the conditions of transfer and of a possible return

to the court of origin.

We are accordingly not in favour of extending this part of the model Act to foreign judgments, as we doubt that doing so would improve the situation.

Footnote: 1 Along these lines, see L.E. Teiz, "Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings" (1992) 26 International Lawyer 21, p. 26.

Footnote: 2 «3151. A Québec authority has exclusive jurisdiction to hear in first instance all actions founded on liability under article 3129.»
«3165. The jurisdiction of a foreign authority is not recognized by Québec authorities in the following cases:
(1) where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
(2) where, by reason of the subject matter or an agreement between the parties, Québec law recognizes the exclusive jurisdiction of another foreign authority;
(3) where Québec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator.

Footnote: 3 «3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.»

«3150. A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.»

Footnote: 4 Second paragraph of art. 3520: "However, recognition or enforcement of a foreign decision shall be refused where its outcome is contrary to public order or to a rule of Québec law which is applicable by reason of its particular object [this should instead read: object of vital interest], or where the decision imperils or significantly affects the proper functioning of the State or is manifestly unreasonable." It would of course be necessary to discuss the exact wording of such a provision.
«The application of the rules of this Code is imperative in matters of civil liability for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec.»

Footnote: 5 «3148. In personal actions of a patrimonial nature, a Québec authority

has jurisdiction where
(1) the defendant has his domicile or his residence in Québec;
(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
(3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
(4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
(5) the defendant submits to its jurisdiction.
However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.»

Footnote: 6 «3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
(3) the decision was rendered in contravention of the fundamental principles of procedure;
(4) 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 first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
(6) the decision enforces obligations arising from the taxation laws of a foreign country.»

Footnote: 7 See TEITZ, supra, pp. 28-29.

Footnote: 8 «3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.»

Footnote: 9 «3156. A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defaulting party in accordance with the law of the place where the decision was rendered.
However, the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to learn of the act of procedure initiating the proceedings or was not given sufficient time to offer his defence.»

Footnote: 10 «3161. Where a foreign decision orders a debtor to pay a sum of money expressed in foreign currency, a Québec authority converts the sum into Canadian currency at the rate of exchange prevailing on the day the decision became enforceable at the place where it was rendered.

The determination of interest payable under a foreign decision is governed by the law of the authority that rendered the decision until its conversion. »