

MEMO

Date: October 26, 2018

To: Joint Drafting Committee on Registration of Canadian Money Judgments

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 November 2-3, 2018 Joint Drafting Committee Meeting

The Draft that will be before the Committee at the November Drafting Committee Meeting reflects (1) decisions made by the Committee at its March 9-10, 2018 Drafting Committee Meeting and during its subsequent phone conference; (2) comments received from the Committee's Style Liaison, Professor James Concannon; and (3) comments received from Commissioners in connection with the first reading of the Act at the 2018 ULC Annual Meeting. The Draft also has benefitted from review by bankruptcy experts Allan Gropper, John Pottow, and Chris Redmond, who are attorney-advisers on the U.S. delegation to UNCITRAL Working Group V on insolvency law.

Following are some issues raised by the November Draft for consideration by the Committee.

I. Subsection 4(b)(2) - Should there be a requirement that the person seeking registration (or that person's attorney) separately sign the statement containing the information required in subsection 4(b)(2)?

The Committee discussed this issue at its March 9-10, 2018 Drafting Committee Meeting, but did not completely resolve the question. Some participants felt that a separate signature should be required, while others felt that signature of the registration as a pleading filed with court would be adequate.

If the Committee determines that there should be a signature requirement, our Style Committee liaison has suggested the draft use a word other than "signed." Under Style Committee rules, whenever "sign" is used, the standard ULC definition of that term must be included. Under that definition, "sign" means not only "to execute or adopt a tangible symbol," but also "to attach to or logically associate with the record an electronic symbol, sound, or process." Thus, the standard definition of "sign" contemplates electronic signatures, and, if used in this Act, inadvertently could be viewed as addressing the issue of the extent to which the court accepts electronic filings. Please consider appropriate alternatives to facilitate our discussion.

II. Subsection 5(b) – From which collection actions is the judgment debtor protected during the 30-day grace period provided in subsection 5(b)?

Under subsection 5(a), a registered judgment is given the same effect as a judgment that has been determined by a court to be entitled to recognition under UFCMJRA section 7 – that is,

the judgment is (1) conclusive between the parties to the same extent as a sister-state judgment that is 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. Subsection 5(a), however, is subject to subsection 5(b), which provides for a 30-day grace period after service of notice of registration during which certain actions to collect the judgment are prohibited. The primary purpose of this grace period is to provide the judgment debtor an opportunity to raise any grounds the debtor has to set aside the registration before being subjected to harmful consequences resulting from enforcement actions.

Section 14 of the Canadian UEFJA contains similar provisions. UEFJA subsection 14(3), however, only prohibits enforcement “by the sale or other disposition of any property of the judgment debtor” during the 30 day grace period. ULC members of the Committee have questioned whether the UEFJA exception to enforcement activities is too narrow, as enforcement measures short of final disposition of property – for example, garnishment – could cause significant and possibly irreversible harm to the judgment debtor. The consensus so far seems to be that, because of this concern, this Act should contain a broader exception than that in the UEFJA. There also appears to be consensus that discovery seeking information about assets that may be available to satisfy the judgment should be allowed during the 30 day period. The Committee, however, has not yet reached consensus on the precise content of this broader exception, despite considerable discussion.

Discussion has centered around finding an appropriate balance between protection of a judgment debtor who may have valid grounds to set aside the registration and the ability of the judgment creditor to effectively and efficiently enforce its judgment, including avoiding dissipation of assets during the grace period. At the March 9-10, 2018 Drafting Committee Meeting, the Committee, after failing to reach consensus, decided the best way to proceed was to draft three alternatives based on views that had garnered some support during the Committee’s discussions in order to help focus future deliberations.

The three alternatives are contained in subsection 5(b) of the November draft. Alternative One prohibits all enforcement activity during the grace period, other than discovery designed to obtain information about property that may be available to satisfy the judgment. Alternative Two expands the permissible activity to allow both discovery and the use of prejudgment remedies. The status of a registered judgment cannot be described literally as “prejudgment”, as under subsection 5(a), once registered the judgment is given the effect of a recognized judgment; however, there was some feeling among the Committee that extending prejudgment remedies to the registration situation could provide an appropriate balance between protection of the interests of the judgment creditor and judgment debtor. Alternative Three is the closest to section 14(3) of the Canadian UEFJA. Like section 14(3), it prohibits disposition of property, with the bracketed language indicating the intent that it also would prohibit other specific enforcement activity that the Committee identifies might cause considerable harm to the judgment debtor, such as garnishment and attachment. Alternative Three differs from the other two alternatives in that it allows all enforcement activity during the grace period other than that specifically excluded, while Alternatives One and Two prohibit all enforcement activity other

than that specifically allowed.

The three alternatives were presented as an issue for consideration by the floor at the ULC Annual Meeting this summer with the hope of obtaining commissioner input. Only one commissioner, however, spoke to the issue on the floor. Commissioner Fred Miller of Oklahoma suggested that, given our goal to harmonize with Canadian law, Alternative Three would be his preference. The Chair received comments from several other commissioners after the reading that expressed the same preference.

III. Subsection 7(c)– What is the effect of the filing of a petition to set aside the registration on the ability of the judgment creditor to enforce the judgment?

Section 7 provides that a judgment debtor may petition the court not later than 30 days after being served with notice of registration to have the registration set aside. An issue to be decided by the Committee is what effect, if any, the filing of a petition to set aside the registration has on the judgment creditor’s ability to take actions to enforce the judgment – does the filing of the petition stay any further enforcement actions, or would the judgment debtor need to take further action to obtain a stay of enforcement while the petition is pending? This issue was raised at the March 9-10, 2018 Drafting Committee Meeting, but not decided.

For purposes of discussion, subsection 7(c) of the November meeting draft provides that the petition “does not of itself stay execution of the judgment.” If this position is adopted by the Committee, the Committee will need to consider the manner in which the judgment debtor may request a stay as well as the scope of the stay. Subsection 5(b) provides that the court may extend the 30-day grace period provided in that subsection for good cause. The subsection 5(b) grace period, however, does not prevent all enforcement-related actions. Even under Alternative A to subsection 5(b), which is the most protective alternative, discovery to determine available assets is allowed to go forward. Thus, it would not be an adequate mechanism for the judgment debtor to obtain a stay of all enforcement-related actions pending determination of whether the registration should be set aside. It seems that a separate provision likely will be required to authorize grant of a stay in this situation.

Similarly, if the Committee adopts the position that filing a petition to set aside the registration automatically stays enforcement of the registered judgment, the Committee will need to consider the means by which the judgment creditor could request that the stay be lifted or modified.

In determining what should be the effect on enforcement of filing a petition to set aside the registration, as well as the means by which that effect can be altered, it may be useful to determine Canadian practice with regard to these issues.

We look forward to discussing these issues, as well as others that will no doubt arise during the course of our meeting, with the Committee at our Joint Drafting Committee Meeting, November 2-3, in Tucson, Arizona. We wish you safe travels.