

MEMORANDUM

Date: March 21, 2019

To: Joint Drafting Committee on Registration of Canadian Money Judgments Act (the “Act”)

From: Lisa R. Jacobs, Esquire, Chair; Professor Kathleen Patchel, National Conference Reporter; and Professor James P. George, Research Reporter

Re: Issues for Consideration at the April 5-6, 2019 Joint Drafting Committee Meeting

I. Introduction

The April 5-6, 2019 Joint Drafting Committee Meeting Draft of the Act reflects both decisions made by the Joint Drafting Committee at its November 2-3, 2018 Joint Drafting Committee Meeting and style changes suggested by the Style Committee at its January 2019 meeting.

There are two new provisions to be considered by the Committee – new section 8 authorizing a stay of enforcement pending determination of a petition to set aside a registration (Item II B below) and a draft Registration Form (attached to this Memo and discussed in Item II D below). In addition, this Memo discusses two issues raised during discussions with the Style Committee: (1) the interaction of sections 7 and 9 (Item II A below) and the scope of section 9 (Item II C below).

As our April meeting is likely to be the last in person meeting of the Joint Drafting Committee before the Act is presented for final approval by the ULC, it also will be important for the Committee as it reads through the April draft to think about the substance of the Act as a whole, and whether the Committee is satisfied with the policy choices it has made and the way in which the Act functions to carry out those choices.

For example, the Committee has spent considerable time focusing on finding the right balance between protection of the judgment debtor who may have a valid defense to recognition of the judgment and the ability of the judgment creditor to effectively and efficiently enforce its judgment, including avoiding dissipation of assets. That discussion has centered on Section 5, dealing with the effect of registration. At its November 2-3, 2018 Joint Drafting Committee Meeting, the Committee reached consensus on this issue. Under section 5, a Canadian judgment is given the same effect upon registration as though a court had determined that it was entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act (“UFCMJRA”), but enforcement is subject to a 30-day grace period after service of notice during which the judgment creditor may not enforce the judgment through any act that would deprive the judgment debtor of use of its property. Is the Committee comfortable that Section 5 now carries out the appropriate policy with regard to this important issue? For example, might the

debtor's "use" of that property include its ability to grant a consensual lien or security interest on the property (or otherwise pledge or hypothecate it)? While such actions would clearly constitute a "transfer" under fraudulent transfer or voidable transaction law, should we clarify (either in the statute or in commentary) that such actions would constitute prohibited "dissipation"? Is that our intent?

Finally, Item III provides a brief discussion of the Uniform Foreign-Money Claims Act ("UFMCA"), primarily as an informational matter. That Act provides the rules for conversion of judgments issued in foreign money, and thus is important to both our Act and the UFCMJRA. As discussed in Item III, the UFMCA recently was reviewed by the Committee to Monitor Developments in Civil Litigation and Dispute Resolution, and that Committee has requested any comments we might have on its use in practice.

II. Issues

A. Relationship of Section 7 to Section 9.

At its November 2-3, 2018 Joint Drafting Committee Meeting, the Committee worked out the details of section 7, dealing with petitions to set aside registration. Section 7 allows a person against whom a judgment was registered to petition the court to set aside the registration based on two distinct types of arguments: (1) that recognition would be denied under the UFCMJRA or (2) that there was a failure to comply with the requirements of this Act for registration. If the court finds that a ground of either type exists, then the registration is vacated and any act under the registration to enforce the judgment is void. Under subsection 7(e), however, if the court grants the petition on a ground upon which recognition would be denied under the UFCMJRA, the court also is instructed to issue a judgment denying recognition of the Canadian judgment. Subsection 7(e) further provides that the judgment denying recognition has the same effect as a judgment denying recognition on the same ground under the UFCMJRA.

The practical effect of these rules is that, if recognition is denied to the judgment, then the judgment creditor is precluded from seeking recognition either through a new registration or under the UFCMJRA. If, however, the registration is set aside because of a failure to comply with the registration requirements, then further efforts to seek recognition are possible, either through filing a new registration (assuming the problem with the registration can be cured) or by filing an action under the UFCMJRA.

During its review of the draft, the Style Committee raised the question of how these rules fit with section 9(c), which prohibits a person from seeking recognition under both this Act and the UFCMJRA. Section 9(d) has been added to the draft to clarify that relationship. It provides that when the petition to set aside a registration is granted solely on the basis of a failure to comply with the registration requirements, then the judgment creditor can either file a new registration curing the defect or file an action under the UFCMJRA. This provision preserves the options that were available ab initio to the judgment creditor and would appear to comport with the intention of section 7.

Do the rules described above accurately reflect the Committee's position on these issues? If so, does the language used in the April draft accurately convey those rules?

B. Section 8 – Stay of Enforcement Proceedings

The Joint Drafting Committee decided at its November 2-3, 2018 Drafting Committee Meeting that the filing of a petition to set aside the registration would not result in an automatic stay of enforcement activities. Instead, the person seeking to set aside the registration would be required to file a motion with the court seeking a stay of enforcement activities while the court determined the merits of its petition to set aside the registration. The Committee further decided to add a section to the Act to authorize the court to grant the stay (if appropriate). Accordingly, section 7(c) provides that filing a petition to set aside the registration does not automatically stay enforcement of the judgment, and new section 8 addresses the grant of a stay of enforcement.

There are several issues for Committee consideration regarding the content of section 8. One set of issues relates to what the standard should be for granting a stay. Should the court be authorized to grant a stay for “good cause,” or should it be provided with more guidance? If more guidance is desired, what should that guidance be? The bracketed language in section 8 “on any ground on which enforcement of a judgment of a court of this state would be stayed” is taken from section 4(b) of the ULC Revised Uniform Enforcement of Foreign Judgments Act (1964)(“ULC UEFJA”), which deals with enforcement through registration of sister state judgments. The ULC UEFJA standard, however, does not seem particularly apt in the context of foreign country judgments. Presumably, a main reason that a judgment debtor would argue for a stay is that there are valid defenses to recognition of the Canadian judgment and the judgment debtor would suffer harm if enforcement were not stayed pending determination of the petition. This argument would not be available under the ULC UEFJA standard.

Section 8 of the UFCMJRA (which will apply to proceedings under this Act by virtue of section 9 of this Act) provides for a stay of proceedings “[i]f a party establishes that an appeal from a foreign-country judgment is pending or will be taken.” Although UFCMJRA section 8 obviously would not apply to the situation where a petition to set aside the registration has been filed, it does seem more analogous to that situation than the ULC UEFJA provision. In both instances, a party is seeking the stay to preserve the status quo pending substantive review of a presumptively enforceable judgment. As noted above, the only express requirement for a UFCMJRA section 8 stay is that the party seeking it establish the factual predicate that an appeal is pending or will be taken. Otherwise, the decision to grant the stay is left to the judge's discretion.

A second group of issues relates to whether section 8 of this Act should authorize the court to require security in connection with granting the stay. If so, how much guidance should the court be given on the issue? Should the determination as to whether to require security be left to the judge's discretion or should more guidance be provided? Should the judge be directed to require that security be provided? The bracketed language “the same security for satisfaction

of the judgment that is required to stay enforcement of a judgment of this state” is based on ULC UEFJA section 4(b). The requirement is mandatory. UFCMJRA section 8 is silent on the question of security.

(C) Application of Section 9(c) to Separate Judgment Debtors Within the Same State

With the limited exception provided by section 9(d) (discussed in Item I(A) above), Section 9(c) prohibits seeking recognition of the same judgment, or part of a mixed judgment, under both this Act and the UFCMJRA in the state where recognition is sought. The policy behind this prohibition is to further the goals of efficiency and conservation of judicial resources. As Reporter’s Note 3 points out, however, this does not prevent a judgment creditor from using different means (registration or an action under section 6 of the UFCMJRA) in different states. In fact, it will be necessary to permit different means of enforcement in different states so long as there remain states that have not adopted this Act (i.e., short-form registration may not be available).

An issue the Committee has not yet considered is whether the section 9 prohibition should apply to require a judgment creditor with a judgment against multiple judgment debtors to choose either registration or an action under the UFCMJRA with regard to all judgment debtors, or whether the judgment creditor should be allowed to register with regard to one judgment debtor and file a suit against another in the same state? Are there times when either the goals of efficiency and conservation of resources would be served by allowing this choice or circumstances of different judgment debtors require different treatment (or both) – for example, when the judgment creditor knows that one judgment debtor has a putative defense to recognition that ultimately is likely to require court determination, but that another judgment debtor does not?

(D) Registration Form

At its November 2-3, 2018 Joint Drafting Committee Meeting, the Committee discussed the possibility of creating a form that could be used on a voluntary basis to comply with the registration requirements of section 4. A draft form is included as an Appendix to this Memorandum. Whether the Committee ultimately decides to include a form, review of the draft form may provide a good way to give a final review to section 4, the Act’s provision dealing with the requirements for registration. In this regard, it should be noted that the draft form asks for some things not expressly required by section 4, but which would seem to be useful information to have in connection with the registration – for example, contact information for the Canadian court, the judgment creditor, the judgment creditor’s attorney, and the judgment debtor. Most of this information is likely to be provided by other sources. Section 6, for example, requires contact information for the judgment creditor and its attorney to be provided to the judgment debtor in connection with notice, and a copy of that notice is filed with the court. Similarly, the authenticated copy of the Canadian judgment will provide information about the Canadian court. Section 4 was based on section 12 of the ULCC UEFJA, which takes a similar bare-bones approach to what is required, but, the Committee might consider whether it wants to

include any other requirements in section 4. Our Canadian colleagues' experience with regard to the operation of section 12 will be useful in this consideration.

If the Committee decides to move forward with a form, the Committee also will need to consider whether the form should be included in the Act. Although uniform acts normally do not include forms, there is precedent for their inclusion. For example, Section 31 of the Uniform Choice of Court Agreements Convention Implementation Act contains a Recognition and Enforcement Form. The form is purely voluntary; Section 31 states that an application for recognition "may be accompanied by a document ... which is in substantially the form of the document that follows." (The Section 31 form was based on the form contained as the Recommended Form under The Hague Convention on Choice of Court Agreements.) Section 7(f) of the Uniform Foreign-Money Claims Act (discussed for another reason in Section III below) provides a form for a judgment on a foreign-money claim, stating that "a judgment substantially in the following form" complies with the requirements of the statute. A Note indicates states should insert their customary forms of judgment with appropriate modifications. Finally, UCC Article 9, section 9-521 contains forms for an initial financing statement and for an amended financing statement, and provides that a filing office that accepts written forms may not refuse to accept those forms, except for the limited reasons stated in UCC section 9-516(b).

The Committee will also need to consider whether the form should have any consequence -- for example, as providing a safe harbor as to compliance -- or should be considered purely advisory.

III. The Uniform Foreign-Money Claims Act (UFMCA)

When recognition and enforcement of a foreign country judgment is sought in the United States, the amount of the judgment is most often stated in currency other than that of the United States. The ULC's UFMCA provides rules for conversion of a judgment to U.S. currency. It adopts the "payment day rule," which is the rule prevalent in many other countries. The policy is that conversion to U.S. dollars should take place on the date of payment. The payment day rule also is adopted by section 13 of the ULCC UEFJA. The UFCMJRA is silent on the question, but Comment 5 to section 6 of the UFCMJRA refers to the UFMCA as the appropriate source to make the determination in states that have adopted it. Because the UFMCA adopts the same rule as the ULCC's UEFJA, a similar comment can be made in our Act to reflect harmonization on this issue.

At a recent meeting of the Committee to Monitor Developments in Civil Litigation and Dispute Resolution, the UFMCA was considered in connection with a systematic review of uniform laws by the Committee on Scope and Program. The Civil Litigation Committee decided to recommend that the UFMCA be retained with no change, noting its importance to the UFCMJRA, as well as our current effort. That Committee also indicated that it would be useful to have input from Members and Observers on our Committee as to their experiences with the UFMCA in practice. Finally, that Committee suggested that our enactment committee and that of the UFCMJRA might consider encouraging states to adopt the UFMCA when adopting those

acts. (The UFMCA was approved by the ULC in 1989 and has 22 adoptions, the last being in Rhode Island in 2010.)

IV. Conclusion

We look forward to seeing you in Washington D.C. on April 5-6, 2019 to discuss these issues and others that the Committee may raise. We wish you safe travels.

FORM FOR REGISTRATION OF CANADIAN MONEY JUDGMENT

I. Identification of Canadian Judgment.

Canadian Court Issuing the Judgment.....

Contact Information for Canadian Court:

Address:.....

Telephone Number:..... Fax Number:

Email:

Case/Docket Number in Canadian Court

Name of Plaintiff

versus

Name of Defendant

The Canadian Court listed above gave a judgment in the above-captioned matter on
.....[Date] in[City] in [Province or Territory],
Canada.

II. Amount of Canadian Judgment

The Canadian Court awarded the payment of money in favor of the judgment creditor identified
below (or its predecessor) in the amount of
(please list any relevant categories of damages included).

The Canadian Court awarded interest as follows (please specify the rate of interest,
the portion of the award to which interest applies, and the date from which interest is computed).

The Canadian Court included in the judgment the following costs and expenses relating to the
proceedings

If registration is sought for only a portion of the judgment, please indicate the portion of the
judgment for which registration is sought and the amount of the monetary award attributable to
that portion of the judgment (see [cite to state's version of the
Registration of Canadian Money Judgments Act sections 3 and 4(b)(2)(c)]).

III. Identification of Judgment Creditor and Judgment Debtor

Name of Judgment Creditor

Contact Information for Judgment Creditor:

Address

Telephone Number Fax Number

Email Address

Contact Information for Judgment Creditor’s Attorney, if any:

Address

Telephone Number Fax Number.....

Email Address

Contact Information for Judgment Debtor (please provide the most recent information known):

Address

Telephone Number Fax Number

Email Address

IV. Statement of Person Seeking Registration

I,, the [judgment creditor or attorney for the judgment creditor] with regard to the Canadian judgment identified above, state as follows:

1. The Canadian judgment is final, conclusive, and enforceable under the law of the Canadian jurisdiction in which it was rendered; and

2. The [Canadian judgment or portion of the Canadian judgment for which registration is sought] is within the scope of the [cite to state's version of the Registration of Canadian Money Judgments Act].

Signature of Judgment Creditor or
Judgment Creditor's Attorney

V. Items Required to Be Included With Registration

Attached to this form are the items marked in the following list:

___ A copy of the Canadian judgment authenticated as accurate by the Canadian court identified above as the court that entered the judgment. [*Note: States should indicate here their authentication requirements.*]

___ If the Canadian judgment is not in English, a certified translation of the judgment into English.

___ A registration fee in the amount of \$ _____. [*Note: States should indicate here the amount of the registration fee.*]

Submitted by: _____
Judgment Creditor or
Attorney of Judgment Creditor

Date of submission: _____

This completed form, together with the documents required by Subpart V, should be filed with [the Clerk of Court] [*Note: States should indicate the appropriate filing office.*]