

MEMORANDUM

TO: Lisa Jacobs (drafting committee chair)
Kathleen Patchel (drafting committee vice chair)

Cc: Kaitlin Wolff

FROM: Thomas S. Hemmendinger (subcommittee chair), Arthur Close, Paul George,
Peter Lown, Darcy McGovern, and Robert Tennesen

RE: Foreign Judgments under the Canadian Bankruptcy and Insolvency Act (“B&I Act”) Part XIII and Creditors Companies Arrangement Act (“CCAA”) Part IV

DATE: December 4, 2017

Introduction

The Uniform Law Conference of Canada’s (ULCC) Uniform Enforcement of Foreign Judgments Act (UEFJA) excludes from its scope any foreign judgment

arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended.

UEFJA § 3(b). At the October 2017 drafting committee meeting, you created a subcommittee to recommend to the drafting committee whether the Act we are drafting should include a similar exclusion and to give the committee our reasons for the recommendation.

This memo is our report and our recommendation that such an exclusion is not necessary in our proposed Act.

Canadian and U.S. Bankruptcy and Insolvency Legislation

Part XIII of the B&I Act is Canada’s adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Part IV of the CCAA is also a version of the UNCITRAL Model Law. Therefore, although the UEFJA mentions only the B&I Act, this memo will address both the B&I Act and the CCAA.

The United States has also adopted the Model Law on Cross-Border Insolvency as Chapter 15 of its Bankruptcy Code (the “Code”). The B&I Act, the CCAA, and the Code adoptions of the

Model Act are consistent with each other. Therefore, a U.S. court and a Canadian court would each administer proceedings under their legislation in the same general manner.

Under the UNCITRAL Model Law, one court proceeding is designated as the “main” proceeding, and a court proceeding in the other country is designated as an “ancillary” or “non-main” proceeding. The main proceeding takes place in the country “where the debtor has the centre of the debtor’s main interests.” B&I Act § 268(1); CAA § 45(1) (where the debtor company has the centre of its main interests”); Code § 1502(4) (“where the debtor has the center of its main interests”). The ancillary proceeding can take place in any country other than where the main proceeding is. B&I Act § 268(1); CCAA § 45(1) (same); Code § 1502(5) (a proceeding other than where a main proceeding is pending “where the debtor has an establishment”).

The main court is the center of action for the reorganization or liquidation of the debtor. The ancillary court in the other country would administer the ancillary proceeding and generally enter orders in aid of the administration of the main proceeding.

An order in a main proceeding in the U.S. is issued by either the U.S. Bankruptcy Court or the U.S. District Court. 28 U.S.C. § 1334. The B&I Act Part XIII and CCAA Part IV give the Canadian court the statutory authority to recognize and enforce such an “incoming” order without the need for the UEFJA.

Likewise, if a Canadian court issues an order in a main proceeding under either the B&I Act or the CCAA, a party would generally seek recognition and enforcement this “incoming” order in the U.S. Bankruptcy Court or the U.S. District Court. The U.S. District Court itself (which includes the Bankruptcy Court as a unit of the District Court) has the following jurisdiction:

- 1) Original and exclusive jurisdiction of all cases under the Bankruptcy Code. 28 U.S.C. § 1334(a). Such a case includes a Chapter 15 main proceeding or ancillary proceeding.
- 2) Original but not exclusive jurisdiction of the following civil proceedings:
 - a) Arising under the Code. 28 U.S.C. § 1334(b). This ground for jurisdiction exists when the Code itself creates the cause of action. *See Stoe v. Flaherty*, 436 F.3d 209, 217 (3d Cir. 2006).
 - b) Arising in a case under the Code. 28 U.S.C. § 1334(b). An “arising in” claim is generally as “those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” *See Middlesex Power Equip. & Marine, Inc. v. Town of Tyngsborough, Mass. (In re Middlesex Power Equip. & Marine, Inc.)*, 292 F.3d 61, 68 (1st Cir. 2002).
 - c) Related to a case under the Code. 28 U.S.C. § 1334(b). A proceeding is “related to” if it

potentially has some effect on the bankruptcy estate, such as altering the debtor's rights, obligations, options, freedom of action or otherwise. *Id.*

Orders issued in a main proceeding generally fall into one or more of the following categories:

- 1) An order for relief under the applicable statute (essentially approving or accepting the debtor as a debtor under the substantive law).
- 2) An injunction or stay to maintain the status quo and enable the debtor or court appointee to administer the case, or an order granting relief from the injunction or stay.
- 3) An order adopting or rejecting an executory contract or unexpired lease.
- 4) An order approving the sale of assets.
- 5) An order allowing or disallowing a claim against the debtor or its estate.
- 6) An order adjudicating a claim by the debtor or its estate against a non-debtor or by one non-debtor against another non-debtor.

Orders in categories (1) through (4) are non-money judgments. Similarly, some orders under category (5) or (6) are non-money judgments. Some non-money judgments must go to the U.S. federal courts under Chapter 15. Other non-money judgments would nevertheless generally go to the U.S. federal courts under Chapter 15, rather than to a state court. This renders an exception for non-money judgments under Canada's enactments of the UNCITRAL Model Law for these types of orders unnecessary.

This leaves only money judgments under categories (5) and (6), and then only that subset of money judgments that are not against the bankruptcy debtor.¹ For various reasons, the judgment creditor may wish to enforce a money judgment against a non-debtor party in a U.S. state court rather than a U.S. federal court. The Uniform Foreign-Country Money Judgment Recognition Act (UFCMJRA) already applies to these money judgments. Because the scope of our proposed Act would have the same scope as the UFCMJRA, the UEFJA exclusion does not seem necessary in our Act.

For these reasons, we believe that an exclusion from our Act is not necessary for judgments entered under the Part XIII of the B&I Act or under Part IV of the CCAA.

¹ The property of the debtor is *in custodia legis*, so the U.S. federal courts, rather than state courts, would have subject-matter jurisdiction.