

The HCCH 2019 Judgments Convention:
Pre-Implementation Report
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Status of the Convention

- The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention) was adopted on 2 July 2019 by delegates to the 22nd Diplomatic Session of the Hague Conference on Private International Law (HCCH)
- It will enter into force on 1 September 2023 in the European Union (all 27 Member States, except Denmark) and Ukraine.

Background

- The Convention is the product of three decades (still ongoing) of negotiations and was preceded by the 2005 HCCH Choice of Court Convention.
- Unlike the Choice of Court Convention, the Judgments Convention does not provide direct jurisdictional rules (rules to determine which State's courts will hear a case). It deals with jurisdiction indirectly, by defining jurisdictional standards or “filters” that must be satisfied for foreign judgments to be recognized.

Preservation of National Recognition and Enforcement Rules

- A judgment given by a court of a Contracting State (the State of origin) rendered in accordance with the jurisdictional grounds set out in the Convention must be recognized and enforced in another Contracting State (the requested State) with refusal permitted only on the grounds specified in the Convention - art. 4(1)
- However, the requested state is *generally* free to have its courts recognize and enforce judgments on grounds accepted in its national recognition and enforcement rules even if those grounds do not qualify under the Convention - art 15
- In all but two of the common law provinces and territories, the relevant rules are found in caselaw. Saskatchewan and New Brunswick have enacted statutes. The Saskatchewan *Enforcement of Foreign Judgments Act* is based on the ULCC's 1992 Uniform Act of the same name. The New Brunswick *Foreign Judgments Act* is based on an older ULCC Uniform Act of the same name, revised to apply only to foreign country judgments.

Territorial Scope

- The Convention applies to “the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State” - art 1(2)
- Contracting States “with two or more territorial units in which different systems of law apply” are not bound to apply the Convention to situations which involve solely different territorial units - art 22(2)
- If implemented, the Convention would therefore apply only to the recognition and enforcement of foreign judgments in the international sense.
- The Convention contains the standard federal State clause permitting a State to declare that the Convention “shall extend to all its territorial units or only to one or more of them” - art 25(1)

Material scope: Judgments in Civil and Commercial Matters

- The Convention applies only to judgments in “civil or commercial matters” and for greater certainty specifies that it “does not extend in particular to revenue, customs or administrative matters” – art 1(1)
- This is subject to a long list of specific exclusions that includes matters that might otherwise qualify as civil or commercial, but which are potentially covered by other international instruments or are considered particularly sensitive by at least some states – art 1(2)
- In addition to various family law matters, the exclusions include maritime carriage, arbitration and related proceedings, insolvency, wills and succession, defamation, privacy, intellectual property, and antitrust.

“Judgment”

- In line with the 2005 Choice of Court Convention, the Convention defines “judgment” broadly to mean “any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings . . . provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention – art 3(1)(b). An interim measure of protection is excluded from the definition.
- The definition is not limited to monetary judgments whereas the traditional common rule limited the recognition of foreign judgments to judgments for a fixed sum of money. The NB FJA codifies the traditional rule – ss 1, 5(e).
- However, the Supreme Court of Canada in *Pro Swing Inc. v. Elta Golf Inc.* (2006) opened the door to the recognition of non-monetary judgments in appropriate cases. The SK EFJA likewise provides for the recognition of non-monetary judgments and entitles the SK court to modify a foreign judgment to make it enforceable in SK – s 7(1)

No review on the merits

- The Convention provides that a court deciding on recognition and enforcement of a judgment is not entitled to review the merits of the judgment given by the court of origin - art 4(2).
- The Canadian common law and statutory regimes likewise reflect the generally accepted principle that the requested court does not sit as a court of appeal on the merits of the decision of the court of origin.

Requirement for effectiveness and enforceability in the State of origin

- Under art 4(3), a judgment must be recognized only if it has effect in the State of origin and must be enforced only if it is enforceable in the State of origin. Under art 4(4), the requested Court *may* postpone or refuse recognition if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.
- This permissive approach is compatible with the approach at common law and under s 5 of the NB FJA (sufficient if the foreign judgment is final at the level of the court that rendered the decision even if it is under appeal or can still be appealed) and with s 4 of the SK EFJA (unenforceable if an appeal is pending, or the time within which an appeal may be made or leave for appeal requested has not expired).

Jurisdictional Bases (“Filters”) for Recognition and Enforcement

- Articles 5 and 6 of the Convention set out the jurisdictional bases (“filters”) that are sufficient for a judgment rendered by the court of origin to be “eligible” for recognition and enforcement by the requested court.
- As under Canadian law, they can be divided into three categories: (1) connections between the defendant and the state of origin; (2) consent/submission by the defendant to the exercise of jurisdiction by the court in the state of origin; and (3) connections between the subject matter of the judgment and the state of origin.

Defendant Connections

- Art 5(1)(a): habitual residence of the defendant in the State of origin when it became a party to the proceedings there. In the case of an entity or person other than a natural person, this is the State (a) where it has its statutory seat; (b) under the law of which it was incorporated or formed; (c) where it has its central administration; *or* (d) where it has its principal place of business – art 3(2).
- Art 5(1)(b): in the case of a natural person who carries on business, the location of the defendant's principal place of business if the claim on which the judgment is based arose out of the business.
- Article 5(1)(d): the defendant's maintenance of a branch, agency, or other establishment in the State of origin when they became a party to the proceedings in the State of origin if the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment

Defendant Connections – Canadian Comparison

- common law: mere “presence” suffices as confirmed in *Chevron Corp. v. Yaiguaje* (2015)
- SK EFJA: a court in the state of origin has jurisdiction if the defendant was ordinarily resident in the state of origin; or, not being an individual, was incorporated in the state of origin, exercised its central management in the state or origin, or had its principal place of business the state of origin (ss 8(d) and (e)). The location of an office or place of business in the state of origin is insufficient under s 9 unless the proceedings relate to a transaction effected through or at that office or place
- NB FJA: “ordinary residence” (s 2(a))

Express Consent

- Art 5(1)(e) - the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given
- Art 5(1)(m) - the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, *other than an exclusive choice of court agreement*

Implicit Consent/Submission

- Art 5(1)(l) - the judgment ruled on a counterclaim (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion
- Art 5(1)(f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law
- Compare *Beals v. Saldanha* (2003), *Barer v. Knight LLC* (2019) SCC 13, NB FJA - jurisdiction only if defendant appears “voluntarily without protest” (s 2(ii)), SK EFJA – jurisdiction if defendant appears “voluntarily” (s 8(b))

Subject Matter Connection: Contractual Obligations

Art 5(1)(g) - the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

- (i) the agreement of the parties, or
- (ii) the law applicable to the contract, in the absence of an agreed place of performance,

unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

Subject Matter Connection – Leases of Immovable Property

Art 5(1)(h) – the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated

Subject Matter Connection - Contractual Obligations Secured by a Right in Rem

Art 5(1)(i) - the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem

Subject Matter Connection: Non-Contractual Obligations (Torts)

Art 5(1)(j) – the judgment ruled on a non-contractual obligation *arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred*

Compare: *Moran v. Pyle National* (1975 SCC) *SSAB Alabama Inc. v. Canadian National Railway Company* (2020 SKCA) *Van Breda v Club Resorts* (2012 SCC), SK EFJA, s. 9

Subject-matter Connection: Trusts

Art 5(1)(k) – the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and

- (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
- (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

Consumer and Employment Contracts

Art 5(2) If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment

- (a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
- (b) paragraph 1(f), (g) and (m) do not apply.

Residential tenants, registration of immovable property

Art 5(3) Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

Judgments on rights in rem in immovable property

Art 6. Notwithstanding Article 5, a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.

Compare: *Lanfer v Eilers* (2021 BCCA-SCC appeal decision pending); NB FJA s 3 – “. . . no court of a foreign country has jurisdiction: (a) in an action involving adjudication on the title to, or the right to the possession of, immovable property situated in the Province, or (b) in an action for damages for an injury in respect of immovable property situated in the Province.

Grounds for Non-Recognition – Article 7

States *may* refuse recognition or enforcement if one or more of seven grounds are met:

- insufficient notification of the essential elements of the claim to the defendant
- fraud in obtaining the judgment
- recognition or enforcement would be manifestly incompatible with the public policy of the requested State
- proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of the requested state
- proceedings in the State of origin were contrary to a choice of court agreement or a designation in a trust instrument
- judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties;
- judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State

Damages – Article 10

Art 10 - Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings

Limitation Periods for Enforcement & Forum Non Conveniens – Article 13

Art 13 - Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court of the requested State shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Conclusions

- With the exception of the New Brunswick FJA, the regimes in the common law provinces and territories liberally recognize and enforce foreign country judgments whereas the regimes in many other States are often more restrictive, including, for example, in the UK. Thus, adoption of the Convention would expand the range of Canadian judgments capable of being enforced abroad.
- There is no apparent downside given that the Convention standards are generally consistent with existing law in common law Canada (New Brunswick again excepted) while preserving the continued application of that law to foreign judgments outside the material scope of the Convention (subject to article 6).
- Ideally, adoption of the Convention would be accompanied by adoption of the 2005 Choice of Court Convention.