UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS ACT: UNIFORM LAW CONFERENCE OF CANADA (1991); ENFORCEMENT OF CANADIAN JUDGMENTS ACT, S.B.C. 1992, c. 37*.

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It seems arguable that since each province has legislative authority over the administration of justice *in* the province the federal residual power encompasses the capacity to make laws with respect to the administration of justice *between* the provinces. This could entail the authority to pass legislation like that in effect in Australia, providing a national mechanism and uniform standard for interprovincial enforcement of judgments.[1] However, the federal government has never demonstrated much interest in legislating in this field, and the current direction of constitutional change does not provide much promise that it will.

The common law provinces have been prepared to act, and happily a nearly harmonious (though hardly ideal) solution has been achieved due to their willingness to adopt model legislation of the Uniform Law Conference. Along with such matters as insurance and chattel security, intra-Canadian enforcement of judgments was one of the chief early preoccupations of the Conference of Commissioners on the Uniformity of Legislation in Canada. At its seventh annual meeting in 1924 it approved a model Reciprocal Enforcement of Judgments Act, which was subsequently em-

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* At the time of writing the British Columbia Act was not in force.

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[1] Service and Execution of Process Act, 1901 (Cth), Part IV, as am. by the Service and Execution of Process Amendment Act 1991, No. 124 of 1991. This statute is based on the explicit power conferred by s. 51 (xxiv) of the Australian Constitution. My ex-colleague Alastair Bissett-Johnson was a proponent of the view that the Canadian federal government could and should pass similar legislation and he found some support in the judgment of Pigeon J. in *Interprovincial Co-operatives Ltd.* v. *The Queen*, [1976] 1 S.C.R. 477, (1975), 53 D.L.R. (3d) 321. See also J. Blom, Case Comment (1991), 70 Can. Bar Rev. 733, at p. 747.

[2] Proceedings of the Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1924), pp. 14-15.

braced by most of the common law provinces. Under the presidency of Horace Read in 1957-58 a revised model act was approved,[3] and it too was adopted in nearly identical form by all the common law provinces and both territories. Now the decision of the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*[4] has prompted the Uniform Law Conference to draft a new model act. British Columbia, on the advice of its Law Reform Commission,[5] has already enacted it, with other provinces certain to follow. That model act and the nearly identical British Columbia legislation are the subject of this note.

That some legislative action was necessary is undisputed. The old uniform acts had paralleled the common law and that had changed. The reciprocal enforcement legislation based on the 1924 and 1958 model acts had not altered the common law barriers to enforcement. It merely provided a cheaper, quicker device whereby those judgments which were already enforceable by suit at common law could be registered in reciprocating jurisdictions. The bars to registration under the statutes were roughly congruent with those at common law, with the consequence that unless a defendant was served within the initial jurisdiction or submitted to its assertion of adjudicative jurisdiction, that defendant could resist enforcement of the resulting judgment even in those provinces which had adopted the model legislation. The Supreme Court's judgment in *Morguard* transformed the situation at common law, at least for intra-Canadian judgments. According to *Morguard,* so long as the courts of one province took jurisdiction in accordance with "principles of order and fairness"[6] any resulting judgment should be enforceable in another Canadian province. A consequence of *Morguard*'s lowering of the common law barriers to enforcement was that the statutory bars to enforcement under the uniform acts were tougher than the common law ones. Since the scheme of the uniform legislation had always been to set forth conditions for registration

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[3] Proceedings of the 40th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1958), pp. 20-21. Read was the author of the leading Commonwealth text on enforcement of foreign judgments, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938).

[4] [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217. Hereinafter *Morguard.*

[5] Law Reform Commision of British Columbia, Report on the Uniform Enforcement of Canadian Judgments Act (1992).

[6] That phrase occurs three times in *Morguard, supra,* footnote 4 at pp. 1097, 1102, 1103 (S.C.R.), 269, 273, 274 (D.L.R.), 233, 237, 238 (W.W.R.). The more commonly remembered phrase from *Morguard* is "real and substantial connection". However I believe it is important not to forget that the Supreme Court's fundamental concern in *Morguard* was with principles of order and fairness, and that the requirement of a real and substantial connection with the original jurisdiction was simply an effort to concretize and make operational this more basic concept.

which duplicated the common law preconditions for enforcement, some revision was obviously in order.

Change was not long in coming. Within a year of *Morguard* the Uniform Law Conference had drafted and approved the new Uniform Enforcement of Canadian Judgments Act (UECJA), and British Columbia passed it in June, 1992. Probably other provinces will have enacted it by the time this is published, and since, like British Columbia's, their statutes will likely differ only in minor ways from the model act, my references in this note will be to the UECJA alone.

The model act's scheme is simple. As its title indicates, the requirement for reciprocal arrangements which had been central to the 1924 and 1958 acts is dropped. Once a province has adopted the UECJA, final money judgments (other than maintenance orders[7]) emanating from other provinces may be registered in the enacting province by the simple expedient of filing a certified copy of the original judgment and paying a filing fee which may later be recouped from the judgment debtor. Once registered, such judgments are accorded the full effect of judgments of the superior courts of the enacting province. The UECJA provides that interest accrues on judgments at the rate applicable in the province where they were made until they are registered. Thereafter the interest rate (in the enacting province) is that of the enacting province. The limitation period for registration is the shorter of the limitation period for judgments in the original province and that in the enacting province.

A central feature of the UECJA is its list of defences which a judgment debtor may raise to oppose enforcement of a registered extra-provincial judgment in the enacting province. That list is brief. An order staying or limiting the enforcement of the original province's judgment may be made if (1) an order staying or limiting the judgment is in effect in the province where the judgment was made, (2) the debtor has brought or intends to bring a proceeding to set aside or vary the judgment in the original province, (3) some limiting order is permitted under the statutes of the enacting jurisdiction relating to restrictions on creditors' remedies, or (4) the original judgment is contrary to the public policy of the enacting jurisdiction.

The scheme of the UECJA, and in particular its elimination of the requirement for reciprocal arrangements, is excellent, and the UECJA's drafters are to be commended on its simplicity. I have just two concerns

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[7] S. 2(1)(a) of the UECJA provides that it does not apply to judgments "for maintenance or support". Those continue to be covered by the reciprocal enforcement of maintenance orders legislation in force in all provinces and territories. S. 2(1)(b) also excludes from the UECJA judgments "for the payment of money as a penalty or fine for committing an offence". The British Columbia Enforcement of Canadian Judgments Act introduces an additional exclusion not found in the UECJA. S. 2(1)(b) of the B.C. act states that it does not apply to judgments "for the payment of less than the amount by which the jurisdiction of the Provincial Court is limited under the *Small Claims Act*".

with its substantive provisions, both of which lie with the defences which may be raised to enforcement of another province's judgments. I suggest the drafters were mistaken in retaining the fourth-mentioned public policy defence. I have maintained elsewhere that this should not be a bar to intra-Canadian enforcement of judgments in the post-*Morguard* era[8] and will only briefly rehearse that argument here. The right to decline recognition of an otherwise enforceable foreign judgment on grounds of public policy is limited to judgments based on substantive laws which are deeply repugnant to the jurisdiction from which enforcement is requested. Such a standard should never be met by a law in force in another Canadian province, and in pre-*Morguard* days it hardly ever was. *Morguard* may be read as including a strong hint that henceforth the public policy defence should never be invoked for intra-Canadian judgments[9] and the UECJA could easily have taken the step of making that explicit.

Far more troubling is the UECJA's section 6(2), which provides that courts of the enacting jurisdiction shall not stay or limit the enforcement of registered judgments on the grounds that the original court lacked jurisdiction "under principles of private international law". The scope of this provision is unclear. Possibly its goal was to make it obvious that the old common law bars to enforcement—that the defendant was not served within the territory of the original court and had not submitted to its jurisdiction—were henceforth unavailable. These common law rules were sometimes referred to as rules of private international law, though they stemmed from no supra-national authority and were, insofar as their derivation was concerned, no more "international" than any other common law rule. That such bars to enforcement should be eliminated from the uniform enforcement legislation in the wake of *Morguard* is beyond doubt, but the UECJA's language is troublesome. In *Morguard* the Supreme Court of Canada eliminated those old common law bars to enforcement but substituted a new one. The court stated that judgments of one Canadian province should be enforced in other provinces so long as the original province took jurisdiction in accordance with principles of order and fairness. Arguably this limitation—namely that judgments emanating from courts which asserted jurisdiction otherwise than in accordance with principles

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[8] V. Black and J. Swan, New Rules for the Enforcement of Foreign Judgments (1991), 12 Advocates' Quarterly 489, at pp. 506-507.

[9] *Morguard, supra,* footnote 4, at pp. 1103 (S.C.R.), 274 (D.L.R.), 238 (W.W.R.). It is true that in the passage referred to the court only affirmed that unfair *process* in the original proceeding was unlikely to occur in Canada (and therefore not a concern for intra-Canadian enforcement), and that the Supreme Court said nothing about unfair substantive laws. However there are a number of aspects of *Morguard* which lend support to an interpretation which would eliminate the public policy defence to enforcement for intra-Canadian judgments. Among these are the court's appeal to the American model (where that defence does not exist for interstate judgments), and more generally its recognition that minimization of bars to enforcement is inherent within a federation.

of order and fairness should be denied enforcement in other provinces—is now a Canadian rule of private international law. The judgment of La Forest J. in *Morguard* expressly refers to it as such.[10] It is inexplicable why the UECJA would wish to eliminate it. Surely the drafters cannot have assumed that the Supreme Court's insistence that only those judgments where the original court had fairly assumed jurisdiction should be enforced was some inconsequential matter. It was based in part on the American minimum contacts test, and challenges to state court jurisdiction on the failure to meet that standard are among the most frequently litigated civil matters in the United States. Cases on that issue have gone to the Supreme Court of the United States ten times in the past twelve years,[11] so clearly *Morguard*'s requirement that the original assertion of jurisdiction be fair is no insignificant issue.

Possibly the drafters' thinking in section 6(2) was that defendants should be required to raise any defence to the propriety of the adjudicative jurisdiction of the original tribunal only in that original proceeding. However this seems unfair. Take the example of a defendant in British Columbia served with the process of the Nova Scotia court in circumstances where the defendant has never had anything to do with Nova Scotia, something which is permitted by Nova Scotia's Civil Procedure Rule 10. In pre-*Morguard* days such a defendant had the option of remaining at home and ignoring the Nova Scotia proceedings. The resulting Nova Scotia judgment would have been unenforceable in British Columbia since the defendant had neither been served in Nova Scotia nor submitted to its jurisdiction. In the post-*Morguard* world those defences no longer exist, but the Nova Scotia judgment will be enforced in British Columbia only if Nova Scotia's assertion of jurisdiction comported with principles of fairness and order. In the example I have given it would seem that it did not, an argument the defendant could raise when the judgment was brought to British Columbia for enforcement. The UECJA's section 6(2) appears to remove this argument from the defendant in the British Columbia courts, at least if one assumes that the *Morguard* fairness requirement is a rule of private international law. In the result, residents of provinces which enact the UECJA who have the misfortune to be served with the process of another province which lacks substantial contacts with them or with the cause of action will have but one place to raise that objection: the province whose assertion of jurisdiction is, by definition, unfair. It is true that rights and

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[10] *Supra,* footnote 4, at pp. 1109 (S.C.R.), 278 (D.L.R.), 242 (W.W.R.).

[11] *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980); *Rush* v. *Savchuk,* 444 U.S. 320 (1980); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinée,* 456 U.S. 694 (1982); *Keeton* v. *Hustler Magazine Corp.,* 465 U.S. 770 (1984); *Calder* v. *Jones,* 465 U.S. 783 (1984); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall,* 466 U.S. 408 (1984); *Burger King Corp.* v. *Rudzewicz,* 471 U.S. 462 (1985); *Asahi Metal Industry Co. Ltd.* v. *Superior Court,* 480 U.S. 102 (1987); *Van Cauwenverghe* v. *Biard,* 486 U.S. 517 (1988); *Burnham* v. *Superior Court,* 110 S. Ct. 2105 (1990).

defences must be asserted in a timely fashion, and that if they are not they may be lost, but it is going too far to say that the only place a defendant may attack the impropriety and unconstitutionality of a given assertion of adjudicatory jurisdiction is in that unfair forum. I suggest that this defect should be remedied by including in the UECJA the following bar to enforcement: judgments should not be enforced if they emanate from the courts of a province whose assertion of jurisdiction was so lacking in contacts with the defendant or with the cause of action that its assertion of jurisdiction did not comport with principles of order and fairness. This is vague language for a statute, but it is derived directly from *Morguard* and will undoubtedly be glossed and concretized by decisional law.

A final problem with the UECJA lies with section 11(a) which provides that it only applies to judgments made in a proceeding commenced after it comes into force. Of course statutes are normally made applicable only prospectively, but it is not clear that this was necessary for the UECJA. *Morguard* lowered the bars to interprovincial enforcement, and since it was judge-made law it was retroactive. The scheme of the UECJA is to parallel *Morguard* but to permit creditors to register their judgments rather than to have to bring suit on them. No one would be unfairly surprised if it had been made retroactive.

These problems with the statute, in particular section 6(2), present a dilemma. For provinces to refuse to enact the UECJA, or to decide to enact some modified version of it, would produce a lamentable lack of uniformity.[12] However the existing model act, while it proceeds in the right direction, seems deeply flawed in execution, and I suggest that the Uniform Law Conference return to the drawing board.

[12] I am aware that the International Law Section of the Canadian Bar Association (Ontario) has written the Attorney General of that province voicing concerns similar to those set out here.