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A CANADIAN PERSPECTIVE

*Louise Lussier**

I. INTRODUCTION

I was asked to present a Canadian perspective on the Hague project on enforcement of judgments as I have been involved in the development of this project both at the Hague and in Canada since 1992. I intend to do so in my personal capacity.

At the outset, three questions come to mind: (1) Is there a Canadian perspective?; (2) If so, how is it shaped?; and (3) What are the salient issues for Canada? The answer to the first question is a simple and straightforward: Yes, there is a Canadian perspective, although still in the making. In order to appreciate this, one has to understand the characteristics of Canada, as a North American country, as a federal State, and as a country with two legal systems. As for the second question—what shapes this Canadian perspective—it appears necessary to examine the process through which Canada's approach to the Hague project has been, and continues to be, developed. It is a two-fold process: it relates on the one hand to the international setting of the discussions at the Hague Conference on Private International Law, and on the other, to the domestic legal background on enforcement of foreign judgments which has undergone important, if not drastic, changes. As to the third question—what are in Canada's views the Hague project's main issues—attention should be given to the following: the extension of the worldwide dimension of the Hague project and its scope of application, the determination of limits to the exercise of international jurisdiction and to enforcement of excessive damages, and the application of the future convention to federal States.

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A. *Canada and the Hague Conference*

Canada became a member of the Hague Conference in 1968, a few years after the United States decided to join the organization. Until then, Canada's ambitions in the field of private international law treaty-making had been somewhat inhibited by the constitutional division of legislative powers which granted provinces broad jurisdiction in the implementation of international treaties.¹ However, in order to respond to the realities of the modern world, a new constitutional practice was established allowing for provincial participation in treaty negotiations, thus enabling Canada to become a Hague Conference member. Canada's move was triggered by domestic wishes to become a fuller participant in the development of private international law as other common law countries and countries outside Europe also became members of the Hague Conference.

Since 1968, Canada has been very actively involved in Hague activities. One major Canadian contribution was the suggestion to negotiate a convention to deal with parental child kidnapping in the late 1970s.² Canada has also been supportive of the Hague Conference work methods, which have ensured the success of many Hague conventions.

Although party to only a small number of Hague Conventions,³ Canada has relentlessly participated in the discussions

1. This was confirmed by the Judicial Committee of the Privy Council in London, which until 1949 served as the highest appellate court for Canadian decisions, in *A.G. Can. v. A.G. Ont. et al.*, 1 D.L.R. 673 (P.C. 1937). The division of powers is listed in Sections 91 and 92 of the British North America Act, now referred to as the Constitutional Act of 1867. See CAN. CONST. (Constitutional Act, 1867) §§ 91-92; see also W. R. Jakkett, *Sections 91 and 92 of the British North America Act and the Privy Council*, in LEGAL ESSAYS IN HONOUR OF ARTHUR MOXON 156, 158 (J.A. Corry et al. eds., 1953). For a historical overview of Canada's involvement in the field of private international law, see Christiane Verdon, *Le Canada et l'unification internationale du droit privé*, 1994 CAN. Y.B. INT'L L. 3, 3-37 (1994).

2. This suggestion ultimately gave rise to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, S. TREATY DOC. No. 99-11 (1985), reprinted in 19 I.L.M. 1501 [hereinafter Child Abduction Convention].

3. To date Canada is party to four Hague Conventions: the Child Abduction Convention, *supra* note 2; the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Convention on Service Abroad]; the Convention on the Law Applicable to Trusts and on Their Recognition, done July 1, 1985 (visited Jan. 19, 1998) <<http://www.minbuza.nl/Vrdragen/verdr30.html>>; and

of the Hague Conference as a promoter of the Hague "spirit." The Hague spirit is based largely on an ideal of compromise which allows for flexibility and representation of various legal and cultural values and systems. Canada may have been particularly well-suited for this approach given its federal nature and bijural characteristics.

B. *Canada as a Federal State and Bijural Country*

Upon becoming a member of the Hague Conference, Canada attempted to find a suitable solution to its constitutional problems limiting its ability to become party to private international law treaties. One specific target was the drafting of federal State clauses which would enable Canada to ratify a Hague Convention and have it extended on a province-by-province basis. These provisions were thought to be more suitable than the old colonial provisions⁴ and more respectful of its legal systems.⁵ In the process, Canada had to convince other States; this was not an easy task as some countries had specific demands while others wished to maintain the status quo.

Since the early 1980s, modern federal State provisions, known as the federal ratification clause and interpretative clauses, have become standard features of Hague Conventions. Other organizations have also modeled their treaty federal

the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (1993) [hereinafter Adoption Convention]. The U.S. also has a short track record of only four ratifications. It is a party to: the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, *done* Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189; the Convention on Service Abroad, *supra*; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Evidence Convention]; and the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, *done* Oct. 5, 1961, 510 U.N.T.S. 177.

4. See Verdon, *supra* note 1, at 27-31.

5. An example of a ratification clause is found in Article 45(1) of the Adoption Convention:

If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them

Adoption Convention, *supra* note 3, art. 45(1). Another type of federal State clause are those provided for interpretation purposes of terms used in the text of conventions, such as habitual residence, authorities, etc. See *id.* art. 36.

State clauses on Hague provisions.⁶

The federal State clauses are only one of many provisions that cater to the needs of non-unitary States. Other types of provisions are aimed at preserving the application of internal rules within countries that know of different legal systems based on religion, ethnicity or legal tradition. These provisions are also of importance for Canada.

The Canadian legal system is characterized by its duality, based on two of the main worldwide legal traditions, *i.e.*, the common law and the civil law. In Canadian terminology, this reality is referred to as "bijuralism" and has been elevated to a quasi-constitutional status. In the foreseeable future, customary Aboriginal rules will also gain recognition as a number of self-governed Aboriginal communities will be granted broad legislative powers.

Canada's involvement in international organizations has been facilitated by its bijural nature. Because of its dual heritage, Canada can play a role in building bridges between the common and civil law traditions despite being often associated solely with common law countries. In addition, given its bilingualism, Canada can speak in both English and French, the official languages of the Hague Conference, on common law as well as civil law.

Some Hague projects have been influenced by the fact that Canada is a federal State, of a bijural nature, and is a North American country. This latter factor will probably have a significant impact on the current Hague project on enforcement of judgments. It may also explain Canada's keen interest in it.

C. Canada's Legal and Trade Interests in Joining a Multilateral Convention on Enforcement of Judgments

Ever since initial discussions of a proposed convention on enforcement of judgments started at the Hague in 1992, Canada has been prepared to welcome such a project for two sets of reasons, legal and commercial.

In the early 1990s, new rules emerged in both the common law and civil law systems. As a result, the Canadian foreign

6. This was the case in particular of the Organization of American States (OAS) Inter-American Conventions in the field of private international law, even before Canada became an official member in 1990.

judgments enforcement scheme began to be perceived as too liberal. This brought some uneasiness and uncertainty given that domestic rules alone do not guarantee reciprocal treatment by other countries as is the case under international treaties. Moreover, given the paucity of conventions applicable to Canada, the lack of adequate protection of Canadian interests led to some discontent regarding the status of domestic rules on enforcement of foreign judgments.

In addition, Canada has been swept by a regional economic integration movement under the Free Trade Agreement⁷ (FTA) with the United States and the North American Free Trade Agreement⁸ (NAFTA) with the United States and Mexico. Outside observers are often surprised to learn that this trend towards an integrated market and freer trade in North America was not supported by closer legal and judicial cooperation, such as in Europe, given that an increase in trade may lead to an increase in litigation. Although learned commentators would dismiss these considerations as ill-adapted to the North American context, it would not be too far-fetched to suggest that competitors in the region may require protection against abusive litigation in order to enjoy a level-playing field.

In light of increased access to courts, extended judicial jurisdiction and liberal enforcement rules, it was inevitable that calls for some form of international regulation be heard in Canada. The convergence of legal and trade interests made it possible for Canada to adopt a benevolent approach towards the Hague Conference project of a convention on judgments. Much attention will be given to its development to ensure that it ultimately meets Canada's interests and fulfills its expectations.

The remainder of this paper is divided as follows: Part II deals with an elaboration on the initial Canadian position along the chronicle of the Hague work program on enforcement of judgments from 1992 through 2000. Part III focuses on a number of salient issues of particular concern to Canada. Part IV will provide brief, yet positive, concluding remarks.

7. Canada-United States Free-Trade Agreement, *done* Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281.

8. North American Free Trade Agreement, *done* Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605, 698.

II. A CHRONICLE OF CANADA'S APPROACH TOWARDS THE HAGUE PROJECT (PAST, PRESENT, AND FUTURE)

It seems important to recall how the Hague project came about at the international level to best appreciate Canada's reaction to it in light of what was happening on the domestic scene. A historical background will be provided in Parts A and B, respectively, on the pre-conception years (1992-1993) and the experimental years (1994-1996) of the Hague project. The initial year (1997) of the negotiations of the Hague proposed convention, its challenges as well as its limits, will be examined in Part C. Although this may constitute a perilous exercise, Part D will venture into yet unknown territories; that is, the years to come (1998-2000) in the Hague negotiations. In parallel to the history of the Hague project, domestic events in Canada will be mentioned in order to assess the possible impact of the proposed Hague convention on the development of Canadian rules.

A. *The Pre-conception Years (1992-1993)*

It took almost two years, 1992 and 1993, for the Hague Conference to finally decide to include a project on the enforcement of judgments in its work program. As those events unfolded at the international level, much was happening on the domestic scene in Canada.

1. At the International Level

At the time of the June 1992 Special Commission on General Affairs and Policy of the Hague Conference,⁹ the U.S. delegation introduced a proposal to develop a convention on the enforcement of judgments. A small working group was then mandated to review the proposal. The group's conclusions

9. This proposal was initiated by a Letter from Edwin D. Williamson, Legal Advisor, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)). Working Document No. 1 to the June 1992 Special Commission, elaborated on the proposal and the Permanent Bureau of the Hague Conference responded to the initial proposal in Preliminary Document No. 17, entitled "Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments." See HAGUE CONFERENCE ON PRIVATE INT'L LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 29, 1993, Tome I, 17 H.C.P.I.L. PROC. 231 (1995).

were discussed at the Seventeenth Session of the Hague Conference in May 1993,¹⁰ leading to the decision to include the topic of a convention on enforcement of judgments on the Hague Conference 1993-1996 work program.¹¹

Canada's first reactions to the U.S. proposal were positive and this position was expressed in June 1992. At the request of the Department of Justice of Canada (DOJ), two Canadian academics were asked to prepare study reports on the conclusions of the working group in light of existing Canadian rules both in the common law provinces and in the civil law province of Québec.¹² Based on their positive conclusions, Canada fully supported the inclusion of the topic of a convention on enforcement of judgments in the future work program of the Hague Conference.¹³

The same enthusiasm was not shared by all Hague Conference member States, such as European Union (EU) member States (twelve at the time), and others, like Australia. They would take some years to truly warm up to the idea of the feasibility, both legal and political, of a multilateral convention. However, no firm opposition was expressed against this new Hague project.

10. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS 257 (Prel. Doc. No. 19, 1992).

11. See Hague Conference on Private International Law, Final Act of the Seventeenth Session, May 29, 1993, pt. B(2), 32 I.L.M. 1134, 1145. The relevant decision reads as follows:

- 2 a Decides to include in the Agenda for the work of the Conference the question of the recognition and enforcement of foreign judgments in civil and commercial matters;
- b Requests the Secretary General to convene as soon as is feasible a Special Commission charged with
 - *studying further the problems involved in drafting a new convention . . .*
 - making proposals with respect to the work that might be undertaken,
 - suggesting the timing of such work;

Id. (emphasis added).

12. See VAUGHAN BLACK, A STUDY OF CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS (Dep't Justice Can., 1993); G. GOLDSTEIN, REPORT ON THE POSSIBLE REPERCUSSIONS FOR QUEBEC OF SIGNING AN INTERNATIONAL CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (Dep't Justice Can., 1993). Both of these reports were prepared for the DOJ in March 1993.

13. The development of the Canadian position was accounted for in the Annual Report of the DOJ on Activities in Private International Law to the Uniform Law Conference of Canada, *reprinted in* 1993 UNIFORM LAW CONFERENCE OF CANADA PROCEEDINGS, app. I, at 243-55.

2. On the Domestic Scene

Canada enjoyed for many years, at least until the early 1990s, foreign judgment enforcement systems based on old rules. In the common law provinces, such a system was modeled largely on British common law rules which were traditional and conservative. In Québec, the system was based on old pre-revolutionary French civil law rules. This situation would change dramatically as a result of parallel events affecting domestic rules both in the Anglo-Canadian common law jurisdictions and in the civil law jurisdiction. These events undoubtedly paved the way for more openness and liberalism in the Canadian approach towards enforcement of foreign judgments. In addition, they have greatly influenced the evolution of Canada's position vis-à-vis the Hague project and conventions in the field of enforcement of judgments.

The first set of events relate to changes in rules regarding the enforcement of intra-Canadian judgments in common law jurisdictions that were initiated by the courts. In 1990, the Supreme Court of Canada (SCC) was seized of an appeal which challenged the refusal of British Columbia (BC) courts to enforce an Alberta judgment against a BC resident who had chosen to ignore service of the original proceeding for defaulting on a mortgage debt. The SCC decided in *Morguard Investments Ltd. v. De Savoye*,¹⁴ that the Alberta judgment ought to be enforced.¹⁵ It also rejected the old common law approach based on personal service and voluntary attornment to a court's jurisdiction and instead indicated a new course of action for sister-province judgments.

Quoting renowned U.S. academics, von Mehren, Traubman, and Yntema, Justice La Forest, who wrote the opinion of the Court, acquiesced with the latter in commenting: "As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice."¹⁶ He continued by adding, "[t]his formula-

14. [1990] 3 S.C.R. 1077 (Can.).

15. See *id.* at 1111. The British Columbia (BC) Appeals Court decision in *Morguard* can be found in 27 B.C.L.R.2d 155 (C.A. 1988), and the lower court's decision in 18 B.C.L.R.2d 262 (S.C. 1987).

16. *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1097 (discussing Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957)).

tion suggests that the content of comity must be adjusted in the light of a changing world order."¹⁷ Looking at the situation in Canada, he then expressed the view that "[t]he considerations underlying the rules of comity apply with much greater force between the units of a federal state,"¹⁸

Moreover, Justice La Forest noted that Canada's Constitution and judicial structure made a "full faith and credit" clause unnecessary as it exists in other federations, such as the United States and Australia, adding that "[i]n short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution."¹⁹ He then stated, "[a]s I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or territory, *so long as that court has properly, or appropriately, exercised jurisdiction in the action*,"²⁰ and also that, "[t]hus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."²¹

These last comments crystallized a so-called *Morguard* test, whereby enforcement could be granted only if a real and substantial connection existed between the original court and the cause of action. This new test was met with mixed reactions in the Anglo-Canadian common law community of academics and practitioners,²² mainly because it had not been

17. *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1097.

18. *Id.* at 1098.

19. *Id.* at 1101.

20. *Id.* at 1102 (emphasis added). This is not the only instance in which Justice La Forest referred to the U.S. Constitution. He was of the view that support for a substantial connection requirement could be based on Section 7 of the Canadian Charter of Rights and Freedoms, which is the equivalent of the U.S. Due Process clause (Fourteenth Amendment), in imposing a constitutional requirement of a "minimal contact with the province." See generally CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7. However Justice La Forest refused to determine the *Morguard* case on this particular constitutional basis. See *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1109-10.

21. *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1103.

22. There have been numerous articles written on the *Morguard* decision, both before and after. One would note, in particular, an entire issue of the *Canadian Business Law Journal* that was dedicated to examining the implications of *Morguard* in 1993. See Symposium, *Recognition of Extraprovincial and Foreign Judgments: The Implications of Morguard Investments Ltd. v. De Savoye*, 22 CAN.

formulated clearly and also had been applied to judgments rendered before the *Morguard* decision.

Another troubling development in the views of the legal community was that, despite the intra-Canadian context of the decision, the *Morguard* test was applied to the enforcement of truly foreign judgments in Canada. However, the Court itself seemed to have suggested such an extension. After examining more generous jurisdictional rules that were applied in other countries (such as the United States and the EU member countries), Justice La Forest referred to the changes that have taken place in the world since the 19th century²³ and added the following comment, "[u]nder these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for a reappraisal."²⁴ This was taken by lower courts as an invitation to apply the *Morguard* test to foreign judgments.

The leading example of judicial activism in the matter is the 1993 decision of the BC Court of Appeals in *Moses v. Shore Boat Builders Ltd.*,²⁵ whose leave to appeal to the Supreme Court was denied.²⁶ This case involved an action for enforcement of an Alaskan Court judgment against a BC boat building company in favor of an Alaska resident. Cumming, J.A. wrote, "[t]he case at bar arises out of international commerce — the sale of a boat to Moses in Alaska. So the informing principle of private international law [comity] supports the extension of the real and substantial connection test to the circumstances here."²⁷ Thus, the BC Court of Appeal applied the *Morguard* test and ruled in favor of the petitioner, emphasizing that "*the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over the foreign defendant*" and that "the same rule which supports the assertion

BUS. L.J. 2 (1993).

23. In an often quoted comment, Justice La Forest wrote: "The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative." *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1098.

24. *Id.* at 1098 (emphasis added).

25. 83 B.C.L.R.2d 177 (C.A. 1993).

26. See *id.* at 193 (dismissing the appeal of the decision in *Moses v. Shore Boat Builders Ltd.*, 68 B.C.L.R.2d 394, 400 (S.C. 1992), where the British Columbia Supreme Court enforced a foreign judgment from Alaska).

27. *Moses*, 83 B.C.L.R.2d at 187.

and taking of jurisdiction by a foreign court must govern the recognition and enforcement of that judgment in this country."²⁸

The Court found support for its position in a number of other BC cases that had already adopted a real and substantial connection test to grant enforcement to foreign judgments, mainly from the United States. As a matter of fact, except in two provinces where statutory regimes had prevented the application of *Morguard* to foreign judgments²⁹ and subject to an isolated contradictory judgment,³⁰ judicial deference was given to the *Morguard* decision throughout Canada.

At the time the SCC considered *Morguard*, Québec was in the midst of finalizing the reform of its civil law. The Act concerning the new Civil Code of Québec³¹ (Civil Code), which was passed by the National Assembly of Québec in 1991, came into effect on January 1, 1994.³² The new Civil Code, contrary to the Civil Code of Lower Canada³³ adopted in 1866, contains an expanded part on private international law, particularly on the international jurisdiction of Québec courts. By analogy, these rules can be applied to the assessment of the jurisdiction of a foreign court which is one of the requirements for the recognition and enforcement of foreign judgments set out in Article 3155(1).³⁴

By and large, conditions related to jurisdiction in the Civil Code would correspond to the real and substantial connection test in *Morguard*.³⁵ As we will see in Part B, this codification has not necessarily alleviated the burden of the legal community forced to adapt to these changes.

28. *Id.* at 188, 190 (emphasis in original).

29. This was the case in Saskatchewan and New Brunswick. Those two provinces are now in the process of amending their legislation.

30. *Re Evans Dodd & Gambin Associates*, 17 O.R.3d 803 (Ont. Gen. Div. 1994).

31. Act Concerning the New Civil Code of Québec, ch. 64, 1991 S.Q. 1061 (Can.).

32. See H. Patrick Glenn, *Codification of Private International Law in Québec*, 60 RABELS ZEITSCHRIFT [RABELSZ] 231, 232 (1996).

33. An Act Respecting the Civil Code of Lower Canada, ch. 41, 1865 S.C. 173 (Can.).

34. See Civil Code of Québec art. 3155(1).

35. Despite some controversy as to whether the Supreme Court of Canada (SCC) judgment in *Morguard* would apply to the Québec legal system, the leading doctrinal opinion in Québec has recognized its relevance.

In parallel to the emergence of new rules concerning jurisdiction, the theory of *forum non conveniens* was formally received in Canada. In its 1993 decision in *Amchem Products Inc. v. Workers' Compensation Board*,³⁶ the SCC recognized, subject to some conditions, the application of *forum non conveniens* in Anglo-Canadian common law.³⁷ Article 3135 of the new Civil Code codified similar principles.³⁸

Those events altered to a great extent the legal landscape of enforcement of foreign judgments in Canada without providing any guarantee of similar treatment for Canadian judgments abroad. It should be noted that under domestic law enforcement of foreign judgments is not conditional to the existence of a treaty. Some provinces have designated several countries "reciprocating jurisdictions" according to their reciprocal enforcement legislation³⁹ whose main purely procedural purpose is to facilitate enforcement of judgments through a registration mechanism.⁴⁰

Until the 1990s, Canada had become a party to only one treaty in the field of enforcement of judgments, the 1984 Convention between Canada and the United Kingdom (UK) on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters⁴¹ (Canada/United Kingdom Convention). The Canada/United Kingdom Convention was negotiated almost exclusively for the purpose of ensuring the protection of Canadian interests against judgments rendered on the basis of exorbitant jurisdiction in European countries party to the

36. [1993] 1 S.C.R. 897 (Can.).

37. See *id.* at 919-21. Those conditions included: (1) the determination of any juridical advantages to the plaintiff or the defendant; (2) the qualification of the parties' connection to the jurisdiction as real and substantial; and (3) the existence of a more appropriate jurisdiction. See *id.*

38. See Civil Code of Québec, art. 3135.

39. 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.

40. See *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 1111 (Can.).

41. 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, Apr. 24, 1984, 1988 Gr. Brit. T.S. No. 74 (Cmd. 519) [hereinafter Canada/United Kingdom Convention]. The Canada/United Kingdom Convention is in force throughout Canadian jurisdictions, with the exception of Québec, as well as at the federal level. For the federal implementing legislation to this convention, see Canada United Kingdom Civil and Commercial Judgments Convention Act, R.S.C., ch. C-30 (1985) (Can.).

Brussels Convention.⁴² As a simple convention, the Canada/United Kingdom Convention does not deal with jurisdiction issues and is aimed primarily at facilitating recognition and enforcement of judgments between the two countries. Its application has remained fairly marginalized, most probably because it remains largely ignored by practitioners.⁴³

This brief review of the domestic situation in Canada with respect to enforcement of foreign judgments completes the examination of the pre-conception years of the Hague project in 1992-1993. One can say that there were converging events which explained Canada's initial support.

B. The Experimental Years (1994-1996)

Once the decision was taken at the Hague Conference to study the feasibility of a convention dealing with jurisdiction, recognition and enforcement of foreign judgments, much anticipation awaited the first meeting of experts convened in 1994. Given the position adopted later by EU member States vis-à-vis punitive damages, it proved necessary to hold another experts' meeting in 1996. The reasons for the slow-moving pace of the Hague project will be reviewed shortly. In parallel, initiatives were taken in Canada in support of the Hague project.

42. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated, current text of this convention see 1990 O.J. (C 189) 2, reprinted in 29 I.L.M. 1413). Historically, because of the similarity, if not identity, of rules regarding enforcement of judgments in both countries, the conclusion of a treaty between Canada and the United Kingdom (UK) was not thought necessary. The adhesion of the UK in the European Community, and its resulting obligation under the Treaty of Rome to become a party to the 1968 Brussels Convention, led Canada and the UK to negotiate a bilateral convention to better protect Canadian defendants as permitted by Article 59 of the Brussels Convention. See generally Brussels Convention, *supra*, art. 59. The Canada/United Kingdom Convention was modified in 1995 to take into account the fact that the UK had become a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 [hereinafter Lugano Convention], which is modelled on the Brussels Convention.

43. 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.*, 6 C.P.C.3d 170 (Ont. Gen. Div. 1992), and *J.B.S. Tooling Co. v. Upward Tool Group Inc.*, 6 C.P.C.4th 191 (Ont. Gen. Div. 1996). It was, however, ignored in *Union of India v. Bumper Development Corp.*, 36 C.P.C.3d 249 (Alta. Q.B. 1995). Interestingly enough, the two Ontario cases have read the Convention as incorporating the *Morguard* test.

They included the monitoring of case law based on the application of new enforcement of foreign judgments rules. These developments will be briefly mentioned here.

1. At the International Level

Despite the apolitical nature of the Hague Conference on Private International Law, interventions at the first Special Commission of experts in June 1994 proved to be motivated to some extent by political considerations. This phenomenon manifested itself through the appearance of three "blocks of countries" based on their different positions vis-à-vis the merits of the Hague project.

The first two blocks, that of the EU member States and of the United States, were easily recognizable. The European countries were reluctant to depart from their own well established tradition of judicial cooperation in the field of enforcement of judgments. The United States was backing an innovative approach, which was largely American-centered. The third one, the "Rest of the World" or ROW, emerged in a disorganized sort of way to regroup other States present at the Hague.⁴⁴ Although ROW countries did not entirely share the same concerns and interests, they wanted their views to be heard in order to inject a "worldwide" perspective in the discussions. They also wanted to avoid an EU/United States confrontation which could have diminished the need for a multi-lateral convention.

The nature of the convention was a prime example of the differences in approaches between the three blocks. The European block insisted on a "double" convention while the U.S. block was supportive of a "mixed" convention. It seemed problematic for the ROW block to push for one or the other at the outset. Finally an agreement was reached on the recognition that participating countries should first aim at a "double" convention, and if this would prove to be impossible, other options could be considered. The "political" problems appeared then to be less insurmountable. There were few difficulties in the discussion on the scope of application, as positions were more cohesive. However, the discussion on jurisdiction remained too

44. It should be noted that only States that are members of the Hague Conference attended the 1994-1996 cycle of meetings.

general to identify major issues.

In spite of those roadblocks, the June 1994 Special Commission concluded that the Hague project was feasible.⁴⁵ These results were met with satisfaction by Canada.⁴⁶ In a consultation held prior to the 1994 meeting, support was expressed for the general orientations of the Hague project including the possibility of drafting a "mixed" convention.

The political aspects of the Hague project were again highlighted at the time of the June 1995 Special Commission on General Affairs and Policy of the Hague Conference. On that occasion, France, speaking on behalf of other EU member States, formally requested another experts' meeting to examine the punitive damages issue as a condition for referring the decision on the future work project to the 18th Session of the Hague Conference (this apparent flex of muscles was interpreted as an indication of the new framework of EU legal cooperation in the aftermath of the Maastricht Treaty).⁴⁷ It was hastily agreed to convene such a meeting given the overall favorable recommendation that the Hague project should be given high priority in the next work programme.⁴⁸

It could be suggested that the EU demand suited other countries looking for some assurances in advance of the negotiations of a convention on enforcement of judgments. Canada,

45. For the position of the June 1995 Special Commission on General Affairs and Policy, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE SPECIAL COMMISSION OF JUNE 1994 ON THE QUESTION OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Prel. Doc. No. 1, 1994) [hereinafter 1994 CONCLUSIONS OF THE SPECIAL COMMISSION].

46. A review of the progress of the Hague project was presented at a panel on enforcement of foreign judgments at the time of the International Trade Law Seminar, jointly sponsored by the Canadian Bar Association and the DOJ, held in Ottawa in October 1995. The texts have been subsequently published in the Canadian International Lawyer. See H. Scott Fairley, *Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty*, 2 CAN. INT'L LAW. 1 (1996); Ronald A. Brand, *Foreign Judgments in U.S. Courts*, 2 CAN. INT'L LAW. 10 (1996); Louise Lussier, *Une nouvelle convention multilatérale pour le prochain millénaire: tour d'horizon du projet de la conférence de La Haye de droit international privé sur la reconnaissance et l'exécution des jugements étrangers*, 2 CAN. INT'L LAW. 18 (1996).

47. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1, [1992] 1 C.M.L.R. 719 (1992) [hereinafter TEU].

48. See generally HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE SPECIAL COMMISSION OF JUNE 1995 ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE (Prel. Doc. No. 9, 1995) [1995 CONCLUSIONS OF THE SPECIAL COMMISSION].

for one, was not displeased that some attention be given ahead of time to a number of particularly difficult issues which were of specific concern to Canadian practitioners. Canada contributed two documents on the use of *forum non conveniens* and the U.S. practice of punitive or multiple damages awards.⁴⁹

The June 1996 Special Commission did not, however, allow for in-depth discussions despite the hopes or expectations of some participants.⁵⁰ It was as if there were a consensus to postpone the discussions to a more appropriate time once the go-ahead had been given. This finally happened at the Eighteenth Session in October 1996. After more than four years of preliminary meetings, the Hague Conference was at long last ready to embark on the drafting of a convention on enforcement of judgments.⁵¹

This decision comforted Canada in two ways. First, the prospect of a multilateral convention could provide a level-playing field for Canadian parties to international litigation. Second, it could limit the negative impact perceived by some of the unilateral "liberalization" of domestic rules on enforcement of judgments without reciprocal benefits.

2. On the Domestic Scene

With respect to the dramatic changes to the Canadian rules on enforcement of foreign judgments, a number of opportunities were provided in 1994-1996 to test those new domestic

49. See Information Note on the Use of *Forum non Conveniens* in Canada, in HAGUE CONFERENCE ON PRIVATE INT'L LAW, NOTE ON THE QUESTION OF "FORUM NON CONVENIENS" IN THE PERSPECTIVE OF A DOUBLE CONVENTION ON JUDICIAL JURISDICTION AND THE ENFORCEMENT OF DECISIONS Annex B (Prel. Doc. No. 3, 1996) [hereinafter FORUM NON CONVENIENS NOTE]; Information Note on Canadian Reactions to U.S. Practice of Judgments Awarding Punitive or Multiple Damages, in HAGUE CONFERENCE ON PRIVATE INT'L LAW, NOTE ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN THE PERSPECTIVE OF A DOUBLE CONVENTION WITH SPECIAL REGARD TO FOREIGN JUDGMENTS AWARDED PUNITIVE OR EXCESSIVE DAMAGES Annex III (Prel. Doc. No. 4, 1996) [hereinafter PUNITIVE DAMAGES NOTE].

50. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE SECOND SPECIAL COMMISSION MEETING ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Prel. Doc. No. 12, 1996) [hereinafter CONCLUSIONS OF JUNE 1996 MEETING].

51. See Hague Conference on Private International Law, Final Act of the Eighteenth Session, Oct. 19, 1996, pt. B(1), 35 I.L.M. 1391, 1405 (Decision "to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters.").

solutions. At the same time, Canada entered into negotiations of a bilateral convention with France.

In the aftermath of *Morguard*, case law continued to develop in the common law jurisdictions regarding the application of the *Morguard* principles and their extension to foreign judgments,⁵² thus giving rise to some controversy and uncertainty amongst practitioners.⁵³ This phenomenon did not escape the attention of either the Uniform Law Conference of Canada (ULCC) or the DOJ.

In 1994, the ULCC finalized a Uniform Court Jurisdiction and Proceedings Transfer Act⁵⁴ (UCJPTA). This Uniform Act proposes a list of bases of jurisdiction as examples of a "real and substantial connection" in the context of the enforcement

52. See generally *Bank of Credit & Commerce International (Overseas) Ltd. v. Gokal* [1995] 2 W.W.R. 240 (B.C.C.A.) (UK judgment); *Commercial Agency v. Jarvis*, 46 C.P.C.3d 223 (Alta. Q.B. 1996) (Oregon judgment); *Dunton v. Whitewater West Recreations Ltd.*, 26 B.C.L.R.3d 49 (S.C. 1996) (Colorado judgment—not final); *United States v. Ivey*, 130 D.L.R.4th 674 (Ont. Gen. Div. 1995) (Michigan judgment), *aff'd*, 30 O.R.3d 370 (Ont. C.A. 1996); *ATL Industries Inc. v. Han Eol Ind. Co.*, 36 C.P.C.3d 288 (Ont. Gen. Div. 1995) (Korean judgment); *Clancy v. Beach*, 92 B.C.L.R.2d 82 (S.C. 1994) (Colorado judgment); *Stoddard v. Accurpress Mfg. Ltd.*, 84 B.C.L.R.2d 194 (S.C. 1993) (Connecticut default judgment); *Webb v. Hooper*, 153 A.R. 390 (Alta. Q.B. 1994) (Kentucky default judgment); *Wilson v. Hull*, 148 A.R. 96 (Alta. Q.B. 1994) (Idaho judgment), *rev'd*, 128 D.L.R.4th 403 (Alta. C.A. 1995); *Mid-Ohio Imported Car Co. v. Tri-K Invs. Ltd.*, 5 B.C.L.R.3d 271 (S.C. 1993) (Ohio default judgment), *rev'd on other grounds*, 129 D.L.R.4th 181 (B.C.C.A. 1995). For a synthesis, see MARVIN BAER ET AL., *PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA* 285-388 (1997).

53. See Fairley, *supra* note 46, at 2-3.

54. *UNIFORM COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT*, reprinted in 1994 *UNIFORM LAW CONFERENCE OF CANADA PROCEEDINGS*, app. C [hereinafter UCJPTA]. The UCJPTA can also be found on the internet at <<http://www.law.ualberta.ca/alri/ulc/acts/ejurisd.html>>. It should be noted that the Uniform Law Conference of Canada (ULCC) had previously recommended the adoption of a *UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS ACT*, reprinted in 1991 *UNIFORM LAW CONFERENCE OF CANADA PROCEEDINGS*, app. J, at 425 [hereinafter UECJA]. The 1994 Uniform Act, the UCJPTA, is aimed at completing the UECJA. Only a limited number of jurisdictions have introduced legislation to adopt both the UECJA and the UCJPTA. This is the case in BC, Prince Edward Island and Saskatchewan. More recently at its 1997 meeting, another piece of legislation was proposed to deal with the enforcement of non-monetary Canadian judgments on the basis of the UECJA. These two Uniform Acts have now been merged.

of Canadian judgments to assist Canadian courts in finding the existence of such a "connection" in monetary matters, such as contract, torts, etc.⁵⁵ Almost all of these bases correspond

55. Section 10 of the UCJPTA reads as follows:

Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [*enacting province or territory*] and the facts on which a proceeding is based, a real and substantial connection between [*enacting province or territory*] and those facts is presumed to exist if the proceeding:

- (a) is brought to enforce, . . . proprietary or possessory rights or a security interest in immovable or movable property in [*enacting province or territory*],
- (b) concerns the administration of the estate of a deceased person in relation to
 - (i) immovable property of the deceased person in [*enacting province or territory*], or
 - (ii) movable property anywhere of the deceased person if at the time of the death he or she was ordinarily resident in [*enacting province or territory*],
- (c) is brought to interpret, . . . any deed, will, contract or other instrument in relation to
 - (i) immovable or movable property in [*enacting province or territory*], or
 - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [*enacting province or territory*],
- (d) is brought against a trustee in relation to carrying out of a trust in any of the following circumstances:
 - (i) the trust assets include immovable or movable property in [*enacting province or territory*] and the relief claimed is only as to that property;
 - (ii) that trustee is ordinarily resident in [*enacting province or territory*];
 - (iii) the administration of the trust is principally carried on in [*enacting province or territory*];
 - (iv) by express terms of a trust document, the trust is governed by the law of [*enacting province or territory*],
- (e) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in [*enacting province or territory*],
 - (ii) by its express terms, the contract is governed by the law of [*enacting province or territory*], or
 - (iii) the contract
 - (A) is for the purchase of property, services or both, . . . , and
 - (B) resulted from a solicitation of business in [*enacting province or territory*] by or on behalf of the seller,
- (f) concerns restitutionary obligations that, to a substantial extent, arose in [*enacting province or territory*],

to rules of court on service *ex juris* existing in the various common law jurisdictions.

For its part, the DOJ sponsored in 1995 a study of possible law reform of Canadian rules on enforcement of foreign judgments. At its request, two academic papers were prepared⁵⁶ and they provided a comprehensive background for discussions and consultation with representative members of the bar in both common law provinces and Québec. This led to a number of recommendations,⁵⁷ one of which called for Canada's continuing support for the Hague project, given that issues of jurisdiction and enforcement are inextricably linked.

Among the other recommendations, which were more domestically oriented, the most important one related to the drafting of uniform legislation on enforcement of foreign judgments to clarify the rules applicable in common law provinces. The ULCC decided to embark on the drafting of such an act in 1996 on the basis of preliminary discussion papers which provided general orientations.⁵⁸ Once completed, this project will

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- (g) concerns a tort committed in [enacting province or territory],
 - (h) concerns a business carried on in [enacting province or territory],
 - (i) is a claim for an injunction ordering a party to do or refrain from doing anything
 - (i) in [enacting province or territory], or
 - (ii) in relation to immovable, or movable property in [enacting province or territory],
 - (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province or territory],
 - (k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory], or
 - (l) is for the recovery of taxes or other indebtedness and is brought in by the Crown or . . . by a local authority of [enacting province or territory].

Id. § 10.

56. See VAUGHAN BLACK & JOOST BLOM, REPORT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW JURISDICTIONS OF CANADA (Dep't Justice Can., 1995); GÉRALD GOLDSTEIN & JEFFREY TALPIS, PROPOSED REFORM OF THE LAW ON THE EFFECT OF FOREIGN DECISIONS IN CANADA, QUEBEC DROIT CIVIL ASPECTS (Dep't Justice Can. Study, 1995). Both reports are on file with the DOJ.

57. See generally DEPARTMENT OF JUSTICE OF CANADA, REPORT ON A STUDY CONCERNING POSSIBLE LAW REFORM ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CANADA (July 1995, on file with the DOJ) [hereinafter DOJ STUDY]. The DOJ is indebted to Mr. T.B. Smith for his participation in the study as chair of the meetings that were organized across Canada.

58. See generally VAUGHAN BLACK & JOOST BLOM, ENFORCEMENT OF FOREIGN

likely correspond to a Canadian refined version of the U.S. *Uniform Foreign Money-Judgments Recognition Act*.⁵⁹

In Québec, the changes brought to the rules on enforcement of foreign judgments by the new Civil Code, now in force, were tested by the Québec courts. Apart from transitory law issues, the most frequent questions put to the courts related to the interpretation of the new provision on *forum non conveniens*.⁶⁰ A number of decisions have explored the limits of the application of those new rules with mixed results.⁶¹ In one case, the Québec Court of Appeal denied the possibility for Québec courts to use their discretion in considering themselves *forum conveniens* if by contract the parties have chosen a foreign court to litigate.⁶²

In parallel to those internal developments, Canada and France commenced bilateral negotiations on a convention on enforcement of judgments for the same reasons mentioned for the Canada/United Kingdom Convention. After a series of preliminary discussions and three negotiating sessions in July 1994, March 1996 and May 1996, the Convention between Canada and France on Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance⁶³ (Canada/France Convention) was

JUDGMENTS (COMMON LAW JURISDICTIONS) (Uniform Law Conference of Canada Discussion Paper, June 1996); JEFFREY TALPIS & GÉRALD GOLDSTEIN, ENFORCEMENT OF FOREIGN JUDGMENTS (QUÉBEC LAW PERSPECTIVE) (Uniform Law Conference of Canada Discussion Paper, Aug. 1996). These papers are contained in the 1996 UNIFORM LAW CONFERENCE OF CANADA PROCEEDINGS, apps. I, J, at 383-84. They are also available on the internet at <<http://www.law.ualberta.ca/alri/ulc>>.

59. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962). See generally Brand, *supra* note 46.

60. On these questions, see Sylvette Guillemard et al., *Les difficultés de l'introduction du forum non conveniens en droit québécois*, 36 LES CAHIERS DE DROIT [C. DE D.] 913 (1995).

61. For a sample of reported cases see, e.g., *La Garantie, compagnie d'assurance de l'Amérique du Nord c. Gordon Capital Corp.* [1995] R.D.J 537 (Québec C.A.); *Malden Mills Industries Inc. c. Huntingdon Mills (Canada) Ltd.* [1994] R.J.Q. 2227 (Québec Cour Supérieure); *Banque Toronto-Dominion c. Cloutier* [1994] R.J.Q. 386 (Québec Cour Supérieure).

62. See *Lamborghini (Canada) Inc. c. Automobili Lamborghini S.P.A.* [1997] R.J.Q. 58 (Québec C.A.).

63. Convention Between the Government of Canada and the Government of the French Republic on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance, done June 10, 1996 (not yet in force) (on file with the *Brooklyn Journal of International Law*).

signed by the two countries in Ottawa in June 1996. The Canada/France Convention has not entered into force, however, because the implementing legislation has yet to be adopted.

One interesting feature of the Canada/France Convention, which is a simple convention, is that it provides a list of bases of jurisdiction that can illustrate admissible grounds of jurisdiction.⁶⁴ Another interesting feature is its scope of application which includes a scheme on the recovery of maintenance orders.⁶⁵ Without excluding the fact that it might negotiate other bilateral conventions, Canada prefers that a multilateral solution be developed under the auspices of the Hague Conference.

As new solutions to issues on enforcement of foreign judgments emerged in Canadian law, Canada became even more convinced of the necessity of the Hague project. Its slow maturation during the experimental years of 1994-1996 has helped lay the foundations of the future convention. As negotiations were about to begin, Canada was gearing up to participate in its success.

C. The Initial Year (1997)

The year of 1997 marked the launching of probably the most long-awaited Hague negotiations in the organization's history. Preparations for the first meeting in June 1997 were somewhat slowed down by the magnitude and the complexity of the issues faced by the participants in the Hague process. On the domestic scene in Canada, 1997 was a very active year in the discussions on enforcement of foreign judgments.

1. At the International Level

Forty-five States sent representatives to the June 1997 Special Commission, including thirty-four member States of the Hague Conference, such as Canada, the United States, EU member States, Japan, China, as well as nine non-member States, such as Korea and Russia, with observer status. The participation of G8 (formerly G7) countries and other major trading partners gives a measure of the potential impact of the

64. *See id.* art. 5.

65. *See id.* ch. IV.

Hague project. As well, the presence of non-governmental organizations, such as the International Bar Association and the International Law Association, has ensured that the practical dimensions of an increasingly integrated world legal order be taken into consideration. The mixed composition of delegations, with the participation of Justice or Foreign Affairs officials, practitioners and academics, also contributed to well-balanced discussions.

As a significant number of participants in the June 1997 meeting had not been present at previous discussions, the newly-appointed chair, Mr. T.B. Smith, from Canada, recognized the need for all to become more familiar with the Hague process. It was also agreed to first focus on international jurisdiction on the basis of the extensive report prepared by Ms. Catherine Kessedjian,⁶⁶ from the Permanent Bureau of the Hague Conference.

The Chair called for open discussions to be held without any decision being taken. There was not much surprise felt at listening to the sober and "gentleman-like" exchanges on the hypothetical and not-so hypothetical facts and proposals concerning jurisdictional grounds relating to what has been described in European terminology as exclusive, protective, choice of court, general and special jurisdictions, and also on exorbitant or prohibited grounds of jurisdictions.⁶⁷ In the background, it was assumed that the Special Commission work would be aimed at incorporating those bases in a double convention.

Although the provisions of the European Conventions of Brussels and Lugano have often served as a starting point, the June 1997 meeting confirmed the need for developing distinct solutions within the future Hague convention. Interestingly enough, European countries have undertaken to tackle in parallel the revision of the Brussels Convention along with that of

66. CATHERINE KESSEDJIAN, *INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS* (Hague Conference on Private Int'l Law, Prel. Doc. No. 7, 1997) [hereinafter *KESSEDJIAN REPORT*].

67. A summary of the discussions was distributed as an "Information Document" at the Chair's request. See generally *HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULTS OF THE WORK OF THE SPECIAL COMMISSION CONCERNING THE PROPOSED CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS* (Info. Doc., Sept. 1997) [hereinafter *PRELIMINARY RESULTS*].

the Lugano Convention.⁶⁸ Those revisions could tentatively be finalized by the end of 1998. It remains to be seen what will be its impact on the Hague project.

2. On the Domestic Scene

The highlight of 1997 in Canada has been the ULCC project on the drafting of uniform legislation on enforcement of foreign judgments. In its initial report presented at the 1997 Annual Meeting of the Conference in August,⁶⁹ the ULCC working group proposed to establish a closed list of acceptable bases of jurisdiction, particularly for default foreign judgments, in order to limit the application of the "real and substantial connection" test imposed by the *Morguard* ruling. It also recommended that the enforcing Canadian court exercise some discretion in verifying the jurisdiction of the foreign court as well as in limiting the enforcement of excessive damages awards. It is expected that a tentative draft uniform act along those lines will be completed for the ULCC annual meeting in August 1998. Inasmuch as is possible, consideration will also be given to the discussions at the Hague.

Case law has continued to flourish in both common law and civil law jurisdictions. A number of problems brought to the attention of the Canadian courts related either to the application of a "real and substantial" connection test,⁷⁰ the determination of the requested court as *forum non conveniens*,⁷¹

68. This decision was taken at the time of the European Union (EU) member States Head of States meeting in Amsterdam at the end of the Netherlands presidency on June 16-17, 1997. Given the adhesion in 1995 of Sweden, Finland, and Austria in the EU, and their correlative obligation to become a party to the Brussels Convention, the number of European Free Trade Association (EFTA) member States party to the Lugano Convention between the EFTA and the EU countries has been reduced to three, namely, Iceland, Norway and Switzerland.

69. This document is to be published in the Uniform Law Conference of Canada's Proceedings of the 1997 Annual Meeting. The Proceedings of the 1997 Annual Meeting are available on the Internet at <<http://www.law.ualberta.ca/alri/ulc/97pro/97e.html>>. ..

70. See, e.g., *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*, 143 D.L.R.4th 213 (B.C.C.A. 1997) (dismissing the jurisdiction of a BC Court to issue a mandatory injunction against parties involved in proceedings in Colorado); *Sarabia v. "Oceanic Mindoro" (The)*, 26 B.C.L.R. 143 (C.A. 1996) (dismissing the jurisdiction of a BC Court given a jurisdiction clause in an employment contract in favor of the Philippines Court).

71. See, e.g., *Hill v. Klynveld Peat Marwick Goerdeler* [1997] 7 W.W.R. 515 (Sask. Q.B.) (other jurisdiction was Vanuatu); *DiPaolo Machine Works Ltd. v. Pres-*

or to requests for refusal to enforce.⁷²

With the Hague project now underway, expectations are high that it will provide solutions for issues on enforcement of foreign judgments that were raised in Canada, especially the ones related to fairness in international litigation. It is as of yet premature to suggest how discussions will evolve, but judging from the tenor of the June 1997 preliminary conclusions, one can remain hopeful as to the outcome of this process.

D. The Coming Years (1998-2000)

A number of events to take place in the next three years are already shaping up both internationally and domestically. They will be briefly mentioned.

1. At the International Level

The coming year, 1998, will certainly be a turning point for the Hague project as two meetings are scheduled to be convened, the first one in March and the second in November. The March 1998 meeting should provide an opportunity to discuss the conditions for recognition and enforcement, including the effects of foreign judgments and complex jurisdiction.⁷³ It will also enable participants to revisit the content of the lists of authorized and prohibited grounds of jurisdiction. Stakes will be higher at the November 1998 meeting given that its objective appears to be the preparation of a tentative preliminary draft convention.⁷⁴

The prospect of having such a document, if only in a very

tige Equipment Corp., 5 C.P.C.4th 175 (Ont. Gen. Div. 1996) (other jurisdiction was New York); *National Bank of Canada v. Clifford Chance*, 30 O.R.3d 746 (Ont. Gen. Div. 1996) (other jurisdiction was England); *Dunlop v. Connecticut College*, 50 C.P.C.3d 109 (Ont. Gen. Div. 1996) (other jurisdiction was Connecticut).

72. Two decisions discussed the exception to enforcement based on denial of justice with different results. *Compare* *National American Insurance Co. v. Leong*, 49 C.P.C.3d 246 (B.C.S.C. 1996) (invocation of exception rejected in the case of a Washington State U.S. District Court judgment), *with* *Leaton Leather & Trading Co. v. Ngai Tak Kong*, 147 D.L.R.4th 377 (B.C.S.C. 1997) (invocation of exception allowed in the case of a Hong Kong Supreme Court decision). Another refusal to enforce dealt with a judgment on appeal in the originating jurisdiction. *See* *Dunton v. Whitewater West Recreations Ltd.*, 26 B.C.L.R. 49 (S.C. 1996) (Colorado default judgment).

73. Background material is found in the KESSEDJIAN REPORT, *supra* note 66.

74. PRELIMINARY RESULTS, *supra* note 67, at 9 (discussing future works in November 1998).

preliminary version, will greatly affect the manner in which discussions will unfold both at Hague meetings and within participating States as well. The Hague project cannot solely exist in an abstract form as it is essential to seek the input from practitioners and business people on how enforcement of foreign judgments should be envisaged. More concrete propositions on such an arcane, complex and vast subject will be necessary in order to generate support for the work of the Special Commission. Since a great amount of time has been devoted already to encouraging discussions on principles and orientations, it would appear realistic to hope for a partial draft by the end of 1998.

Moreover, such a development would appear timely in light of the discussions on the revisions of the Brussels/Lugano Conventions. Officials representing the EU at the Hague, as observers, have given assurances that information will be provided on the progress of the Brussels discussions. Without putting too much emphasis on negotiations taking place outside of the Hague Conference, the impact of this European exercise cannot be ignored since the Brussels/Lugano Conventions are probably the most sophisticated inter-state system to date for ensuring enforcement of foreign judgments. This element will need to be taken into account, as the Hague project advances into its final maturation years.

The years 1999 and 2000 may appear far away given the pace of the Hague discussions. However, as only one meeting is planned in 1999 (either in late Spring or early Fall), it will most certainly be a crucial opportunity to refine the tentative preliminary draft. By then a number of major issues should be ready for appraisal. Another significant event to occur that year will be the drawing up of the provisional explanatory report by the two co-reporters. This will prove most helpful to the conduct of internal consultation and the elaboration of official State positions. The much awaited Nineteenth Session in 2000 (probably in October) will certainly be among the major Diplomatic Conferences held by the Hague Conference. It is possible to imagine that a greater number of States will send representatives to that final meeting.

Before achieving a satisfactory compromise, participants will face extraordinary challenges. There is much hope that they will be willing to agree on a final convention for the next millennium. Its future will much depend on individual State

actions. If it is successful, as it could be expected, the new convention will represent a major contribution to the world legal order.

2. On the Domestic Scene

In Canada, one of the most salient developments during the coming years will be the finalization of the uniform act on enforcement of foreign judgments and hopefully its enactment in as many jurisdictions as possible. In parallel, important consultation efforts will be devoted to the Hague project in partnership with the legal and business communities. This will ensure that Canadian representatives at the Hague seek solutions to remaining domestic concerns related to international litigation, despite ambitious internal law reforms. Finally, one would hope that work on the timely implementation of the future Hague Convention will be initiated early on.

Canada's chronicle of the development of the Hague project, past, present and future, was aimed at presenting the Hague discussions in context. Although the stakes as to the completion of the project remain high, the prospects of a successful outcome look better today than they did in 1992 when the U.S. delegation presented its initial proposal. Along the years, the numerous Hague meetings have ensured that negotiations be undertaken in the interest of all participating States. It has also allowed for the building of support for the future convention, as the evolution of Canada's position towards the Hague project has revealed.

III. A "REALPOLITIKS" OVERVIEW OF THE HAGUE PROJECT MAIN ISSUES FOR CANADA

Five issues that are of particular concern to Canada, as they are defined by Canada's geo-political positioning: its legal tradition, its commercial interests, and its own constitutional structure will be examined here.⁷⁵

At this stage of its development, the key to the success of the Hague project would appear to be the determination of a common goal that could be shared by State interest groups

75. Needless to say, this Canadian perspective is personal, provisional and unofficial.

represented at the Hague. The examination of this first issue involves a review of the objectives of the Hague project as well as relevant general international law principles to be made in Part A. The scope of application of the future convention also raises interesting questions. Should the future convention have an ambitious scope to cover all possible matters or should it deal only with the most important civil and commercial matters in today's integrated business world? How open should the future convention be in the sense of allowing the largest possible number of States to join in while restricting the application of its rules to party States? These questions will be discussed in Part B.

Beyond the need for a common goal and a limited scope of application, another essential issue to deal with is whether international jurisdiction should be envisaged in a framework that would be innovative, universal and flexible. If that were to be the case, the convention should not adopt the model of the so-called "strict double convention" and only provide for an exhaustive list of admissible bases. In addition, transfer of jurisdiction should be allowed through inter-state cooperation on the basis of a *forum conveniens/non conveniens* doctrine or similar principles. Moreover, limits should be imposed to the exercise of jurisdiction by expressly prohibiting some grounds which can unduly extend territorial jurisdiction. These propositions will be explored in Part C.

As a corollary, the question of the controversial practice of excessive damages awards, whatever importance this issue may really represent, particularly in torts-related matters, cannot be ignored. A number of solutions are already in place in some countries which may assist in suggesting a satisfactory rule. Those elements will be summarized in Part D. Finally, the application of the future convention in the specific context of federal States as opposed to plurilegislative States has raised some questions in relation to the capacity of federal States to ensure properly the enforceability of the future convention throughout their territory. This issue will be briefly examined in Part E.

A. *The United States, the EU and the ROW: An Unholy Trinity in Pursuit of a Common Goal*

As already indicated, three State interest groups have

emerged in the Hague process representing different States or regions, mainly the United States, the EU member States and the "Rest of the World" or ROW. As for the first group, consisting only of the United States, it is the promoter of an original approach to issues regarding jurisdiction and enforcement of foreign judgments. But there is some irony in the fact that the United States actually participates in an exercise which may prove ultimately very costly to implement, in light of purely domestic political interests. The second group, the EU member States, represents fifteen countries with different legal systems that are however bound by agreement to achieve closer legal cooperation as a result of increased regional integration.⁷⁶ However, it has not yet been made clear how those new EU relations will affect the conduct of individual EU member States as Hague Conference members.⁷⁷ Finally the last group, the ROW, is by far the most inclusive and, as a result, the least homogeneous of the three State interest groups. It has tried to embody in some disorganized fashion the truly worldwide dimension of the Hague project, but without being too vocal about it.

Whether or not these State interest groups have learned to relate with one another, the most important thing is that they have been able to demonstrate a less confrontational attitude and a greater desire for cooperation and understanding. This may explain why at the June 1997 meeting there was little objection to the exposé on the pre-set objectives of the Hague project. These objectives need to be reassessed in light of well-recognized private international law principles, most especially comity between nations.

76. See generally TEU tit. I, arts. A-F. On the evolution of the EU, see *supra* note 68.

77. The Statute of the Hague Conference on Private International Law, *done* Oct. 9-31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121 (entered into force July 15, 1955), which dates back to the 1950s, governs the relationship between the Hague Conference and individual member States. At the time, as the European Community with only six members was limited to economic matters, it could not have been foreseen that it would grow into a major regional integration force including in the legal area.

1. Review of the Hague Project Pre-set Objectives

Like the World Trade Organization in the trade area, the Hague process represents another attempt to regulate a particular area of activities in today's changing world, as a result of globalization and greater economical integration in accordance with a number of pre-set objectives. They are predictability, certainty, flexibility and avoidance of litigation.⁷⁸ These objectives, which would no doubt comfort a large number of practitioners and their clients, including Canadians,⁷⁹ have a special meaning in the context of a new world legal order: What is it?

It first suggests that order and fairness must be instilled in the way courts take jurisdiction in international litigation. To that end, agreement on admissible and prohibited bases of jurisdiction within the future convention would assist practitioners by providing some measure of predictability on the determination of the competent or most competent court. It could also help the avoidance of multiple litigation and forum shopping as well as numerous counter-claim and frivolous suits. Incentives to follow jurisdictional rules could come from the fact that the new convention would ensure recognition and enforcement of "valid" judgments. Such a scheme would benefit all parties, as it would add certainty to the outcome of international litigation.

It also supposes that international jurisdiction should be exercised with some flexibility so as to best serve, in particular circumstances, the protection of vulnerable parties or the interest of justice. Thus a competent court under the convention could be able to require pre-hearing exchanges of information and evidence with a foreign venue, and if necessary, transfer proceedings to the most competent court. Such transfer mechanisms could rely on a system of inter-state cooperation incorporated in the convention that would echo well-accepted international law principles.

78. See PRELIMINARY RESULTS, *supra* note 67, at 3 (Section I, discussing goals of the convention).

79. Such views were canvassed more particularly in the DOJ STUDY, *supra* note 57.

2. Application of General International Law Principles

In the background, the Hague process has relied on a number of general law principles that have influenced the evolution of private international law as well as domestic law. One such principle is comity, described a century ago as follows:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which 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.⁸⁰

It has been recognized that comity can and must be adjusted to the needs of a changing world order.⁸¹ This is of the utmost importance in the context of the Hague project as the future convention will establish a set of supra-national rules that will be embodied in the laws of participating countries.

Another principle is State interdependence in today's community of nations, and its corollary, the need for harmonization of rules. Such harmonization has been achieved with a great degree of success in the field of enforcement of arbitral awards, which is very much comparable with that of enforcement of judgments.⁸² The need for courts to rely on each other in order to serve justice has been recognized in an increasing number of international litigation cases, one typical example being provisional measures proceedings.⁸³ Since harmonization has worked well for enforcement of arbitral awards worldwide, there is no reason why it could not work for enforcement

80. *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895) (quoted with acquiescence by the SCC in *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 1096 (Can.).

81. See *Morguard Investments Ltd.* [1990] 3 S.C.R. at 1097.

82. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, is a typical example. A large number of States have become party to it and the success of arbitration worldwide has much to owe to its worldwide enforceability regime.

83. That was the underlying logic of the SCC decision in *Amchem Products Inc. v. Workers' Compensation Board* [1993] 1 S.C.R. 897 (Can.), which involved an anti-suit injunction.

of judgments, so as to accommodate the growing interdependence of courts and other adjudicatory bodies.

Finally, one cannot ignore the principle of State sovereignty in the regulation of international jurisdiction.⁸⁴ As part of the Hague process, States will legitimize the foundations of the future worldwide enforcement system by their agreement to rules on acceptable bases of jurisdiction and other limits to their courts' territorial sovereignty.

A careful understanding of these guiding principles will assist in the determination of a common goal for the Hague project to progress along its pre-set objectives. It could also enhance the discussions of its various components, such as the scope of application of the future convention.

B. A Plea For a Limited Scope of Application

Although there has been some indication given in the past on the type of civil or commercial matters to be included, not much discussion has taken place so far on whether the future convention should be opened to any State or whether some of its rules could be extended to non-contracting States. These two questions, the nature of matters to be covered and the quality of States' party, will come up for discussion in 1998.

1. Matters to be Included and Excluded

The future convention on judgments will deal with judgments in civil and commercial matters. In accordance with the Hague tradition, the terms "civil and commercial matters," which are used in a number of Hague Conventions titles,⁸⁵ are not defined as it would prove too difficult to come up with a satisfactory definition for all legal systems. However these terms remain important to distinguish those matters covered

84. See generally F.A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186-III RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9 (1984); Pierre Mayer, *Droit international privé et droit international public sous l'angle de la notion de compétence*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 1-29, 349-87, 537-83 (1979). The Kessedjian Report has presented a theory on international jurisdiction in the private international law sense, based on the studies of Mann and Mayer in particular. See KESSEDJIAN REPORT, *supra* note 66, at 36-40.

85. This is the case of the Convention on Service Abroad, *supra* note 3, and Evidence Convention, *supra* note 3.

from matters generally not considered civil or commercial, such as tax and criminal matters. For the sake of clarity, those matters are often expressly excluded, as in the case of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments.⁸⁶ As for matters that would otherwise be qualified as civil or commercial, and to which the convention does not apply, they are expressly exempted from the scope of application.

It would be surprising for the drafters of the future convention not to adopt these techniques. In other words, provisions will specify to which non-civil or commercial matters the convention does not apply and which civil or commercial matters are excluded. Such orientations have already been identified in preliminary meetings.⁸⁷ However, the precise limits of the scope of "civil and commercial" matters remain to be determined.

It appears most probable that judgments related to civil status and capacity, matrimonial property, wills and successions, bankruptcy, social security and arbitration, will be specifically excluded.⁸⁸ The status of a number of other matters, the list of which includes maintenance, competition, intellectual property, and protective or provisional measures,⁸⁹ is not yet determined. Another area relates to collective actions in relation to employment and consumers contracts.⁹⁰

At this point, only tentative comments could be made on possible additions to the list of excluded matters. The inclusion of maintenance has generated some discussions but it seems very unlikely that a convention on general civil and commercial matters would deal with this matter. Decisions on the exclusion of specific questions, such as competition or intellectual property,⁹¹ will much depend on how the general scope of torts matters will be defined. Decisions on other matters, such as provisional measures, will be delayed until further study is

86. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, done Feb. 1, 1971, 1144 U.N.T.S. 249 [hereinafter 1971 Judgments Convention].

87. See 1994 CONCLUSIONS OF THE SPECIAL COMMISSION, *supra* note 45, at 13.

88. See KESSEDJIAN REPORT, *supra* note 66, at 18.

89. See *id.* at 18-28.

90. See *id.* at 54-60 (in the context of the so-called "protective jurisdictions").

91. In Canada, see Robert G. Howell, *Intellectual Property, Private International Law, and Issues of Territoriality*, 13 CAN. INTELL. PROP. REV. 209 (1996).

provided.⁹² In light of a growing trend in international litigation towards the use of worldwide provisional measures, many problems would ensue for litigants and their clients if the future convention would be limited only to final judgments.⁹³ As for collective actions, it may be premature to suggest any position as trans-border litigation, especially in the context of domestic lawsuits affecting the rights of victims residing outside the jurisdiction of origin, appears to be a very specialized area which would command careful consideration.

These are only a few examples of the questions raised in the context of the current Hague exercise. Decisions on the scope of application and on matters to be excluded will be easier to make, one could predict, once bases of jurisdiction become clearer. It could be suggested that Canada would be prepared to support a convention whose scope of application would focus on the most important aspects of international litigation, that is, contracts and torts in general. This position might evolve depending on, among other factors, the progress to be made in the discussions over international jurisdiction.

2. States Party

According to international law, treaties apply only to States that are party to such conventions. Although this principle is not challenged in the current Hague negotiations exercise, the application of the future convention only within Contracting States could be questioned because it involves trans-border enforcement of judgments issues.

For this reason, in the context of the determination of a Contracting State court's jurisdiction, there could be some discussion on the possible extension of some convention rules to include parties or causes of action located in non-party States. This issue would have no relevance in the case of a

92. The contribution of the International Law Association (ILA) on this subject-matter has been noted in the KESSEDJIAN REPORT, *supra* note 66, at 74. The ILA resolution on Provisional and Protective Measures in International Litigation is reproduced in its Annex I. See *id.* Annex I.

93. In Canada, see Vaughan Black & Edward Babin, *Mareva Injunctions in Canada: Territorial Aspects*, 28 CAN. BUS. L.J. 430 (1997). It could be noted that the ULCC has recognized the need to ensure the enforcement of such intra-Canadian proceedings or "decrees" and has thus recommended the adoption of the UCJPTA. See *supra* note 54.

court of a non-party State given that it would not be appropriate for that court to refer to Hague rules to determine its jurisdiction. However, the situation could be different with respect to *lis pendens* when proceedings are ongoing at the same time in a party State and a non-party State with a view to enforcing their decisions in a third State also party to the Convention.⁹⁴

Another issue to be examined thoroughly has to do with the degree of control, if any, that could be imposed at the stage of recognition and enforcement over the exercise of jurisdiction by the court of origin, particularly if the future convention were to be open to all States. In Canada, concerns have been expressed on the fairness of courts in some countries towards foreign defendants and judgments.⁹⁵ A preventative solution would be to enable the enforcing court to use some limited discretion in verifying the jurisdiction of the court of origin and also to examine the procedural aspects of the original proceedings when raised by the party opposing enforcement.

Participation in the convention could also be more scrutinized. One avenue would be to establish a screening process for States that are not members of the Hague Conference before they can become a party to the future convention on judgments. According to the Hague Conference tradition, each treaty provides rules for determining whether States present at the negotiations with the status of observers as well as States that have not participated in the negotiations can become a party. As a result, in principle, most if not all Hague Conventions are open to any country wishing to become a party and are not limited only to Hague member States. However, in the case of the accession of non-member States, certain conditions, such as the agreement by or the non-objection of other party States,⁹⁶ are imposed in order for the convention to come into force between them and States already party. In theory, similar rules could be incorporated in the future convention on judgments so as to ensure its potential worldwide

94. For a discussion of these questions, refer to the KESSEDJIAN REPORT, *supra* note 66, at 28-32.

95. See *supra* note 57.

96. That was the solution elaborated in the most recent Convention, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19 1996, art. 58, 35 I.L.M. 1391, 1403 [hereinafter Parental Responsibility Convention].

application.

Another alternative would be to require bilateralization of the convention rules between States party to the convention. A similar regime, which was developed under the 1971 Hague Convention on Judgments,⁹⁷ was criticized for being too complex. This may be one reason why that Convention was never quite successful. It is thus doubtful that this avenue would be desirable for the future convention on judgments.

In Canada's view, it would be essential that the future convention be as open as possible while establishing safeguards to minimize the risks of admitting "unruly" States. However, the convention should operate in a closed system only between party States so as to attract the largest number of them. At a time where profound legal and commercial changes are taking place, the prospect of a worldwide convention with a limited scope of application would be the most appealing. This would be particularly important given the ambitious propositions concerning international jurisdiction.

C. A Need to Revisit International Jurisdiction in the Context of the Global Village

In many ways, the Hague project has established a framework for innovative discussions on international jurisdiction. As there is no pre-established model for a worldwide convention, participating countries should feel free to develop new approaches towards the exercise of jurisdiction. They could consider, for instance, closer cooperation between their judicial and administrative authorities as it could lead to a better allocation of international jurisdiction on generally well-accepted principles, such as proximity, level of contact, reasonableness, as well as order and fairness. In this perspective, one could question the political correctness of the suggested "three-shaded" (either white, black, and grey, or green, red, and yellow) lists of grounds of jurisdiction that have been proposed as the basis for the discussions on jurisdiction. At the same time, this could encourage open discussions on the need for allowing

97. The 1971 Judgments Convention, in Article 21, requires States to become party to the text and also to its Protocol on a reciprocal basis. See 1971 Judgments Convention, *supra* note 86, art. 21. This complicated system has limited the number of States' ratification to only three since the Convention was finalized.

transfer of jurisdiction and limiting extra-territorial jurisdiction.

1. Political Correctness of a Three-shaded Approach and Transfer of Jurisdiction

In its initial form, the U.S. proposal of a *convention mixte* promoted a three-shaded approach towards international jurisdiction given its flexibility and predictability. Bases that would be considered acceptable would be on a "white" list; those that would be prohibited would be on a "black" list; and those bases on which no agreement was possible would remain in a "grey" list or area. The determination of the color of the list would ensure whether or not the judgment would be ultimately enforced. In the case of the white list, enforcement would be mandatory; in contrast, in the case of the black list, there would be no enforcement; but for those judgments relying on bases in the grey list, enforcement would remain discretionary.⁹⁸

Currently, a more "color blind" approach has been adopted by the Hague on the assumption that international litigation should be envisaged through acceptable and prohibited bases of jurisdiction within the concept of a "convention double."⁹⁹ These changes can be politically correct, given the interaction between the three State interests blocks. However, it may signal a paradigmatic shift towards a later recognition of the need for discretionary bases should a "convention double" appear too limiting.

It has been suggested that within a strict "convention double" system, such as under the Brussels Convention, a court must exercise jurisdiction if it has competence according to the convention rules. Conversely, it should not take jurisdiction if this is not the case. This approach raises a number of problems. One such problem is the potential conflict which may arise between jurisdictional rules and choice of forum

98. See Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 283-85 (1994) (with special emphasis on the chart entitled "Types of Foreign Judgments Recognitions Conventions").

99. These changes had occurred already in 1994. See generally 1994 CONCLUSIONS OF THE SPECIAL COMMISSION, *supra* note 45. The most current statement is presented in the PRELIMINARY RESULTS, *supra* note 67.

clauses. Another problem is whether parties to litigation should be given some freedom to decide before which forum they wish to litigate, particularly in the context of a worldwide convention.

In this perspective, defendants would be allowed under specific conditions to request from the competent court a transfer of jurisdiction to a more appropriate forum. In the alternative the court seized could decide to decline jurisdiction and order such a transfer. Transfer of jurisdiction could be considered for practical reasons (location of witnesses) or in the interest of justice. At least one Hague Convention has so far incorporated similar mechanisms¹⁰⁰ while a number of countries have relied on domestic solutions to ensure transfer to a more convenient forum, as is the case in Canada.¹⁰¹

In the context of a worldwide convention on judgments, propositions on transfer of jurisdiction would require further examination¹⁰² and not solely with respect to the doctrine of *forum non conveniens* and *forum conveniens* to which some countries might object because of its inconsistency with their national rules.¹⁰³ However, consideration of the need for specific rules on transfer of jurisdiction and judicial cooperation may have to be postponed until some progress is achieved in the discussions on jurisdiction at the Hague.

2. Limits on Extra-territorial Jurisdiction

The Hague project has reaffirmed on the basis of principles of territoriality and sovereignty that jurisdiction must be established on the premise of a connection or relation between the cause of action and the court seized. There have been suggestions that a territorial connection would exist if based on the presence of the defendant or through other factual elements, the determination of which would depend on the sub-

100. See Parental Responsibility Convention, *supra* note 96, arts. 8-9.

101. It is the case of Australia, Canada, the United States and the UK as presented in the FORUM NON CONVENIENS NOTE, *supra* note 49. In Canada an elaborate legislative scheme has been incorporated into the UCJPTA, *supra* note 54, pt. 3.

102. The ILA Committee on International Litigation has embarked on such a project as a result of a decision taken at the Helsinki Meeting in August 1996.

103. The merits of such an approach were discussed at the June 1996 meeting. See CONCLUSIONS OF JUNE 1996 MEETING, *supra* note 50, at 11.

ject-matter of the action. However, conditions as to the degree of contact or proximity required in order to include specific connecting factors in the list of acceptable grounds of jurisdiction have yet to be more clearly fleshed out.¹⁰⁴

In so doing, one of the most difficult challenges within the Hague project will be to limit the exercise of far-reaching jurisdiction. One such controversial example is the "doing business" basis as the sole connecting factor between a court and a defendant. In such a case, a company is obliged to appear before a foreign court to defend itself against a claim filed by an alleged competitor only because it is involved in a number of commercial transactions over which it has little control.

It has been proposed that such ground be prohibited so as to not only deny enforcement of the judgment but also to prevent the exercise of such jurisdiction.¹⁰⁵ It remains to be seen whether this proposal could be further refined with the inclusion of a definition of the terms "doing business" after a careful review of cases.¹⁰⁶ An alternative would be to determine more clearly the extent of the jurisdiction over company branches or similar sub-entities.¹⁰⁷ The last resort solution would be to consider the "doing business" basis and similar examples of far-reaching jurisdiction as part of a list of discretionary bases. This may not be entirely satisfactory to defendants who are involved in costly proceedings abroad, but it could at least protect them against enforcement in the State where they have their main activities.

Although much discussion will take place before any decisions on jurisdiction are taken, the Hague project represents an opportunity to devise a system of international jurisdiction that would be adapted to the demands of a growing interdependent world for order and fairness. In Canada's view, this could be best achieved through judicial cooperation in allowing transfer of jurisdiction and in limiting the exercise of extra-territorial jurisdiction, such as in the case of "doing business." This is not the only restraint to the exercise of international

104. See KESSEDJIAN REPORT, *supra* note 66, at 34-48.

105. See PRELIMINARY RESULTS, *supra* note 67, at 9.

106. A request for such review was made at the June 1997 meeting.

107. Problems have been raised with respect to the requirement of a connection between the action and the business conducted in the state where it is initiated in the case of corporate sub-entities at the time of the June 1997 meeting. See PRELIMINARY RESULTS, *supra* note 67, at 5.

jurisdiction that would require attention.

D. A Need For a Regulated Enforcement of Excessive Damages

If one were asked to select one of the most difficult make-or-break issues of the whole Hague project, that person could easily point to the issue of excessive damages awards, as notably practiced by U.S. courts.¹⁰⁸ This issue has already justified a number of participants in preliminary meetings to request that the future convention provides strict rules on the matter. Such direction would also echo the concerns expressed by practitioners in a number of countries.¹⁰⁹ Whatever the risks of carrying on business, there is a need for an elaborated proposal to curtail the enforcement of excessive damages awards within the context of the future convention. Until this issue is dealt with, several participants will continue to express doubts about the outcome of the Hague discussions. It may not be after all such an impossible problem to resolve as recent case law in a number of countries has demonstrated.

1. Balancing the Risks of Carrying on Business

Lawyers who advise clients about entering or enlarging new markets in some countries, notably the United States, ought to be aware of the practice of excessive damages awards. For that matter, the decision of their clients should involve balancing the long-term benefits vis-à-vis the risks of lawsuits by local competitors for punitive damages and other types of excessive awards. However, this is not always the case and business interests might dictate taking risks. In the long run, given the extraordinary size of excessive damages awards, even though some of them have been reversed on appeal,¹¹⁰ at great cost for the foreign defendant, fears remain that such practice might deter business and encourage acrimonious litigation.

108. That was clearly the message sent by EU member states at the meeting that gave rise to the 1995 CONCLUSIONS OF THE SPECIAL COMMISSION, *supra* note 48.

109. This matter was debated within Canada at the time of the DOJ study on possible law reform. *See generally* DOJ STUDY, *supra* note 57.

110. One well-noted example having been the 1996 U.S. Supreme Court decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

Despite some troubling cases which have received bad publicity, they do not account for average current practice. A review of the situation in four countries, namely in Australia, Canada, the U.K., and the U.S., undertaken in preparation for the June 1996 meeting at the Hague, has helped put the issue more into perspective.¹¹¹ For instance, several solutions have been highlighted, such as the imposition of a cap on the amount of damages awarded, especially in the case of truly punitive or multiple damages,¹¹² or the development of a more stringent test for the consideration of punitive damages by the court of origin.¹¹³ This may not be sufficient for dealing with excessive damages awards in an international context. Over recent years, the use of the public policy exception to the enforcement of foreign judgments has become a powerful sanction.

2. Emergence of Worldwide Public Policy Concerns

The trend towards policing excessive foreign damages awards was initiated by a 1993 German court decision, soon to become a most notorious decision around the world for having relied on a public policy exception to limit the enforcement of a U.S. punitive damages award.¹¹⁴ Although public policy is not usually defined in private international law conventions (the question for some remains whether it is a purely domestic concept or it should be understood in the international legal order), it is usually recognized as a valid exception or as a defense to enforcement.

In the context of the Hague project, it has been suggested that the public policy exception could be extended to allow the

111. See PUNITIVE DAMAGES NOTE, *supra* note 49, at 18.

112. Could this suggest that the judgment be considered of a criminal nature thus providing an exception or ground to refuse its enforcement? This is debatable. In one Canadian case where enforcement of a U.S. punitive awards judgment was sought on the basis of environmental protection legislation, the judge resisted the idea. See *United States of America v. Ivey*, 130 D.L.R.4th 674 (Ont. Gen. Div. 1995), *aff'd*, 30 O.R.3d 370 (Ont. C.A. 1996).

113. In Canada, see *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, 1208 (Can.), where a common law test very similar to the one used in the U.K. was applied. The Civil Code of Québec also contains a specific rule for punitive damages in article 1621. See Civil Code of Québec, ch. 64, art. 1621, 1991 S.Q. 1061, 1325 (Can.).

114. See PUNITIVE DAMAGES NOTE, *supra* note 49, at 28. Other national courts include Japan and Switzerland. See *id.* at 22-24.

enforcing court to exercise control over the original decision, and thus reduce the amount of damages awarded.¹¹⁵ This solution, which has received support in some countries,¹¹⁶ has already been tentatively acquiesced to by some delegations, including the U.S.,¹¹⁷ despite the fact that no drafting proposal has yet been presented.

This proposed solution, in theory, may raise a number of practical questions: how would the enforcing court assess what would constitute a "reasonable" award if the court of origin has not provided a detailed description of the total amount of damages awarded in its judgment? Would there be a need to limit enforcement to certain types of excessive damages? These questions related to the use of public policy will resurface in the upcoming 1998 meetings at the Hague. It is long overdue that a preventative solution be introduced so as to ensure some progress in the discussions.

E. A Reexamination of Federal States' Approach to Their Treaty Obligations to Enforce Judgments

It would not be possible to present a specific Canadian perspective on the Hague project without mentioning the question of federal States. This issue has already been raised in a particular light, that of the "special status of States without a unified system" with respect to general and specific jurisdictions.¹¹⁸ Given the Hague tradition on the matter and the challenges of a changing world, it is hoped that the issue of federal States clauses will be tackled in an informed manner and that attention will be drawn ahead of time to possible solutions.

115. For an overview of this approach, see the KESSEDJIAN REPORT, *supra* note 66, at 102-04, 106-08 (discussing public policy and excessive damages).

116. This would seem to be the case in Canada on the basis of some decisions which alluded to public policy, such as *Stoddard v. Accurpress Mfg. Ltd.*, 84 B.C.L.R.2d 194 (S.C. 1993), and *Mid-Ohio Imported Car Co. v. Tri-K Invs. Ltd.*, 5 B.C.L.R.3d 271 (S.C. 1993), *rev'd on other grounds*, 129 D.L.R.4th 181 (B.C.C.A. 1995). A more concrete proposal will be examined in the context of the ULCC working group on enforcement of foreign judgments. See *supra* note 69.

117. The U.S. and the U.K. have pointed to the draft provision included in their 1978 Draft bilateral convention, reproduced in the PUNITIVE DAMAGES NOTE, *supra* note 49, at 18.

118. KESSEDJIAN REPORT, note 66, at 46.

1. The Hague Tradition

The question of federal States clauses has recently received renewed attention in light of emerging drafting problems as "interpretative" federal States provisions have become more and more detailed.¹¹⁹ In addition, some Hague member States have expressed their growing dissatisfaction over the Hague tradition of discussing federal State clauses at the very end of the negotiations process which does not allow time for a full debate of the problems at stake. This new situation calls for new solutions.

2. Possible Solutions

The federal States clauses issue is quite complex from both a political and a legal perspective. Given the diversity of State structures, some States that have more than one legislative level consider themselves pluri-legislative States rather than federal ones. Other States which have more than one legal and judicial system remain unitary States. On the other hand, some States that have several territorial units combined with one or more than one legal and judicial systems. For these reasons, a number of problems arise in the context of a future convention on enforcement of judgments in relation primarily to internal allocation of jurisdiction and to the effects of a foreign judgment once enforced in such States.

At this stage of the development of the Hague project, it would be premature to suggest what would constitute acceptable solutions. It seems that a fits-all solution no longer appears workable and that parallel solutions may need to be crafted to suit the needs of different "federal" States. It is hoped that this issue could be satisfactorily resolved through timely exchanges of views, as has been jointly proposed by Canada, Spain, Switzerland and the United States at the June 1997 meeting.

The overall challenge, not only for federal States or other plurilegislative States, but also for all States involved in the Hague process, is to agree on principles and rules that will have a practical and effective impact. In order to accomplish this task within the next three years, a number of issues will

119. See, e.g., Adoption Convention, *supra* note 3, art. 36.

soon have to be tackled at least provisionally in a preliminary draft that could be further discussed and refined. The most pressing questions relate to the global framework of the Hague project with a view to ensuring its worldwide reach, inclusiveness and flexible application. To that end, difficult choices will have to be made on the scope of application, bases of jurisdiction, transfer of, and limits to jurisdiction in the interests of justice, as well as on enforcement of excessive damages awards. Attempts to work on suitable solutions will prove demanding but not impossible.

IV. CONCLUSION

From Canada's perspective, the process now in place at the Hague will lead to successful negotiations despite the difficult issues to be discussed, the slow-moving pace of those discussions, and the complexity and magnitude of questions and interests. The task of finalizing a new multilateral convention for the next millennium cannot rest on one or several countries alone. It will very much depend on the seriousness and commitment of all participants and also on the openness of the discussions under the moral authority of the chair and the Permanent Bureau of the Hague Conference in the Hague "spirit" of compromise which has often guided member States in the past.

Two such member States, Canada and the United States, given their geographical proximity and their common legal heritage, could be at the forefront of these upcoming developments. Canada, by the confidence put in the elected Canadian Chair, Mr. T.B. Smith, has an important responsibility to guide and inspire while the U.S. continues to occupy the center stage with an innovative proposal. The Hague project could benefit from an alliance between these two countries to build a satisfactory compromise. It is hoped that the legal and business communities in Canada and the United States would lend their support to this endeavor. It is a challenge that starts right here, right now.

