

MEMORANDUM

Date: June 10, 2019

To: Uniform Law Commission

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

Re: Uniform Registration of Canadian Money Judgments Act (the Act)

I. Introduction

The Act creates for the first time in the United States a registration procedure designed to facilitate the recognition and enforcement of a foreign-country money judgment – specifically, a Canadian money judgment that is within the scope of the Uniform Foreign-Country Money Judgments Recognition Act (2005) (UFCMJRA). Currently, a person seeking recognition and enforcement of a judgment of this type must commence a court action. UFCMJRA Section 6 provides that “the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.” The Act supplements UFCMJRA Section 6 by providing a registration alternative for recognition and enforcement of Canadian money judgments. The Act has been drafted to integrate into the UFCMJRA and relies on the rules of the UFCMJRA with regard to recognition of foreign-country judgments, other than the UFCMJRA requirement that an action be filed.

The Act also has been drafted to harmonize the registration procedure it creates, to the extent practicable, with existing registration procedures in the Canadian provinces and territories for recognition and enforcement of foreign-country judgments, particularly the registration procedure in the Canadian Uniform Enforcement of Foreign Judgments Act (UEFJA), which is a product of the Uniform Law Conference of Canada (ULCC). The Canadian legal system has considerably greater experience with registration procedures in this area than that in the United States, and that experience provided a valuable resource in developing the Act. In addition, the similarities between the U.S. and Canadian legal systems made it possible for the provisions of the Act to be harmonized in large part with the UEFJA registration procedure.

This Memo discusses issues that the Joint Drafting Committee¹ encountered in drafting the Act. Part II discusses two important issues regarding harmonization of the Act with Canadian law: (1) harmonization of the scope of the Act with that of the UEFJA, and (2) harmonization of the substance of the Act with the UEFJA and other Canadian law. Part III discusses issues relating to coordination of the Act with the UFCMJRA. Finally, Part IV discusses the most important issue faced by the Joint Drafting Committee in developing a registration procedure for Canadian money judgments – creating an appropriate balance between the interests of the person registering the judgment in obtaining quick and efficient recognition

¹ This Memo refers to the “Joint Drafting Committee”, recognizing that the drafting committee included both ULC commissioners and members of the ULCC.

and enforcement of the judgment and the interests of the person against whom the judgment is registered in having an adequate opportunity to raise for judicial determination issues regarding whether the judgment should be recognized.

II. Significant Harmonization Issues

A. Harmonization Issues Regarding Scope of the Act

The Executive Committee's charge to the Joint Drafting Committee was "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 [ULC] Uniform Foreign Country Money Judgments Recognition Act or the [ULCC] Uniform Enforcement of Foreign Judgments Act". The Joint Drafting Committee's first task, therefore, was to determine the overlap in coverage of the UFCMJRA and the UEFJA, as the Act applies only to judgments that come within both of those acts.

The scope of the UFCMJRA is narrower than that of the UEFJA; the UFCMJRA applies to a foreign-country judgment to the extent the judgment (1) grants or denies recovery of a sum of money; and (2) is final, conclusive and enforceable under the law of the rendering jurisdiction. The UEFJA is not limited to money judgments; it applies more broadly to a final order or judgment in a civil proceeding. On the other hand, the exclusions from coverage in the UEFJA are slightly broader than those in the UFCMJRA. The two acts have similar exclusions regarding (1) tax judgments; (2) fines and penalties; and (3) domestic relations. The UEFJA, however, also excludes foreign judgments (1) "arising out of bankruptcy and insolvency proceedings"; (2) "that recognize the judgment of another foreign State"; and (3) that were "rendered in proceedings commenced before the coming into force of [the Canadian UEFJA]". There is no need to address the bankruptcy exclusion in the Act because U.S. bankruptcy law requires that a foreign-country money judgment against a debtor in bankruptcy, or the debtor's estate, be filed in the bankruptcy proceedings rather than under the UFCMJRA. The exclusion of a judgment recognizing the judgment of another foreign State is dealt with in the Act by excluding that type of judgment from the definition of "Canadian judgment" in Section 2(2). The third exclusion is addressed in Section 11 of the Act, stating that the Act applies only to the registration of a Canadian judgment entered in a proceeding commenced in Canada on or after the effective date of the Act. Harmonizing the exclusions in this way also furthers the second goal of the Act – coordination with the UFCMJRA – as the scope of the Act tracks the scope of the UFCMJRA. Section 3 of the Act states the Act applies to a Canadian judgment to the extent the judgment is within the scope of the UFCMJRA.

Section 3 contains an additional limitation on the Act's scope not found in either the UFCMJRA or the Canadian UEFJA. The person seeking recognition of the Canadian judgment must be doing so for the purpose of enforcing the judgment: intending to use available procedures in the state to collect the amount of the judgment from the assets of a person who is obligated to pay the judgment. The registration procedure thus is not available when recognition of a Canadian judgment is sought solely to establish the judgment's preclusive effect with regard to the determination of the dispute, or issues decided in the dispute, by the rendering court. In

most instances, the issue of recognition of a Canadian judgment solely to establish its preclusive effect will be raised in connection with a court proceeding, and, therefore, the Joint Drafting Committee determined that recognition solely to obtain preclusive effect was best dealt with under the procedures of Section 6 of the UFCMJRA.

B. Harmonization Issues Regarding Provisions of the Act

Because the Canadian law on registration of foreign-country judgments is more developed than that in the United States, the Joint Drafting Committee approached its task to harmonize the rules for registration by developing a registration procedure for the U.S. that is harmonized to the extent possible with Canada's existing registration procedures, particularly that of the Canadian UEFJA. Not surprisingly, many of the issues the Joint Drafting Committee addressed focused on the extent to which the Act should harmonize with Canadian law. In general, the Joint Drafting Committee took the approach that the provisions of the Act should be comparable to the provisions of the Canadian UEFJA, unless there was a practical or strong policy reason for deviation. If the Canadian UEFJA did not address an issue, consideration was given to procedures developed under the Canadian Reciprocal Enforcement of Judgments Acts. The following two issues illustrate the Joint Drafting Committee approach.

(1) Grace Period under Section 5(b)

Under Section 5(a) of the Act, once a Canadian judgment is registered, it has the same force and effect as a judgment that has been determined by a court to be entitled to recognition under the UFCMJRA – it is (1) conclusive between the parties to the same extent as the judgment of a sister-state entitled to full faith and credit and (2) enforceable in the same manner and to the same extent as a judgment rendered in the recognizing state. Under Section 5(b), however, certain enforcement activities are prohibited until the 31st day after service of notice of registration in order to provide the person against whom the judgment was registered an opportunity to challenge the registration under Section 7.

Both Section 5(a) and Section 5(b) are comparable to provisions in the Canadian UEFJA. The Canadian UEFJA grace period, however, prohibits enforcement *only* through sale or other disposition of property. The Joint Drafting Committee decided that an appropriate balance between the interests of the person registering the judgment and the person against whom the judgment was registered dictated a broader prohibition, as actions short of final disposition of property potentially could cause irreversible harm. Section 5(b) thus provides that the prohibition on enforcement activities extends not only to sale or disposition of property, but also to seizure or garnishment of property.

(2) Method of Providing Notice of Registration – Section 6(b)

Both the Canadian UEFJA and the Act require that notice of registration be given to the person against whom the judgment was registered. The Canadian UEFJA does not contain a provision as to how this notice is to be given. The Canadian Reciprocal Enforcement of Judgments Acts, however, require that notice be served in the same manner as for a statement of claim, and Canadian practice under the UEFJA also requires personal service of notice. The Joint Drafting Committee considered whether a less stringent requirement, such as service by

registered mail, would be adequate. Ultimately, however, the Joint Drafting Committee decided that the notice requirement should be harmonized with that in Canada. Therefore, Section 6(b) provides that notice must be served in the same manner as a summons and complaint would be served in an action under the UFCMJRA.

III. Coordination with the UFCMJRA

The Canadian UEFJA and the Canadian Reciprocal Enforcement of Judgments Acts each contain both a registration procedure and substantive standards for recognition of foreign-country judgments. The U.S. statutes (most notably the UFCMJRA, which currently is the law in 25 jurisdictions), however, contain substantive standards for recognition of foreign-country judgments, but do not provide for a registration procedure. Therefore, in order to be effective, the Act had to be drafted in a fashion that allows it to be integrated with the substantive rules for recognition of the UFCMJRA. The Act in effect supplements Section 6 of the UFCMJRA by providing an exception to the UFCMJRA Section 6 requirement that a judicial proceeding is required for the recognition of a Canadian money judgment.

There are a number of consequences resulting from the integration of the Act into the UFCMJRA. First, if the UFCMJRA contains a rule on a subject addressed in the Act, that rule is incorporated by reference in the Act, rather than being restated. *See, e.g.* Section 7(b)(1) (providing a motion to vacate a registration may assert “a ground that could be asserted to deny recognition of the judgment under [the UFCMJRA]”). Indeed, Section 9(a) provides that all of the UFCMJRA, including not only substantive rules, but other provisions, such as definitions, rules of construction, burdens of proof, and limitation of actions, applies to a registration under the Act.

Second, the Joint Drafting Committee was careful to insure that the rules contained in the Act not only are consistent with the UFCMJRA, but also do not create any negative interpretative impact with regard to that act. The UFCMJRA was drafted to include only the provisions necessary for recognition of foreign-country judgments. For rules on peripheral matters, that act relies on other law of the state. The Act takes a similar approach, deferring to other law of the state on a number of matters, including the requirements for authentication of a copy of a Canadian judgment (Section 4(b)(1)), certification of a translation (Section 4(b)(10)), the timing of currency conversion (Section 4), the relief available to the person registering the judgment to prevent dissipation, disposition, or removal of assets (Section 5(b)), and the manner of service of notice (Section 6(b)).

Third, as noted above, the Act relies on the UFCMJRA for its scope with regard to the type of judgments that may be registered. Section 3(a) states that the Act applies to a Canadian judgment to the extent the judgment is within the scope of Section 3 of the UFCMJRA. As discussed in Part II(A) above, the UFCMJRA applies to final, conclusive, and enforceable foreign-country money judgments that are not excluded as a tax judgment, fine or other penalty, or judgment rendered in connection with a domestic relations matter. These limits on the type of judgments included in the UFCMJRA’s scope raise the question of how to treat a judgment that is partly within and partly outside the UFCMJRA’s scope. UFCMJRA Section 3 answers this question by providing that the UFCMJRA applies to a judgment *to the extent* the judgment comes within its scope. Thus, when a judgment is only partially within its scope, the UFCMJRA

applies to the part within its scope. The Act adopts the same rule with regard to the type of judgments that may be registered. A judgment that is partially within the scope of the UFCMJRA (and, thus, partially within the scope of the Act) may be registered with regard to the part within the Act's scope.² The issue of mixed judgments is discussed further in comments 5 and 6 to Section 3 and comment 6 to Section 4 of the Act.

Finally, because the Act relies on the recognition rules of the UFCMJRA, the Act is intended for adoption in states that either have already enacted the UFCMJRA, or are enacting the Act as a companion act in connection with enactment of the UFCMJRA. The Act is not intended for enactment in the absence of either an existing or concurrently enacted UFCMJRA.

IV. Balancing the Interests of the Person Registering the Canadian Judgment and the Person Against Whom the Judgment is Registered

The overarching issue for the Joint Drafting Committee as it developed the registration procedure of the Act was how to achieve an appropriate balance between the interests of the person seeking registration in obtaining quick and efficient recognition and enforcement of its judgment and the interests of the person against whom the judgment is registered in having an adequate opportunity to challenge the judgment. The registration procedure shifts the burden of invoking judicial scrutiny of the Canadian judgment from the person seeking its recognition and enforcement (who has that burden under UFCMJRA Section 6) to the person opposing recognition. As discussed in more detail in Part III of the Prefatory Note to the Act, the similarities between the U.S. and Canadian legal systems, the shared legal and social values, and the close socio-economic ties between the U.S. and Canada mean that a strong presumption of fairness attaches to a Canadian money judgment. The likelihood that a Canadian money judgment will implicate a ground for denying recognition is, therefore, low, although certainly not non-existent. Given these considerations, requiring the person opposing recognition to bear the burden of invoking judicial scrutiny is justified. The Act includes critical requirements designed to protect that person's interest in having an adequate opportunity to raise any issues with regard to the judgment: (1) a requirement of personal service of notice of registration, (2) a 30-day period after service of notice during which potentially dispositive enforcement activities are prohibited, (3) a robust procedure for invoking judicial scrutiny of the judgment after registration, and (4) a procedure to seek a stay of all enforcement activity pending determination of whether the registration should be vacated.

The above-described protections had to be balanced against the interests of the person registering the judgment in obtaining efficient and effective recognition and enforcement of the judgment. The Act had to contain adequate protections of the interests of the person against whom the judgment was registered while maintaining the efficacy of the registration procedure. The most important provisions striking the balance between the parties are discussed below.

² Registration of a mixed judgment may require various amounts included in the judgment, such as interest, costs and expenses, and attorney's fees, to be allocated between the part of the mixed judgment subject to registration and the part that may not be registered. Similar issues may arise with regard to post-judgment costs, expenses, and attorney's fees and the amount of the judgment that has been satisfied. Because the need for allocation, and the method of allocation, will depend on the facts of the particular case, the amounts allocated are left initially to the determination of the person registering the judgment; however, those initial allocations are subject to the ability of the person against whom the judgment is registered to challenge the allocations.

(A) Section 5

Section 5(a) states the basic rule that a registered judgment is given the same effect as a judgment that has been determined by a court to be entitled to recognition under Section 7 of the UFCMJRA. Thus, upon registration, a Canadian judgment is (1) conclusive between the parties to the same extent as the judgment of a sister-state entitled to full faith and credit and (2) enforceable in the same manner and to the same extent as a judgment rendered in the recognizing state. Section 5(a), however is subject to the prohibition in Section 5(b) on enforcement of the judgment by sale or other disposition of property or by seizure or garnishment until the 31st day after service of notice of the registration.

Section 5(b) is a crucial provision in establishing an appropriate balance between protecting the person against whom the judgment is registered, who may have a valid ground to deny recognition, and permitting the person registering the judgment to effectively and efficiently enforce its judgment, including avoiding dissipation of assets. The prohibition on disposition, seizure or garnishment of property until the 31st day after service of notice provides the person against whom the judgment is registered with a period during which to act to have the registration vacated before being subject to types of enforcement that have the potential to cause irreversible harm. Section 5(b), however, also provides protection to the interests of the person registering the judgment. The enforcement prohibition does not prevent all actions related to enforcement, but only those specifically listed. Thus, for example, it does not prohibit discovery seeking information about property available to satisfy the judgment. Nor does it prohibit enforcement activity short of seizure or garnishment, such as placing a lien on property of the person against whom the judgment is registered. The person registering the judgment, therefore, is not prohibited from establishing during the 30-day period its priority to the assets vis a vis other creditors. Section 5(b) also does not preclude use of other laws of the state that provide relief against dissipation, disposition or removal of assets potentially available to satisfy the judgment. Finally, Section 5(b) provides that the court for cause may shorten or lengthen the protection period, which allows the court to fine tune the balance between the parties in a particular case.

(B) Section 6

Section 6 requires the person registering the judgment to cause notice of registration to be served in the same manner as a summons and complaint must be served in an action for recognition of a judgment under the UFCMJRA. This requirement means that normally the person against whom the judgment is registered will be personally served with notice of the registration. It also means, however, that in instances when personal service is not possible, the person registering the judgment will have available the alternative means for providing notice under state law. Section 6(c) lists certain information that must be provided in the notice, including a copy of the registration and its attachments.

(C) Sections 7 and 8

Section 7 provides a procedure by which the person against whom the judgment is registered may challenge the registration during the 30-day period after receiving service of notice of the registration. As with the concomitant period under Section 5, the court for cause

may shorten or lengthen the period during which the person challenging the registration must file a petition to vacate the registration. Under Section 7(d), if the petition is granted, any enforcement actions taken under the registration are void. Further, under Section 7(e), if the court vacates the registration on a ground that would cause recognition to be denied under the UFCMJRA, then the court will also enter a judgment denying recognition to the Canadian judgment, thus preventing the person registering the judgment from attempting to pursue further recognition and enforcement activities under the UFCMJRA. (See also Section 9(c), prohibiting use of both registration and the UFCMJRA with regard to the same judgment against the same person in the same state.)

Section 7(c) provides that filing the petition to vacate does not itself stay enforcement of the registered judgment, thus protecting the person registering the judgment from a petition to vacate filed merely for purposes of delay. Section 8, however, allows a person filing a petition to vacate to obtain a stay of all enforcement activities by demonstrating a likelihood of success on the merits with regard to a ground upon which the registration may be vacated. Section 8 gives the court granting the stay discretion to require security.

(D) Section 4

Section 4 sets out the mechanics of registration of a Canadian money judgment. Its provisions also reflect the need to balance the interests of the person registering the judgment and the person against whom the judgment is registered. Section 4(b), which states the information required to be included in the registration, requires the person registering the judgment to include items identifying the various components of the judgment, the amounts allocated to those components, the type and amount of post-judgment items included in the amount for which enforcement is sought, and the amount of the judgment that has been satisfied. A primary purpose of this information is to inform the person against whom the judgment is registered as to what is included in the judgment, as well as how the amount for which enforcement is sought was calculated. At the same time, a standard form is included in Section 4(d) to assist the person registering the judgment in complying with these registration requirements. Although use of this form is optional, its use provides a safe harbor for the person registering the judgment. Section 4(d) provides that a registration in substantially the form of the standard form, and including the attachments specified in the form, meets the requirements for registration.

Conclusion

The Joint Drafting Committee believes that the Act will further the interests of judicial economy in a manner that is fair and balanced to both the person registering a Canadian money judgment and the person against whom the judgment is registered. The Joint Drafting Committee looks forward to presenting the Act for final approval at the 2019 Annual Meeting and receiving the comments of the Committee of the Whole.