

**AFTER THE HAGUE: SOME THOUGHTS ON THE IMPACT ON CANADIAN
LAW OF THE CONVENTION ON CHOICE OF COURT AGREEMENTS⁺**

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⁺This article elaborates on a presentation and subsequent participation in a panel discussion on implementation of the Hague Convention on Choice of Court Agreements by H. Scott Fairley for the International Law Association, American Branch, International Law Weekend Programme: *International Norms in the 21st Century: Development and Compliance Revisited*, New York City, 20-22 October 2005.

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INTRODUCTION

The Hague Convention on Choice of Court Agreements¹, signed by member states of the Hague Conference on Private International Law in June 2005, is an important step in harmonizing national conflict of laws rules that sometime strain to manage the burgeoning traffic in transnational litigation generated by global commerce. This development is particularly important for Canada, a nation dependent on the benefits of international business and trade, and particularly so given the recent *sui generis* evolution of Canadian conflict of laws rules against which the HCCCA may provide a welcome panacea. Nevertheless, given the narrow focus and application of the HCCCA to “exclusive choice of court agreements concluded in civil or commercial matters”, essentially a designation by private contracting parties of the court(s) of one Contracting State to the HCCCA,² much of the status quo in the national law of Contracting States will remain undisturbed. Whether the HCCCA ultimately gains broad acceptance and when it will come into force are also open questions that only an indeterminate amount of time will answer.

Our purpose here is to give a succinct account of the applicable status quo in Canada with respect to recognition and enforcement of foreign judgments and the likely impact of the HCCCA thereon, assuming the Convention does come into force and

¹ Hague Conference on Private International Law, 20th Sess., Special Commission on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, *Hague Convention on Choice of Court Agreements*, done at the Hague, 30 June 2005 (hereinafter, the “HCCCA”).

Canada follows through in ratifying it. We also focus on the Uniform Law Conference of Canada's *Uniform Enforcement of Foreign Judgments Act*³, a model law for possible subsequent adoption by all Canadian jurisdictions, the development of which paralleled Canadian participation in the Hague project and which was conceived as a domestic legislative response to many of the same issues addressed by the HCCCA.

THE STATUS QUO

Prior to the Supreme Court of Canada's seminal ruling in *Morguard Investments v. De Savoye*⁴, Canadian courts rigorously adhered to the English common-law approach to recognition and enforcement of foreign judgments. This approach allowed that, unless the Canadian defendant had voluntarily attorned to the jurisdiction of the foreign court, or was otherwise deemed to be found within that jurisdiction in certain circumstances,⁵ the foreign proceeding could be safely ignored. The foreign plaintiff would be required to sue on its judgment, against which a full defence on the merits could then be waged at home. New Brunswick's *Foreign Judgments Act*⁶ and Saskatchewan's *Foreign*

² *Ibid.*, Art. 3.

³ *Uniform Enforcement of Foreign Judgments Act* ("hereinafter, the "*Uniform Act*"), Uniform Law Conference of Canada (hereinafter, the "ULCC"), 14 August 2003. Text available at: <http://www.ulcc.ca/en/us/>.

⁴ [1990] 3 S.C.R. 1077 (hereinafter, *Morguard*).

⁵ see *Emanuel v. Symon*, [1908] 1 K.B. 13. 302 (C.A.), at 309 (per Buckley L.J.):

In actions *in personam* there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

For critical comment on the pre-*Morguard* approach of Canadian courts, see Vaughan Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada", (1989) 9 Oxford J. Leg St. 547.

⁶ R.S.N.B., c.90, s.2.

*Judgments Act*⁷ effectively codify the pre-*Morguard* rules, only recognizing a foreign court's jurisdiction where the defendant is, at the time of the commencement of the action, ordinarily resident in the foreign country, or where the defendant voluntarily attorns, or has expressly or impliedly agreed to submit, to the foreign jurisdiction.

Somewhat surprisingly in retrospect, given that Lord Justice Buckley's decision in *Emanuel v. Symon* focused specifically on foreign judgments, Canadian courts, before *Morguard*, applied the English approach co-equally to the enforcement of rulings from one province to another within the federation. Thus, in either case, recognition and enforcement required a new action and potentially a new trial. Legislatures in all Canadian provinces, except Quebec, attempted to address the enforcement issue as between sister provinces with reciprocal enforcement of judgments legislation.⁸ Some provinces' reciprocal enforcement legislation went further, listing a number of foreign jurisdictions as "reciprocating states" where complementary legislation has been adopted in cooperating foreign jurisdictions. For example, British Columbia enacted the *Court Order Enforcement Act*⁹, which allows a judgment creditor from a reciprocating state – including a number of foreign countries – to apply to the Supreme Court of British Columbia to have the judgment registered as a judgment of that court.¹⁰ Nevertheless,

⁷ R.S.S. 1978, c. F-18.

⁸ See *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5; R.S.A. 2000, c. R-6; R.S.S. 1996, c. R-3.1; C.C.S.M. c. J20; R.S.Y. 2002, c. 189; R.S.N.W.T. 1988, c.R-1 as duplicated for Nunavut by s. 29 of the Nunavut Act, S.C. 1993, c. 28; R.S.N.B., c. R-3; R.S.N.S. 1989, c. 389; R.S.P.E.I. 1988, c. R-6; R.S.N.L. 1990, c. R-4; *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 (hereinafter, the "COEA"); but see also *Civil Code of Québec* Arts. 3155 & 3156; Quebec treats all judgments originating from outside the province, whether they originate from another province or another country, as foreign judgments, and its judgments receive the same treatment in the other provinces.

⁹ See COEA, *ibid*.

¹⁰ *Ibid*, s. 29. The reciprocating states are all provinces and territories of Canada except Quebec, most of the states of Australia, certain Pacific islands, the Federal Republic of Germany, the Austrian Republic, the

under the COEA, the out-of-province or foreign judgment, as the case may be, will not be registered if the defendant was neither carrying on business nor ordinarily resident in the other jurisdiction, and did not voluntarily appear or otherwise submit to the other jurisdiction.¹¹ Thus, the COEA does not address those cases in which a plaintiff has a judgment from another Canadian province or foreign country that clearly had jurisdiction over the subject matter of the dispute, but the defendant was not a resident of that province or foreign country and did not appear. Therefore, while this reciprocating legislation streamlines the process of recognition and enforcement, substantively it still fails to take plaintiffs much beyond the rigid, conservative confines of *Emanuel v. Symon*. Indeed, the Supreme Court of Canada rendered its groundbreaking decision in *Morguard*, a British Columbia case, within the context of the substantive shortcomings of the COEA.

Morguard eschewed the traditional English formula in relation to the inter-provincial context, importing the American constitutional concept of “full faith and credit”¹² as between co-ordinate jurisdictions within national boundaries, and posited a new formula. The enforcing court would recognize and enforce the judgment of the originating court, precluding any further defence on the merits, provided:

1. The adjudicating court had properly exercised jurisdiction under its own rules; and
2. The enforcing court could satisfy itself that there was “a real and substantial connection” between the adjudicating jurisdiction and determinative features of

United Kingdom (pursuant to Schedule 4 to the Act), and, in the U.S.A., the following States: Washington, Alaska, California, Oregon, Colorado, and Idaho.

¹¹ *Supra* note 8, s. 29(6)(b).

¹² *United States Constitution*, Art IV, §1.

the *lis* or the defendant as a party.¹³

Further, the *Morguard* Court, in prophetic unanimous reasons in *obiter* authored by Justice LaForest, suggested that the same approach might apply to foreign judgments of comparably civilized jurisdictions. Justice LaForest premised his reasons on the notion of “international comity”, which he described as

the recognition [that] one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹⁴

Justice LaForest resurrected this 19th-century notion, borrowed from American jurisprudence, in light of late 20th-century realities placed on a trade-dependent country:

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under the circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.¹⁵

The LaForest opinion added that “(u)nder these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for a reappraisal.”

Lower courts across Canada enthusiastically took up this invitation to a dramatically liberalized approach and their endorsements entailed sometimes harsh consequences for

¹³ *Morguard*, *supra* note 4 at 1103 – 1109; for discussion, see H. Scott Fairley, “Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty” (1996) 2 Can. Int’l Lawyer 1 at 2 (hereinafter, “A New Age of Uncertainty”); Jost Blom, “Reform of Private International Law by Judges,” in *Reform and Development of Private International Law [:] Essays in Honour of Sir Peter North*, pp. 3 -49 (J. Fawcett, ed.) (Oxford: Oxford University Press, 2002).

¹⁴ *Morguard*, *supra* note 4 at 1096.

¹⁵ *Ibid.* at 1098.

Canadian defendants.¹⁶ The retrospective application of the new rule caught many defendants who had decided, pre-*Morguard*, not to defend themselves against foreign law suits.¹⁷ It also caught those defendants whose exposure to damages awards — notably from U. S. civil juries — were far in excess of anything a Canadian court would have awarded had the defendants been sued in a Canadian jurisdiction at first instance.¹⁸ Nevertheless, the Supreme Court chose not to revisit such concerns until *Beals v. Saldanha*¹⁹, in which it affirmed the international comity branch of *Morguard*. With that, the lower court applications of *Morguard* to transnational cases were essentially vindicated, including those that yielded harsh results from the Canadian defendant's perspective such as in *Old North State Brewing Co.*²⁰, considered in more detail below.

The substantial connections test, as laid down in *Morguard*, forecloses any re-opening of a case on its merits. In the wake of adopting this new test in the enforcement of foreign judgments, the question arises whether existing defences to enforcement, elaborated under the previous Anglo-Canadian common-law approach of formal attornment, should be revised. The Supreme Court of Canada, in *Beals*, answered this question — essentially, but not unequivocally — in the negative. Once the Court satisfies itself that a substantial connection to the foreign jurisdiction exists, defendants

¹⁶ See, *Fairley*, *supra* note 13, Blom, *supra* note 13, *passim*.

¹⁷ See e.g., *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R.(4th) 654 (B.C.C.A.), leave to appeal refused, (1994) 24 C.P.C. (3d) 294 (S.C.C.), post -*Morguard* enforcement of pre-*Morguard* Alaska Judgment; for other examples, see discussion in Blom, *supra* note 13 at 38-39; Fairley, *supra* note 13 at 3-4.

¹⁸ See: Jost Blom, "The Enforcement of Foreign Judgments: Morguard Goes Forth Into the World", (1997) 28 Can. Bus L.J. 373; Fairley, *supra* note 13 at 3-5; H. Scott Fairley, "In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments" in C. Carmody et al., eds., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore, MD: American Society of International Law, 2003) at 57 (hereinafter, "In Search of a Level Playing Field").

¹⁹ [2003] 3 S.C.R. 416 (hereinafter, *Beals*).

are left only with certain impeachment defences — namely, natural justice, public policy, and fraud — to oppose recognition and enforcement of the foreign judgment.

The aforementioned defences have – and, thus far, continue to retain – relatively narrow application. For a defence based on natural justice, the enforcing court measures the foreign judgment against its own standards of natural justice, but does not impose requirements of conformity with its own procedural rules. The public policy defence must establish that the foreign law, on which the judgment is founded, is on its face, not in its application, offensive to the fundamental morality of the Canadian legal system.²¹ Finally, a “fraud” that was adjudicated upon in the foreign court cannot be re-litigated unless newly discovered and material evidence has become available.²²

Morguard, and later *Beals*, significantly altered the legal landscape for the enforcement of foreign judgments in Canada without any assurance of similarly liberal treatment for Canadian judgments presented for enforcement in other jurisdictions. The perceived result is a playing field tilted against Canadian businesses, particularly those in the position of defendant.²³

Though, as noted above, some provinces have designated several countries as reciprocating jurisdictions in their reciprocal enforcement legislation, in order to facilitate enforcement of judgments through a registration mechanism, domestic rules alone do not guarantee reciprocal treatment by other countries, as is the case under international

²⁰ See *infra* note 36.

²¹ *Beals*, *supra* note 19 at paras. 71 and 72; see also, *Beals v. Saldanha* (2001), 54 O.R. (3d) 641 (C.A.), at paras. 76-78 (per Doherty J.).

²² J.G. Castel & J. Walker, *Canadian Conflicts of Law*, 5th ed. (Toronto: Butterworths, 2002) at p. 14-25.

²³ See H.Scott Fairley “Open Season: Recognition and Enforcement of Foreign Judgments in Canada after *Beals v. Saldanha*” (2005) 11 ILSA J. Int’l Comp. L. 305.

treaties.²⁴ Canada is a party to two treaties in the field of enforcement of judgments: the 1984 *Convention between Canada and the United Kingdom on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*²⁵, and the 1996 *Convention between Canada and France on Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance*.²⁶ As a simple “enforcement” convention, the Canada/United Kingdom Convention does not deal with jurisdictional issues and is limited to facilitating recognition and enforcement of judgments between the two countries.²⁷ The Canada/France Convention, signed in June 1996, is not in force because the implementing legislation has not yet been adopted. One interesting feature of the Canada/France Convention is that it provides a list of bases of jurisdiction that can illustrate admissible grounds of jurisdiction.²⁸

²⁴ This is the case of Germany and Austria notably in BC as well as a number of Australian States in a few provinces that so provide.

²⁵ *Convention Between the United Kingdom of Great Britain and Northern Ireland and Canada Providing For the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (24 April 1984) (hereinafter the “Canada/United Kingdom Convention”).

²⁶ *Convention between the Government of Canada and the Government of the French Republic on Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance* (10 June 1996) (hereinafter the “Canada/France Convention”).

²⁷ Its application has remained fairly marginalized, most probably because it remains largely ignored by practitioners. Only a handful of cases have relied expressly on the Canada/United Kingdom Convention, such as in *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc* (1992), 6 C.P.C.3d 170 (Ont. Gen. Div.), and *J.B.S. Tooling Co. v. Upward Tool Group Inc.* (1996), 6 C.P.C.4th 191 (Ont. Gen. Div.). It was, however, ignored in *Union of India v. Bumper Development Corp* (1995), 36 C.P.C.3d 249 (Alta. Q.B.). The two Ontario cases have read the Canada/United Kingdom Convention as incorporating the *Morguard* test.

²⁸ *Supra* note 26, Art. 5:

The court of the State of origin shall be deemed to have jurisdiction within the meaning of this Convention if in particular:

- (a) The defendant had his or her habitual residence, if a natural person, or its principal place of business, if an artificial person, in the State of origin when the proceedings were started;
- (b) The defendant had a place of business or branch in the State of origin when the proceedings were started and was served in that State in connection with a dispute related to the activities of that place of business or branch;
- (c) In an action for damages in tort, quasi-delict or delict, the wrongful act occurred in the State of

LOOKING FORWARD

In the aftermath of *Morguard*, case law continues to develop in the common-law provinces regarding the application of the decision's principles and their extension to foreign judgments. Controversy and uncertainty remain as those within and outside the legal profession appreciate that the *Morguard* principle of comity amounting to full faith and credit might not always be acceptable because of the variety of legal systems around the world.

The Uniform Law

There is growing recognition in Canada of an unequal playing field in transnational litigation.²⁹ With this perspective in mind, the ULCC set about drafting the *Uniform Act*³⁰, under which it seeks to clarify the enforcement rules applicable in common law provinces. The *Uniform Act* establishes a closed list of acceptable bases of jurisdiction, particularly for default foreign judgments, in order to limit the application of

origin;

(d) The claim is related to a dispute in connection with rights in rem in immovable property located in the State of origin;

(e) The defendant expressly submitted in writing to the jurisdiction of the court of the State of origin;

(f) The defendant appeared without challenging the court's jurisdiction or presented a defence on the merits;

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

(h) 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;

(i) In matters of custody of and access to children, the child had his or her habitual residence in the State of origin at the commencement of the proceedings on the merits;

(j) In matrimonial matters, both spouses had their last common habitual residence in the State of origin.

²⁹ See "In Search of a Level Playing Field", *supra* note 18.

the “real and substantial connection” test imposed by the *Morguard* ruling.³¹ It also enables the enforcing Canadian court to exercise some discretion to verify the jurisdiction of the foreign court and, hence, determine whether enforcement is appropriate, as well as to limit the enforcement of excessive damages awards.³²

The ULCC, in drafting the *Uniform Act*, gave deep consideration to the Hague’s discussions on a comprehensive, worldwide draft convention on jurisdiction and the enforcement of judgments in order to ensure that some degree of congruity and complementarity will exist between legislation based on the *Uniform Act* and any Hague treaty or other treaty initiatives that may eventually emerge. What the *Uniform Act* does not do is purport to offer a competitive statutory regime that would interfere with current or future treaty initiatives on the same subject matter. To this end, the ULCC has expressly stated that the *Uniform Act* should apply only 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.³³ The *Uniform Act* is premised as general legislation that could be augmented by more specialized regimes such as the HCCCA and, thus, legislation based on the *Uniform Act* would not apply to the extent that a proceeding falls within the ambit of the HCCCA in a Canadian jurisdiction that has enacted and brought into force both regimes.

³⁰ *Supra* note 3.

³¹ *Ibid*, s. 8.

³² *Ibid*, s. 6.

³³ See ULCC Working Group on Enforcement of Foreign Judgments, *Uniform Enforcement of Foreign Judgments Act* (Revised Draft & Commentary), (Fredericton, NB: 10-14 August 2003).

To date, Saskatchewan is the only province that has introduced legislation³⁴ to adopt the *Uniform Act*, which will replace the province's much more restrictive *Foreign Judgments Act*.³⁵ Whether other provinces will enact similar legislation remains to be seen. Nevertheless, one expects that such legislation would help avoid, or at least minimize, the sometimes harsh results that can arise from unqualified applications of *Morguard* and *Beals*. How would the disposition of cases be influenced in the result?

Consider a recent post-*Morguard* decision of the British Columbia courts, *Old North State Brewing Co. v. Newlands Service Inc.*³⁶ There, the vendor ("V"), situated in British Columbia, and a purchaser ("P"), in North Carolina, where the goods were to be delivered, had signed a typical international sales contract for the delivery and commissioning of machinery. V sourced a substantial portion of its business abroad, much of it in the United States, and prudently inserted into its standard form contract language that it was to be governed by the laws of British Columbia and that the parties thereto would attorn to the courts of that jurisdiction. Dissatisfied with the machinery, P sued V for breach of contract in its home jurisdiction, not in V's home jurisdiction as specified in the contract. V did not attorn and P obtained a default judgment in North Carolina and an award of treble damages, pursuant to the local legislation, plus punitive damages and attorney's fees.

Predictably, P sought enforcement of the judgment in British Columbia, where V's assets were available to satisfy it. P succeeded at first instance, and the judgment

³⁴ Sask. Bill No. 101, *An Act respecting the Enforcement of Foreign Judgments*, 1st Sess., 25th Leg., Saskatchewan, 2004-05.

³⁵ *The Foreign Judgments Act*, R.S.S. 1978, c. F-18.

³⁶ *Old North State Brewing Co. v. Newlands Service Inc.* (1997), 47 B.C.L.R. (3d) 254 (B.C.S.C.); (1998) 58 B.C.L.R. (3d) 144 (C.A.).

was upheld on appeal. The enforcing court satisfied itself that “a real and substantial connection” existed between the *lis* and the originating court and, on the basis of *Morguard*, refused to permit a defence on the merits by V. Moreover, the trial court found that the parties’ choice of forum clause was non-exclusive. The British Columbia Court of Appeal agreed. It also agreed that enforcement of both punitive and treble damages by way of a default judgment in a foreign jurisdiction was not *per se* contrary to Canadian public policy.

The application of the *Uniform Act* to a case like *Old North* would possibly yield a much different and, at least from the perspective of the Canadian defendant, more fair result. When measured against domestic judicial standards and litigants’ expectations, the jurisdictional analyses of both the British Columbia Supreme Court and the Court of Appeal are consistent with sections 8 and 9 the *Uniform Act*. The *Uniform Act* does not expressly prevent a court from assuming jurisdiction based on a real and substantial connection when faced with an exclusive choice of court agreement under which the parties have agreed to be governed by a different jurisdiction. Nevertheless, section 10 of the *Uniform Act* is an “escape clause” that may have protected the Canadian defendant in *Old North*. Section 10 provides that a foreign judgment may not be enforced if the judgment debtor proves to the satisfaction of the enforcing court that it was clearly inappropriate for the foreign court to take jurisdiction. One may not be hard-pressed to argue that the North Carolina Court inappropriately assumed jurisdiction by ignoring the choice of forum provision in a typical international sales contract, and refusing to give effect to the reasonable expectations of two sophisticated parties.

Further, Article 5 of the *Uniform Act* gives the enforcing Court the power to

reduce enforcement of non-compensatory and excessive compensatory damages. It provides that, where 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, it will limit enforcement of that part of the award to the amount of similar or comparable damages that could have been awarded in the enforcing jurisdiction. Thus, in *Old North*, the British Columbia court would have been encouraged and likely would have exercised its discretion to eliminate the punitive and treble damages award of the North Carolina court. Canadian defendants will doubtless welcome such changes in judicial discretion influenced by the *Uniform Act* in future enforcement actions. At the same time, the *Uniform Act* is also a unilateral instrument that incoming litigants might view as undercutting the principles of comity articulated in *Morguard*. Nevertheless, in the absence of any alternatives on point, the *Uniform Act* appears necessary as general law in aid of a better balanced status quo – a statutory guide to fine-tune a system Canadian courts have not been prepared to fine-tune on their own.

The HCCCA

Unlike the *Uniform Act*, which focuses only on recognition and enforcement, but does so on a broad front, the HCCCA regulates both the jurisdiction to adjudicate and the recognition and enforcement of judgments, but on a narrower front: disputes governed in business to business choice of court agreements. Earlier convention drafts provided for jurisdiction on the basis of several enumerated grounds, including a connection between the cause of action and the court seized of the matter, which conforms with the *Morguard* principle that the jurisdiction must have a “substantial connection” to the action. While

the HCCCA, like its earlier drafts, still treats the jurisdiction of the rendering court as a linchpin, eschewing any general re-examination of either the choice of law or adjudication on the merits, it establishes only a single basis for jurisdiction, the parties' choice of forum, subject to safeguards that may be applied by both originating and enforcing courts.

The HCCCA, as a multilateral convention, creates a level playing field for Canadian parties to international litigation involving business-to-business contractual disputes. It will limit – though perhaps not to the extent of its earlier, wider-ranging drafts – the negative impact, real and perceived, of the unilateral liberalization of domestic rules on enforcement of judgments in one jurisdiction without reciprocal benefits accruing in others. International initiatives have the principal benefit of avoiding the risks of unilateralism that is counterproductive for important Canadian interests tied to international commerce, a central concern prompting the *Morguard obiter* to embrace comity between nations through their respective courts.³⁷ Further, though the HCCCA is considerably narrower in scope and effect than as originally envisaged³⁸, it offers the possibility of both realistic success in its adoption by member states, and a solid point of departure from which the Hague could very well expand upon, working toward more comprehensive rules for jurisdictional equilibration.

There are three basic rules upon which the HCCCA's operation turns:

³⁷ See H. Scott Fairley, "Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty", *supra* note 13.

³⁸ For a comprehensive discussion on the history of the Hague project and the difficulties encountered therein see: R.A. Brand, "Concepts, Consensus and the Status Quo: Getting to "Yes" on a Hague Jurisdiction and Judgments Convention" in C. Carmody et al., eds., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore, MD: American Society of International Law, 2003) at 71.

- 1) The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;
- 2) If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case; and
- 3) A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States.

Similar to the New York Convention³⁹, which has given a measure of predictability to treatment of international arbitration agreements, the HCCCA establishes rules for enforcing private-party agreements in respect of the forum for resolution of any resulting disputes, as well as rules for recognizing and enforcing the decisions issued by the chosen forum.⁴⁰ Thus, with litigation and arbitration on a more equal footing within an increasingly globalized legal and economic order, parties to trans-national transactions are able select the form of dispute resolution based on its individual merits rather than the parties' level confidence in the recognition and enforcement potential of that dispute resolution mechanism.⁴¹

By rationalizing the forum selection process in international contract litigation before national courts, the HCCCA aims to restore predictability – so critical to international commercial transactions – that judicial discretion exercised in such litigation can possibly undermine. Recall that, in *Old North*, the North Carolina Court's discretion to consider optimal jurisdictional placement of a dispute with international elements

³⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ["New York Convention"], available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁴⁰ R.A. Brand, "A Global Convention on Choice of Court Agreements" 10 ILSA J. Int'l & Comp. L. 345 at 350.

⁴¹ *Ibid.* at 351.

subverted the reasonable expectations of the contracting parties; nevertheless, the British Columbia Court subsequently recognized its jurisdiction and enforced the default judgment. The HCCCA, which deals with both exclusive and non-exclusive choice of court clauses, addresses this alarming version of comity.

Article 3 of the HCCCA creates a presumption that if a party lists only one court or country, the clause is exclusive. This is important to enforcement of the agreement, because only exclusive “choice of court” clauses are entitled to enforcement under Article 5. Under Article 8, however, judgments of courts, which took jurisdiction on the basis of any valid choice of court agreement that is “exclusive” within the meaning of the HCCCA⁴², are entitled to recognition and enforcement.

In *Old North*, as noted above, the trial judge held that the contractual provision committing the parties to attorn to British Columbia was not an exclusive choice of forum clause. Rather, the trial judge held – and the Court of Appeal affirmed - that the provision granted concurrent jurisdiction to British Columbia courts with any other court in which the matter was properly brought. The contractual language interpreted by the British Columbia courts as non-exclusive would have been deemed exclusive pursuant to Article 3 of the HCCCA⁴³ and thereby would have qualified for recognition and

⁴² See HCCCA, *supra* note 1, Art. 22, which addresses reciprocal declarations on non-exclusive choice of court agreements. Paragraph 1 of Article 22 reads:

A Contracting State may declare that its courts will recognize and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

⁴³ *Ibid.*, Art. 3(b) which reads:

A choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.

enforcement under Article 8. Thus, the North Carolina Court would not have had jurisdiction to grant default judgment against the Canadian defendant. British Columbia would have had exclusive jurisdiction as the only jurisdiction listed in the contracting parties' choice of forum clause. Further, pursuant to Article 11 of the HCCCA, the British Columbia court would have had the discretion to refuse recognition and enforcement of the North Carolina judgment on the basis that the punitive and treble damages awarded by the Court over-compensated the plaintiff for actual loss or harm suffered. Article 11 provides:

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the *judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.*
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.⁴⁴

Interestingly, the HCCCA has a narrower damages provision than the *Uniform Act*, which specifically allows the enforcing court to reduce a compensatory damages award. Until quite late in the drafting process, versions of the HCCCA provided for the reduction of compensatory damage awards;⁴⁵ however, those provisions were removed

⁴⁴ *Supra* note 1, Art. 11 (emphasis added).

⁴⁵ See Hague Conference on Private International Law, "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Preliminary Document No. 25 of March 2004, Article 10, which reads as follows:

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

on the basis that, where parties had validly agreed on a certain court, there was no reason to interfere with the compensatory component of that court's decision.⁴⁶

Though the HCCCA will go a long way in ensuring predictability and upholding the reasonable expectations of sophisticated parties to international business contracts, Article 20 may stand in the way of the Convention's ultimate effectiveness. Article 20 was originally drafted at the behest of the Canadian delegation to minimize the domestic impact of asbestos-related litigation in the United States:

Article 20 Limitation with respect to asbestos related matters

Upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters.⁴⁷

Other delegations subsequently proposed that the provision refer to additional specific subject matters such as natural resources and joint ventures. After continued discussion and drafting, the delegations agreed on a provision, Article 21 of the HCCCA, as enacted,

b) In no event shall the court addressed recognize or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.

Similarly, subsection 6(2) of the *Uniform Act*, *supra* note 3, which was based on these earlier drafts, reads as follows:

Where the enforcing court, on application by the judgment debtor, determines that a foreign judgment includes an amount of compensatory damages that is excessive in the circumstances, it may limit enforcement of the award, but the amount awarded may not be less than that which the enforcing court could have awarded in the circumstances.

⁴⁶ Hague Conference on Private International Law, "Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at Its Third Meeting – 25-28 March 2003", Preliminary Document No. 22 of June 2003, at 33.

⁴⁷ Hague Conference on Private International Law, "Proposal by Drafting Committee", Work Doc. No. 110E of April 2004.

giving Contracting States a much broader, and seemingly unlimited, power to effectively contract out of the HCCCA.⁴⁸

The only counterweight to the potential sweep of Article 21 declarations – but it may be a substantial one – is the reciprocity language within it. This language short-circuits the HCCCA for enforcement purposes in other Contracting States, with respect to the reserved subject matter, where the exclusive choice of court agreement designates the courts of the State that made the reservation at first instance. So the potential chilling effect goes both ways, ensuring that States reap the consequences of what they sow.

CONCLUSION

Writing on a similar topic for this publication in 2004, one of the present authors observed: “At this time, Canada taken as a whole and specifically in individual provinces, is one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdiction.”⁴⁹ Adoption of the HCCCA throughout Canada would neither fundamentally alter nor undermine that appraisal. What the HCCCA would accomplish, however, is amelioration of some of the harsher effects of the current Canadian common-law regime and its treatment of Canadian

⁴⁸ *Supra* note 1, Art. 21, “Declarations with respect to specific matters”:

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply -
 - a) in the Contracting State that made the declaration;
 - b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

defendants in relation to incoming foreign judgments, at least those arising from exclusive choice of court agreements. To the extent that the HCCCA becomes an understood and appreciated tool by international commercial lawyers, ensuring that it will apply may become a new drafting point for corporate counsel – but that is a subject for another forum.

In the absence of the HCCCA taking hold, the *Uniform Law* may fulfill a similar role as general law not confined to exclusive choice of court agreements. It remains, however, that a unilateral statutory substitute for a multilateral treaty instrument obviously lacks the same spirit of comity as a new international treaty on point. The premise of the *Uniform Act* to give ground in the field(s) occupied by any subsequent treaty instrument(s) appears to vindicate this view. While the HCCCA is much more limited scope and coverage than originally envisaged, and may be disappointing to many of the state actors who invested close to a decade of time and considerable effort in the Special Commission's project, it is nevertheless an achievement that should be welcomed and embraced by member states of the Hague Conference.

In general terms transcending the particular elements singled out for discussion here, the HCCCA is a good start. From the Canadian point of view presented here, that we hasten to add is ours and not necessarily that of any Canadian government, there is also every good reason for Canada to welcome the HCCCA and no compelling reason we can think of why Canada should not do so.

⁴⁹ *Supra* note 23 at 316