Recognition and Enforcement of Foreign Judgments 1997

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APPENDIX F - RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

REPORT OF THE WORKING GROUP
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[1] In 1996, two reports on the enforcement of foreign judgments were received and discussed by the Uniform Law Conference, viz. Vaughan and Joost Blom, Enforcement of Foreign Judgments in Common law Jurisdiction, [1996] Proceedings, Appendix I, and Jeffrey Talpis and Gerald Goldstein, Enforcement of Foreign Judgments in Quebec, [1996] Proceedings, Appendix J. The ULC adopted a resolution to establish a working group «to recommend legislative options to deal with the issues identified in the papers presented» - the issues being identified at page 48 of the [1996] Proceedings, as: 1) scope of application; 2) conditions for recognition and enforcement; 3) propriety of a list of countries to benefit from a presumption of jurisdiction; and 4) punitive damages.

[2] The working group met by conference call on five occasions: 13 February, 27 March, 24 April, 15 May and 29 May 1997. This progress report reflects the discussions of the working group and seeks instructions from Conference on specific points which appear below. The members of the working group acknowledge with grateful appreciation the excellent efforts of Joost Blom, as rapporteur, and Louise Lussier, as coordinator which greatly facilitated the work of the working group.

1. Scope of Application

[3] The working group considered whether a proposed Act should embrace recognition and enforcement of judgments pursuant to bilateral and/or multilateral conventions as well as recognition and enforcement apart from any convention. The consensus of the working group is that, if possible, the Act should include the recognition and enforcement of both convention and non-convention judgments. The question of how to incorporate

implementing provisions for convention judgments is unresolved at the moment. [See the discussion in relation to the project on the implementation of the Canada-France Convention.]

(a) Tax judgments

[4] The working group agreed to exclude tax judgments from the proposed Act. Under Quebec law, art. 3162 C.C.Q. provides that «obligations resulting from the taxation laws of foreign countries in which the obligations resulting from the taxation laws of Quebec are recognized and enforced». The same general rule exists in the common law jurisdictions, where apart from bilateral conventions on tax matters, foreign judgments for the enforcement of tax liability are not enforceable. It was agreed that the proper place to deal with the reciprocal enforcement of tax judgments is in the tax convention with the relevant foreign country. In such a convention, necessary administrative arrangements and safeguards can be included along with the enforceability rule. See the new (1994) protocol to the US-Canada Tax Convention, adding art. XXVIA. According to para. (3) of that article, a «revenue claim» of the United States that has been «finally determined», as certified by the US authorities, «may be accepted for collection» by Canada and, if it is, shall be collected by Canada «as though such revenue claim were [Canada's] own revenue claim finally determined in accordance with the laws applicable to the collection of [Canada's] own taxes». It is recommended that the Act should not extend to judgments for the recovery of taxes.

(b) Judgments in bankruptcy and insolvency proceedings

[5] As a result of the passage of Bill C-5, the effect of judgments arising out of foreign bankruptcy or insolvency proceedings is now comprehensively dealt with by Part XIII of the Bankruptcy and Insolvency Act. Therefore, any judgment or order that falls under those provisions must be excepted from the proposed Act. It is recommended that the proposed Act should not apply to a judgment arising out of a foreign proceeding as defined in Part XIII of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended.

(c) Judgments for the enforcement of a third-state judgment

[6] The purpose of Canada-UK Convention art. IV(1)(f) is to exclude a foreign judgment that is itself a judgment enforcing a judgment from the court of a third state. Third-state judgments are not expressly excluded by the Canada-France Convention though exclusion is arguably implied in Article 1. The argument for excluding such judgments is that there is a difference between enforcing a judgment from country X if the original proceeding is brought there, and enforcing a judgment from country X that is simply the enforcement in X of another judgment from country Y. If the latter approach is adopted, a Y judgment that we would not enforce directly, can be enforced indirectly by the creditor's getting an intermediate judgment in X, whose rules for recognizing Y judgments are broader, or whose limitation period on enforcement is longer than otherwise permitted under the law of Y. The

argument against excluding such judgments is that a judgment in X, which meets our criteria for enforcement (e.g. because the debtor is ordinarily resident in X) is of the same effect, irrespective of whether it's given on an original claim or on a judgment from Y.

[7] Though of diverse opinions, the members of the working group generally believe that exclusion is the preferred approach and recommend that the proposed Act should not include the recognition and enforcement of a judgment obtained in a third state.

(d) Orders of administrative tribunals

[8] The Canada-UK Convention, art. I(1) and Canada-France Convention art. 1(2) exclude judgments rendered by administrative tribunals. Canada-UK Art. II(2)(c) also excludes court judgments given on appeal from administrative tribunals. The range of foreign administrative tribunals that might be capable of giving legally binding judgments is very large, and questions of fair process might be frequent. The UECJA does extend to orders made in the exercise of a judicial function by a tribunal in Canada (s. 1(b)), but there seems to be no strong reason to be more generous in our Act than Canada has been in the two conventions. The working group recommends that the proposed Act should not extend to judgments rendered by administrative tribunals or court judgments given on appeal from judgments rendered by administrative tribunals.

(e) Penal Judgments and Punitive Damages

[9] According to the phrasing of the UECJA (s. 2(1)(b)), and Art. 1(2) of Canada-France has a similar rule,:

The Act should not extend to judgments for the recovery of monetary fines or penalties.

The members of the working group agree that enforcement on a reciprocal basis with particular jurisdictions is best dealt with by special legislation rather than by a general provision in the proposed Act. By consensus, the working group recommends that the proposed Act should not extend to judgments for the recovery of monetary fines or penalties

[10] The working group further considers that an express provision is necessary to address the issue of civil penalties such as punitive damages e.g. triple damages. The members note that art. 8A of the US-UK draft 1978 Convention provided a discretion to the enforcing court to set aside damages in excess of damages available under the law of the enforcing jurisdiction. This approach, which commends itself to some members of the Working Group, is reproduced for ease of reference:

8A: « 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 the lesser amount. »

Time did not permit the working group to adopt a more specific proposal on punitive damages. The working group seeks the collective wisdom of the ULC on this matter.

(f) Spousal and Family maintenance

[11] Consultations with appropriate bodies are ongoing in relation to this matter. In general, the members of the working group are open to the feasibility of including such matters in the proposed Act. In general, see the discussion on maintenance in the report on the implementation of the Canada-France Convention.

2. Conditions for recognition and enforcement

[12] The members of the working group considered various proposed bases of international sense jurisdiction (international indirect jurisdiction) as reflected in existing law and the UCJPTA. Members of the working group agreed and they recommend that a foreign judgment ought to be recognized or enforced if the jurisdiction of the foreign court where the judgment was obtained was based on the basis of the following grounds of jurisdiction:

i) consent

The judgment debtor was a defendant in the original court and submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

(Copied from Art. V(1)(a) of the Canada-UK Convention. Cf., in the Canada-France Convention, Art. 5(f): «appeared without challenging the court's jurisdiction or presented a defence on the merits». N.B.: It is recognized that it is desirable to define «voluntary appearance» to eliminate the uncertainty about whether taking a jurisdictional point should count as a voluntary appearance.)

ii) consent as plaintiff or counterclaim

The judgment debtor was a plaintiff in, or counterclaimed in, the proceedings in the original court.

(Copied from Art. V(1)(b) of the Canada-UK Convention. The Canada-France Convention has no express equivalent but the Article 5, which includes the words « in particular », is arguably an open-ended provision.)

iii) consent by agreement

The judgment debtor was a defendant in the original court and, before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the territory of origin.

(Copied from Art. V(1)(c) of the Canada-UK Convention. Cf., in the Canada-France Convention, Art. 5(e): «expressly submitted in writing to the jurisdiction of the court of the State of origin».)

iv) presence - habitual residence/principal place of business

The judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted habitually resident in, or being a body corporate had its principal place of business in the territory of origin.

(Copied from Art. V(1)(d) of the Canada-UK Convention; cf. Art. 5(a) of the Canada-France Convention which is similar.)

[13] The Working Group agreed that, aside from the grounds just mentioned, default judgments against non-consenting defendants should be enforceable on the basis of a closed list of real and substantial connections. Each of the connections should be capable of being determined with (1) as much certainty as possible and (2) as little analysis of the reasoning in the foreign judgment as possible. The following formulations were seen as acceptable:

- Branches

The judgment debtor, being a defendant in the original court, had an office or place of business in the territory of origin and the proceedings were in respect of a transaction effected through or at that office or place.

(Canada-UK, Art. V(1)(e). Cf. Canada-France, Art. 5(b):«had a place of business or branch in the State of origin when the proceedings were started and was served in that State in connection with a dispute related to the activities of that place of business or branch».)

- Torts

In an action for damages in tort, quasi-delict or delict, the wrongful act occurred in the State of origin.

(Canada-France, Art. 5(c). No equivalent in Canada-UK.)

- Immovable

The claim is related to a dispute in connection with rights in rem in immovable property located in the State of origin.

(Canada-France, Art. 5(d). No equivalent in Canada-UK. The latter specifically denies recognition if the subject matter of the proceeding was immovable property outside the territory of the origin.)

- Contract

The contractual obligation that is the subject of the dispute was or should have been performed in the State of origin.

(Canada-France, Art. 5(g). No equivalent in Canada-UK.)

- Trust

For any question related to the validity or administration of a trust established in the State of origin or to trust assets located in that State, the trustee, settlor or beneficiary had his or her habitual residence or its principal place of business in the State of origin.

(Canada-France, Art. 5(h). No equivalent in Canada-UK.)

[14] In addition, the Working Group recommends that the following products-liability connection is appropriate and would help foreigners sue Canadian manufacturers wherever their products are sold.

The foreign proceeding arose out of goods made or services provided by the judgment debtor and the goods or services

(a) were acquired or used by the judgment creditor when the judgment creditor was ordinarily resident in the originating state and

(b) were marketed through the normal channels of trade in the originating state.

(inspired by Moran v. Pyle National (Canada) Ltd.). Compare the «wrongful act» test in the connection listed above for tort claims.)

[15] The Working Group **recommends that there be a proviso to the enforcement of any default judgment, as follows:**

In the case of a default judgment, the defendant must have been lawfully served according to the law of the originating state or received notice of the commencement of the

proceedings in sufficient time to present a defence.

(Cf. Canada-France, Art. 4(c). Cf. Canada-UK, Art. IV(2)(a), which makes this an optional part of the implementing legislation.)

[16] The Working Group discussed whether there should be an escape clause in relation to default judgments. Three alternatives were identified, such as:

*[A] Notwithstanding that a foreign judgment satisfies provisions ***-*** [the listed connections other than consent or ongoing presence], a court may refuse to recognize it if the debtor shows that there was no real and substantial connection between the territory of origin and the events giving rise to the foreign proceeding.*

An alternative wording suggested by some members of the Group would change «no real and substantial connection» to a test of «clearly inappropriate forum»:

*[B] Notwithstanding that a foreign judgment satisfies provisions ***-*** [the listed connections other than consent or ongoing presence], a court may refuse to recognize it if the debtor shows that the original court was a clearly inappropriate forum for the proceeding.*

A third alternative would see the provision read «real and substantial connection or clearly inappropriate forum»:

*[C] Notwithstanding that a foreign judgment satisfies provisions ***-*** [the listed connections other than consent or ongoing presence], a court may refuse to recognize it if the debtor shows that there was no real and substantial connection between the territory of origin and the event giving rise to the foreign proceeding or that the original court was a clearly inappropriate forum for the proceeding.*

The members of the working group seek the collective wisdom of Conference on this matter.

3. Defences to recognition and enforcement

[17] The members of the working group achieved consensus on the following defences and **recommend their incorporation in the proposed Act:**

- *The judgment has been satisfied.*
- *The judgment is not enforceable in the territory of origin.*
- *The judgment is not final.*
- *The judgment was obtained by fraud.*

(Cf. Canada-UK Convention, art. IV(1)(d). Art. 4 of Canada-France is drafted differently but contains similar rules - see the introduction par.-; in addition a judgment obtained by fraud is assumed to fall under the public policy defence in any event.)

- *Enforcement of the judgment would be contrary to public policy in the territory of the registering court.*

(Canada-UK Art. IV(1)(e). Art. 4(d) of Canada-France is to the same effect, and also uses (in the English version) the exact words «public policy».)

- *The decision was rendered contrary to the principles of natural justice.*

(Cf. Art. 4 (c) of Canada-France: « In the case of a default judgment, the defendant was lawfully served or received notice of the commencement of the proceedings in sufficient time to present a defence »; optional in terms of implementation in Canada-UK, Art. IV(2)(a).)

[18] In relation to the public policy and natural justice defences, the working group agreed that it is advisable not to define «public policy» or «natural justice» but to take advantage of the fairly well-established jurisprudence on the subject. The working group seeks advice of Conference as to the use of either [natural justice] or [fundamental rules of procedure].

[19] There was also consensus that the proposed Act should not be as strict as the Canada-France and Canada-UK Conventions (optionally, in terms of implementation, in the Canada-UK Convention), and the UREJA in prohibiting registration if the judgment is still capable of being appealed. The Working Group recommends a rule that a foreign judgment is enforceable but is subject to a stay if under appeal in the jurisdiction of origin:

A judgment is enforceable, but proceedings to enforce it may be stayed, if an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.

[20] The Working Group also recommends that **it should be a defence that the foreign judgment sought to be enforced is contrary to a previous domestic judgment or a previous foreign judgment that is entitled to recognition.** The model favoured is Art. 4(e) of the Canada-France Convention and as modified is as follows:

A judgment must not be recognized or enforced if, at the time recognition or enforcement is sought, proceedings between the same parties, based on the same facts and having the same purpose as in the state of origin:

(I) are pending before a court of [enacting jurisdiction] that was seized of the matter prior to it being brought before the court of the state of origin, or

(ii) have resulted in a judgment rendered by a court of [enacting jurisdiction], or

(iii) have resulted in a judgment rendered by a court of a third state that meets the conditions for its recognition and enforcement in [enacting jurisdiction].

[21] In relation to default judgments, the working group further **recommends a provision to govern the situation where a default judgment might have been obtained in breach of an agreement to arbitrate** (i.e. Scott v. Avery clause). The rationale behind this recommendation is that if such a ground isn't specifically mentioned, the breach of an arbitration clause or an exclusive forum clause would have to be raised as a public policy defence, which might or might not be successful. The provision could read:

The bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the territory of origin.

(cf. Art. V(2)(b) of Canada-UK; compare with art. 3165.3 of the Québec Civil Code)

4. Reciprocity - Procedural Issues

[22] There is some opinion in the working group that reciprocity is not an appropriate regime, after Morguard, for the recognition and enforcement of foreign judgments. The other opinion is that the Morguard decision is limited to the intra-Canadian constitutional regime for the recognition and enforcement of provincial and territorial judgments. The Working Group **agreed to submit to Conference for discussion and guidance the advisability of incorporating the following provision:**

A judgment entitled to enforcement under the Act could be enforced by

(a) an action on the judgment, or,

(b) if the judgment is from a reciprocating state [as defined], by registration of the judgment in the same manner as judgments are registered under the Uniform Enforcement of Canadian Judgments Act.

5. Related Matters

a) Effects of recognizing a foreign judgment

[23] If a judgment is recognized, two possibilities arise. If the judgment orders the debtor to pay money to the creditor, the creditor is entitled to enforce the judgment. If the judgment declares that the alleged debtor is not liable to the creditor, the debtor should be entitled to rely on the judgment as res judicata if the creditor attempts to make the same claim in a local court proceeding. The question is whether our Act should specify the latter effect as well as the former. The Canada-France Convention says that judgments meeting its criteria «shall be recognized and may be declared enforceable or registered for the purpose of enforcement» in the recognizing state (art. 4). It does not, however, specify what the consequences of recognizing the judgment are. There is a good argument for

following this model, and leaving it up to the courts in the recognizing jurisdiction to decide what are the consequences of recognition. To specify the effects of res judicata in the Act, which presumably would include both cause of action estoppel and issue estoppel, is to run the risk of creating confusion as to whether those effects are the same as at common law or different. The working group recommends that the proposed Act should specify that a judgment meeting its criteria must be recognized in the enacting jurisdiction, but should leave the meaning of «recognized» and, therefore, the «effect» of recognition, undefined.

b) Bar to an action on the original claim - merger

[24] At common law an enforceable foreign judgment does not merge with the original cause of action so that, in theory, the judgment creditor can bring another action locally on the same cause of action on which the foreign judgment was based. It is also difficult to imagine situations where a judgment creditor would prefer to relitigate the claim rather than merely enforce the foreign judgment. The working group recommends that the proposed Act not deal specifically with merger.

c) Limitation period

[25] Using s. 5 of the UECJA as its model, the working group accepts that uniformity is desirable in relation to the enforcement period for foreign judgments and recommends that the limitation period for enforcing a foreign judgment under the Act should be the shorter of the limitation period in the original jurisdiction and six years.

Conclusion and Next Steps

[26] As noted in the introduction, in 1996, the ULC received two reports and adopted a resolution to recommend legislative options on matters pertaining to the recognition and enforcement of foreign judgments. Since that time, much work has been done by the Working Group to find consensus on fundamental issues of substance and procedure. This progress report has set forth the consensus and recommendations of the Working Group and calls for guidance of Conference on a number of fundamental matters.

[27] The task is now for the ULC to consider these recommendations and give directions to the Working Group to enable its members, if desired by the Conference, to undertake the drafting of a uniform statue on the recognition and enforcement of foreign judgments based on the recommendations contained in this progress report and any directions suggested at the 1997 Meeting.