Uniform Enforcement of Foreign Judgments Act
DRAFT - August 2001

(Parts I - IV)

Part I: Definitions and Scope of Application

Definitions

1. In this Act,

"civil proceeding" means a proceeding to determine a dispute between two or more persons or entities, one or more of whom may be a government body, the object of which is an order or judgment requiring a party to comply with a duty or pay damages for the violation of a legal right, or to determine the personal status or capacity of one or more of the parties;

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

"foreign judgment" means a final judgment, order or decree, whatever it may be called in the State of origin, made in a civil proceeding by a court, or such other adjudicative body where the [enforcing court] is satisfied that such adjudicative body, rather than a court, is the body which determines disputes of the kind in question in that State, other than a court or adjudicative body of a province or territory of Canada;

["foreign provisional order" means an order made in a civil proceeding 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 , or such other adjudicative body where the [enforcing court] is satisfied that such adjudicative body, rather than a court, is the body which determines disputes of the kind in question in that State, other than a court or adjudicative body 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 [or foreign provisional order];

"judgment debtor" means the person liable under a foreign judgment [or foreign provisional order];

"State of origin" means the State or a subdivision of a State where a foreign judgment [or foreign provisional order] 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 judgment" is not limited to money judgments. In addition, a definition of "foreign provisional order" is provided. In light of a lack of consensus at the Hague Conference as to whether provisional and protective measures should be afforded some degree of automatic recognition and enforcement in the draft Convention on jurisdiction and foreign judgments in civil and commercial matters and the existence of provisions in Canadian civil law which prohibit the

recognition and enforcement of foreign provisional and protective measures, the Conference should consider whether this Uniform Act should provide for their recognition and enforcement.

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 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended;

(c) for maintenance or support;

(d) obtained in a third State;

(e) for the recovery of monetary fines or penalties;

(f) rendered in proceedings commenced before the coming into force of this Act.

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). 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 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 or 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] 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 in a proceeding the conduct of which was contrary to the principles of fundamental fairness;

(g) the judgment is manifestly 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 or order rendered by a court of [enacting jurisdiction], or

(iii) have resulted in a judgment or order 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.

Paragraphs (e) and (f). The defence of fraud that is referred to in paragraph (e) is intended to replicate, for common law jurisdictions, the defence as it has been developed in the Canadian case law. The defence is distinct from that of violation of the principles of fundamental fairness as provided in paragraph (f). The fundamental fairness defence refers to the manner in which the foreign proceeding was conducted. Fraud refers to a

deception that was practised on the court or on the judgment debtor in order to obtain judgment. It is possible for fraud to exist even in an action that, as far as procedure is concerned, complies with the requirements of fundamental fairness. The reference in paragraph (f) is to "fundamental fairness", instead of the more conventional "natural justice", because the former is plainer language.

In civil law, fraud would have been covered either by section 3 f) or by section 3 g). Principles of fundamental fairness would most likely be understood as binding on the parties to the proceedings as well as on the court. Fraud could also be contrary to public policy. Paragraph e) clarifies the issue if there were any doubt.

Paragraph (g). For common law jurisdictions, "public policy" is intended to refer to the concept that is used in the Canadian case law to determine whether a foreign judgment must be denied recognition, or a foreign rule of law denied application. Public policy, used in this sense, applies only if the foreign judgment or rule violates concepts of justice and morality that are fundamental to the legal system of the recognizing jurisdiction. The word "manifestly" is used in this paragraph to emphasize that the incompatibility with justice and morality must be convincingly demonstrated. Public policy in this context is clearly distinct from public policy in the more general sense of the aims that are supposed to be served by a rule of domestic law. A foreign judgment may be at odds with domestic legislative policy, because it gives a different result from that which domestic law would produce, but that does not mean that the judgment contravenes public policy in the sense in which it is used here. The distinction corresponds to that drawn in the civil law between ordre public interne (policies served by rules of domestic law) and ordre public international (public policy in the international sense).

Subsection 3 (h) (i) addresses the situation where lis pendens in the

enforcing court can be invoked based on either an originating process or an interlocutory proceeding the subject matter of which is related to the merits addressed in the foreign proceeding.

Subsection 3 (h) (ii) addresses the straightforward exception of res judicata based on an equivalent judgment on the merits in the enforcing court. It also addresses the possibility of interim unenforceability created by the existence of an order in the enforcing court resulting from an interlocutory proceeding the subject matter of which is related to the merits addressed in the foreign proceeding. In such a case, the interlocutory matter would have to be disposed of by the enforcing court in advance of it considering the enforcement proceeding any further.

Subsection 3 (h) (iii) addresses the situation of res judicata in a third jurisdiction coming to the attention of the enforcing court, the judgment of which jurisdiction would also qualify for recognition and enforcement.

[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 or 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 in a proceeding the conduct of which was 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) ten 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 of judgments 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

(i) expressly agreed to submit to the jurisdiction of the court

(ii) as defendant, submitted to the jurisdiction by voluntarily appearing

(iii) as plaintiff, commenced the proceeding or counterclaim

(b) that person,

(i) being a natural person, was habitually resident in

(ii) being a business entity

a. was incorporated in, or

b. its management and control was located in, or

c. had its principal place of business in

the State of origin

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

Comments: Section 6 sets out three groups of circumstances in which a foreign court has jurisdiction in a proceeding brought in its courts.

The first group describes party choice - the parties may contractually agree on a forum; the defendant may voluntarily appear in a forum chosen by the plaintiff; or, for purposes of orders against the plaintiff, the plaintiff is bound by the choice of forum it has made.

The second group describes the "home base" of defendants, using the accepted principle of habitual residence. For business entities, an equivalent is created by use of "place of incorporation," which is the place which gives the entity its existence and personality. Since such legal entities always act through agents, two additional grounds are added for business entities - "management and control" and "principal place of business." These are consistent with decisions which have gone beyond a simplistic reliance on "place of incorporation" for all purposes. Almost all incorporation statutes mandate being subject to the authority of the courts of the place of incorporation. "Management and control" and "principal place of business" depend on the particular circumstances of the case and the issues raised by it.

The third ground reflects the development of jurisprudence by the Supreme Court in Morguard and subsequent cases. The concept was developed with respect to recognition within Canada of other Canadian judgments. It has, however, been applied to non-Canadian judgments, even though the arguments relating to the comity between units within a federal state are less compelling in other circumstances. This issue has been discussed at differing levels of intensity in a number of cases, including Moses v. Shore Boat Builders Ltd., (1) Old North State Brewing Company v. Newlands Services Inc., (2) Braintech, Inc. v. Kostiuk (3) and U.S.A. v. Ivey. (4) The concept of "real and substantial connection" is well known in conflict of laws generally.

Real and substantial connections

7. For the purpose of section 6(c), 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 :

- only in the case of default judgments, be it final or provisional; and

- 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.

Paragraph (a) should be read together with s. 6(b)(ii). The latter provides, in essence, that a court in the state of origin has jurisdiction in a proceeding against a corporation whenever that body is headquartered in the state of origin. This is general jurisdiction, that is, jurisdiction irrespective of the subject matter of the proceeding. Section 7(a), by contrast, is more restricted. It applies if the judgment debtor, which may be a natural person or a corporation, has an office or place of business in the territory of origin. The office or place of business need not be a principal one. Section 7(a) provides that a court in the state will have jurisdiction to give default judgment against the judgment debtor, based on a real and substantial connection, but this is special jurisdiction. That is, jurisdiction exists only with respect to certain proceedings. The proceeding must be "in respect of a transaction effected through or at that office or place". The word "transaction" implies a business context, but a proceeding "in respect of a transaction" could be for contractual, tortious (delictual) or restitutionary claims, so long as the claims arise out of a "transaction" effected through or at the relevant location.

The Working Group recognized that sub-paragraph (b)(ii) could raise issues for electronic commerce. Given other work undertaken by the Conference, the Working Group decided to leave sub-paragraph (b)(ii) as is and note that it may need to be modified in the future as the law in the area of electronic commerce develops.

[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.

Part 3: Enforcement Procedure

Enforcement

Section 9--Registration of a foreign judgment

9.(1) In this part, "registration" and "registered" refer to the procedure, whatever its form, that is prescribed by regulation to enforce a foreign judgment under this Act.

(2) Upon registration, and subject to subsection (5), a foreign

judgment must be enforceable as if it were a judgment of the enforcing court.

(3) If the foreign judgment is in respect of two or more claims that are severable from each other, the registration procedure must permit a judgment creditor to elect to limit registration to one, or some, of the claims.

(4) the registration procedure must permit a foreign judgment to be enforced in part where it has been partly satisfied or where the judgment creditor so elects.

(5) The enforcing court has the same control and jurisdiction over a registered foreign judgment as it has over judgments given by itself.

(6) A registered foreign judgment may not be enforced by sale or other disposition of any property of the judgment debtor before the expiration of [30] days, or such longer period as the enforcing court may order, after the judgment debtor has had notice of the registration proceeding.

(7) Nothing in this part affects the right of a person to enforce a foreign judgment by bringing an action on the judgment, but the judgment must meet the substantive requirements for enforcement as defined by this Act.

Comments: This draft reflects a compromise between two approaches to defining the procedure for enforcement of foreign judgments. One approach would leave the procedure entirely to be defined by the enacting jurisdiction, whether by regulation or by statutory provision. This would allow too much variation from one province or territory to another. The other would define the procedure exhaustively in the model Act. This

would create difficulties in terms of harmony with long-established procedures in each jurisdiction. The compromise proposed here is to set certain parameters for the procedure but permit the details to be set by regulation in each jurisdiction. Section 9 defines the effect that the procedure must have, and section 10 sets minimum requirements for what the procedure must include.

The expression "registration" is used, but the definition in subsection (1) is intended to include any procedure by which a foreign judgment is made enforceable in the same manner as a local judgment. This would include, notably, the Quebec procedure under which an application is made to the court to render the judgment executory in Quebec, and the court's order is the means by which this is achieved. It is immaterial for the purposes of the definition whether the "registration" is ex parte, with notice and an opportunity to oppose enforcement being given to the debtor afterwards, or the "registration" is made only after the debtor is given notice and an opportunity to oppose. Subsection (5) is designed to ensure that no property of the debtor can be sold or disposed of until a defined period has elapsed after the debtor has received notice that the "registration" has been applied for or, in the case of an ex parte registration, has taken place.

Subsections (2), (3) and (4) of section 9 define what "registration" must achieve. It must give the foreign judgment the same effect in the enacting jurisdiction as a local judgment (subsection (2)). It must permit the judgment creditor, if a foreign judgment is given on two or more severable claims, to enforce one or more of the claims but not enforce the others (subsection (3)). And it must give the enforcing court the same control over the registered foreign judgment as it would have over a local judgment (subsection (4)).

Subsection (6) of section 9 preserves the procedure of bringing an

ordinary action on the foreign judgment, but stipulates that the Act governs the substantive requirements that the foreign judgment must satisfy to support the action.

Section 10--Registration procedure

10(1) The registration procedure must provide for the filing by the judgment creditor in the enforcing court of:

(a) a copy of the foreign judgment certified as true by a proper officer of the original court;

(b) if the foreign judgment was not given in one of the official languages of Canada, English or French, as required by the rules of procedure of [the enforcing court], a certified translation of it into that language;.

(c) a sufficient indication to the judgment debtor of the grounds in section 6 on which the judgment creditor says the foreign court had jurisdiction;

(d) the order of the foreign court that the judgment creditor seeks to make enforceable, and any modification of the order that the judgment creditor says is necessary for the order to operate as if it had been made by the enforcing court.

(2) The enforcement procedure must provide for notice to the judgment debtor that includes the information specified in subsection (1).

(3) The regulations made under this Act may provide for the recovery by the judgment creditor of costs from the judgment debtor in

relation to the registration procedure.

Comments: The requirements that section 10 sets out for the "registration" procedure are the minimum that was thought necessary to ensure an adequate degree of uniformity among the enacting jurisdictions. The court (subsection 1) and the judgment debtor (subsection 2) must be provided with the text of the foreign judgment, translated into English or French if necessary; a sufficient indication of the grounds of jurisdiction, among those in section 6 of the Act, on which the judgment creditor relies; and a specific statement of the order of the foreign court that the judgment creditor seeks to enforce. If any modification of that order is, according to the judgment creditor, necessary to the order to operate as if it were an order contained in a local judgment, the creditor must specify what that modification is. Subsection (3) adds to these informational requirements a substantive provision that the enacting jurisdiction may (or may choose not to) provide, in the regulations under the Act, for the recovery by the judgment creditor from the judgment debtor of costs in relation to the registration procedure.

Section 11--Currency conversion

11(1) If a foreign judgment orders the payment of a sum of money expressed in a currency other than the currency of Canada, the judgment as registered must include a statement that the money payable under the judgment will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in [the enforcing jurisdiction] at the close of business on the conversion date.

(2) For the purposes of this part, the conversion date is

[option A] the day the foreign judgment became enforceable in the original jurisdiction.

[option B] the day the judgment is registered in the enforcing jurisdiction.

[option C] the last day, before the day on which a payment under the registered judgment is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

[option D] the day the foreign judgment became enforceable in the original jurisdiction or such later day as the enforcing court considers will result in the judgment creditor being most truly and exactly compensated.

(3) A registered foreign judgment is deemed to be a judgment for the amount of the currency of Canada that is provided in the statement referred to in subsection (1).

Comments: Four options are provided here for the date of currency conversion.

Option A is the old common law rule (notionally based on the date of breach of the obligation to pay the judgment), as well as the rule adopted in art. 3161 C.C.Q. It has the advantage of allowing a sum certain of Canadian dollars to be stated upon registration, but the disadvantage that the creditor loses, in terms of the foreign currency, if the Canadian dollar devalues against the foreign currency between the date of the foreign judgment (which is the conversion date under this option) and the date when the creditor gets paid. By the same token the debtor's obligation increases, in terms of the foreign currency, if the Canadian dollar

appreciates in value against that currency between the two dates.

Option B also has the advantage of certainty and reduces the period of time during which the creditor risks devaluation, and the debtor risks appreciation, of the Canadian dollar against the foreign currency.

Option C is the solution adopted in the Foreign Money Claims Act, consistently with the common law rule (the "date of payment" rule) adopted by the House of Lords in the Miliangos case. The Foreign Money Claims Act solution is the one provided for in the B.C. Court Order Enforcement Act, s. 31. It is theoretically the fairest conversion date, if one assumes that the creditor is most accurately compensated by receiving--possibly years after the foreign judgment--the amount of foreign currency stipulated by the judgment or the Canadian dollars that are needed, as of the time of payment, to purchase that amount of foreign currency.

Option D has the advantage and the disadvantage of flexibility. As drafted it would provide for the date of the foreign judgment as the default rule, but the date of registration or the date of payment/Foreign Money Claims Act rule could equally be made the default rule. The enforcing court is given a discretion to vary the conversion date in the interests of compensating the creditor most fairly. Thus, if it is clear that the judgment creditor would have converted the money paid under the foreign judgment, had it been promptly paid, into Canadian dollars at that time, the date of the foreign judgment would be appropriate. If the creditor would have kept the foreign currency, for instance because that is its working currency, the date of payment could be selected. Other circumstances might lead to selection of an intermediate date.

Section 12--Interest

12 The interest payable on a registered foreign judgment is

(a) the interest payable on the foreign judgment under the law of the original jurisdiction from the day on which the foreign judgment became enforceable in the original jurisdiction until the conversion date, and

(b) the interest payable on a judgment of the enforcing court under the law of the enforcing jurisdiction from the conversion date until the day on which a payment is made under the registered judgment by the judgment debtor to the judgment creditor

[unless the enforcing court considers that a different rule will result in the judgment creditor being most truly and exactly compensated].

Comment on section 12:

The proposed rule is based on the assumption that the rule for post-foreign-judgment interest should parallel the rule for currency conversion in section 11. That is, the foreign judgment should bear interest at the relevant foreign interest rate until the date as of which the obligation is converted from the foreign currency into Canadian currency, and after that date should bear interest at the same rate as a local judgment. Thus if the original jurisdiction has a rapidly devaluing currency, it would usually have a correspondingly high interest rate, and the foreign judgment ought to bear interest at that rate as long as the obligation is denominated in that currency, i.e. up to the date of conversion. After the date of conversion into Canadian currency, the relevant local interest is appropriate. The bracketed clause would allow a court to vary the interest rate if it considers that the application of the stipulated rule would over- or undercompensate the judgment creditor.

Another solution would be the one used in ss. 2-3 of the Foreign Money

Claims Act, namely, to allow the issue of interest to be dealt with by regulation. The Act also permits the court, in the absence of an appropriate rule in the regulations, to apply a rate of interest, "having regard to rates that are being paid on the other currency in a country where that currency circulates as legal tender" (s. 2(2)).

Part 4: Final Provisions

Power to make regulations

13. The [body in the enacting jurisdiction with authority to do so] may make regulations that are considered necessary or advisable respecting the application of this Act.

1(1993), 106 D.L.R. (4th) [1994] 1 W.W.R. 112 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

2 (1998), 155 D.L.R. (4th) 250, 47 B.C.L.R. (3d) 258 (C.A.)

3 (1999), 171 D.L.R. (4th) [1999] 9 W.W.R. 133 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

4 (1995), 26 O.R. (3d) 533, affirmed (1996), 30 O.R. (3d) 370 (Ont. C.A.).