

**MEMORANDUM**

TO: Joint Drafting Committee—Registration of Canadian Money Judgments  
FROM: Paul George  
RE: Research on various questions  
DATE: March 15, 2019

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Below is a summary of research on several questions raised earlier and a couple that I'm including on my own (items III, X & XI). I'm not necessarily suggesting that any of these be included in the text. The topics are:

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Some of these topics such as Provisional Remedies and Enforcement Methods are likely incomplete and I welcome suggestions on those and other topics.

**I. Canadian Judgments Filed in the United States Under the UFCMJRA (2005) (24 states) during 2017-18**

During the 2017 and 2018, there were a total of twenty-four foreign county judgments filed in the twenty-four states using the UFCMJRA (2005). Two of those were from Canada, filed in California and Washington state.

*Attorney General of Canada v. Malone*, No. B276129, 2018 WL 258972 (Cal. App. Jan. 2, 2018). Canada AG filed a Canadian judgment against Malone to collect on student debts incurred in Canada. The trial court issued summary judgment favoring Canada over Malone's objection that the Canadian judgment exceeded the ten-year filing limit under the

California UFCJMRA. The California Court of Appeals reversed in Malone’s favor on the ten year limit. Query why the public debt grounds did not apply.

*DeTray v. AIG Insurance Company of Canada*, No. 2:17-cv-0983 RAJ, 2018 WL 4184334 (W. D. Wash., Aug. 31, 2018). Tammy DeTray and her husband were Washington residents who operated a pilot car service which guided trucks. Tammy was driving a pilot car when a truck she was piloting she had an accident in Washington that damaged a bridge. Mullen Trucking, a Canadian corporation based in Calgary, owned the truck in question. Tammy and Mullen were sued by the State of Washington and others. Mullen was insured by Northridge and AIG, both from Canada, who agreed to defend Mullen. Tammy also sought coverage from Mullen’s insurers, who both denied coverage. In addition, AIG brought a declaratory judgment action against Tammy in Calgary. Tammy defaulted and the Calgary court issued a declaratory judgment of non-liability. AIG then introduced the Calgary judgment in the Washington lawsuit and moved for summary judgment on preclusion grounds. The federal court in Washington first noted that Washington’s UFCMJRA did not apply because the Calgary judgment was not for a sum of money. The Washington federal court then denied enforcement, finding that Tammy was not subject to Canadian jurisdiction on this issue.

## **II. All foreign country judgments filed in 2017-18 under the UFCMJRA and the UFMJRA**

This data point responds to a request to assess foreign country judgment filings in total. I did not attempt to quantify foreign country judgments filed in states not using either Uniform Act.

UFCMJRA: During the 2017 and 2018, there were a total of twenty-four foreign country judgments filed in the twenty-four states using the UFCMJRA (2005). Two of those were from Canada, filed in California and Washington state, as noted above.

UFMJRA: In the states using the UFMJRA (1962) (ten states and the Virgin Islands) there were twenty-six foreign country judgments filed, none from Canada.

## **III. States amending their UFCMJRA to add protection from foreign-country defamation judgments**

Three states have amended their foreign-country money judgment acts to provide extra defense against defamation judgments rendered in foreign countries. Two states—California and Oklahoma—amended their 2005 UFCMJRA:

- Cal. Code of Civ. Pro. § 1725. Declaratory relief following foreign-country defamation judgment; conditions; jurisdiction (eff. Jan. 1, 2018)
- 12 Ok. Stat. § 718A. Foreign defamation judgments (eff. Nov. 1, 2013)

One state—Florida—amended its 1962 UFMJRA:

- Fla. Stat. Ann. § 55.6055. Foreign defamation judgment (eff. July 1, 2009)

The amendments do not appear to be from a uniform or standardized statute.

#### IV. Choice of law during enforcement

As a general rule, the rendering country's law governs legal questions arising prior to filing to the enforcing country's court, and the enforcing country's law governs enforcement questions after filing. See e.g., Restatement (Second) Conflict of Laws § 99 (local law governs enforcement methods). Some questions may arise outside of enforcement methods, most of which can be connected to sections in the Registration Act. Note, however, that the question of governing law is generally a non-issue because questions not directly controlled by the Registration Act will usually be resolved by the enforcing state's conflict of laws rule. To the extent there is a conflict between the Registration Act and some other law (local or foreign), that too will usually be decided by the enforcing state's conflict of laws rule. In rare instances, the enforcing state's conflict of laws rule may be pre-empted by the United States Constitution or public international law (although international law would be at the discretion of the enforcing state).

The areas of the Registration Act that could generate conflict of laws questions include:

1. Section 3. Applicability—What law governs the characterization of the Canadian judgment in regard to its coming within the scope of the Registration Act? The best answer is that the enforcing state's law governs questions of the Registration Act's scope, as stated in the Registration Act. Nonetheless it's conceivable that questions could arise under the argument that the enforcing court is to give the foreign judgment the same effect it has in the rendering jurisdiction.
2. Section 4(b)(1). Registration—two issues arise here:
  - a. Section 4(b)(1) regarding certification—the Registration Act's text at least implies (if not directs) that Canadian law controls certification.
  - b. The Section 4(b)(2)(B) regarding scope—as noted above in IV.1, whether the Canadian judgment fits within the Registration Act's scope is best governed by the enforcing state's law but there could be confusion on this, or even legitimate arguments that the rendering jurisdiction's law provides a controlling label.
3. Section 5. Effect of Registration—this section contemplates provisional steps and limits after registration but before enforcement of the final judgment. To the extent the judgment creditor seeks to freeze (by attachment or sequestration) the debtor's property, what law governs exemption from attachment? The enforcing state's law of pre-judgment attachment is the most likely answer, but it's conceivable that Canadian law could be pertinent, especially where corporate assets are at issue.
3. Section 6. Notice—to the extent notice is served outside the United States (Canada or elsewhere), there could be objections regarding the law governing notice. One example is where notice is served on the enforcing state's secretary of state, pursuant to enforcing state's law. These objections should be invalid, and the enforcing state's law should govern because the issue is execution on assets located in the enforcing state.
4. Section 7. Petition to Set Aside Registration—what law governs defenses to enforcement? Once again, the enforcing state's law should generally govern defenses to enforcement on assets in the enforcing state. But what about defenses such as payment or discharge of the judgment? One answer is that defenses such as payment are not

adequate unless they discharge the judgment in the rendering jurisdiction and make it unenforceable there. This could require further action from the rendering court. Because the Registration Act is limited to money judgments, the problems here should be minimal but there could be procedural problems.

5. Sections 6 and 7 regarding privity—the Registration Act does not address this (and probably should not), but instead directs enforcement as to “the person against whom recognition of the judgment through registration is sought (Section 6(a)), and “A person against whom a Canadian judgment has been registered . . .” (Section 7(a)). This leaves open the possibility of filing against someone not named in the Canadian judgment, although other aspects of the Registration Act may defeat that. To the extent the Registration Act allows filing against an alleged debtor privity, various arguments could be made about what law defines privity. Perhaps that would be determined by the conflict of laws rule in the enforcing state.

Other issues can arise either inside or outside the terms of the Registration Act. The default rule should be that the enforcing state’s law governs, either through its local law regarding judgment enforcement or through its conflict of laws rule.

## **V. Survey of Authentication Methods**

The UEFJA has no authentication provision but Section 2 provides that the judgment must be “authenticated in accordance with an act of congress or a statute of this state.” The UFMJRA (1962) did not mention authentication, but at least one state modified the 1962 Act to include an authentication reference. See Texas Civ. Prac. & Rem. Code § 36.041, requiring the filed judgment copy to be authenticated “in accordance with an act of congress, a statute of this state, or a treaty or other international convention.” This is similar to the requirement in UEFJA § 2.

The 2005 UFCMJRA does not mention authentication. Presumably that rests with the judgment creditor’s burden in proving a prima facie final judgment and entitlement to summary judgment. Although Texas included an authentication reference in its UFMJRA, it did not do so when it adopted the 2005 UFCMJRA. I am unaware of any 2005 Act state with an authentication provision or reference, and I assume that all 2005 states use authentication provision under local law. I surveyed twelve UFCMJRA states’ civil procedure codes for samples of their authentication methods, and distributed a memo at the October, 2018 meeting in Tucson (ask me if you need copy). All examples found were under that state’s Rules of Evidence, generally mirroring FRE 902. My recollection is that this was resolved at the October, 2018 meeting.

## **VI. Survey of Provisional Remedies**

Provisional remedies are those which may be pursued at the time of registration, pending the enforcing state’s authorization for enforcement. As with other enforcing-state procedures, provisional remedies will vary from state to state, including the terminology. Common remedies include

1. Sequestration—pre-judgment seizure of property or funds, typically those at issue in the

litigation or foreign judgment

2. Attachment—pre-judgment seizure of unrelated assets to satisfy anticipated judgment
3. Garnishment—attachment of non-exempt assets, related or unrelated, in hands of a third party
4. Receivership
5. Temporary Restraining Orders and Injunctions

These are typically available for local judgment enforcement and for properly registered sister-state judgments. They will presumably be available for properly registered Canadian judgments.

## **VII. Survey of Enforcement Methods**

State enforcement procedures vary both in terminology and method. They are governed by the enforcing state's laws because they apply to what is now a final judgment of the enforcing state. There are also a few pre-empting federal laws such as bankruptcy stays. Typical enforcement processes include:

1. Asset discovery
2. Asset exemption
3. Creditor priority rules, typically based on the priority of lien filing
4. Collection remedies
  - a. Judgment lien
    - real property
      - filed with property records, typically kept in county where real property is located
    - personal property
      - attaches when property is levied or seized in execution
    - creates right of foreclosure
  - b. Execution—seizure of non-exempt assets by sheriff for sale at auction unless judgment debtor posts a bond or pays the judgment
  - c. Garnishment—seizure or attachment of non-exempt assets possessed by third party
  - d. Turnover
  - e. Charging order—for partnership assets
  - f. Fraudulent transfer action to undo transfer of non-exempt assets to third party
  - g. Contempt for non-compliance with court orders regarding collection
5. Judgment renewal

The terms “attachment” and “levy” are typically provisional remedies but may also apply in these enforcement processes.

### VIII. Survey of common law defenses to enforcement

As best I can tell after extensive research in both old and new sources, there is no definitive list of common law defenses. The lists that do exist vary depending on how “defenses” are defined—are they merely the attacks on the original judgment such as personal jurisdiction or fair trial, or do they include affirmative defenses such as payment or discharge? The best list of common law defenses may come from the Restatement (Second) Conflict of Laws. The defenses listed there, both under “defenses” and separate titles like “validity”, include (all cites are to the Restatement (Second) Conflict of Laws):

1. Judicial jurisdiction in the rendering state—the judgment debtor must have been amenable to the rendering state’s jurisdiction. See §§ 92 & 104. This is governed by the rendering state’s law and possibly by international law. See § 92 cmt. g.
2. Notice and opportunity to be heard—the judgment debtor must have received notice of the prior litigation and have an opportunity to contest it. See §§ 92 & 104.
3. Competent court—the rendering court must have had subject matter jurisdiction. See §§ 92 & 105.
4. Fair trial in a contested proceeding. § 98 (noting that default judgments may or may not be enforced, see § 98 cmt. d).
5. Lack of finality. § 107
6. Uncertainty of judgment amount (controlled by the law of the rendering state). § 108.
7. Modifiable judgment. § 109
8. Not on the merits. § 110
9. Conditional judgments (unenforceable in the rendering state because of a condition not yet performed). § 111
10. Vacated judgment (controlled by the law of the rendering state). § 112
11. Injunction against enforcement, regardless of where the injunction was issued. § 13 & cmt. a.
12. Inconsistent judgments (as determined by the law of the rendering state) § 114
13. Where equitable relief is available in the rendering state (if the judgment debtor can show grounds for equitable relief in the rendering state). § 115
14. Payment or discharge. § 116
15. Contrary to the enforcing state’s public policy. § 117
16. Limitations. § 118  
118(1): limitation on original action in rendering state—not a defense in the enforcing state  
118(1): limitation enforcement in the rendering state—is a good defense
17. Penal claim not enforceable § 89
18. Reversal in rendering state is a defense. § 121.

## Invalid defenses

1. Error of law or fact in rendering court. § 106.
2. Not a real party in interest under the rendering state's law—not a good defense. § 119
3. A non-penal government claim. § 120

The Restatement (Second) § 98 Reporter's Note states that, "The Uniform Foreign Money-Judgments Recognition Act (1962) has been adopted in several States. It sets forth what is believed to be the common law rule in the United States."

## **IX. Relitigating the Merits**

It is a widely accepted rule for judgment preclusion and enforcement that a party cannot relitigate the merits of a properly rendered claim. The Restatement (Second) Judgments makes the basic point in regard to preclusion generally:

"No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and is unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction."

Restatement (Second) Judgments § 17 Reporter's Note d, quoting 1 Black, Judgments § 271 (2d ed.1904). The Judgments Restatement cites several cases in support, quoting the oldest:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

*Elliott v. Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828).

The Restatement (Second) Conflict of Laws makes the same point in regard to a judgment's extraterritorial effect. See Restatement (Second) Conflicts § 106: (judgment will be enforced in spite of error of fact or law), citing to *MacDonald v. Grand Trunk R.R. Co.*, 71 N.H. 448, 52 Atl. 982 (1902) (Canadian judgment for defendant had preclusive effect in plaintiff's subsequent lawsuit in the United States). See also Restatement (Second) Conflict of Laws § 98, cmt. b (the rationale is the need for an end to litigation).

In regard to enforcing foreign country judgments, cases are cited for that proposition but the cases themselves do not make that statement or provide good examples of that principle. See e.g. *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213 (2018)(Greek judgment on arbitration award filed in D.C.). In spite of the absence of current authority, especially as to UFMJRA or UFCMJRA actions, the point can be inferred from older sources.

## **X. Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. §§ 1330 & 1602 et seq.**

Question: If Canada renders a judgment against a foreign sovereign and the judgment creditor then attempts to enforce it under the Canadian Judgment Registration Act, is that enforcement also governed by the FSIA.

A number of cases have applied the FSIA to UFCMJRA enforcement, although most or all did so without question. There have been four in the past two years, all in the District of Columbia. See *Commissions Import Export, S.A. v. Republic of Congo*, 118 F. Supp. 3d 220 (D.D.C. 2018); *BCB Holdings Limited v. Government of Belize*, 232 F. Supp. 3d 28 (D.D.C. 2017); *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 603 Fed Appx. 1 (D.D.C. 2015); *SACE S.P.S. v. Republic of Paraguay*, 243 F. Supp. 2d 21 (D.D.C. 2017); but see *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213 (D.C. Cir. 2018). None of those cases involved Canadian judgments. The FSIA probably does apply, in spite of the general rule in the United States that foreign judgment enforcement is a matter of state law. The reasoning supporting that conclusion is:

- Sec. 1602 makes the FSIA exclusive for suing foreign sovereigns, preempts state and federal law, and thus applies to all courts in the United States.
- Sec. 1604 creates a presumption of a foreign sovereign's immunity from legal actions in United States courts (federal and state) which must be overcome by an exception in Sec. 1605.
- Sec. 1608 is the exclusive means for service on foreign governments.
- Sec. 1608(e) prohibits pure default judgments, but allows for defaults if there's a prove-up.
- Secs. 1609 - 1610 govern judgment enforcement, with Sec. 1610(a) restricting enforcement to "a judgment entered" by a federal or state court pursuant to the FSIA.

That leads to these conclusions and questions:

1. Issues affected

a. Conclusion: If a Canadian court renders a money judgment against a foreign sovereign as defined in the FSIA (including instrumentalities), and then the judgment creditor seeks enforcement in the United States, any use of our Canadian Registration Act will have to comply with the FSIA as to service, amenability, and other issues specified in the FSIA.

b. Question: Does that mean the Canadian judgment must have complied with the FSIA, and if so, to what extent?

2. "Judgment entered" under the FSIA

Question: For the FSIA language "a judgment entered," does that require a trial on the merits or would the domestication of the Canadian judgment be sufficient? If "judgment entered" requires that the US action be original, then our Canadian Registration Act may not be used. However, the UFCMJRA might still apply if the recognition included proof of the FSIA's non-immunity elements.

3. Default Judgments

Questions: For Canadian default judgments against a foreign sovereign, including a prove-up done in Canada, what would be required for registration in the United States? Would it be enough if the Canadian judgment recited the prove-up? What level of notice would be



required in Canada? (In the U.S., some states do not require notice of the prove-up if the record shows valid initial service of process).

There are likely a number of other issues not raised here.

**XI. Other Foreign Judgment Enforcement Regimes Involving the United States**

- 11 U.S.C. §§ 1501 et seq. (implementing the UNCITRAL Model Law on Cross-Border Insolvency)
- 28 U.S. Code § 2467 (Enforcement of foreign judgment for penalties or fines)
- Uniform Foreign-Money Claims Act (regarding conversion of money judgments to U.S. dollars)
- Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption)
- Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (not ratified)