

**Fredericton, New Brunswick**

**10-14 August 2003**

**UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT**

**(REVISED FINAL DRAFT AND COMMENTARY)**

**CIVIL SECTION**

**WORKING GROUP ON ENFORCEMENT OF FOREIGN JUDGMENTS**

**2002-2003 Working Group on Enforcement of Foreign Judgments**

**Uniform Enforcement of Foreign Judgments Act (Revised Final Draft) Report August 2003**

**1. Overview of Activities**

[1] The Working Group was asked by the ULCC at its August 2001 meeting to revise the Draft Uniform Enforcement of Foreign Judgments Act (UEFJA) based on the discussions that had taken place and the resolutions of the Civil Section in that regard. In particular, the Conference confirmed that the Act was to apply to monetary and non-monetary judgments. It also resolved that the Act should contain provisions to provide safeguards with respect to the execution of problematic non-monetary judgments, since safeguards for problematic monetary judgments were already included, and that provisional orders should be excluded from the scope of the Act. The Conference decided that option C should be retained for the conversion date under the then article 11. Finally, it was recognized that the text needed to be reviewed by legislative drafters.

[2] The 2002-2003 Working Group was composed of Joost Blom, Russell Getz, Peter Lown, H. Scott Fairley, Greg Steele, Darcy McGovern, Frédérique Sabourin and Tim Rattenbury with Kathryn Sabo as co-ordinator. As the drafters assigned to the project, Linda Tarras and Hélène Rodrigue were of great assistance. The Working Group acknowledges their key contribution with sincere thanks.

[3] From January to June 2003, the Working Group held a series of conference calls with a view to implementing the decisions of the

Conference from 2001, reviewing the text as revised by the drafters and discussing issues raised or highlighted by the redrafted text.

## **2. Results of this year's activities**

[4] With the assistance of the legislative drafters, the Working Group has implemented the decisions of the Conference of 2001. Provisional and protective measures have been removed from the scope of the Act. Safeguards with respect to the enforcement of problematic non-monetary judgments have been added. The currency conversion option chosen by the Conference in 2001 has been retained.

[5] The policy choices with respect to enforcement of foreign judgments already approved by the Conference continue to be reflected in the revised final draft. They are as follows:

- A specific uniform act should apply to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.
- The proposed uniform act indicates what kind of judgments it covers as well as to which judgments it will not apply.
- The proposed uniform act applies to money judgments as well as to those ordering something to be done or not to be done.
- The proposed uniform act rejects the “full faith and credit” policy applicable to Canadian judgments under the *Uniform Enforcement of Canadian Judgments* (UECJA).
- The proposed uniform act identifies the conditions for the recognition and enforcement of foreign judgments in Canada. These conditions are largely based on well-accepted and long-established defences or exceptions to the recognition and enforcement of foreign judgments in Canada.
- Following *Morguard*, the proposed uniform act adopts as a condition for recognition and enforcement of a foreign judgment that the jurisdiction of the foreign court which rendered the judgment was based on a real and substantial connection between the country of origin and the action against the defendant.

[6] The modifications that appear in this revised final draft are mainly editorial. There are some language changes and some reordering of provisions. A table setting out the article numbers of the 2003 version and the corresponding 2001 article numbers is attached, followed by the text and commentary of the revised final draft.

[7] There are some substantive differences in this revised final draft as compared to the 2001 version, but these are generally additions dictated by the need for clarification or for balance as opposed to changes in orientation. For example, in Part 2 – Enforcement – General, the Working Group has broadened the possibility in section 6 for a court to reduce the damages awarded in a foreign judgment. The Working Group has added a new section 11 to ensure that the grounds for opposing the enforcement of a foreign judgment can be made applicable, as appropriate, where enforcement as such is not sought but where recognition of the judgment may be justified. The Working Group has made refinements to Part 3 – Enforcement Procedures while retaining a minimalist approach. Some detail is provided, especially in sections 12 and 14, to ensure that clear registration and enforcement procedures are set out, but the provisions aim to avoid interfering with general civil enforcement regimes. Section 16 appears now in square brackets to reflect the Working Group's view that this section is no longer necessary.

### **3. Overview of the revised final draft uniform act: *Uniform Enforcement of Foreign Judgments Act***

[8] The proposed Uniform Enforcement of Foreign Judgments Act is divided into four parts.

[9] Part 1 deals with definitions (s. 2) and scope of application (s. 3).

[10] Part 2 refers to enforcement generally. It contains eight provisions on various matters: reasons for refusing to enforce (s. 4); the time within which enforcement is to be sought (s. 5); the discretion of the enforcing court to reduce foreign awards of non-compensatory and excessive damages (s. 6); the discretion of the enforcing court to modify a foreign judgment or provide for procedures to be used (s. 7); the jurisdiction of the foreign court based on voluntary submission, territorial competence

or a real and substantial connection (s. 8); examples of real and substantial connections (s. 9); and an “escape clause” (s. 10).

[11] Part 3 deals with the enforcement procedure.

[12] Part 4 covers the regulations.

#### **4.Particular issues to be considered by the Conference**

[13] It should be noted that in the Act a distinction is drawn between recognition and enforcement for certain purposes as provided in section 11.

[14] The Conference is asked to consider whether section 16 can be deleted. The aim of this section was to preserve the existing procedure of bringing an action on the foreign judgment but to make such an action subject to the substantive requirements set out in the Act to ensure the greatest degree of uniformity possible. After discussion, the Working Group has concluded that given the provisions of the Act, there is no need to preserve the action on the foreign judgment and recommends that section 16 be deleted.

#### **5. Recommendation**

[15] Subject to the Conference’s decisions with respect to the above-noted issues, it is recommended that the Conference approve and adopt this revised final draft Uniform Enforcement of Foreign Judgments Act and commentaries.

### **Appendix 1**

#### **Concordance Table**

##### **2003 Sections**

##### **2001 Sections**

1- new

-

#### **PART 1 - INTERPRETATION AND APPLICATION**

2

1, 9 (1)

3

2

## **PART 2 - ENFORCEMENT — GENERAL**

4	3 (note - 3A deleted)
5	4
6	5
7 – new (non-monetary judgments)	
8	6
9	7 (note - 7A deleted)
10	8
11 – new (non-estoppel)	

## **PART 3 - ENFORCEMENT PROCEDURES**

12 (1) - new	
(2)	9 (3)
(3) new in part	10 (1) (c)
(4) (a)	10 (1) (a)
(b) new in part	10 (2)
(c) new in part	10 (1) (d)
(d)	10 (1) (b)
(5)	10 (3)
13	11
14 (1)	9 (2)
(2)	9 (4), (5)
(3)	9 (6)
15	12
[16]	9 (7)

## **PART 4 - REGULATIONS**

## **2002-2003 Working Group on Enforcement of Foreign Judgments**

### ***Uniform Enforcement of Foreign Judgments Act***

#### **REVISED FINAL DRAFT – August 2003**

#### **Short title**

1. This Act may be cited as the *Uniform Enforcement of Foreign Judgments Act*

## **PART 1 - INTERPRETATION AND APPLICATION**

### *interpretation*

#### **Definitions**

2. The definitions in this section apply in this Act.

“civil proceeding”

«*instance civile*»

“civil proceeding” means a proceeding to determine a dispute between two or more persons or entities — one or more of whom may be a government body — the object of which is an order or judgment that

(a) in the case of a violation of a right, requires a party to comply with a duty or pay damages; or

(b) in any other case, determines the personal status or capacity of one or more of the parties.

“enforcing court”

«*tribunal d'exécution*»

“enforcing court” means [*the superior court of unlimited trial jurisdiction in the enacting province or territory*].

“foreign judgment”

«*jugement étranger*»

“foreign judgment” means a final decision made in a civil proceeding by a court of a foreign State, rendered by means of a judgment, order, decree or similar instrument in accordance with the laws of that State. It includes a final decision made by an adjudicative body other than a court if the enforcing court in [*the enacting province or territory*] is satisfied that the adjudicative body is the body that determines disputes of the kind in question in that State.

“judgment creditor”

«*créancier judiciaire*»

“judgment creditor” means the person entitled to enforce a foreign judgment.

“judgment debtor”

«*débiteur judiciaire*»

“judgment debtor” means the person liable under a foreign judgment.

“registration”

«*enregistrement*»

“registration” means the procedure prescribed by this Act or the regulations for the registration and enforcement of a foreign judgment.

“State of origin”

«*État d’origine*»

“State of origin” means the State or subdivision of a State where a foreign judgment was made.

**Comments:** As is customary the proposed uniform act on enforcement of foreign judgments includes a section on definitions. Most of them are self-explanatory.

In light of ULCC-Civil Section discussions, the scope of the future UEFJA is not limited to only foreign judgments that are final and monetary in nature (see the definition of “civil proceeding”). It was also decided that the Act would not include foreign provisional orders (see the definition of “foreign judgment” which limits the application of the Act to final decisions). Finally, the Act applies to foreign final judgments, even where such a judgment was not rendered by a court but rather by another adjudicative body, where the enforcing court in the province or territory adopting the Act is satisfied that the adjudicative body that rendered the decision was empowered to do so. Thus a decision rendered by an administrative tribunal could be covered by the Act if it arose from a civil proceeding and did not concern administrative law.

In terms of the procedure set out in the Act, the expression “registration” is used, but the definition here is intended to include any procedure by which a foreign judgment is made enforceable in the same manner as a local judgment. This would include, notably, the Quebec procedure under which an application is made to the court to render the judgment executory in Quebec, and the court’s order is the means by which this is achieved. It is immaterial for the purposes of the definition whether the “registration” is *ex parte*, with notice and an opportunity to oppose enforcement being given to the debtor afterwards, or the “registration” is made only after the debtor is given notice and an opportunity to oppose.

*application*

## **Exceptions**

3. This Act does not apply to foreign judgments

(a) for the recovery of taxes;

(b) arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

(c) for maintenance or support;

(d) that recognize the judgment of another foreign State;

(e) for the recovery of monetary fines or penalties; or

(f) rendered in proceedings commenced before the coming into force of this Act.

**Comments:** Section 3 determines the scope of application of the Act by specifying the foreign judgments to which the Act does not apply. This list accords with the traditional list of exceptions to enforcement of foreign judgments in Canada (taxes, penalties), and also takes into account those judgments for which separate enforcement rules exist (insolvency, maintenance). Thus enforcement of foreign judgments on these matters will not be possible under the proposed UEFJA. However, enforcement of judgments on matters not mentioned in the list could be considered in compliance with the conditions set out in the Act.

The proposed UEFJA applies only to original foreign judgments and not to judgments recognizing a foreign judgment. Moreover, the proposed Act has no retroactive effect: only judgments obtained in proceedings commenced after the entry into force of the Act would be executable under its provisions.

## **PART 2 - ENFORCEMENT - GENERAL**

### **Reasons for refusal**

4.A foreign judgment cannot be enforced in [*the enacting province or territory*] if

(a) the court of the State of origin lacked jurisdiction over the judgment debtor or subject matter contrary to sections 8 and 9;

(b) the judgment has been satisfied;

(c) the judgment is not enforceable in the State of origin or an appeal is pending, or the time within which an appeal may be made or leave for appeal requested has not expired;

(d) the judgment debtor was not lawfully served in accordance with the laws of the State of origin or did not receive notice of the commencement

of the proceeding in sufficient time to present a defence, and the judgment was allowed by default;

(e) the judgment was obtained by fraud;

(f) the judgment was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice;

(g) the judgment is manifestly contrary to public policy in [*the enacting province or territory*];

(h) at the time the judgment was submitted for registration or an action for enforcement was commenced, a civil proceeding based on the same facts and having the same purpose

- (i) was pending before a court in [*the enacting province or territory*], having been commenced before the civil proceeding that gave rise to the foreign judgment was commenced,
- (ii) has resulted in a judgment or order rendered by a court in [*the enacting province or territory*], or
- (iii) has resulted in a judgment or order rendered by a court of a foreign State, other than the State of origin, that meets the conditions for its registration and enforcement in [*the enacting province or territory*].

**Comments:** Section 4 lists in sub-par. (b) to (h) the traditional defences or exceptions which can be opposed to the enforcement of foreign final judgments in Canada. It includes notably the following circumstances: the foreign judgment is not final or is against public policy; the proceedings that were conducted show a lack of respect for the rights of the defendant; or *lis pendens* or *res judicata* can be invoked. Unlike the policy governing the enforcement of Canadian judgments based on full faith and credit under the UECJA, enforcement of a foreign judgment could also be opposed if, as provided in sub-par. (a), the foreign court lacked jurisdiction.

**Paragraphs (e) and (f).** The defence of fraud that is referred to in paragraph (e) is intended to replicate, for common law jurisdictions, the

defence as it has been developed in the Canadian case law. The defence is distinct from that of violation of the principles of procedural fairness as provided in paragraph (f). The procedural fairness defence refers to the manner in which the foreign proceeding was conducted. Fraud refers to a deception that was practised on the court or on the judgment debtor in order to obtain judgment. It is possible for fraud to exist even in an action that, as far as procedure is concerned, complies with the requirements of procedural fairness.

In civil law, fraud would have been covered either by section 4 f) or by section 4 g). Principles of procedural fairness would most likely be understood as binding on the parties to the proceedings as well as on the court. Fraud could also be contrary to public policy. Paragraph e) clarifies the issue if there were any doubt.

**Paragraph (g).** For common law jurisdictions, “public policy” is intended to refer to the concept that is used in the Canadian case law to determine whether a foreign judgment must be denied recognition, or a foreign rule of law denied application. Public policy, used in this sense, applies only if the foreign judgment or rule violates concepts of justice and morality that are fundamental to the legal system of the recognizing jurisdiction. The word “manifestly” is used in this paragraph to emphasize that the incompatibility with justice and morality must be convincingly demonstrated. Public policy in this context is clearly distinct from public policy in the more general sense of the aims that are supposed to be served by a rule of domestic law. A foreign judgment may be at odds with domestic legislative policy, because it gives a different result from that which domestic law would produce, but that does not mean that the judgment contravenes public policy in the sense in which it is used here. The distinction corresponds to that drawn in the civil law between *ordre public interne* (policies served by rules of domestic law) and *ordre public international* (public policy in the international sense).

Subsection 4 (h) (i) addresses the situation where *lis pendens* in the enforcing court can be invoked based on either an originating process or an interlocutory proceeding the subject matter of which is related to the merits addressed in the foreign proceeding.

Subsection 4 (h) (ii) addresses the straightforward exception of *res judicata* based on an equivalent judgment on the merits in the enforcing court. It also addresses the possibility of interim unenforceability created by the existence of an order in the enforcing court resulting from an interlocutory proceeding the subject matter of which is related to the merits addressed in the foreign proceeding. In such a case, the interlocutory matter would have to be disposed of by the enforcing court in advance of it considering the enforcement proceeding any further.

Subsection 4 (h) (iii) addresses the situation of *res judicata* in a third jurisdiction coming to the attention of the enforcing court, the judgment of which jurisdiction would also qualify for recognition and enforcement.

### **Time periods**

5.A foreign judgment can be enforced in [*the enacting province or territory*] only within the period provided by the law of the State of origin, or within ten years after the day on which the foreign judgment becomes enforceable in that State, whichever is earlier.

**Comments:** Such a rule accords with the average limitation period for enforcement of judgments set up in most provinces.

### **Limit of damages**

6.(1)Where the enforcing court, on application by a judgment debtor, determines that a foreign judgment includes an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes, it shall limit enforcement of the damages awarded by the foreign judgment to the amount of similar or comparable damages that could have been awarded in [*the enacting province or territory*.]

### **Excessive damages**

(2)Where the enforcing court, on application by the judgment debtor, determines that a foreign judgment includes an amount of compensatory damages that is excessive in the circumstances, it may limit enforcement

of the award, but the amount awarded may not be less than that which the enforcing court could have awarded in the circumstances.

### **Costs and Expenses**

(3) In this section, a reference to damages includes the costs and expenses of the civil proceeding in the State of origin.

**Comments:** The enforcement in Canada of foreign awards of damages which could include punitive, multiple or excessive compensatory damages that would otherwise be considered enforceable under this Act has raised and continues to raise a number of issues. This situation warrants that under the UEFJA the enforcing Canadian court being expressly empowered to limit the enforcement of damages so awarded that would be in excess of similar damages that could be awarded in similar circumstances had the action been filed in Canada. The defendant would have the onus of establishing that the damages awarded by the foreign court are in excess of awards normally granted in Canada.

To clarify the rules, a distinction is made in s. 6 between punitive and multiple damages (para. 1) which are not considered compensatory, on the one hand, and excessive compensatory damages (para. 2) on the other, given the principles set forth by the S.C.C. in *Hill v. Church of Scientology*. In addition, the third paragraph provides that judicial costs and expenses are part of the damages award of which the enforcement could be limited.

### **Limits relating to non-monetary awards**

7.(1) In the case of a non-monetary foreign judgment, the enforcing court may, on application by any party,

(a) make an order that the foreign judgment be modified as may be required to make it enforceable in [*the enacting province or territory*], unless the foreign judgment is not susceptible of being so modified;

(b) make an order stipulating the procedure to be used in enforcing the foreign judgment;

(c) make an order staying or limiting the enforcement of the foreign judgment, subject to any terms and for any period the enforcing court considers appropriate in the circumstances, if

- (i) the enforcing court could have made that order with respect to an order or judgment rendered by it under [the statutes and the rules of court] [*any enactment of the enacting province or territory*] relating to legal remedies and the enforcement of orders and judgments, or
- (ii) the judgment debtor has brought, or intends to bring, in the State in which the foreign judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the foreign judgment.

## **Application**

(2) An application must be made under subsection (1) before any measures are taken to enforce a foreign judgment where

(a) the enforceability of the foreign judgment is, by its terms, subject to the satisfaction of a condition; or

(b) the foreign judgment was obtained without notice to the persons bound by it.

**Comments:** The rules in section 7 are necessary to deal with special issues raised by non-monetary foreign judgments or, more precisely, foreign judgments containing orders that require the judgment debtor to do something other than pay a sum of money to the judgment creditor. An order to pay money is readily translated into the local procedure. An order made by a foreign court to do something else (such as an order for specific performance), or to refrain from doing something (an injunction), may not have an exact equivalent in the enforcing court's own procedure. Also, non-monetary orders may involve issues of policy and convenience not raised by money judgments, such as the extent to which it is fair to restrain the judgment debtor's freedom to act, or appropriate to place a burden on the court to monitor the judgment debtor's conduct.

The provisions in section 7 are modeled on the corresponding ones in the Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA)

(s. 6(2) and (4) of that Act). Paragraphs (a) and (b) of section 7(1) provide a mechanism whereby any party can ask the enforcing court to modify a foreign judgment, which is not enforceable in the enforcing jurisdiction as it stands, so as to make it enforceable (paragraph (a)), or to stipulate the procedure for enforcement (paragraph (b)). The concluding words in paragraph (a), which have no equivalent in the UECDJA, expressly contemplate that some foreign judgments may be so out of keeping with the relevant procedures in the enforcing jurisdiction that they are just not capable of being adapted so as to make them enforceable.

Paragraph (c) gives the enforcing court discretion, on application by any party, to stay or limit the enforcement of a non-monetary foreign judgment in either of two circumstances. One is where the enforcing court's own procedure would allow a local order of the relevant type to be stayed or limited in this way. This is consistent with the policy expressed in section 14(2) that the enforcing court must have the same control over a registered foreign judgment as it does over one of its own judgments. The other circumstance is where the judgment debtor has taken or intends to take steps in the originating jurisdiction to set aside, vary or obtain relief in respect of the foreign judgment. This recognizes that relief from a non-monetary judgment can often be sought by procedures other than an appeal, so the rule in section 4(c), prohibiting enforcement of a foreign judgment while an appeal is pending or may still be brought, will not cover all the situations that can arise.

Section 7(2) stipulates two cases in which the judgment creditor, as a precondition of taking any steps to enforce a non-monetary foreign judgment, must make an application to the enforcing court under subsection (1). In effect, the judgment creditor must ask the court to approve the way in which the creditor proposes that the foreign judgment be enforced. One case (paragraph (a)) is where the foreign judgment by its own terms is subject to the satisfaction of a condition, making it essential that the enforcing court have an opportunity to rule on whether that condition is satisfied. The other (paragraph (b)) is where the foreign judgment was obtained without notice to the persons bound by it. In such a case, since the judgment debtor has not had the opportunity to contest

the making of the order, enforcement should not take place without at least the express sanction of the enforcing court.

## **Jurisdiction**

8.A court in the State of origin has jurisdiction in a civil proceeding that is brought against a person if

(a) the person expressly agreed to submit to the jurisdiction of the court;

(b) as defendant, the person submitted to the jurisdiction of the court by appearing voluntarily;

(c) the person commenced a counterclaim to the proceeding;

(d) the person, being a natural person, was ordinarily resident in the State of origin;

(e ) the person, not being a natural person, was incorporated in the State of origin, exercised its central management in that State or had its principal place of business located in that State; or

(f) there was a real and substantial connection between the State of origin and the facts on which the proceeding was based.

**Comments:** Section 8 sets out three groups of circumstances in which a foreign court has jurisdiction in a proceeding brought in its courts.

The first group describes party choice – the parties may contractually agree on a forum; the defendant may voluntarily appear in a forum chosen by the plaintiff; or, for purposes of orders against the plaintiff, the plaintiff is bound by the choice of forum it has made.

The second group describes the “home base” of defendants, using the accepted principle of habitual residence. For business entities, an equivalent is created by use of “place of incorporation,” which is the place which gives the entity its existence and personality. Since such legal entities always act through agents, two additional grounds are added for business entities – “central management” and “principal place of business.” These are consistent with decisions which have gone beyond a simplistic reliance on “place of incorporation” for all purposes. Almost all

incorporation statutes mandate being subject to the authority of the courts of the place of incorporation. “Central management” and “principal place of business” depend on the particular circumstances of the case and the issues raised by it.

The third ground reflects the development of jurisprudence by the Supreme Court in *Morguard* and subsequent cases. The concept was developed with respect to recognition within Canada of other Canadian judgments. It has, however, been applied to non-Canadian judgments, even though the arguments relating to the comity between units within a federal state are less compelling in other circumstances. This issue has been discussed at differing levels of intensity in a number of cases, including *Moses v. Shore Boat Builders Ltd.*, [1] *Old North State Brewing Company v. Newlands Services Inc.*, [2]

*Braintech, Inc. v. Kostiuk* [3] and *U.S.A. v. Ivey*. [4] The concept of “real and substantial connection” is well known in conflict of laws generally.

### **Real and substantial connection**

9. For the purposes of paragraph 8(f), in the case of a foreign judgment allowed by default, a real and substantial connection between the State of origin and the facts on which the civil proceeding was based is established in, but is not limited to, the following cases:

(a) the judgment debtor, being a defendant in the court of the State of origin, had an office or place of business in that State and the proceedings were in respect of a transaction effected through or at that office or place;

(b) in an action for damages in tort or for extra-contractual damages

- (i) the wrongful act occurred in the State of origin, or
- (ii) injury to person or property was sustained in the State of origin, provided that the defendant could have reasonably foreseen that the activity on which the action was based could result in such injury in the State of origin, including as a result of distribution through commercial channels known by the defendant to extend to that State;

(c) the claim was related to a dispute concerning title in an immovable property located in the State of origin;

(d) in an action for damages in contract, the contractual obligation was or should have been performed in the State of origin;

(e) 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 ordinary residence or its principal place of business in the State of origin; or

(f) the claim was related to a dispute concerning goods made or services provided by the judgment debtor and the goods and services were acquired or used by the judgment creditor when the judgment creditor was ordinarily resident in the State of origin and were marketed through the normal channels of trade in the State of origin.

**Comments:** It was felt necessary for policy reasons to provide a list of examples of real and substantial connections in order to establish the subject-matter competence of the foreign court. Grounds are identified here for actions involving branches of corporate bodies (a); torts (b); immovables (c); contracts (d); trusts (e); consumer contracts and products liability (f). They would largely accord with those identified in the context of the enforcement of Canadian judgments (see s. 10 UCPTA).

As a result of the discussions held in August 1998, section 9 is intended to operate :

- only in the case of default judgments; and
- in a non-exhaustive fashion so that additional grounds which would be acceptable both in the State of origin and in Canada could be considered by the enforcing court.

Paragraph (a) should be read together with s. 8(e). The latter provides, in essence, that a court in the state of origin has jurisdiction in a proceeding against a corporation whenever that body is headquartered in the state of origin. This is general jurisdiction, that is, jurisdiction irrespective of the subject matter of the proceeding. Section 9(a), by contrast, is more

restricted. It applies if the judgment debtor, which may be a natural person or a corporation, has an office or place of business in the territory of origin. The office or place of business need not be a principal one. Section 9(a) provides that a court in the state will have jurisdiction to give default judgment against the judgment debtor, based on a real and substantial connection, but this is special jurisdiction. That is, jurisdiction exists only with respect to certain proceedings. The proceeding must be “in respect of a transaction effected through or at that office or place”. The word “transaction” implies a business context, but a proceeding “in respect of a transaction” could be for contractual, tortious (delictual) or restitutionary claims, so long as the claims arise out of a “transaction” effected through or at the relevant location.

### **Judgment not enforceable**

10. A foreign judgment may not be enforced in [*the enacting province or territory*] if the judgment debtor proves to the satisfaction of the enforcing court that

(a) there was not a real and substantial connection between the State of origin and the facts on which the civil proceeding was based; and

(b) it was clearly inappropriate for the court in the State of origin to take jurisdiction.

**Comments:** Section 10 recognizes that there will be exceptional cases where the basis for jurisdiction can be found under Section 8(a) to (e), but nonetheless the exercise of jurisdiction by the court in the State of origin was clearly inappropriate. In those rare instances, the enforcing court may decline to recognize or enforce the judgment. A real and substantial connection between the State of origin and the facts on which the proceeding was based is not necessary for the court in the State of origin to have exercised jurisdiction but its absence, coupled with a finding that for some reason it was inappropriate for it to have done so, may be a sufficient reason to decline to enforce or recognize the judgment.

Section 10 provides the ultimate possibility at the enforcement stage to challenge the jurisdiction of the foreign court even though the defendant

was not successful in challenging jurisdiction or has not done so at the time of the initial proceeding.

On that point, a useful reference can be made to s. 3164 of the Civil Code of Québec which reads as follows:

“The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seised of the case.” (our emphasis)

As pointed out during the deliberations of the ULCC-Civil Section in August 1998, the application of s. 10 should be appreciated as clearly as possible, particularly in light of its relationship with other sections of Part II that deal with jurisdiction, namely s. 4, 8 and 9.

In principle, the enforcement of a foreign judgment can be granted if the foreign court was competent to make a final order in accordance with the rules to be set out in the future UEFJA. Defences to enforcement are those listed in s. 4, one of which being the lack of jurisdiction. This has to be determined in light of the requirements mentioned in s. 8 and 9.

For instance, if jurisdiction can be determined on the basis of a real and substantial connection as provided in s. 8(f), examples of which are contained in s. 9 in the case of default judgments, the defendant would not be successful in establishing that the foreign court lacked jurisdiction. For this reason, it might be necessary to adopt quite a high threshold for allowing the defendant to be able to do so.

### **Recognition of foreign judgments**

11. The rules in this Part that determine whether a foreign judgment is unenforceable for lack of jurisdiction in the court of the State of origin over a party or subject matter, or on account of fraud, public policy or a violation of the principles of procedural fairness and natural justice, also apply, with any necessary modifications, in determining whether a foreign judgment is binding on the parties so as to be a defence to a claim, or to be conclusive of an issue, in an action in [*the enacting province or territory*].

**Comments:** It is recognized that enforcement and recognition operate in similar ways, one initiated by the successful plaintiff/judgment creditor, and the other by the successful defendant. However, recognition operates in a narrower compass, especially where the foreign action is dismissed. It is possible that the unsuccessful plaintiff may attempt to sue again in another forum or appeal the foreign judgment. In the meantime, however, the successful defendant in the foreign litigation must be able to rely on the judgment dismissing the action to prevent a new action (estoppel in common law), unless and until circumstances are shown to have changed.

Because recognition operates in a slightly narrower compass, we have indicated the grounds which would preclude the foreign action being raised by the successful defendant.

## **PART 3 - ENFORCEMENT PROCEDURES**

### **Right to register**

12.(1) A foreign judgment that is enforceable under this Act may be registered under this Part.

### **Multiple claims**

(2) If a foreign judgment contains parts that may be enforced separately, the judgment creditor may register the judgment in respect of those parts at different times.

### **Notice to judgment debtor**

(3) The judgment creditor must give to the judgment debtor a notice of intention to register a foreign judgment in respect of one or more of its parts

(a) indicating which of the grounds set out in section 8 are being relied on to claim that the court in the State of origin had jurisdiction to make the foreign judgment; and

(b) identifying the parts.

## Registration procedure

(4) A judgment creditor may register a foreign judgment by filing with the enforcing court

(a) a copy of the foreign judgment certified as true by a proper officer of the court that made the order;

(b) a copy of each notice referred to in subsection (3);

(c) an application to modify the foreign judgment, if the judgment creditor is of the opinion that the judgment must be amended by the enforcing court to render it enforceable; and

(d) a certified translation of the foreign judgment into either English or French, if it was not given in one of those languages.

## Costs and expenses

(5) The judgment creditor may, if the regulations so provide, recover from the judgment debtor the costs and expenses related to the registration of the foreign judgment.

**Comments:** Part III of the Act reflects a compromise between two approaches to defining the procedure for enforcement of foreign judgments. One approach would leave the procedure entirely to be defined by the enacting jurisdiction, whether by regulation or by statutory provision. This would allow too much variation from one province or territory to another. The other would define the procedure exhaustively in the model Act. This would create difficulties in terms of harmony with long-established procedures in each jurisdiction. The compromise proposed here is to set certain parameters for the procedure but to recognize the need to accommodate existing differences to a certain extent. Additionally, the Act allows the general civil enforcement rules to operate as much as possible, recognizing that work to achieve uniformity there is underway.

Section 12 sets out the procedural steps for registration. The Act recognizes that for a variety of reasons a judgment creditor may wish to seek *enforcement* of only part of a judgment, a matter covered in section

14(2). Subsection (2) of section 12 ensures that the judgment creditor can also *register* with respect to part of a judgment and can do so on different occasions for the different parts, subject to the notice provisions. Subsection (3) requires the judgment creditor to notify the judgment debtor of the intention to register, to inform the latter of the jurisdictional grounds under section 8 that are relied upon and to identify the parts of the judgment with respect to which registration is sought. Subsection (4) sets out the documents that must be provided to the court: a certified copy of the foreign judgment, translated into English or French if necessary; a copy of the notice to the judgment debtor; and, where the judgment creditor considers that the foreign judgment requires modification in order to be enforceable as if it were an order contained in a local judgment, an application that would set out the modifications proposed. Finally, subsection (5) adds to these informational requirements a substantive provision that the enacting jurisdiction may (or may choose not to) provide, in the regulations under the Act, for the recovery by the judgment creditor from the judgment debtor of costs in relation to the registration procedure.

### **Conversion to Canadian currency**

13.(1) Where a foreign judgment orders the payment of a sum of money expressed in a currency other than Canadian currency, when the judgment is registered it must include a statement that the money payable under the judgment will be the amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in [*the enacting province or territory*] at the close of business on the conversion date.

### **Conversion date**

(2) For the purposes of subsection (1), the conversion date is the last day, before the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment, on which the bank quotes a Canadian dollar equivalent to the other currency.

**Comments:** Section 13 adopts the policy of the Uniform Foreign Money Claims Act respecting the date of conversion of foreign currency to

Canadian currency. This is consistent with the common law rule (the “date of payment” rule) adopted by the House of Lords in the Miliangos case. The policy is that the conversion to Canadian dollars shall take place at the rates prevailing at the time of payment. This is also the currency conversion date in Section 31 of the British Columbia Court Order Enforcement Act respecting the reciprocal enforcement of foreign judgements. It is the fairest conversion date based on the principle that the creditor is most accurately compensated by receiving, possibly years after the foreign judgment, the amount of foreign currency stipulated by the judgment or the Canadian dollars that are needed, as of the time of payment, to **purchase that amount of foreign currency.**

### **Enforcement**

14.(1) On registration, a foreign judgment is enforceable as if it were a judgment of the enforcing court.

Jurisdiction of enforcing court

(2) An enforcing court has the same jurisdiction and control over a registered foreign judgment as it has over its own judgments and may order enforcement in respect of one or more of its parts.

### **Enforcement by sale of property**

(3) A registered foreign judgment may not be enforced by the sale or other disposition of any property of the judgment debtor before the expiry of 30 days after the judgment debtor has received notice of the proceedings to register the foreign judgment, or any longer period that the enforcing court may allow.

**Comments:** Section 14 is for greater certainty, to remove any doubt that, on registration, a foreign judgment is the functional and juridical equivalent of a judgment emanating at first instance from the enforcing court. This status applies to the foreign judgment as a whole or in part depending on and as per the enforcement procedures that have been completed pursuant to section 12 of the Act. Subsection 14(3) provides a grace period before a judgment creditor can satisfy all or part of a registered foreign judgment through the enforced sale of a judgment

debtor's property, but this is intended to provide a judgment debtor only with reasonable notice of the likely consequences of registering a foreign judgment and in no way qualifies the legal status, force or ultimate effect of the registration itself.

## **Interest**

15.(1) The interest payable on an amount awarded under a registered foreign judgment is

(a) the interest accruing on that amount under the law of the State of origin, starting on the day on which the foreign judgment became enforceable in that State and ending on the day immediately before the conversion date; and

(b) the interest accruing on that amount under the law of [*the enacting province or territory*], starting on the conversion date and ending on the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment.

## **Variation of interest**

(2) The enforcing court, if it considers it necessary to do so to ensure that the judgment creditor will be most truly and exactly compensated, may order that the interest be calculated in a different manner.

**Comments:** The provision respecting interest is based on the principle that the rule for post-foreign judgment interest should parallel the rule respecting currency conversion in Section 13. That is, the foreign judgment should bear interest at the relevant foreign interest rate until the date as of which the obligation is converted from the foreign currency into Canadian currency, and after that date should bear interest at the same rate as a local judgment. Thus, if the original jurisdiction has a rapidly devaluing currency, it would usually have a correspondingly high interest rate, and the foreign judgment ought to bear interest at that rate as long as the obligation is denominated in that currency, i.e., up to the date of conversion. After the date of conversion into Canadian currency, the relevant local interest rate is appropriate.

The alternative solution provided for in Sections 2 and 3 of the Uniform Foreign Money Claims Act, that is, of allowing the matter of interest to be dealt with by regulation would be less satisfactory from the perspective of a uniform approach.

Subsection (2) allows a court to vary the interest rate if it considers that the application of the stipulated rule would overcompensate or undercompensate the judgment creditor.

### **Other enforcement procedures**

[16.Nothing in this Act affects the right of a person to enforce a foreign judgment by bringing an action on the judgment, as long as the judgment meets the requirements for enforceability under this Act.]

**Comments:** Section 16 preserves the procedure of bringing an ordinary action on the foreign judgment, but stipulates that the Act governs the substantive requirements that the foreign judgment must satisfy to support the action. While section 16 gives a judgment creditor the option of utilizing a different procedure than that available under the Act, it cannot be used to enforce a judgment which would not otherwise be enforceable in accordance with the substantive requirements of the Act.

## **PART 4 - REGULATIONS**

### **Regulations**

17. The [*regulation-making authority of the enacting province or territory*] may make any regulations that the[*regulation-making authority of the enacting province or territory*] considers necessary to carry into effect the purposes and provisions of this Act.

### **Footnotes:**

[1] (1993), 106 D.L.R. (4th) [1994] 1 W.W.R. 112 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

[2] (1998), 155 D.L.R. (4th) 250, 47 B.C.L.R. (3d) 258 ( C.A.)

[3] (1999), 171 D.L.R. (4th) [1999] 9 W.W.R. 133 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

[4] (1995), 26 O.R. (3d) 533, affirmed (1996), 30 O.R. (3d) 370 (Ont. C.A.).