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Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention

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Abstract
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COMMODIFYING JUSTICE FOR GLOBAL FREE TRADE: THE PROPOSED HAGUE JUDGMENTS CONVENTION©

BY VAUGHAN BLACK*

A notable omission from the legal apparatus for international free trade is a multilateral agreement on court jurisdiction and enforcement of foreign country judgments. However, negotiations toward such an international convention are in progress. This paper explores the background to those discussions. It examines the current draft of the proposed judgments convention with particular reference to the way in which implementation of that draft would affect Canadians engaged in the practice of international commercial litigation. It concludes with a discussion of current sticking points in the negotiations, and with commentary on the judgment enforcement scene and the implications of failure to achieve international uniformity in that area.

Une omission remarquable du régime juridique du libre-échange international est l'absence d'un accord multilatéral en matière de la compétence des cours et de la mise en application des jugements émanant d'un pays étranger. Toutefois, des négociations pour établir un tel accord international sont en cours. Cet article considère le contexte de ces discussions et examine l'avant-projet proposé de la convention sur la compétence et les jugements étrangers en matière civile et commerciale, avec emphase particulière sur la façon dont la mise en vigueur de cet avant-projet pourrait affecter les canadiens oeuvrant dans la pratique du litige en droit commercial international. En conclusion, l'article aborde les difficultés rencontrées pendant les négociations et l'auteur fait des commentaires au sujet de la mise en application des jugements et les répercussions de ne pas arriver à l'uniformité internationale dans ce domaine.

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I. INTRODUCTION

At least outside Quebec, Canadian conflict of laws has been mainly a judicial creation. Despite continuing statutory encroachments into a range of historically common law domains, legislatures have traditionally seemed content to leave to the judiciary the task of sorting out questions of choice of law, enforcement of foreign judgments (both interprovincially and internationally), certain elements of adjudicatory jurisdiction, and most aspects of cross-border civil procedure, including anti-suit injunctions, international *Mareva* injunctions, negative declarations, *forum non conveniens*, and *lis alibi pendens*.[1] This judicial pre-eminence is especially noteworthy in light of the fact that in the United Kingdom, the jurisdiction from which Canada inherited the bulk of its private international law, the field has become predominantly a legislative one. This is due in part to statutes implementing treaty obligations arising from the United Kingdom's membership in the European Union,[2] but as well there is recent homegrown United Kingdom legislation dealing with conflict of laws, notably a 1995 statute dealing with both choice of law in tort and the recognition of foreign marriages.[3]

But, bit by bit, the Canadian scene is changing. It is no longer uncommon to see statutes that feature provisions purporting to specify

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[1] A case on these last two matters is on its way to the Supreme Court of Canada: *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.* (1999), 173 D.L.R. (4th) 498 (C.A.), leave to appeal to S.C.C. granted 20 April 2000, [1999] S.C.C.A. No. 298, online: QL (*SCCA*).

[2] The two most significant are the 1980 *European Community Convention on the Law Applicable to Contractual Obligations*, 19 June 1980, 23 O.J. L. 266, 19 I.L.M. 1492 (entered into force 1 April 1991, brought into force in the U.K. by the *Contracts (Applicable Law) Act 1990* (U.K.), 1990, c. 36) and the *Brussels Convention* discussed *infra*, note 34.

[3] *Private International Law (Miscellaneous Provisions) Act 1995* (U.K.), c. 42, ss. 5-8 (Matrimonial), ss. 9-15 (Tort). Note also the *Foreign Limitation Periods Act 1984* (U.K.) 1984, c. 16.

their territorial application. To take a few examples, there are sections dealing with choice of law in the *Personal Property Security Act* in force in each Canadian common law jurisdiction,[4] in most provinces' matrimonial property legislation,[5] and in each provincial *International Sales of Goods Act* embodied pursuant to Canada's 1992 adoption of the United Nations *Convention on Contracts for the International Sale of Goods*.[6] Provincial statutes dealing with child custody now feature provisions dealing with territorial jurisdiction,[7] as does some consumer protection legislation.[8] Recent amendments to federal bankruptcy legislation have sought to address some of the thorny issues presented by insolvencies of transnational corporations.[9] In short, for better or worse, Canadian legislators are coming to perceive that questions of cross-border co-ordination of private law need not be left to judges deciding individual cases, but instead present an appropriate site for legislative activity.

No single factor explains this development. In part it is but another sign of the expansion of the legislative domain that has characterized the twentieth century. This is augmented by a widely shared sense that, at least in some areas of conflict of laws, courts have not been notably successful in reaching acceptable solutions. With its atavistic attraction to latin maxims, judge-made conflict of laws remains an egregiously formalistic enterprise, frequently generating contentious results and occasionally prompting judicial entreaties for statutory salvation.[10]

Another factor contributing to growing legislative inroads into judge-made conflict of laws has been laws enacted pursuant to Canada's adoption of multilateral treaties, most notably those originating at the Hague Conference on Private International Law. In this regard, as elsewhere in Canadian conflict of laws, the influence of Jean-Gabriel

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[4] See, for example, *Personal Property Security Act*, R.S.O. 1990, c. P-10, ss. 5-8.

[5] See, for example, *Family Law Act*, R.S.O. 1990, c. F-3, s. 15.

[6] *Convention on Contracts for the International Sale of Goods* 11 April 1980, 1511 U.N.T.S. 77, 19 I.L.M. 668 (entered into force 1 August 1988; accession by Canada 1 May 1992) [hereinafter *CISG*]. For an example of provincial implementing legislation, see *International Sale of Goods Act*, R.S.O. 1990, c. I-10.

[7] See, for example, *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 22 [hereinafter *CLRA*].

[8] See *Consumer Products Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, s. 27.

[9] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am. by S.C. 1997, c. 12 [hereinafter *BIA*]. See ss. 267-75.

[10] See, for example, *Grimes* v. *Cloutier* (1989), 69 O.R. (2d) 641 at 661 (C.A.); and *Going* v. *Reid Brothers Motor Sales Ltd.* (1982), 35 O.R. (2d) 201 at 213 (H.C.J.).

Castel has been significant. Although the Hague Conference has been labouring at the unification of rules of private international law since its creation in 1893, Canada was a latecomer to that effort, not joining until 1968. It might well have remained a non-participant to this day had it not been for Castel's influential 1967 contribution to the Canadian Bar Review. That article sought to introduce the Canadian legal community to the mission and history of the Conference. It ended with this appeal:

> The United States of America is now a member of the Conference. When will it be Canada's turn? Let us not wait any longer. Let us join the Hague Conference. This could be a most desirable Centennial project in the field of law. It would show to everyone who is interested in law that Canada's legal horizons and objectives are world-wide. Canada should not miss the opportunity to attend the 1968 Session of the Conference.[11]

Canada joined the following year, and since that time has been a regular and active participant. Indeed, Canada was the initiator of what is widely regarded as the Hague Conference's most important and successful project of recent decades, the *Convention on the Civil Aspects of International Child Abduction*[12] (in force in all provinces [13]). Due in part to difficulties of federal-provincial co-ordination, Canadian adoption of Hague Conference conventions has been less frequent than some of that organization's advocates might have hoped, consisting to date of the ratification and implementation of four such treaties,[14] only two of which

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[11] J.-G. Castel, "Canada and the Hague Conference on Private International Law: 1893-1967" (1967) 45 Can. Bar Rev. 1 at 34 [hereinafter "Canada and the Hague"].

[12] *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983, ratification by Canada 2 June 1983) [hereinafter *CCA*].

[13] See *CLRA*, *supra* note 7, s. 46(2) and its equivalent in other provinces.

[14] In addition to the child abduction convention mentioned *supra* note 12, the others are: (1) *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, Can. T.S. 1989 No. 2 (entered into force 10 February 1969, accession by Canada 1 May 1989), in force in all provinces and territories, and in the Federal Court of Canada; *Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985, Can. T.S 1993 No. 2, 23 I.L.M. 1389 (entered into force 1 January 1992, ratification by Canada 1 January 1993), in force in most provinces (for a list of implementing legislation and an analysis of the convention see J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 544-49 [hereinafter *Conflict of Laws*]); and *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of Children*, 32 I.L.M. 1134 (entered into force 1 May 1995, ratification by Canada 1 April 1997) [hereinafter *CPC*] which, like the trusts convention, is not in force in all provinces (for details on implementing legislation and an analysis of the convention see *Conflict of Laws*, *supra* at 448-49).

A number of the Hague Conference's earlier conventions, in particular ones negotiated before Canada joined in 1968, lack federal state clauses. Thus, since most of them deal with matters within provincial legislative competence, Canada could not accede to them as a practical matter unless all provinces were prepared to implement them. That is not always easily achieved.

are in force throughout the country. However, adoption of other of the Hague Conference's conventions is under consideration and will further change the Canadian private international legal landscape in the future.

There is one project under way at the Hague Conference with the potential to provoke a legislative change in Canadian private international law greater than any witnessed to date. Since the mid-1990s, Canada and the other member states have been engaged in the negotiation of a convention which, if successfully concluded and implemented, would radically alter the rules governing litigation of those civil and commercial matters with any significant international connection. This project is the proposed Hague judgments convention, and it is the goal of this article to describe and comment on that work. I begin by situating this proposed treaty in the context of existing multilateral agreements for co-ordination of worldwide commerce. That is followed by a brief outline of the current Canadian law in this area. Against that background I offer an account of the shape of the most recent draft of the convention,[15] with some observations on how existing Canadian law would have to be altered if we were to adopt it, and also a discussion of the current sticking points in its negotiation. I conclude with commentary on what is at stake for Canada in these deliberations, and on the discourse of the internationalization of commercial justice.

II. THE PLACE OF COURT JURISDICTION AND ENFORCEMENT IN THE LEGAL ARCHITECTURE OF GLOBAL COMMERCE

Developments in communication and transportation technology have facilitated the internationalization of economic activity and have been accompanied by a variety of changes in the legal arrangements relating to cross-border movement of goods, services, investment, and (sometimes) persons embodied in a number of multilateral conventions implemented by the world's trading nations. Pre-eminent among those

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[15] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference on Private International Law on 30 October 1999 [hereinafter the Draft Convention]. The Draft Convention may be found in the American Law Institute's *International Jurisdiction and Judgments Project, Report of April 14, 2000* (Philadelphia: American Law Institute Press, 2000) at 41 [hereinafter *ALI Report*], online: Hague Conference on Private International Law <http://www.hcch.net/e/conventions/draft36e. html> (date accessed: 10 July 2000).

has been the establishment of the World Trade Organization (WTO).[16] In addition, there are a variety of comprehensive regional trading arrangments, such as the North American Free Trade Association[17] and the European Union, and also a number of multilateral conventions on specific topics. These have gone a long way to standardizing laws relating to such matters as international shipping contracts,[18] international sales of goods,[19] and international air travel.[20] Finally, there are the arrangements made by non-governmental organizations to regularize various types of commercial practice, such as the standard letters of credit promulgated by the International Chamber of Commerce.[21]

Recent years indeed have witnessed measurable amounts of rain on this parade. The stalled progress on the Multilateral Agreement on Investment, last year's inconclusive developments at the Seattle round of the WTO, and the protests at the World Bank meeting in Washington in April 2000 are the most visible examples. Still, even taking those setbacks into account, few would disagree that, at least for the near future, nation states will continue to achieve some success in developing and implementing multilateral arrangements to facilitate global trading.

A notable omission from the preceding list of agreements is an effective multilateral agreement dealing with two key aspects of international commercial litigation, the (contingently) related questions of (1) which countries' courts should properly hear which international private law disputes (*i.e.*, shared standards of direct adjudicatory

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16 *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, 33 I.L.M. 1 (entered into force 1 January 1995).

17 *North American Free Trade Association Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA*].

18 *Carriage of Goods by Water Act*, S.C. 1993, c. 21. Schedule 1 to that statute sets out the Hague Rules, Schedule 2 sets out the Hague-Visby Rules, and schedule 3 (not yet in force) sets out the Hamburg Rules.

19 *CISG, supra* note 6.

20 See *Carriage by Air Act*, R.S.C. 1985, c. C-26, sched. 1. This act implements the *Warsaw Convention: Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, Can. T.S. 1947 No. 15 (entered into force 13 February 1933, accession by Canada 8 September 1947) as amended by protocol at The Hague 1955, Can. T.S. 1964 No. 29 [hereinafter *Warsaw Convention*].

21 International Chambers of Commerce Uniform Customs and Practice for Documentary Credits, 1993 Rev. ICC Pub. No. 500. This is not a treaty, but rather a non-governmental codification that has been almost universally adopted.

jurisdiction), and (2) cross-border enforcement of court judgments.[22] However, negotiations toward a multilateral convention on both these questions are in progress—albeit a progress that, at least in terms of the popular press and the groups that oppose globalization, has received far less attention than the WTO or the World Bank.

Starting in the mid 1990s, the Hague Conference on Private International Law has functioned as the forum for work on a projected worldwide convention on transborder enforcement of judgments in civil and commercial matters. This proposed judgments convention would provide not just for a standardized regime, but, broadly paralleling elimination of protectionist barriers for goods and services, for greatly liberalized international recognition of commercial judgments. That is, it would provide not only uniformity, but a uniformity achieved by the reciprocal removal or at least lowering of many existing obstacles to transfrontier judgment enforcement. The result would be that persons with property in one country would find such property considerably more vulnerable than it currently is to collection processes invoked pursuant to judgments rendered in member states on the far side of the globe. Conversely, court judgments rendered in Canada would be far more likely to enjoy recognition in Europe, China, Japan, the antipodes, and elsewhere. In fact, the change would be more complicated: since the new rules would apply only to matters within the convention's scope, its implementation here would bifurcate Canadian law, creating one scheme for enforcement in Canada of court judgments from some countries, and leaving another recognition regime (presumably the existing one) for judgments outside its scope and for all judgements from non-participating countries.

Of possibly greater significance, the proposed judgments convention would prescribe mandatory rules for direct jurisdiction. It would dictate which civil suits should be entertained (and which should not) by which country's judges. Accordingly, if implemented in Canada, the convention would have the effect of recasting the service *ex juris* regimes found in provincial rules of court and thus rendering uniform the current provincial patchwork of adjudicatory jurisdiction. It would also alter certain long-standing common law rules on this subject and

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[22] In fact, the Hague Conference did produce a convention dealing with judgment enforcement: *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1 February 1971 (entered into force 20 April 1979), online: Hague Conference on Private International Law <http://hcch.net/e/conventions/text16e.html> (date accessed: 10 July 2000). However, it attracted minimal interest, in part because it was pre-empted by the *Brussels Convention* (see *infra*, note 34), and in part because of its considerable complexity, it attracted minimal interest.

likewise restructure the tests for *forum non conveniens* and *lis alibi pendens*.

I do not suggest that the relative lack of attention to the proposed judgments convention—as compared with, say, the public debate and scholarly scrutiny devoted to the WTO process or the proposed Multilateral Agreement on Investment—is in any respect misplaced. Assessed by its probable impact on the general push toward globalization, the judgments convention is less significant, both for the proponents of international capitalism and for those who seek to derail or retard it. There are a number of explanations for why a worldwide arrangement for markedly freer movement of court judgments across national frontiers would represent a less important development than one might at first expect.

Chief among these explanations is the fact that today's preferred dispute resolution mechanism for many international commercial transactions is arbitration. Pursuant to the *New York Convention*,[23] to which Canada and more than 100 other countries are party, commercial arbitrations are already enforceable among the world's major trading nations. Under the federal and provincial legislation implementing this treaty,[24] the grounds on which Canada may decline to lend its support to enforcing an arbitration held in, for example, London, Paris, or Singapore, are few and narrow. Thus, under the auspices of the *New York Convention*, a significant portion of commercial dispute resolution has already been internationalized.

In addition, there are other isolated areas where treaties and implementing legislation have already created a measure of co-ordination. For example, there exists an array of tax treaties which, although they do not generally provide for international enforcement of judgments in tax matters, at least address the important practical issue of double taxation. As well, there already has been an appreciable

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[23] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Can. T.S. 1986 No. 43 (entered into force 7 June 1959, accession by Canada 10 August 1986) [hereinafter *New York Convention*]. Presumably one of the attractions of arbitration as an international dispute resolution mechanism is the very existence of the cross-border enforcement facilitated by this convention. That is, if there was comparable international enforcement of court judgments, some persons who currently contract for arbitration might prefer to forgo arbitration clauses in favour of litigation.

[24] *United Nations Foreign Arbitral Awards Act*, S.C. 1986, c. 21. For discussion of that convention and references to provincial legislation see *Conflict of Laws*, *supra* note 14 at 334-37.

globalization of the law respecting children,[25] so that court dispositions dealing with cross-border adoptions and international child custody disputes enjoy considerable transborder recognition. Finally, as noted above, the recent amendments to the *BIA*[26] have attempted to effect a greater co-ordination in the area of international insolvencies.

Still, even allowing for the fact that the developments just mentioned have rendered the question of cross-border enforcement of court judgments in civil and commercial matters less crucial than might otherwise be the case, the matter is not inconsequential. The lack of international standards on court jurisdiction and judgment enforcement amounts to a significant missing link in the system for resolution of international commercial disputes.[27] Even with the growth of alternative dispute resolution, considerable amounts of civil and commercial dispute resolution does end up before courts. Not all international contracts have provisions for arbitration, and even when they do, questions may arise about the scope of the arbitrators' authority, and those questions might have to be resolved by judges. In addition, there are situations where the parties have not had an effective opportunity for *ex ante* bargaining, and hence no possibility of a pre-negotiated arbitration clause relating to the issue that has arisen. The prime examples here are non-market torts and property (including intellectual property) disputes—tort claims in particular present a persistent problem for cross-border enforcement. In short, the lack of binding global standards on court jurisdiction and enforcement is a significant gap in the current system of international commercial arrangments, and closing that gap would be a development of some consequence.

To some it comes as a surprise that no worldwide arrangement for cross-border judgment recognition exists. With global agreements relating to cross-border trade in goods and services, it seems a curious omission from this set of international arrangements that the countries of the world have not yet put in place the apparatus for a standardized approach to enforcement of foreign court judgments. After all, many of those judgments are just the resolution of disputes arising from

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25 For fuller discussion see S. Detrick and P. Vlaardingerbroek, eds., *Globalization of Child Law: The Role of the Hague Conventions* (The Hague: Nijhoff, 1999) and A. Dyer, "The Internationalization of Family Law" (1997) 30 U.C. Davis L. Rev. 625. And in this connection see the Canadian legislation implementing the *CCA* and *CPC* respectively, *supra* notes 12 and 14.

26 *Supra* note 9.

27 A. Straus, "Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments" (1998) 61 Alta. L. Rev. 1237 at 1238.

transactions which themselves flow relatively unimpeded across national frontiers and do so in light of standardized binding agreements. So why should the ultimate efficacy of an important part of the mechanism for resolving disputes arising from such agreements be left to unilateral decisions of states?

Some explanations may emerge below, but for the moment let us focus on the existing situation. Canada has implemented just a single agreement on mutual enforcement of court judgments, a bilateral one with the United Kingdom.[28] That arrangement is not comprehensive;[29] nor is it especially significant, since it mainly codifies the common law as it existed in both countries at the time it was negotiated. A second such bilateral agreement was entered into with France in 1996 but has not yet been implemented.[30] Each of these treaties is confined to the question of enforcement. Neither has any effect on the question of initial adjudicatory jurisdiction, and although there are some limited arrangements touching on jurisdiction, such as the *Warsaw Convention*'s arrangments for adjudicating claims arising out of international air travel,[31] as well as some bilateral treaties dealing with the mechanics of service of judicial documents,[32] Canada is not signatory to any general treaty dealing with court jurisdiction. Similarly the United States, the world's largest international trader, has no international agreements dealing with enforcement of court judgments in commercial matters or with judicial jurisdiction.[33]

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[28] By "not comprehensive" I mean that parties are not required to resort to the enforcement mechanism set out in the legislation implementing the convention. Judgment creditors who cannot bring their judgments within the scope of the convention can and do obtain cross-border enforcement at common law.

[29] *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 24 April 1984, Can T.S. 1987, No. 29 (entered into force 1 January 1987). The federal government implemented this by the *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30 (in respect of the Federal Court of Canada), and all the common law provinces and the territories have likewise implemented it.

[30] *Convention Between Canada and France on the Recognition of Judgments in Civil and Commercial Matters 1996 and on Mutual Legal Assistance in Maintenance*, 10 June 1996, P.C. 1996-813.

[31] *Supra* note 20, art. 28.

[32] For a list and a discussion see *Conflict of Laws*, *supra* note 14 at 221-23.

[33] In 1976 the U.S. and U.K. attempted to negotiate a bilateral agreement on judgment enforcement, but it foundered due to concerns of U.K. insurance companies about the size of American damages awards (regarding this see the discussion, *infra*, Part IV) and was never concluded. See P. Hay & R. Walker, "The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom" (1976) 11 Tex. Int'l L.J. 421; and P. North,

The notable exception to this lack of co-ordination is the European Union. The founding members of that organization perceived at the outset that liberal enforcement of each other's judgments was a crucial adjunct to the cross-border movement of goods and services that was at the heart of their union, and concluded among themselves a multilateral arrangement both to facilitate such enforcement and to limit jurisdiction *inter se*.[34] As the European Union has expanded, participation in that "free trade zone for judgments" has been required for new members.[35] But such arrangements are not the rule elsewhere. For instance, *NAFTA* embodies no such regime.[36] In the absence of any truly global scheme of binding standards of court judgment enforcement it is helpful to take note, briefly and by way of background, of the manner in which Canada's law on this subject has been formed.

"The Draft U.K./U.S. Judgments Convention: A British Viewpoint" (1979) 1 Nw. J. Int'l Law & Bus. 219.

[34] In article 220 of the *Treaty of Rome*, which founded the European Community, the original six member countries agreed to work for "the simplification of formalities governing the reciprocal recognition of judgments of courts or tribunals ... ." This led to the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, 21 O.J. L. (No. C97/1) 36, 8 I.L.M. 229 (entered into force 1 February 1973) [hereinafter *Brussels Convention*]. The Supreme Court of Canada took notice of the *Brussels Convention* in *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*]. In modifying the common law of Canada to lower barriers to enforcement of intra-Canadian judgments, the court observed, at 1100, that the model provided by the European Union provided a persuasive analogy.

[35] *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 16 September 1988, O.J. L. (No. L 319) 9, 28 I.L.M. 620 (entered into force 1 January 1992).

[36] *Supra* note 17. Nor does the free trade agreement between Canada and Chile: *Canada-Chile: Free Trade Agreement*, 5 December 1996, 36 I.L.M. 1067 (entered into force 4 July 1997), see also the *Canada-Chile Free Trade Implementation Act*, S.C. 1997, c. 14, s. 32. These treaties and their implementing legislation do provide for resolution of disputes between states parties and certain investors, and those awards are enforceable within the free-trade zone, but the treaties have no general judgment enforcement or jurisdiction provisions regarding general civil litigation.

The only other multilateral enforcement convention of note is the so-called *Montevideo Convention* in force among Mexico and a number of South American states: *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 8 May 1979, 1439 U.N.T.S. 87 (entered into force 14 June 1980). It deals with judgment enforcement, but not with the participating countries' rules of direct jurisdiction.

III. GENESIS OF THE DRAFT CONVENTION

A. *The Courts*

It is not my goal here to provide a detailed description of Canadian rules of enforcement of foreign country judgments. That is available elsewhere.[37] However, a few comments on the manner in which that law has been formed and on the consequences of that formation will be helpful in understanding both the birth of the Hague project and what is at stake for Canada in the completion of that enterprise.

Like other countries, Canada does not enforce all foreign judgments. It gives effect to some but declines to recognize others. Those that are refused enforcement are ineffective here, and if Canada is the only place the judgment debtor has property, then a foreign judgment we decline to enforce is useless to the judgment creditor. In the common law provinces of Canada the law on this subject has been made mostly by judges.[38] Foreign judgment recognition has been conceived of as a common law right of action: a judgment creditor in whose favour a foreign country court proceeding has gone and who needs to enforce the resulting foreign judgment in Canada, brings an action here on the judgment. A decade ago, Canadian rules respecting that cause of action were modified by the Supreme Court of Canada. In its much discussed judgment in *Morguard*,[39] the Court adopted an avowedly instrumentalist and economic perspective. It began its analysis by noting that the question of which foreign judgments should be recognized in Canada is a matter entirely within Canada's unilateral control; that is, it is dictated neither by any binding precepts of public international law nor by any obligations Canada owes to private

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[37] *Conflict of Laws*, *supra* note 14 at 269-322.

[38] In 1933 the Uniform Law Conference of Canada codified those judge-made rules in the model *Foreign Judgments Act*. This was adopted by just two provinces: Saskatchewan, in the *Foreign Judgments Act*, R.S.S. 1978, R.S.S. 1978, c. F-18; and New Brunswick, in the *Foreign Judgments Act*, R.S.N.B. 1973, c. F-19.

[39] *Supra* note 34. For commentary see J.-G. Castel, "Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection" (1991) 7 B.F.L.R. 111; P. Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye* v. *Morguard Investments Ltd.*" (1992) 37 McGill L.J. 537; J. Blom, Case Comment (1991) 70 Can. Bar Rev. 733; V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd* v. *De Savoye*" (1991) 12 Advocates' Q. 489; and P. Finkle & S. Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991) 14 Dal. L.J. 340.

individuals who have obtained judgments from other states' courts.[40] However, having embraced that starting point, the Court immediately went on to note that, as a practical matter in the new global economy, Canada would benefit by granting liberal enforcement to foreign judgments. Such a practice would enable us to avoid isolation and participate more fully in international trade.

The Supreme Court's analysis in *Morguard* represents its core pronouncement on how Canadian judges should modify the common law in light of the changing world economic order. Such response, in the words of Mr. Justice La Forest, should be conditioned by "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner,"[41] a need that should prompt courts to select rules "that will best promote suitable conditions of interstate and international commerce,"[42] which today means that the law "must be adjusted in light of the changing world order."[43] In the Court's unanimous view, new economic circumstances leave judges no option but to reconfigure the rules respecting enforcement of foreign court judgments: "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."[44]

Two points are worthy of note in connection with the Supreme Court's assessment of how judges should respond to the increasing internationalization of commerce. The first is the Court's agnosticism as to whether globalization of economic activity is a good or bad thing. For all of Mr. Justice La Forest's statements about the momentous change in the world economic order and its attendant effects on political power, he is strikingly mute about whether that development is a welcome one. He simply observes that it is an unavoidable datum of great significance and thus something that judges must take into account.[45] The result of

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[40] *Morguard*, *supra* note 34 at 1095-96.

[41] *Ibid.* at 1096.

[42] *Ibid.* at 1097, quoting H. Yntema, "The Objectives of Private International Law" (1957) 35 Can. Bar Rev. 721 at 741.

[43] *Morguard*, *supra* note 34 at 1097.

[44] *Ibid.* at 1098.

[45] Perhaps it should come as no great surprise to see the Supreme Court of Canada pronounce that judges, in articulating the common law, should attempt to facilitate global capitalism. This may be no more than another instance of private law's long-standing role of fulfilling the reasonable expectations of parties to contracts and protecting justified reliance. Some

Morguard and its progeny has been that in the 1990s foreign judgments have become far more easily enforceable in this country than they previously were. This development is contemporaneous with, and analogous to, Canada's lowering of trade barriers pursuant to *NAFTA* and the WTO, except that it is unaccompanied by mandated reciprocal action by other states.

The second point follows from the preceding comment: the success (as measured by economic benefit to Canada) of the Court's gambit appears to depend on other countries taking notice of Canada's willingness to enforce their judgments and then responding by recognizing that their own enlightened self-interest (or perhaps just a spirit of fair play) should prompt them to follow suit and lower their barriers to recognition of Canadian judgments. Such consequences are hardly guaranteed. It bears noting that Canada is not alone in this. American laws on enforcement of foreign country judgments were likewise devised mostly by judges. Like Canada's, they do not make relevant any reciprocity of treatment of American judgments by the country in which the proffered foreign judgment originates,[46] and on the whole they permit liberal enforcement of foreign judgments. American commentators have attributed their country's approach to enforcement of foreign judgments to the same tactic espoused by the Supreme Court in *Morguard*: "U.S. courts give respect to foreign judgments not only because finality is a fair and efficient policy, but also because U.S. courts hope to encourage abroad similar respect for their own judgments."[47]

It is possible to doubt the wisdom of this stratagem. As will be discussed below, many countries with which Canada has significant trade relationships remain appreciably less willing to enforce Canadian judgments than post-*Morguard* Canada is to enforce theirs. The problem may be characterized as a species of iterated prisoner's dilemma in

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of the widely voiced concerns about the negative consequences of the global economic development of the last decade include its alleged role in increasing economic inequalities (both between the countries of north and south and within nations), its claimed role in creating a race to the bottom in terms of regulation of matters such as environmental protection and workers' rights, and its erosion of the nation state's power generally. Given these concerns one might have thought that such long-standing principles of judge-made law as equality, fairness, and protection of weaker parties might have produced some more restrained statement about how the judge-made law should respond to internationalization of commercial activity. Conceivably, the Supreme Court might have at least offered a gesture toward something a little more measured and circumspect than simply placing the common law so entirely at the service of the globalization of commerce. But it did not.

[46] *Hilton* v. *Guyot*, 159 U.S. 113 (1895) appeared to impose a reciprocity requirement, but that has been discarded: *Somportex Ltd.* v. *Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971) at 440 n. 8, cert. denied, 405 U.S. 1017 (1972).

[47] K. Clermont, "Jurisdictional Salvation and the Hague Treaty" (1999) 85 Cornell L. Rev. 89 at 98.

which, over the long term, cooperation is rewarded and defection punished. Therefore, the unilateral-dropping-the-guard tactic is not irrational.[48] To be fair, perhaps insufficient time has elapsed since *Morguard* to permit proper assessment.

B. *The Executive*

We may never know whether the *Morguard* approach to creation of an optimal worldwide enforcement regime might eventually bear fruit, for the action has now shifted to the executive and bureaucratic realm. As noted, the United States endured a lack of equivalence in international judgment enforcement for decades. With the growing international trade of the 1990s, it began to tire of that. In the words of one commentator, "[a]s a well-behaved member of the international community of nations, the United States eagerly gives appropriate respect to foreign judgements, despite sometimes getting no respect in return."[49] This came to be perceived as being unfair to individual

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[48] For elaboration of this point, though not from a Canadian angle, see M. Whincop, "The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments" (1999) 23 Melbourne U.L. Rev. 416.

[49] Clermont, *supra* note 47 at 89. Even a European commentator agrees that, by and large, the Americans are more welcoming to European judgments than most European countries are to American ones: J. Zekall, "The Role and Status of American Law in the Hague Judgments Convention" (1998) 61 Alta. L. Rev. 1283 at 1300. Americans themselves have gone so far as to assert that there is no country in the world more willing to enforce foreign judgments than the United States. See R. Brand, "Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law," in J. Bhandari & A. Sykes, eds., *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge: Cambridge University Press, 1997) 592 at 604. However, another leading American scholar who conducted a study of how Canada and the United States treated one another's judgments came to the conclusion that there was a rough equivalence: R. Weintraub, "Recognition and Enforcement of Judgments and Child Support Obligations in United States and Canadian Courts" (1999) 34 Tex. Int'l L.J. 361 [hereinafter "Recognition and Enforcement"].

This is not the place to pursue that debate, but a case might be made that post-*Morguard* Canada is even more receptive to international judgment recognition than is the United States. Despite commensurability in many aspects of American and Canadian judgment enforcement practice, there is one area in which Americans are, as a general rule, not at all welcoming to foreign judgments: defamation. Largely because of the U.S. Constitution, the United States' substantive law on this subject differs from that of many other countries. In general, American libel law is pro-defendant, and American courts have been prepared to export this social policy by not recognizing foreign libel judgments which reach results contrary to those that would have been reached had the original action been brought in the United States: see *Telnikoff* v. *Matusevitch*, 702 A. 2d 230 (Md. 1997) and *Bachchan* v. *India Abroad Publications Inc.* 585 N.Y.S. 2d 661 (Supp Ct.

Americans: "U.S. citizens are being whipsawed."[50] That is, the claim was advanced in that, insofar as foreign judgments were concerned, Americans[51] were being unfairly harmed by an inequality of national practice. Significantly, this was seen as not only inequitable to individual Americans (the "whipsawees"), but as a species of trade imbalance between countries. Under this view, American judgment debtors responsibly pay off foreign judgment creditors, while American judgment creditors "tend to be given short shrift in [foreign] courts,"[52] generating no equivalent return flow of wealth into the United States. The situation was perceived as akin to the imbalance of tariffs that occurred during the 1990s when Americans felt they were suffering as compared to their trading partners, notably Japan. It was further claimed that this so-called discriminatory position was of such magnitude as to amount to "a real threat to American primacy in international trade."[53] This new trade-law orientation to the question of foreign judgment enforcement, reinforced by the awareness that the European Union offered a model of a free trade zone for judgments, is nicely summed up in the title of one law review article by a leading American scholar: "How Substantial Is Our Need for a Judgment-Recovery Convention and What Should We Bargain Away to Get It?"[54]

The upshot was that in 1992 the government of the United States asked the Hague Conference on Private International Law to assume the task of facilitating the negotiation of a multilateral convention on the

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[50] Clermont, *supra* note 47 at 94.

[51] More accurately, the individuals (if any) who are unfairly treated are those with exigible assets present in the United States. Obviously that group is not co-extensive with American citizens, but the claim that the unfair treatment correlates with American citizenship has greater resonance, and of course there is sufficient overlap between the two classes to make the claim plausible.

There is a significant issue here. An individual (natural person or corporation) in the United States might, for example, own property (or shares in a corporation) located in a country that does not grant ready enforcement to foreign judgments. Such a person, despite being present in the United States, may be able to benefit from the restrictive enforcement practice of that foreign country.

[52] Clermont, *supra* note 47 at 94.

[53] K. Russell, "Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action" (1993) 19 Syr. J. Int'l L. & Com. 57 at 80.

[54] R. Weintraub, "How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?" (1998) 24 Brooklyn J. Int'l L. 167 [hereinafter "How Substantial Is Our Need"]. To similar effect see Clermont, *supra* note 47 at 97, where he expects the "net benefits of reform" to "yield great returns."

enforcement of judgments.[55] The request found favour and the Conference became the forum for talks involving its thirty-six member states, a number of non-member countries, some intergovernmental organizations (the United Nations, the European Commission and others) and also several NGOs (notably the International Chamber of Commerce). This has consisted of an ongoing series of discussions, study papers, negotiations and specialized working groups all aiming toward a worldwide[56] convention on judicial jurisdiction and the enforcement of foreign court judgments in civil and commercial matters.

IV. THE DRAFT CONVENTION DESCRIBED

A blow-by-blow account of the various meetings and working groups would require book-length treatment, and even a complete analysis of all features of the current draft of the convention would be a lengthy undertaking. However, the current draft's essential elements can be delineated within a relatively brief compass, as can the problems underlying the handful of its provisions which remain incomplete and subject to further negotiation.

The Draft Convention applies to civil and commercial (but not administrative) matters.[57] It excludes judgments dealing with revenue, customs, insolvency, admiralty, social security, succession, matrimonial

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55 The process was initiated by a letter from the Department of State to the Hague Conference in May 1992 (made available by the Hague Conference and distributed with Hague Conference Document L.c. ON No. 15 (92)). For an account of the steps involved in getting this matter onto the Conference's agenda, and of the project's early development, see the report by C. Kessedjian for the Conference: *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, prel. doc. No. 7 (1997), online: <http://www.hcch.net/e/workprog/jdgm.html> (date accessed: 10 July 2000). And for an account of Canadian activity in the early years of work on the convention, see L. Lussier, "A Canadian Perspective" (1998) 24 Brooklyn J. Int'l L. 31 at 36-54.

56 We should not fail to note that here, as is commonly the case, the words "worldwide" and "globalization" are potentially misleading. Just as the so-called worldwide web is not quite a reality in much of the third world, at present it is mainly the industrialized trading nations that are involved in the negotiations on the judgments convention. The participants comprise almost all of Western Europe, some (but not all) of the countries of Eastern Europe, the United States, Canada, Japan, China, Australia, New Zealand, Mexico, and some (but not all) of the countries of South and Central America. Currently there are no participants from sub-Saharan Africa, the Islamic countries of the Middle East, or South Asia.

57 The Draft Convention, *supra* note 15, art. 1.

property and maintenance.[58] Some of these (maintenance, for example[59]) are excluded because they are thought to be dealt with adequately under existing arrangements; others (revenue, for example) because their resolution seems unlikely or peripheral to the private law focus of the enterprise.

Turning from scope to substance, the principal point to note is that, although the original impetus for the Draft Convention was an international framework for judgment *enforcement*, the greatest number of its terms deal with the formulation of agreed standards of original adjudicatory jurisdiction. The explanation for the focus on jurisdiction is that a consensus has emerged that, to the greatest extent possible, enforcement should correlate with forensic jurisdiction. That is, if it is possible to arrive at internationally shared rules as to which private law disputes should be entertained by which country's judiciary, then resolution of the enforcement question follows easily: matters litigated and resolved in "the right place" should be given effect everywhere, or at least in other participating countries; other obstacles to enforcement being both few and confined.

This parallels the approach to interprovincial enforcement which the Supreme Court of Canada articulated in *Morguard*.[60] That is not surprising when one recalls that in opting for correlativity of jurisdiction and enforcement the *Morguard* Court was much influenced by the fact that this was a technique which had been successfully implemented elsewhere, including within Europe by the *Brussels Convention*.[61] The *Brussels Convention* enabled the EU, already a free trade zone for goods and services, to become a free trade zone for judgments. It is therefore not surprising to see that treaty's core mechanism—complementarity of jurisdiction and recognition—become a dominant model for the Hague project. Indeed, it seems to be the current received wisdom about transborder enforcement of court judgments that the chief question is the propriety of the original assertion of jurisdiction (as opposed to, say, the correctness of the result). If initial jurisdiction can be successfully allocated among available fora, which is largely a matter of getting all participants to curtail the breadth of their direct jurisdiction, then

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[58] *Ibid.*, art. 7.

[59] See *Convention on the Law Applicable to Maintenance Obligations*, 2 October 1973, 1056 U.N.T.S. 199 (entered into force 1 October 1977). This is in force in nineteen member countries of the Conference—unfortunately, Canada is not among them.

[60] *Supra* note 34.

[61] *Ibid.*

judgments arising from actions in those places would be enforceable in all of the other states party to the convention, with very few other barriers to enforcement. Accordingly, article 25(1) of the draft judgments convention provides: "A judgment based on a ground of jurisdiction provided for in articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced ... ."

The question then becomes, what is the appropriate basis of general adjudicatory jurisdiction? The basic criterion chosen in the Hague negotiations is the residence of the defendant. That is, regardless of where the cause of action arose, of what the cause of action is, or of other matters (for example, the parties' nationality), a plaintiff is entitled to seek out a defendant at the defendant's home and bring its action there. A resulting judgment will then be recognized in other participating countries. Article 3(1) states: "Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident." As with other Hague conventions that employ the phrase "habitual residence," that term is not defined, at least as it applies to natural persons. However, the residence of corporations is addressed by article 3(2) which facilitates suits against such defendants by providing an expansive, non-hierarchical set of options for ascertaining the residence of non-natural persons. At their option, plaintiffs may sue corporate defendants (1) where the corporation has its statutory seat, (2) in the jurisdiction under whose law it was formed, (3) where it has its central administration, or (4) where it has its principal place of business.

There are three ways in which the Draft Convention qualifies its general rule that defendants may be sued at their habitual residence. First, it facilitates party autonomy by providing that persons may agree in advance to settle their disputes only in a certain country's courts,[62] or that a defendant may, by appearing and proceeding on the merits, agree to a plaintiff's choice of court, and that such choices will, with certain narrow exceptions, be respected.[63]

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[62] The Draft Convention, *supra* note 15, art. 4. One way in which the Draft Convention's approach to forum selection clauses differs from current Canadian law is that such clauses are assumed to confer exclusive jurisdiction unless the parties expressly state otherwise: *ibid.*, art. 4(1). That is, a contractual clause which reads "the parties agree to resolve their differences in the courts of Alberta" will under the Draft Convention's approach be assumed to mean "*only* in the courts of Alberta." That is not the meaning Canadian courts presently give to such clauses.

[63] The Draft Convention's principal limits on contractual choice of law clauses are that they may derogate neither from the special jurisdictional benefits given to consumers and employees (*infra*, notes 67 and 68), nor from certain mandatory bases of jurisdiction: *infra*, notes 71 and 22.

Second, there are a range of supplemental grounds of jurisdiction. These are in some sense analogous to the criteria in current Canadian service *ex juris* rules, but there are two key differences. First, the Draft Convention's supplementary grounds of jurisdiction, like all of its jurisdictional standards, do not turn on where the defendant is served.[64] Second, on the whole they are narrower than existing Canadian *ex juris* rules. The supplemental rules comprise provisions that tort actions may be brought in the contracting state where the wrongful act or foreseeable harm occured;[65] that actions in respect of contracts for goods or services may be brought where the goods or services were supplied;[66] that in consumer contracts consumers have the option to sue defendant traders at the consumer's habitual residence, at least where the trader has solicited the consumer in that place and steps have been taken there to conclude the contract;[67] and that employees have the option of suing their employers in the state where the employees habitually carried out their work.[68] Actions in respect of trusts may, at the plaintiff's choice, be brought in the state (1) where the trust is principally administered, (2) whose law is applicable, or (3) which has the closest connection with the trust for the purpose of the proceedings.[69] There is a final provision on supplemental jurisdiction over defendants based on the fact that they have a branch or establishment within a jurisdiction or have done business there. However, the wording of this remains contentious and unresolved, and will be the subject of further discussion below.[70]

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[64] In this respect the Draft Convention's approach to jurisdiction is like that in the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, as am., s. 3. There, territorial jurisdiction is based on one year's residence of either party in the province where the suit is to be heard. The place where the respondent is served with the petition is irrelevant: serving him within the province creates no greater claim to jurisdiction; serving him on the far side of the world results in no lesser one.

[65] The Draft Convention, *supra* note 15, art. 10.

[66] *Ibid.*, art. 6.

[67] *Ibid.*, art. 7(1). As noted *supra* note 63, art. 7(3) of the Draft Convention overrides general provision in favour of party autonomy and forbids *ex ante* contractual modification of this rule.

[68] *Ibid.*, art. 8(1)(a)(i). If there is no such state, article 8(1)(a)(ii) provides that the employee may bring the action in any state where the employer is situated. As with the previous rule dealing with consumers, the employment contract cannot provide effectively for derogation from this rule.

[69] *Ibid.*, art. 11 (2).

[70] The relevant provision of the Draft Convention is article 9, which reads:

> A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial

The third way in which the general rule is qualified is that the Draft Convention prescribes certain rules of mandatory exclusive jurisdiction. These override both the principle that defendants may always be sued in the courts of their residence, and the rules that allow for party autonomy in the choice of forum. They are: (1) that *in rem* or lease proceedings in respect of immoveable property must be brought where the property is situated;[71] (2) that actions concerning the validity of a legal person must be brought in the state whose law governs its putative existence;[72] (3) that suits concerning the validity of entries in public registeries should be brought only where the registry is kept; and (4) that proceedings relating to the registration or validity of patents, trade marks, or similar rights must be heard where the registration has been applied for.[73]

It is critical to note that the Draft Convention does more than just stipulate that judgments rendered in accordance with the foregoing criteria are entitled to enforcement in other Convention countries. Rather, states would have to make such jurisdiction available. For example, Canadian service *ex juris* rules, which do not typically provide special jurisdictional advantages for consumers or employees, would have to be modified so as to ensure that Canadian courts afforded such jurisdiction.[74]

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activity].

The bracketed sections remain contentious. The question of "doing-business" jurisdiction has a further aspect. See *infra*, note 91.

[71] *Ibid.*, art. 12(1). The exception is that, where the action concerns a tenancy, the landlord retains the option to sue the tenant at the tenant's habitual residence. This parallels the existing Canadian rule originating in *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602 (H.L.).

[72] The Draft Convention, *supra* note 15, art. 12(2).

[73] Or where that registration is deemed to have taken place under the terms of an international convention: see *ibid.*, arts. 12(3) & (4).

[74] It is not my goal here to enumerate all the ways in which Canadian jurisdictional rules might have to be expanded to accommodate the Convention. However, here is another example: consider a situation where a party brings suit in a Canadian province in respect of a contract that contains a choice of forum clause in favour of that province. That province will have jurisdiction over the action, but it is still open to the defendant to request the court stay or dismiss the action on the grounds of *forum non conveniens*. In such a motion the choice of forum clause will count strongly in the plaintiff's favour, but the court will retain a discretion to grant the defendant's application: see *Conflict of Laws*, *supra* note 14 at 261-66. Under the convention the court would not be in a position to decline that jurisdiction: The Draft Convention, *supra* note 15, arts. 4 and 22(1). In that respect, Canadian jurisdiction would have to be "broader" than it now is. Note that this broadening of Canadian jurisdiction, so as to remove judicial discretion to decline it in circumstances where they are currently entitled to do so, would involve altering a rule which is generally conceived of being part of the superior court's inherent power to control abuse of its own process.

The Draft Convention goes beyond simply specifying the jurisdictional bases state parties are required to afford. It stipulates circumstances in which a country may *not* exert jurisdiction. This is key: states party to the Convention would have to amend their internal law of original court jurisdiction (*i.e.*, in Canada, both provincial service *ex juris* rules and certain common law rules) so as to bring the territorial reach of their existing adjudicatory jurisdiction within the boundaries imposed by the Convention. This adjustment would mean eliminating certain existing jurisdictional grounds viewed as exorbitant. The Convention's key jurisdictional limit will have a familiar ring: "[T]he application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute."[75]

This may seem like nothing more than a nonpleonastic rendering of *Morguard*'s requirement that courts may not assert jurisdiction in the absence of a real and substantial connection,[76] and thus unlikely to necessitate any amendment to Canadian law, but that is not quite the case. First, since the *Morguard* restriction on direct jurdiction is derived from the "in the province" limitations in section 92 of the *Constitution Act, 1867*,[77] it applies to the provinces' courts, but it is not clear that it binds the Federal Court of Canada. The proposed convention would govern all Canadian courts. Secondly and more importantly, the Draft Convention goes on to offer a number of instances of direct jurisdiction that do not meet its substantial connection test. Some of those banned grounds are ones currently exercised in Canada and which, moreover, have been held to satisfy the *Morguard* test. In particular, the Convention specifies that jurisdiction may be taken neither on the basis of the residence of the plaintiff, nor on the basis of service of the writ upon the defendant in the forum state—two jurisdictional bases said by Canadian courts to meet the *Morguard* real and substantial connection test.[78] Those are not the only items on the forbidden list which appear to

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[75] The Draft Convention, *supra* note 15, art. 18(1). This would only apply for defendants habitually resident in other contracting states. As noted, *supra*, Part II, the effect of implementing the proposed convention would be to bifurcate Canadian law on enforcement and jurisdiction.

[76] *Morguard*, *supra* note 34 at 1104. The test is traceable to *Indyka* v. *Indyka*, [1969] 1 A.C. 33 (H.L.), [1967] 2 All. E.R. 689, [1967] 3 WLR 510 (H.L.) cited to A.C. at 105.

[77] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92 (13) & (14), reprinted in R.S.C. 1985, App. II, No. 5.

[78] The Draft Convention, *supra* note 15, arts. 18(2)(d) and (e). In *Morguard* itself Justice La Forest said that jurisdiction taken on the basis of the defendant's presence posed no problem for his substantial connection test: *supra* note 34 at 1104. Admittedly this was *obiter dicta*.

Likewise a number of Canadian decisions appear to have held that a plaintiff's residence

clash with the jurisdiction currently asserted by some Canadian provinces. For instance, the convention provides that a state may not assert jurisdiction based on the mere signing in that state of the contract from which the dispute arises.[79] This would appear to clash with Ontario's *ex juris* rule (and similar ones in several other provinces) which permits service *ex juris* "in respect of a contract where ... the contract was made in Ontario ... ."[80]

Despite the previously adduced examples of the ways in which Canadian adjudicatory jurisdiction would have to be *expanded* to accord with the Draft Convention, the more signficant changes—and the net effect on Canadian jurisdictional reach—would be a contraction to bring Canadian jurisdiction into line with the convention's substantial connection standard. Canadian courts would thus be entitled to hear a smaller range of cases than is permitted under existing rules, but judgments resulting from such suits would be entitled to easier enforcement than they now are.

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in the forum will satisfy *Morguard*'s substantial connection standard: *Dennis* v. *Salvation Army Grace General Hospital Board et al.* (1997), 156 N.S.R. (2d) 372 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiii (*sub nom. Pike* v. *Dennis*); *Pare* v. *Halldorson* (1996), 150 Sask. R. 96 (Q.B.); and *Oakley* v. *Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), leave to appeal to S.C.C. dismissed [1998] 2 S.C.R. v. Note, there are also cases going the other way, for example, *MacDonald* v. *Lasnier* (1994), 21 O.R. (3d) 177 (Gen. Div.). I have argued elsewhere in favour of the view in the last-mentioned case: V. Black, "Territorial Jurisdiction Based on the Plaintiff's Residence" (1998) 14 C.P.C. (4th) 222.

[79] The Draft Convention, *supra* note 15, art. 18(2)(j).

[80] *Rules of Civil Procedure*, Ontario, Rule 17.02(f)(i). For another instance of a common Canadian *ex juris* rule which likely offends the banned grounds of jurisdiction in the Draft Convention, consider Ontario's r. 17.02(o) (and its equivalent in most other provinces) which permits service *ex juris* "against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario ... ." It is by no means clear that, just because there is justifiable assertion of jurisdiction over A and that under our rules of joinder B is a proper party to that action, assertion of jurisdiction over B is permitted under the convention. In short, rules such as Ontario's r. 17.02(o) have the potential in certain cases to run afoul of the convention's substantial connection standard.

As with the ways in which Canadian jurisdictional rules would have to be *expanded* to accord with the convention (see *supra* note 74) I have not attempted to be exhaustive about the ways in which those rules would have to be curtailed. The point is that they would have to be rewritten substantially.

In this connection it should be noted that in the United States, where (like Canada) enforcement of foreign country judgments has hitherto been a matter mainly for the states and not the federal government, the American Law Institute is proposing that, should the Convention be concluded and the United States choose to implement it, it should be implemented by a *federal* statute. See the *ALI Report*, *supra* note 15 at xv and 18-19, and L. Silberman and A. Lowenfeld, "A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute" (2000) 75 Ind. L.J. at 635. It is interesting to speculate on whether the Canadian Constitution would permit comparable federal legislative action.

Five additional features of the Draft Convention should be noted. First, jurisdiction and enforcement would not be completely correlative. Bases of original jurisdiction that are neither required nor prohibited would be permitted.[81] However, resulting judgments would not be guaranteed recognition in other contracting states (though such states could choose to enforce them if they wished). Second, the convention specifies certain exceptional circumstances in which courts may decline to exercise a jurisdiction given to them under it. If implemented this would amount to a legislative *forum non conveniens* power. However, the version in the Draft Convention provides less scope for declining jurisdiction than does the current Canadian *forum non conveniens* test. If the court's jurisdiction is conferred neither by contract nor by one of the convention's provisions for exclusive jurisdiction, then the court may suspend its proceedings if, and only if, (1) it is clearly inappropriate for that court to exercise jurisdiction, (2) another court has jurisdiction, and (3) it is clearly more appropriate for that other court to resolve the dispute.[82] Third, the Convention has a section on provisional and protective measures which guarantees recognition on roughly the same grounds as final judgments. As a result, a worldwide *Mareva* injunction issued on an interim basis by a Canadian court that had appropriate jurisdiction would have to be recognized by other convention countries.[83] Fourth, even under the Convention, states would retain the power that exists in most national systems (including Canada's) to refuse to enforce foreign judgments that are obtained by procedural fraud or that are incompatible with their public policy.[84] Finally, in respect of those portions of damages awards that are "non-compensatory" (a term which includes, but is not limited to punitive awards), contracting states are not required to enforce them beyond the amount they themselves could have awarded in non-compensatory damages.[85] A similar provision allows courts to decline those portions of damages awards which are shown to be "grossly excessive."[86]

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[81] The Draft Convention, *supra* note 15, art. 17.

[82] *Ibid.*, art. 22. Likewise article 21 is a provision on *alibi pendens* which is comparable to the common law on that point, but provides considerably greater preference to the first court seized.

[83] *Ibid.*, art. 13.

[84] *Ibid.*, art. 28.

[85] *Ibid.*, art. 33(1). It is not clear, for example, whether non-compensatory damages awards would include those where damages are measured by the gain to the defendant, rather than the loss to the plaintiff.

[86] *Ibid.*, art. 33(2).

These last-mentioned matters point to reservations that many of the negotiating states have about judgments emanating from the United States. These concerns exist even when the original (American) assertion of adjudicatory jurisdiction conforms to the Convention's standards. In that connection it is worth focusing more closely on the American situation, since much of the negotiations have assumed a United States *versus* Rest of the World (ROW) flavour, and appreciating that dynamic is crucial to understanding both the nature of the existing draft of the convention and the still unresolved issues on which the project might easily fail. One might have thought that, because the United States (like post-*Morguard* Canada) has by unilateral judicial action already lowered its barriers to enforcement of foreign country judgments, the U.S. would come to this process with fewer bargaining chips than its economic power typically gives it in international negotiations.[87] After all, if the United States already enforces most foreign country judgments, what, apart from appeals to fair play, would induce ROW (also known as the "whipsawers") to do the same? In light of this, one American scholar has suggested that the United States get tough on foreign judgments—that is, revise its recognition rules to resemble more closely ROW's, thus giving itself greater leverage in the Hague negotiations.[88]

But the Americans do have bargaining chips. The courts of several of the United States have a jurisdictional reach that permits them to entertain actions with which they appear to have little connection, for example, suits in which neither of the parties is an American citizen or resident and where the cause of action did not arise in the United States. Such jurisdiction can be asserted on the basis that the defendant does business—for example, has (or even *had*) a branch operation—in the forum state, even if the cause of action has nothing to do with the activities of that branch.[89] Moreover, there are a variety of explanations for why foreign plaintiffs are commonly inclined to seek out such fora. These include broad pre-trial discovery, contingency fee arrangements, the availability of punitive damages, high damages awards for pain and suffering, the possibility of a jury trial, and certain attractive

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[87] A view espoused by Clermont, *supra* note 47 at 94-95.

[88] "How Substantial Is Our Need," *supra* note 54 at 178. For another recent example of American legal scholarship seeking to contribute to the bargaining process, this time by trying to convince ROW to modify its demands, see R. Brand, "Due Process, Jurisdiction and a Hague Judgments Convention" (1999) 60 U. Pitt. L. Rev. 661.

[89] The propriety of such jurisdiction, as asserted by Texas, was at issue in *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

features of American substantive law, such as a greater (*i.e.*, greater than ROW) willingness to disregard corporate personality. In the oft-quoted words of Lord Denning, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States."[90]

Moreover, it is by no means the case that foreign persons impleaded as defendants in such actions are always able to disregard them. That is, although such defendants are *sometimes* in a position to remain at home in ROW, ignore the American proceedings and benefit from their own country's barriers to foreign judgment recognition, frequently they cannot because they have branch operations or some other property in the United States. That is, although both the plaintiff and defendant might have their principal operations in ROW, and although the suit between them might have arisen out of their interaction there, if the defendant has assets in the United States then the American judgment will be enforceable against these and there will be no need for the plaintiff to confront the prospect that ROW is unwelcoming to American judgments. The simple fact is that many corporations resident elsewhere in the world do want to have branch plants, offices, or business property in the United States in order to trade in that market.

It is not my intent to cast apersions on the United States for the reach of its long arm jurisdiction. Other countries, Canada among them, have bases of direct jurisdiction which are arguably exorbitant. However, when you combine the broad jurisdiction of some of the United States with (1) the above-noted attractions of the American civil litigation landscape, and (2) the fact that a percentage of resulting judgments will be collectable even against nonresident defendants due to their having property in the United States, the overbreadth of American jurisdiction is an irritant to ROW and thus, in the context of the Hague process, amounts to a stack of American bargaining chips of nontrivial height. As a result, an important dynamic of the negotiations has been how much the United States will be prepared to give up in terms of reining in its wide jurisdictional rules, in return for obtaining easier enforcement of

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[90] *Smith Kline & French Laboratories Ltd.* v. *Bloch*, [1983] 1 W.L.R. 730 (C.A.), [1983] 2 All. E.R. 72 (C.A.) cited to W.L.R. at 733. The phrase is typically colourful, but for three reasons perhaps less than accurate. First, as a rule it is not litigants, but rather *plaintiffs* who experience the attraction; in general, foreign defendants would prefer to avoid the United States. Second, it is not the United States as a whole that is the object of the putative attraction, but rather certain magnet fora, such as Texas. Third, the leading theory of lepidopteran phototaxis posits that moths are not attracted to light, but rather to the dark Mach bands which they perceive to surround the light: H. Hsiao, *Attraction of Moths to Light and Infrared Radiation* (San Francisco: San Francisco Press, 1972) at 34-55. It might then perhaps have been more accurate for the Master of the Rolls to write that *plaintiffs* are attracted to *some* American *states* like flies to dung.

(the remainder of) its court judgments in countries that today do not readily recognize them. Indeed, should the Draft Convention founder, it will almost certainly be on this very point. This brings us back to the unresolved supplemental grounds of jurisdiction alluded to above,[91] which is perhaps *the* crucial sticking point in the negotiations. The United States is reluctant to abandon so-called "doing-business" jurisdiction. This is the power that some of its states' courts are prepared to exercise over defendants who, although they are resident elsewhere and the cause of action has arisen elsewhere, have business operations in those states. Conversely, ROW is reluctant to agree to a convention that does not require the United States to abandon this ground of jurisdiction. How that will resolve itself remains to be seen. Quite conceivably, the agreement will prove to be out of reach.

V. THE STAKES FOR CANADA AND THE DISCOURS(ES) OF GLOBAL COMMERCIAL JUSTICE

In light of uncertainties surrounding the outcome of the Hague project it is instructive to consider the Canadian position. Viewed as a matter of wins and losses to countries, Canada may well have more at stake in this process than any other participant. As noted, like the United States (and unlike much of ROW) Canada is already relatively willing to enforce foreign court judgments, including American ones. There is thus a flow of wealth out of the country. Also, like the United States, Canada may not enjoy an equivalent return flow from ROW. In short, Canadians too feel the whipsaw's bite. However, *unlike* the United States, Canada gets few compensating benefits from being an appealing centre for worldwide commercial litigation. While some Texas law firms may be doing good business conducting contingency fee litigation on causes of action that arise on the far side of the world, no Canadian law firm is. Admittedly no empirical studies quantify the resulting harm to Canada from non-equivalence in the judgment-enforcement market, or

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[91] *Supra* note 70. The problem goes beyond the difficulty in defining branch-activity jurisdiction. Several American states assert jurisdiction over foreign defendants who do business in those states, even when the cause of action does not arise from that business activity within the state. Although it is settled that such jurisdiction will not be among the jurisdictional grounds that states are required to have, what is not settled is whether it should be among the banned grounds. The current Draft Convention suggests that it should be: *supra* note 15, art. 18 (2)(e). However, the United States has suggested it will not go along with that: see the *ALI Report*, *supra* note 15 at 13-15.

even verify that such loss exists.[92] Yet, intuitively it appears to be much in Canada's interests that the Draft Convention be successfully concluded (regardless of how the contentious issue of doing-business jurisdiction is resolved). But, despite this interest, by this point it will be obvious that Canada has even less bargaining power in the Hague judgment convention discussions than its mid-range economic power typically gives it in international trade negotiations. Evidently, Canada can do nothing except sit on the sidelines and hope that the United States and ROW reach some compromise.

In the face of this, it is interesting to return for a moment to Jean-Gabriel Castel's Canadian Bar Review article quoted in the introduction.[93] There, Castel described the Hague process and urged Canada (successfully, as it turned out) to join in that work. His account of how things worked at the Hague did not paint a picture of states engaged exclusively in self-interested trade negotiations. Rather, he noted that "the objectives of the Convention are not of a political nature"[94] and that its work was scientific and impartial. He wrote: "A seminar-like atmosphere prevails and the exchange of ideas that takes place among the men from nations where different legal systems are in force, usually results in the adoption of very constructive solutions to the problems under study."[95] Castel was not oblivious to the fact that states' ultimate decisions about whether to adopt any given product of the Conference were political. No one could be so naive as to think otherwise. In addition, one would expect that the experts sent by various states to negotiate Hague conventions would be aware of their own countries' political preferences and economic stakes in the matters before the Conference. But Castel was observing that the discourse employed in hammering out Hague conventions was that of lawyers pursuing principled solutions, not of states engaged in horse trading.

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92 There is no shortage of comparative assessments of judgment enforcement rules, such as that of Weintraub in "Rocognition and Enforcement," *supra* note 49, but those focus on legal doctrine. Empirical studies of gains and losses resulting to countries from such doctrinal differences seem not to exist. A particular difficulty in conducting any such study is that the true measure of losses would have to include those from *ex ante* decisions made about where to do business. For example, a business entity might decide to set up its somewhere in ROW rather than in Canada, basing its decision (at least in part) on expected gains and losses associated with the judgment enforcement situation I have just described. The loss to Canada would then flow from that entity not bringing its capital here in the first place. Ascertaining the existence, frequency, and resulting effect of such decisions seems a near impossible task.

93 "Canada and the Hague," *supra* note 11 at 8.

94 *Ibid.* at 8.

95 *Ibid.* at 7.

Certainly many of Canada's subsequent labours at the Conference have been of that nature. The conventions on international child abduction and international adoption, as projects which sought to fulfil commitments arising from the United Nations *Convention on the Rights of the Child*,[96] were certainly of that character. None of this accords easily with the way I have described the judgments convention, either in its inception or in the current impasse.

Let us specify two models for the way the negotiation of a multilateral convention on judgment enforcement might be conducted. The matter of cross-border enforcement may be seen as a matter of justice, both between potential parties to a private law suit and between the states connected with their activity. Take, for example, a person injured at her home in state A by a product manufactured in state B by X Ltd. Defining the circumstances in which that injured person should be able to sue X Ltd. in state A and then enforce any resulting judgment against X Ltd.'s property in B is something which can be approached both in terms of fairness between the parties and justified assertion of territorial jurisdiction by states. Of course different national legal systems will initially generate different resolutions to the problem, but the creation of international standards on the matter may still be conducted as a disinterested search for broadly shared norms or for new common grounds of international justice, much as Castel described above.

Alternatively, the matter might be viewed as one of international trade. Under this conception, court judgments are commodities—a sort of "justice product," much like a good or a service. Countries are no more obliged to allow foreign judgments past their borders (*i.e.*, recognize them) than they are required to admit foreign manufactured goods. Of course they may choose to recognize them, but since this option typically involves an outflow of wealth they may be reluctant to do so. They will confront the recognition question much as they do the question of whether they should lower their tarriffs on goods and services. This problem is not in any respect a principled one, but rather a bargaining process wherein states are rational self-maximizers. As such, they appreciate that there are efficiency gains to be made by the removal of barriers and that their own self-interest requires that such removal be reciprocal—thus, the establishment of the WTO. This does not imply that it is impossible for justice factors—for example, concerns over human rights, labour standards, or environmental regulation—to bear

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[96] *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3 (entered into force 2 September 1990, accession by Canada 13 December 1991).

on trade issues. However, the dominant model in the 1990s has been for the free trade *versus* fair trade debate to become polarized, with advocates of the latter finding themselves in the streets (and jails) of Seattle rather than at its negotiating tables.

One might have predicted that in the case of something like the judgments convention—where what is being traded across international borders is not goods or services but is itself "a justice product"—justice discourse would come to the fore and negotiations would not reach an impasse on issues of admitted state self-interest. This is especially the case where the negotiating forum is the Hague Conference with its history of disinterested, apolitical, scientific inquiry. In light of that, the fact that negotiation of the Hague judgments convention *has* fallen into a trade law mould, may be yet more evidence of the expansion of law and economics discourse in private law matters and of the hegemony of trade discourse in national and international affairs. One possible response to this is an *o tempora, o mores* lament. However, it should be noted that there are examples of Hague Conference conventions which have been successfully negotiated but never implemented, or at least not widely so. Arguably, this is due to an overly scholarly orientation at the creation of those conventions, with insufficient attention to *realpolitik* at the negotiation and drafting stage.[97]

In any event, should the Hague project fail there is reason to think Canada should consider unilaterally revising its rules on foreign judgment enforcement. A possible response would be to provide for increased barriers to recognition, conceivably even a reciprocity requirement: if ROW cannot be persuaded to lower its restrictions on recognition of foreign judgments in the Hague process, where it would get something in return, then it seems unlikely it will soon take up the *Morguard* invitation to do so unilaterally in a spirit of comity. At the same time Canada could seek a bilateral arrangement with the United States to preserve the relatively liberal judgment enforcement picture that presently exists between those two countries.[98] The issue of judgment enforcement would have been thrust firmly into a trade law framework, with little immediate opportunity of returning to any other conception of the problem.

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[97] This may explain the lack of success of the earlier Hague convention on judgment enforcement: *supra* note 22.

[98] In this connection it should be noted that the Uniform Law Conference of Canada has for several years been working on a model *Uniform Enforcement of Foreign Judgments Act*. Part of the impetus for this model statute is the trade imbalance in the judgment enforcement market that emerged in the post-*Morguard* era.