

MEMORANDUM

Date: October 15, 2017

To: Drafting Committee on Registration of Foreign Judgments to Harmonize the Law of the United States and Canada

From: Lisa R. Jacobs, Esquire, Chair, Professor Kathleen Patchel, Vice-Chair, and Professor James P. George, Reporter

Re: Background and Issues for Discussion

I. Introduction

A. Background

In the United States, recognition of foreign country money judgments is governed in most jurisdictions by either the Uniform Foreign-Country Money Judgments Recognition Act (2005) (UFCMJRA),¹ or its predecessor, the Uniform Foreign Money-Judgments Recognition Act (1962) (UFMJRA),² which are both Uniform Law Commission (“ULC”) products. Neither of these Acts provides for a registration procedure with regard to foreign country money judgments. In fact, while the UFMJRA is silent on the question of the appropriate procedure, UFCMJRA section 6 requires that the judgment creditor file a court action against the judgment debtor in order to have its judgment recognized. Jurisdictions that have not enacted either the UFCMJRA or the UFMJRA recognize foreign country money judgments under common law principles of comity. Under the common law, a judgment creditor must file a court action in the jurisdiction where recognition and enforcement is sought requesting that the foreign country money judgment be “domesticated,” so that it can be treated like a judgment of the recognizing jurisdiction. Thus, there currently is no registration procedure for recognition of foreign country money judgments generally available to judgment creditors in the U.S.³

By contrast, statutes in the Canadian provinces and territories long have provided a procedure for the registration of foreign country money judgments. Both the original Canadian statutes dealing with recognition and enforcement of foreign country judgments, the Reciprocal Enforcement of Judgments Acts, and the modern Uniform Enforcement of Foreign Judgments Act (UEFJA), which is a product of the Uniform Law Conference of Canada (“ULCC”), contain registration procedures. The availability of these procedures to U.S. judgment creditors, however, differs significantly between the old Reciprocal Enforcement of Judgments Acts and the ULCC’s UEFJA. The Reciprocal Enforcement Acts require that a judgment come from a foreign jurisdiction that has been recognized as granting reciprocity to judgments originating in that province or territory by having been placed by the appropriate governmental official on

¹ The UFCMJRA has been adopted in 24 jurisdictions.

² The UFMJRA is in effect in 14 jurisdictions.

³ A question for further research is whether any of the individual states provide some form of a registration procedure for foreign country money judgments.

a statutory list of reciprocating jurisdictions.⁴ If a U.S. judgment comes from a state not on the list of the particular Canadian jurisdiction where recognition and enforcement is sought, then the Reciprocal Enforcement Act registration procedure is not available and the U.S. judgment creditor must file a common law action. On the other hand, under the UEFJA, the uniform law that has been drafted to replace the Reciprocal Enforcement Acts, there is no reciprocity requirement; registration is available to all foreign country judgments that otherwise meet the statute's requirements for recognition and enforcement.

This project to harmonize the law of the Canadian provinces and territories and that of the states of the United States with regard to registration of foreign country judgments originated as a proposal from the ULC International Development Committee. Based on that proposal, a Study Committee was appointed by the ULC Committee on Scope and Program to consider whether a drafting committee was warranted. The Study Committee submitted its Final Report to Scope and Program in January, 2017, recommending

That a Joint Drafting Committee consisting of members of the ULCC [Uniform Law Conference of Canada] and the ULC be appointed to harmonize the law between Canadian and U.S. jurisdictions with regard to registration of certain foreign country money judgments originating in either country where recognition is sought in a jurisdiction in the other country, with the scope of the drafting project limited to foreign country money judgments that are final, conclusive, and enforceable in the jurisdiction of origin and are not excluded from the coverage of either the [ULC] Uniform Foreign Country Money Judgment Recognition Act (2005) or the [ULCC] Uniform Enforcement of Foreign Judgments Act (2003).⁵

In light of this recommendation, the Committee on Scope and Program passed the following resolution, which was subsequently approved by the ULC Executive Committee:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Joint Drafting Committee consisting of members of the Uniform Law Conference of Canada and the Uniform Law Commission be appointed to Harmonize the Law between Canadian and U.S. Jurisdictions regarding Registration of Final and Conclusive Foreign Money Judgments originating in Either Country (enforceable in the jurisdiction of origin) where recognition is sought in a jurisdiction in the other country, which are not already excluded from the coverage of the Canadian [sic] Uniform Foreign Country Money Judgments Recognition Act or the Uniform Enforcement of Foreign Judgments Act, be formed.⁶

⁴ See, e.g., Reciprocal Enforcement of Judgments Act, Revised Statutes of Alberta 2000, Chapter R-6, §8(1) (Lieutenant Governor in Council may by order declare a jurisdiction outside Canada a reciprocal jurisdiction for purposes of the Act).

⁵ Final Report of the Joint Study Committee on Harmonization of the Law of Caribbean Nations, Canada, and the United States Concerning Registration of Foreign Judgments to the Uniform Law Commission Committee on Scope and Program, January 8, 2017 (distributed to the Drafting Committee). The original proposal included harmonization of the law of Caribbean jurisdictions as well as those of Canada and the U.S. Because of timing and resource issues, however, it was decided that the Caribbean portion of the suggested project would be placed in abeyance, with the possibility that it could be considered in the future.

⁶ Minutes of the Midyear Meeting of the Committee on Scope and Program, Uniform Law Commission, Friday, January 13, 2017, Point Clear, Alabama, 1-2.

B. Scope of the Project

As both the Study Committee's Recommendation and the Scope and Program Resolution quoted above indicate, our project has a fairly specific scope. We are tasked with drafting (1) a registration procedure (2) for final and conclusive Canadian foreign money judgments (3) that come within the scope of *both* the ULCC's UEFJA and the ULC's UFCMJRA, (4) which registration procedure should be in harmony with Canadian law on registration of foreign country money judgments to the extent possible. As discussed above, there are two sources of Canadian law with regard to registration of foreign country money judgments, the Reciprocal Enforcement of Judgments acts, still in place in some Canadian jurisdictions, and the ULCC's UEFJA, which increasingly is replacing the Reciprocal Enforcement of Judgments acts in the Canadian provinces and territories. Because the UEFJA represents modern Canadian law on registration and continues to be adopted in Canadian jurisdictions as a replacement of the Reciprocal Enforcement acts, its registration provisions, which are contained in Part III of the UEFJA, logically should be the primary focus of our harmonization efforts, although the registration procedure in the Reciprocal Enforcement acts, particularly to the extent it is consistent with the UEFJA, could also inform our deliberations.

It also may be useful to note what is *not* within our charge. Our task is to draft a registration procedure that will provide an alternative means of obtaining recognition of a Canadian foreign country money judgment to that provided in UFCMJRA section 6 (which requires that the judgment creditor file an action for recognition). It is not within our scope to amend the UFCMJRA other than by adding a registration procedure for Canadian judgments. The other provisions of the UFCMJRA continue to apply and serve as the framework within which the registration procedure will be drafted. Our task also is limited to final and conclusive Canadian money judgments that are of a type covered by both the UFCMJRA and the UEFJA. Thus, both judgments that are not final and conclusive *money judgments* (for example, a judgment granting an injunction) and money judgments not within the scope of both acts (for example, a divorce settlement, which is excluded from both acts, or a judgment arising out of a bankruptcy proceeding, which is excluded from the UEFJA, but not the UFCMJRA), will not be covered by the registration procedure we propose.

To state our task in its simplest terms, it is to supplement section 6 of the UFCMJRA by providing a registration procedure for certain Canadian money judgments that is harmonized to the extent practicable with Canada's registration procedure for similar U.S. judgments, particularly as that procedure is set out in Part 3 of the UEFJA.

C. Drafting Approach

Given the interlocking relationship between the registration procedure that our Committee will develop and the UFCMJRA, we believe it is useful to think of our task as creating a "module" that will "plug in" to the UFCMJRA. This conceptual approach is analogous to the approach taken in the drafting of the ULC's Uniform Protected Series Act, which was approved at the ULC's 2017 Annual Meeting. This approach means that rules (as well as definitions and construction provisions) already contained in the UFCMJRA need not be restated in our draft (unless there is some compelling reason for doing so), as the UFCMJRA rules and provisions will apply automatically to the registration procedure. It also means that we must be careful that the rules that are stated in the registration act are both consistent with the UFCMJRA and do not create any negative interpretative impact on that statute. We believe this approach not only will create the shortest, clearest and most cohesive statute, but that it also is the best way to avoid unintended effects on both the substance of the UFCMJRA and that statute's further enactment.

The UFCMJRA has so far been adopted in 24 U.S. jurisdictions. It has had two adoptions this year, and two additional introductions. The ULC has designated it a targeted act, and an enactment committee has been formed to assist in encouraging enactments. Similarly, the Canadian UEFJA continues to be in an active enactment mode. One hope of the Registration of Foreign Judgments Joint Study Committee was that development of harmonized registration procedures between the U.S. and Canada would encourage further enactments of both the UFCMJRA and the UEFJA; certainly, the Joint Study Committee believed it was important that the registration project at the very least not discourage further enactment of either statute.

Thus, while in some respects our project is a fairly limited one, it is also one that will require considerable thought and finesse on the part of the Drafting Committee. The registration statute we create must not only harmonize with Canadian registration law, but also coordinate with the UFCMJRA so that it can “plug in” seamlessly to that statute – and, it must reach these goals in a fashion that at least does not detract from further enactment of either the UFCMJRA or the UEFJA, and hopefully facilitates further enactments of those Acts.

D. A Note Concerning Terms – “Recognition” versus “Enforcement”

While the UFCMJRA creates rules primarily with regard to “recognition” of judgments, the UEFJA, although it creates similar rules, does so primarily in the context of “enforcement.” The explanation for this appears to be that the U.S. and Canadian statutes are using these two terms with somewhat different meanings.

The UFCMJRA uses the term “recognition” to mean that “the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country.”⁷ “Enforcement” means “the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign country judgment.”⁸ Because a basic principle with regard to recognition and enforcement of judgments in the United States is that a judgment cannot be enforced unless and until it has been recognized, the UFCMJRA focuses on the rules for recognition – once a foreign country judgment meets the standards for recognition, it is both binding between the parties and enforceable against the judgment debtor through the enforcement procedures of the recognizing jurisdiction.⁹

The UEFJA, however, most often seems to be using the terms “recognition” and “enforcement” based on the purpose for which the judgment creditor wishes to use the foreign judgment. If the foreign judgment is going to be used solely for its preclusive effect, then the term “recognition” is used.¹⁰ If the judgment creditor ultimately wants to collect on the foreign judgment then the term “enforcement” is used.

Ultimately, however, it seems doubtful that this difference in terminology will have much impact on our efforts to develop a registration procedure for *recognition* of foreign country judgments that is harmonized with the Canadian registration procedure for their *enforcement*, as while the terminology may differ, the intended results of the procedures will be the same.¹¹

⁷ UFCMJRA §4 cmt 2.

⁸ UFCMJRA §4 cmt 2.

⁹ UFCMJRA §7.

¹⁰ See UEFJA §11.

¹¹ It is likely that the Prefatory Note and Comments to our Uniform Act will be adequate to prevent any

E. What is a Registration Procedure?

Although the details of the registration procedure that our Committee develops obviously will be determined by the deliberations of the Committee over time, it may be useful to describe briefly the basic characteristics of a registration procedure of the type we will be drafting. This type of registration procedure is an expedited procedure that allows the judgment creditor to seek recognition of its foreign country judgment by filing a request for recognition with a court administrative officer (e.g., the Clerk of the court that has jurisdiction over actions for recognition) rather than having to file a court action for recognition of the judgment. If the judgment debtor has defenses to recognition under the UFCMJRA, then the burden is on the debtor to invoke the judicial process to have those defenses heard and determined in a court proceeding. If the judgment debtor does not raise any defenses, then the judgment creditor can obtain recognition (and, thus, the ability to enforce its judgment) simply by registering the judgment, thereby avoiding the costs associated with a court action. Thus, the basic differences between a registration procedure for recognition of foreign country judgments and the procedure currently required by UFCMJRA is that under the registration procedure no judicial proceeding is required unless defenses to recognition are asserted (as opposed to the current rule requiring a judicial proceeding in every case) and the burden of invoking judicial involvement is on the judgment debtor (as opposed to the current rule where the burden of invoking judicial involvement is on the judgment creditor.)

II. Issues for Consideration and Discussion

Below is a list of issues for the Drafting Committee's consideration and discussion. This is a preliminary and partial list. A primary purpose of this first Drafting Committee meeting is for the Committee to develop a more comprehensive list of the issues that we will need to consider as part of our drafting process.

A. Issues Related to Scope

(1) What types of decisions are covered by the UEFJA and the UFCMJRA?

Section 2 of the UFCMJRA defines a "foreign country judgment" as a "judgment" of a "court" of a foreign country.¹² Comment 3 to Section 2 states:

The foreign-country judgment need not take a particular form – any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a "judgment" comes within the term "court" for purposes of this Act. The judgment, however, must be the judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

Section 2 of the UEFJA defines a "foreign judgment" as "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 State" and states that "[i]t includes a final decision made by an adjudicative

confusion caused by differing terminology between our Act and the UEFJA.

¹² UFCMJRA §(2)(2).

body other than a court if the enforcing court ... is satisfied that the adjudicative body is the body that determines disputes of the kind in question in that State.”

If one merely compares the texts of the two Acts, it would appear that the UEFJA definition may be considerably broader; however, the elaboration on the UFCMJRA definition in its comment indicates that the concepts of “court” and “judgment” in the two Acts actually are quite similar. Is there sufficient similarity that we need not worry about any potential restrictions on scope based on a narrower U.S. coverage? Does the UEFJA apply to arbitral awards?

(2) Exclusions

The UFCMJRA applies only to a foreign country judgment that (1) grants or denies recovery of a sum of money; and (2) is final, conclusive and enforceable under the law of the rendering jurisdiction.¹³ It also excludes from its coverage (1) a judgment for taxes; (2) a fine or other penalty; or (3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.¹⁴

The UEFJA is not limited to money judgments, applying instead to “a final decision made in a civil proceeding.”¹⁵ It excludes judgments (1) for recovery of taxes; (2) “arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the Bankruptcy and Insolvency Act”; (3) for maintenance or support; (4) that recognize the judgment of another foreign State; (5) for the recovery of monetary fines or penalties or (6) rendered in proceedings commenced before the UEFJA came into force.

Given our charge, it is clear the registration act will be limited to final, conclusive, enforceable money judgments, and, in addition to the exclusions in the UFCMJRA, will exclude bankruptcy and insolvency judgments, judgments recognizing the judgment of another foreign State; and those rendered before the registration act goes into force (although, under ULC drafting conventions, this last item is likely to be included in a section dealing with the effective date of the Act, rather than being listed as an exclusion.¹⁶) Still, there could be interpretative questions as to (1) the extent to which the exclusions that the two Acts have in common may be interpreted differently under U.S. and Canadian law and (2) the extent to which the additional UEFJA exclusions, particularly the exclusion for bankruptcy and insolvency, have the same meaning that they would have under U.S. law. The answers to both of these questions could affect the scope of the exclusions. Are there differences in interpretation that are sufficiently significant that they implicate the scope of the registration act?¹⁷

(3) Does UEFJA section 6 raise scope issues?

In addition to excluding fines and penalties from its coverage, the UEFJA in section 6 authorizes the enforcing court, upon application of the judgment debtor, to limit the enforcement of damages awarded in a foreign judgment, if the court determines that the foreign judgment includes (1) an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes” or (2) “an amount of compensatory damages that is excessive in the circumstances.” The UFCMJRA does not contain any comparable provision. Does section 6 operate as an additional exclusion

¹³ UFCMJRA §3(a).

¹⁴ UFCMJRA §3(b).

¹⁵ UEFJA §2 & cmt.

¹⁶ See UFCMJRA §12(b) (dealing with the question of retroactive effect).

¹⁷ See UFCMJRA §3 cmt 4 for a discussion of the meaning of the exclusions in the UFCMJRA.

from coverage in the UEFJA that would implicate the scope of the registration act or is it better characterized as a substantive rule (i.e. an additional defense to recognition and enforcement) that does not implicate our efforts to harmonize our registration procedure with that found in the UEFJA?

(4) “Mixed” Judgments

Because of the limited scope of the registration act, it will be possible for a foreign judgment to contain elements that are within the scope of the registration act and others that are not. This could occur in two ways. First, the judgment could combine a monetary award (which would be within the act’s scope) with a non-monetary award, such as an injunction (which would be outside the act’s scope). Second, the judgment could relate to both a subject matter within the scope of the act and one that is excluded. How are these judgments to be treated?

This issue is dealt with in section 3 of the UFCMJRA, which provides that the Act applies to a foreign country judgment “*to the extent that the judgment*” is within the scope of the Act, and that the Act does not apply *to the extent* a judgment falls within one of the excluded categories. Comments 2 and 5 to section 3 explain that this language means that in both these instances the UFCMJRA applies to the portion of the judgment that is within its scope, while the court would be free to recognize and enforce the other aspects of the judgment under common law principles of comity or other applicable law. Given the “plug-in” nature of the registration act, does the registration act need to address this question or is UFCMJRA section 3 sufficient?

(5) Statute of Limitations

UEFJA section 5 establishes an outer limit on enforcement of a foreign judgment of 10 years after the day on which the foreign judgment becomes enforceable in the country of origin. UFCMJRA establishes an outer limit on commencing an action to enforce a foreign country judgment of 15 years from the date the foreign country judgment became effective in the foreign country. Do these differences raise scope issues? Should the registration act contain a statute of limitations period comparable to the UEFJA?

B. Harmonization Issues

(1) Notice to the Judgment Debtor

The UEFJA requires a judgment creditor to give the judgment debtor notice of intention to register a foreign judgment before the judgment is registered.¹⁸ It appears that this notice must actually be received by the judgment debtor, not merely sent.¹⁹ The notice must identify the basis for personal jurisdiction over the judgment debtor in the rendering court and the parts of the judgment to be registered.²⁰ How is this notice given? Is it served on the judgment debtor in the same manner as other process? (The comments to UEFJA indicate that section 12 does not define the procedure in detail in deference to long-established procedures in each jurisdiction). Is there anything the judgment debtor can do to prevent registration once it receives this notice, or is its recourse to raise its defenses after registration? (Note that UEFJA section 14 provides that the judgment becomes enforceable upon

¹⁸ UEFJA §§12(3) & (4)(b).

¹⁹ See UEFJA §14(3) (period before disposition of property measured from judgment debtor’s receipt of notice).

²⁰ UEFJA §12(3).

registration, although enforcement by sale or disposition of any property cannot occur for 30 days after the judgment debtor receives notice of registration.) To what extent can the registration act be harmonized with these UEFJA provisions? What additions, deletions or changes will be required?

(2) Registration Procedure

UEFJA section 12(4) provides that the judgment creditor registers the foreign judgment by filing with the enforcing court (1) a copy of the foreign judgment certified by a proper officer of the rendering court; (2) a copy of the notice to the judgment debtor; (3) an application to amend the judgment, if the judgment creditor believes the judgment must be amended to make it enforceable;²¹ and (4) a certified translation of the judgment, if the judgment was not rendered in either English or French. How is receipt of the registration notice by the debtor established? To what extent can the registration act be harmonized with these provisions? What additions, deletions or changes will be required?

(3) Costs and Expenses

UEFJA section 12(5) provides that an enforcing jurisdiction may by regulation provide for the recovery from the judgment debtor the costs and expenses related to registration of the judgment. The UFCMJRA is silent on the issue of recovery of costs. Under the “American Rule” parties normally pay their own expenses of litigation, unless a specific statute or a contractual agreement provides otherwise. Is this a provision we want to consider for inclusion in the ULC registration act?

(4) Rules Regarding Currency Conversion and Judgment Interest

UEFJA section 13 sets out specific rules regarding currency conversion when a foreign judgment orders payment of a sum of money specified in a foreign currency. The basic rule is that the money payable on the judgment will be the amount of Canadian currency necessary to purchase an equivalent amount of the foreign currency on the last day before the judgment debtor pays the judgment on which a Canadian equivalent for the foreign currency is quoted. The Comments state that section 13 is adopting the policy of the ULCC’s Uniform Foreign Money Claims Act.

UEFJA section 15 states rules regarding the applicable interest rate on registered foreign judgments, providing that interest accrues at the amount provided by the law of the country of origin from the day the judgment is enforceable there until the day before the conversion date under section 13, and then accrues at the rate provided under the law of the Canadian jurisdiction registering the judgment from the conversion date until payment.

The UFCMJRA does not address either currency conversion or the applicable interest rate. Comment 5 to UFCMJRA section 6 simply notes that in states that have adopted the ULC’s Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under the Act. Should the registration act address the currency conversion and interest questions in light of its “plug in” relationship with the UFCMJRA?

(5) Effect of Registration

²¹ The UEFJA covers non-monetary awards, as well as money judgments, and UEFJA section 7 contemplates that non-monetary judgments sometimes may need to be amended in order to be enforceable. We will need to enquire as to whether there have been situations under the UEFJA when a money judgment was amended.

As discussed above, UEFJA section 14 provides that upon registration a foreign judgment is enforceable as if it were a judgment of the enforcing court. The analogous provision in the UFCMJRA is section 7, which provides that if a court finds that a foreign country judgment is entitled to recognition, then the judgment is (1) conclusive between the parties to the same extent as a sister state judgment and is (2) enforceable in the same manner and to the same extent as a judgment of the enforcing state.

There is, however, an important difference between the two provisions. Under the UFCMJRA, recognition currently always must be sought in the context of a court proceeding.²² Under section 7, it is only if at the end of that proceeding, after the court has considered the judgment creditor's case and rejected any defenses raised by the judgment debtor in the proceeding, that the foreign judgment becomes enforceable. Under UEFJA section 14, however, the foreign judgment becomes enforceable upon registration. This difference raises at least two important and related questions. First, if a judgment debtor has a defense to recognition and enforcement of the foreign judgment, what is the procedure by which the judgment debtor asserts that defense and obtains a court determination of the issue? Second, what is the effect of the successful assertion of a defense by the judgment debtor? Can the judgment debtor prevent the initial registration of the foreign judgment (which would prevent it from becoming enforceable) or is the judgment debtor's only recourse to use the defense to set aside a registration that has already occurred?

The UEFJA is silent on these issues, perhaps because, given the long history of registration of foreign judgments in Canada, the answers are well-established. In the context of the new registration act that we will be drafting, however, they are questions that will need to be answered, and the answers will need to be consistent with UFCMJRA, particularly given the "plug in" nature of the relationship of the new registration act with that Act.

(6) Grace Period with Regard to Sale of the Judgment Debtor's Property

UEFJA section 14(3) provides that a registered foreign judgment "may not be enforced by the sale or other disposition of any property of the judgment debtor" for 30 days measured from the time the judgment debtor receives notice of the proceedings to register the foreign judgment. To what extent should the registration act be harmonized with this provision? (The answer to this question may depend in part on the answer to Issue (5) above.) What deletions, additions or changes will be required? What about creditor remedies other than sale of property, such as judgment liens, garnishment of wages and avoidance of transfers? Why does the grace period not extend to all creditor's remedies?

We look forward to a robust discussion of the above issues, as well as other issues raised by the Committee, at our Drafting Committee meeting in Tuscon later this month.

²² UFCMJRA §6.