APPENDIX D

[See page 49]

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

(Preliminary Draft)

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Canada

A. OVERVIEW OF ACTIVITIES

[1] The Working Group was asked by the ULCC at its August 1998 meeting to continue its work on enforcement of foreign judgments and to draft a uniform act based on the discussions of its 1998 Report and the resolutions of the Civil Section in that regard.

[2] The 1998-99 Working Group was composed of Joost Blom, Russell Getz, Peter Lown, H. Scott Fairley, Greg Steele, Darcy McGovern, Jacques Papy, Frédérique Sabourin, John McEvoy and Tim Rattenbury with Louise Lussier and Kathryn Sabo as co-ordinators.

[3] The Working Group held eight conference calls between October 1998 and June 1999. The main topics on the Working Group's agenda were the jurisdiction of foreign courts to make provisional orders and the conditions of their recognition and execution in Canada, excessive punitive and compensatory damages, as well as jurisdiction in tort and delict and with respect to goods and services. In addition, the work of the Hague Conference on Private International Law in the area was discussed, taking into account the results of two sessions of two weeks each held in November 1998 and in June 1999.

B. RESULTS OF THIS YEAR'S ACTIVITIES

[4] The Working Group was successful in drafting a preliminary draft uniform act, a copy of which is attached, to be reviewed by the ULCC Civil Section at its annual meeting in Winnipeg in August 1999. This preliminary draft is not complete, nor is the drafting refined; it is submitted for further discussions.

[5] Certain policy choices with respect to enforcement of foreign judgments are reflected in the preliminary draft. They are as follows:

a) A specific uniform act should apply to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.

b) The proposed uniform act indicates what kind of judgments it covers as well as to which judgments it will not apply.

c) The proposed uniform act applies to money judgments as well as to those ordering something to be done or not to be done.

d) The proposed uniform act applies to provisional orders as well as to final judgments.

e) The proposed uniform act rejects the "full faith and credit" policy applicable to Canadian judgments under the *Uniform Enforcement of Canadian Judgments* (UECJA).

f) The proposed uniform act identifies the conditions for the recognition and enforcement of foreign judgments in Canada. These conditions are largely

based on well-accepted and long-established defences or exceptions to the recognition and enforcement of foreign judgments in Canada.

g) Following on the heels of Morguard, the proposed uniform act adopts as a condition for recognition and enforcement of a foreign judgment that the jurisdiction of the foreign court which has rendered the judgment was based on a real and substantial connection between the country of origin and the action against the defendant.

C. OVERVIEW OF THE PRELIMINARY DRAFT UNIFORM ACT: *Uniform Enforcement of Foreign Judgments Act*

[6] The proposed Uniform *Enforcement of Foreign Judgments Act* (UEFJA), which is attached, is divided into four parts.

[7] Part 1 deals with definitions (s. 1) and scope of application (s. 2).

[8] Part 2 refers to recognition and enforcement generally. It contains eight provisions on various matters: conditions for enforcement of judgments (s. 3) and provisional orders (s. 3A); the time within which enforcement is to be sought (s. 4); the discretion of the enforcing court to reduce foreign awards of non-compensatory and excessive damages (s. 5); the jurisdiction of the foreign court based on voluntary submission, territorial competence or a real and substantial connection (s. 6); examples of real and substantial connections (s.7); the jurisdiction of the foreign court to make provisional orders (s. 7A); and an "escape clause" (s. 8).

[9] The two remaining parts are not yet completed. Part 3 will deal with enforcement procedure. Part 4 will cover related issues that have yet to be considered by the Working Group, as well as final provisions.

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

PARTIAL DRAFT

(Parts I and II only)

Part I: Definitions and Scope of application

Definitions

1. In this Act,

"enforcing court" means the [court of unlimited trial jurisdiction in the *[enacting province or territory];*

"foreign judgment" means a final judgment or order made in a civil proceeding by a court other than a court of a province or territory of Canada;

"foreign provisional order" means an order directed to the respondent or third parties to freeze or attach the respondent's assets located in *[the enacting jurisdiction]*, or any other order under which the respondent is required to do or not to do a thing or an act, made by a court other than a court of a province or territory of Canada pending a final judgment on the merits;

"judgment creditor" means the person entitled to enforce a foreign judgment;

"judgment debtor" means the person liable under a foreign judgment and includes the respondent in a" foreign provisional order".

"State of origin" means the State or a subdivision of a State where a foreign judgment was made.

Comments: As is customary the proposed uniform act on enforcement of foreign judgments includes a section on definitions. Most of them are self-explanatory.

In light of the ULCC-Civil Section August 1998 discussions, the scope of the future UEFJA is not limited to only foreign judgments that are final and monetary in nature and also includes foreign provisional orders. For these reasons, the definition of "foreign judgments" is not limited to money judgments. In addition, a definition of "foreign provisional orders" is also provided. It is possible that at a later stage, we would be able to come up with only one generic expression that would encompass both "foreign judgment" and "foreign provisional judgment".

Judgments to which this Act does not apply

2. The Act does not apply to foreign judgments :

(a) for the recovery of taxes;

(b) arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the <u>Bankruptcy and Insolvency Act</u>, R.S.C. 1985, c. B-3, as amended;

(c) rendered by administrative tribunals or court judgments given on appeal from judgments rendered by administrative tribunals;

(d) for maintenance or support, or for the determination of the personal status or capacity of a person;

(e) obtained in a third state;

(f) for the recovery of monetary fines or penalties.

Comments: Section 2 determines the scope of application of the Act by specifying to which foreign judgments the Act does not apply. This list accords with the traditional list of exceptions to enforcement of foreign judgments in Canada (taxes, administrative decisions, penalties), and also takes into account those judgments for which separate

enforcement rules exist (maintenance, civil status). Thus enforcement of foreign judgments on these matters will not be possible under the proposed UEFJA. However, enforcement of judgments on matters not mentioned in the list could be considered in compliance with the conditions set out in the Act.

Part 2: Enforcement generally

Reasons to refuse enforcement: Foreign final judgments

3. A foreign final judgment cannot be enforced *[in the enacting jurisdiction]* if

(a) the foreign court lacked jurisdiction *[territorial or subject-matter competence]* over the judgment debtor or subject-matter as provided in sections 6 and 7;

(b) the judgment has been satisfied;

(c) the judgment is not enforceable or final in the State of origin; however, a registered foreign judgment is enforceable, but proceedings to enforce it may be stayed, if an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the State of origin;

(d) in the case of a default judgment, the [judgment debtor] [defendant] was not lawfully served according to the law of the State of origin or did not receive notice of the commencement of the proceedings in sufficient time to present a defence;

(e) the judgment was obtained by fraud;

(f) the judgment was rendered contrary to the principles of fundamental fairness;

(g)* the judgment is contrary to the public policy in the territory of *[the enacting jurisdiction];

(h) at the time registration of the judgment was sought or an action for enforcement commenced, proceedings between the same parties, based on the same facts and having the same purpose as in the state of origin:

(i) were pending before a court of *[enacting jurisdiction]* that was seized of the matter prior to it being brought before the court of the State of origin; or

(ii) have resulted in a judgment rendered by a court of *[enacting jurisdiction]*, or

(iii) have resulted in a judgment rendered by a court of a third State that meets the conditions for its recognition and enforcement in *[enacting jurisdiction]*.

Comments: Section 3 lists in sub-par. (b) to (h) the traditional defences or exceptions which can be opposed to the enforcement of foreign final judgments in Canada. It includes notably the following circumstances: either the foreign judgment is not final, is against public policy, the proceedings that were conducted show a lack of respect for the rights of the defendant, or *lis pendens* or *res judicata* can be invoked. Unlike the policy governing the enforcement of Canadian judgments based on full faith and credit under the UECJA, enforcement of a foreign judgment could also be opposed if, as provided in sub-par. (a), the foreign court lacked jurisdiction.

Reasons to refuse enforcement: Foreign provisional orders

3A. A foreign provisional order cannot be enforced in *[enacting jurisdiction]* if

(a) the foreign court lacked jurisdiction as provided in s. 7A;

(b) the order was *[satisfied]*;

(c) the order is not enforceable in the State of origin; however, a registered foreign order is enforceable, but proceedings to enforce it may be stayed if

an appeal is pending or the respondent is entitled to appeal or to apply for leave to appeal against the order in the State of origin;

(d) the respondent did not have a reasonable opportunity to present objections or defenses [either before the order was made or after the order was made in the case the proceedings were conducted ex parte];

(e) the order was obtained by fraud;

(f) the order was made contrary to the principles of fundamental fairness;

(g) the order is against public policy in the territory of *[the enacting jurisdiction].*

Comments: This provision is largely inspired by the conditions set forth in s. 3 in relation to final foreign judgments subject to a few adaptations given that s. 3A would apply specifically to provisional orders made by foreign courts. Conditions mentioned in sub-par. b, e, f, and g remain fairly unaltered. However a few changes are notable in paragraphs a, c and d.

For instance, jurisdiction requirements referred to in sub-par. a would be those provided in a new section, s. 7A. The drafting of sub-par. c has been modified in order to delete the reference to the "finality" of the foreign order. The drafting of sub-par. d has also been revised to take into account the fact that most provisional orders are made *ex parte*; the respondent would still be entitled to oppose the recognition and enforcement of the order in case of failure to give him or her notice of the order.

Sub-par. h of s. 3 was left out as it would appear difficult in practice to find situations in the context of provisional orders in which the strict requirements of *res judicata* or *lis pendens* would apply. In such cases, if any, it was suggested to preserve the possibility of the enforcing court to take into consideration the existence of other similar provisional orders either made in the enacting jurisdiction or elsewhere at the time of an application for enforcement. Such a provision could be added in Part 3 on Enforcement Procedure.

Time limit for registration and enforcement

4. A foreign judgment must not be enforced in *[enacting jurisdiction]* after the earlier of

(a) six years after the day on which the judgment became enforceable in the State of origin; or

(b) any time shorter provided for the enforcement of the judgment by the internal law of that State.

Comments: Such a rule accords with the average limitation period for enforcement proceedings set up in most provinces.

Power to reduce enforcement of non-compensatory and excessive compensatory damages

5. (1) Where upon application of the judgment debtor, the *[enforcing court]* determines that a foreign judgment includes an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes, the [enforcing court] shall limit enforcement of that part of the award to the amount of similar or comparable damages that could have been awarded in *[the enacting jurisdiction]*.

(2) *[In exceptional cases]*, where upon application of the judgment debtor, the *[enforcing court]* determines that a foreign judgment includes an amount of compensatory damages that is *[grossly]* excessive in the circumstances, including those existing in the state of origin, the *[enforcing court]* may limit enforcement of that part of the award to a lesser amount but no less than the amount of damages which that *[enforcing court]* could have awarded in the circumstances, including those existing in the State of origin.

(3) References in this provision to damages include, where appropriate, judicial costs and expenses.

Comments: The enforcement in Canada of foreign awards of damages which could include punitive, multiple or excessive compensatory damages, that would otherwise be considered enforceable under this Act, has raised, and continue to do so, a number of issues. This situation would warrant that under the UEFJA, the enforcing Canadian court be expressly empowered to limit the enforcement of damages so awarded that would be in excess of similar damages that could be awarded in similar circumstances had the action been filed in Canada. The defendant would have the onus to establish that the damages awarded by the foreign court are in excess of awards normally granted in Canada. This policy would be in line with the one now being considered at The Hague.

To clarify the rules that would be applicable, a distinction would be made in s. 5 between punitive and multiple damages (par. 1) which are not considered compensatory, on the one hand, and excessive compensatory damages (par. 2) on the other, given the principles set forth by the S.C.C. in *Hill* v. *Church of Scientology*. In addition, a third par. would specify that judicial costs and expenses are part of the damages award of which the enforcement could be limited.

Jurisdiction based on various grounds: (voluntary submission; counter-claim; ordinary residence; choice of court; habitual residence; and a real and substantial connection)

6. A foreign court in the State of origin has jurisdiction in a proceeding that is brought against a person if

(a) that person being the defendant submitted to the jurisdiction of that court by voluntarily appearing in the proceeding;

(b) that person was a plaintiff in the proceeding or brought a counterclaim;

(c) that person had, before the commencement of the proceeding, agreed expressly to submit to the jurisdiction of that court;

(d) that person, being a physical person, at the time the proceeding was instituted, was [*ordinarily*] [*habitually*] resident in the State of origin;

(e) that person, being a body corporate or corporation, at the time the proceeding was instituted, had its [principal] place of business in the State of origin or had the control of its management exercised in that State; or

(f) there was a real and substantial connection between the State of origin and the facts on which the proceeding against that person was based.

Comments: Section 6 provides a list of circumstances in which the foreign court is considered to have territorial jurisdiction over the defendant for the purpose of the enforcement of its final judgment in Canada. Subject to the rule in sub-par. (f), all other rules in sub-par. (a) to (e) have been well-established in Canadian laws. Jurisdiction of a foreign court could be determined if the defendant submitted to the jurisdiction of the foreign court, including through a choice of court (sub-s. a, b, and c), where the defendant being a physical person was a habitual resident in the State of origin (d) or being a corporation had its principal place of business or control of management there (e). In the case of corporations, some further thoughts could be given to the possibility of adopting alternative rules which could be modeled on the sections 7 to 9 of the UCJPTA dealing with the definition of "ordinary residence" for corporations, partnerships and unincorporated associations.

Also jurisdiction could be determined when there was a real and substantial connection between the action, the defendant and the original court (f). This rule accords with the ruling of the Supreme Court in *Morguard.* Although formulated for intra-Canadian judgments, the real and substantial jurisdictional test has been extended to foreign judgments in a number of cases in most common law provinces, the leading case being the decision of the B.C.C.A. in *Moses* v. *Shore Boat.* The inclusion of this ground of jurisdiction reflects the evolution of Canadian rules on this matter.

Real and substantial connections

7. For the purpose of section 6(f), in the case of a default judgment, a real and substantial connection between the State of origin and the facts on which the proceeding is based includes:

(a) Branches

The judgment debtor, being a defendant in the original court, had an office or place of business in the territory of origin and the proceedings were in respect of a transaction effected through or at that office or place;

(b) Torts

In an action for damages in tort, quasi-delict or delict,

(i) the wrongful act occurred in the State of origin, or

(ii) injury to person or property was sustained in the State of origin, provided that the defendant could reasonably foresee that the activity on which the action is based could result in such injury in the State of origin, including as a result of distribution through commercial channels known by the defendant to extend to that State;

(c) Immovable

The claim was related to a dispute concerning title in an immovable property located in the State of origin;

(d) Contracts

The contractual obligation that is the subject of the dispute was or should have been performed in the State of origin;

(e) Trusts

For any question related to the validity or administration of a trust established in the State of origin or to trust assets located in that State, the trustee, settlor or beneficiary had his or her habitual residence or its principal place of business in the State of origin;

(f) Goods and services

The claim was related to a dispute concerning goods made or services provided by the judgment debtor and the goods or services

(i) were acquired or used by the judgment creditor when the judgment creditor was ordinarily resident in the State of origin; and

(ii) were marketed through the normal channels of trade in the State of origin.

Comments: It was felt necessary for policy reasons to provide a list of examples of real and substantial connections in order to establish the subject-matter competence of the foreign court. Grounds are identified here for actions involving branches of corporate bodies (a); torts (b); immovables (c); contracts (d); trusts (e); consumer contracts and products liability (f). They would largely accord with those identified in the context of the enforcement of Canadian judgments (see s. 10 UCPTA).

As a result of the discussions held in August 1998, section 7 is intended to operate:

(a) only in the case of default judgments, be it final or provisional; and

(b) in a non-exhaustive fashion so that additional grounds which would be acceptable both in the State of origin and in Canada could be considered by the enforcing court.

Jurisdiction for foreign provisional orders

7A. A court has jurisdiction to make a provisional order if that court is seized or is about to be seized of proceedings on the merits against the respondent in the State of origin and has jurisdiction in accordance with sections 6 and 7.

Comments: Given that the conditions for the enforcement of foreign provisional orders are mentioned separately from those applicable to the enforcement of foreign final judgments, it made some sense to provide for a separate rule in the future UEFJA with respect to the foreign court's jurisdiction to grant a provisional order. Overall the jurisdictional requirements in this case are similar to those for foreign final judgments as spelled out in s. 6, although drafting adaptations may be necessary. There is no need to repeat here the comments already provided under that section.

However, the special context in which provisional orders are made, most often to assist foreign litigation, has also to be taken into consideration. For this reason, the working group felt that the rule in s. 7A should reflect at a minimum the necessary relation of the foreign provisional order with proceedings on the merits before the same foreign court. This additional requirement is found in the chapeau or introductory par. of s. 7A.

Note: As case law on enforcement of foreign provisional orders in Canada will evolve, clearer rules might develop with respect to jurisdictional requirements.

Escape clause

8. A foreign judgment may not be enforced if the judgment debtor proves to the satisfaction of the enforcing court that

(i) there was no sufficient real and substantial connection between the State of origin and the facts on which the proceeding was based; and

(ii) it was clearly inappropriate for the foreign court to take jurisdiction.

Comments: Section 8 is aimed at better protecting Canadian defendants in circumstances where the foreign court took jurisdiction on tenuous grounds. It goes so far as providing the foreign final judgment debtor or the foreign provisional order respondent with the ultimate possibility at the enforcement stage to challenge the jurisdiction of the foreign court even though the defendant was not successful in challenging jurisdiction or has not done so at the time of the initial proceeding. This should only be used in exceptional circumstances as a last resort mechanism.

On that point, a useful reference can be made to s. 3164 of the *Civil Code of Québec* which reads as follows:

> *" The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seised of the case." (our emphasis)*

As pointed out during the deliberations of the ULCC-Civil Section in August 1998, the application of s. 8 should be appreciated as clearly as possible, particularly in light of its relationship with other sections of Part II that deal with jurisdiction, namely s. 3, 6 and 7.

In principle, the enforcement of a foreign judgment can be granted if the foreign court was competent to make either a final or a provisional order in accordance with the rules to be set out in the future UEFJA. Defences to enforcement are those listed in s. 3, one of which being the lack of jurisdiction. This has to be determined in light of the requirements mentioned in s. 6 and 7 for final judgments or s. 7A for provisional orders.

For instance, if jurisdiction can be determined on the basis of a real and substantial connection as provided in s. 6(f), examples of which are contained in s. 7 in the case of default judgments, the defendant would not be successful in establishing that the foreign

court lacked jurisdiction. For this reason, it might be necessary to adopt quite a high threshold for allowing the defendant to be able to do so.

The drafting of s. 8 reflects this approach by identifying a set of requirements relating to the inappropriateness of the foreign court to have taken jurisdiction in light of the weakness of its connection with the cause of action. This would cover situations under which the defendant felt compelled to participate in the original proceeding for fear of penalties as well as situations where the defendant was not given sufficient time to challenge jurisdiction or was prevented from doing so.