

Enforcement of Foreign Judgments Convention (Canada-France Convention) 1997

Enforcement of Foreign Judgments Conventions (Canada-France Convention)

Introduction

The working group on foreign judgments was created as a result of the decision made by the Uniform Law Conference at its August 1996 meeting that the topic of general enforcement of foreign judgments, including that of the implementation of the Canada-France Convention, be on the agenda for its August 1997 meeting in Whitehorse, Yukon.

The working group was composed of:

Joost Blom, Faculty of Law, University of British Columbia
Jacqueline Caron, Government of Canada - DFAIT
Arthur Close, B.C. Law Institute
John Gregory, Government of Ontario
Russell Getz, Government of British Columbia
Steven Hartley, CBA National International Law Section
Mary Ann Kelly, Barrister and Solicitor, Toronto
John McEvoy, CBA New Brunswick
Tim Rattenbury, Government of New Brunswick
Frédérique Sabourin, Government of Quebec
Greg Steele, CBA - British Columbia
Louise Lussier, Government of Canada - Justice, as coordinator.

The following members were part of the sub-group on the implementation of the Canada-France Convention: John Gregory, Mary Ann Kelly, Jacqueline Caron and Louise Lussier.

The working group met a number of times through conference calls between January and May 1997. It has agreed that three possible options regarding the format of a uniform implementing act be proposed for discussion at the ULC August 1997 meeting as follows:

- Option 1: The traditional ULC approach;
- Option 2: A specific act with substantive provisions;
- Option 3: Incorporation of implementing provisions in a general statute.

OPTION 1: The traditional ULC approach

The traditional ULC approach towards the implementation of private international law conventions can be characterized as the drafting of a separate and specific implementing act with a limited number of provisions whose purpose is to give force of law to a particular convention, the text of which is annexed to the statute by which it is implemented.

In the context of the implementation of the Canada-France Convention, it was suggested that this approach be slightly modified so as to provide, not only for the implementation of the Canada-France Convention, but also of similar conventions which may be entered into by Canada in the coming years. Under option #1, the proposed uniform implementing act is therefore of a more generic format with no specific reference to one particular convention. Subject to these changes, its provisions remain largely modelled on the traditional ULC approach.

Uniform Enforcement of Judgments Convention Act

Comment: The title of the proposed uniform act is general to cover as many conventions on enforcement of judgments as possible. In so doing it would remedy the need for the enactment of a separate implementing act each time a convention has to be implemented. Only the list of designated countries would be amended from time to time.

Definition:

1. *In this Act, "convention" means the conventions existing with countries designated by [regulation] [order] and to which this Act gives force of law.*

Comment: The section on definition, a usual feature of uniform implementing legislation, indicates to which conventions the act applies. In light of the comment made above, this section is drafted generally without mentioning any specific convention so as to refer to any conventions that might be concluded by Canada in the area of recognition and enforcement of judgments upon consultation with the provinces and territories. It would be sufficient for the enacting jurisdiction to list the names of countries with which such conventions will exist, as in the case of the Canada-France, by designating them either by way of a regulation or ministerial order depending on the choice of each jurisdiction.

There is no reference to the text of a convention being added in a schedule to the uniform act. From an implementation point of view the publication of the text of a convention is optional and not mandatory. Each jurisdiction will therefore decide on the need to publish the text of the Canada-France Convention and other such conventions as an annex to the act or elsewhere. Other alternatives to the publication of conventions as part of provincial statutes, including the use of a web site, such as that of the Department of Foreign Affairs, could also be explored.

Designation of jurisdiction and court

2. *The [responsible Minister] shall,*
(a) *request that the Government of Canada designate [enacting jurisdiction] as a territorial unit to which the convention extends;*
(b) *determine the courts in [enacting jurisdiction] to which application for [registration or declaration of enforceability] of a judgment rendered by a court of a country with which a convention has been concluded may be made and request the Government of Canada to designate those courts for the purpose of the convention [.]*

Comment: Section 2 contains standard paragraphs: see the Canada-UK Convention implementing legislation. They correspond to articles 24.1 and 25 of the Canada-France Convention.

There was some discussion of the need to refer in this section to the designation of an authority responsible for the recovery of maintenance in order to meet the requirement of article 10. 3 of the Canada-France Convention. The working group was finally of the view that such designation could best be done in the complementary arrangement to be concluded by the jurisdiction with France under article 26 of the Convention.

For more information generally on the Convention, please consult the Explanatory Report prepared by the Canadian delegation to the negotiations with France [to be available at the meeting in Whitehorse].

Convention in force and given force of law

3. From the date the convention enters into force in respect of [enacting jurisdiction] as determined by the convention, the convention is in force in [enacting jurisdiction] and its provisions are law in [enacting jurisdiction].

Comment: This is a standard and fundamental provision for the purpose of the implementation of a convention (see the Canada-UK Convention implementing legislation). It should be noted that the Canada-France Convention will apply to judgments rendered on maintenance matters, status of natural persons, and custody and access to children even if they were rendered before the Convention came into force for the jurisdiction. See article 2 of the Convention.

Publication

4. The Attorney General shall cause to be published in the [named publication]
(a) the date the convention comes into force in [enacting jurisdiction];
(b) the courts to which applications for [registration or declaration of enforceability] of a judgment rendered by a court of a country with which a convention has been concluded may be made [;
(c) the arrangements that may be completed in application of such convention .]

Comment: Paragraphs (a) and (b) are standard (see the Canada-U.K. Convention uniform implementing statute). Paragraph (c) is added to account for article 26 of the Canada-France Convention, likely to be reproduced in other similar treaties, which enables the enacting jurisdiction and the treaty country to conclude arrangements to assist in particular in the application of the maintenance recovery scheme. It would appear appropriate that such arrangements be published to inform judgment creditors and debtors of the complementary requirements concerning recognition and enforcement of orders. The text of paragraph (c) is presented between brackets as it will be up to each enacting jurisdiction to decide whether to include it.

Prevalence of this act:

5. Where there is a conflict between this Act and any other act on recognition and enforcement of foreign judgments, this Act prevails [.] [subject to the following exceptions provided by another act:].

Comment: This is a standard and fundamental implementing provision (see the Canada-UK Convention implementing legislation). It is aimed at harmonizing the responsibilities of the implementing jurisdiction under this act with those under provisions of other acts or rules on matters similar to those covered by the convention.

In the past, this section was drafted in very broad terms so as to refer to "any act or regulation". This time, in order to avoid unnecessary confusion, it was felt necessary to narrow the application of the prevalence clause to "other act on recognition and enforcement of foreign judgments". In addition, as suggested by the phrase in brackets, each implementing jurisdiction may wish for sake of clarity to identify in this section domestic rules of a "public policy/order" nature that will prevail over the rules of the convention. It is conceivable that even though they may conflict with the treaty rules, as in the case of a blocking provision against the enforcement of foreign asbestos judgments, such domestic rules could remain applicable.

It is a well-accepted principle in the area of conflict of laws as well as in private international law conventions, like the Canada-France Convention in articles 4 (d) and 16 (d), to refer to "ordre public/public order" in exceptional circumstances, as determined by local laws, to justify a refusal to recognize or enforce a foreign judgment. However, this defense has very seldom been invoked and it has been construed narrowly (Castel, **Canadian Conflict of Laws**, p. 164, as quoted in *United States of America v. Ivey*, (1995), 26 OR 533; 130 DLR (4th) 674 (Ont. Gen. Div.; upheld on appeal, (1996) 30 O.R. (3d) 370 (Ont. C.A.) ; leave to appeal to the S.C.C. denied on May 29, 1997), partly reproduced and discussed in Baer, Blom, Edinger, Rafferty, Saumier, Walsh, **Private International Law in Common Law Canada**, pp. 55-64).

The meaning of "ordre public/public order" has been debated for centuries and may vary according to different legal systems. Thus it has been difficult to come up with a suitable definition in the context of conventions. As mentioned in Castel, *supra*, "[I]n the absence of legislation establishing the stringency of public policy, it is for the courts to define its precise limits according to their judgment and good conscience."

Castel, *supra*, p. 163, also writes: "evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum, since it **will reflect the local sense of justice and public welfare**". However, "public policy must connote more than local policy as regards internal affairs"; "[P]ublic policy is relative and in conflicts cases represents a national policy operating on the international level" (id.). "If foreign law (or judgment) is to be refused any effect on public policy grounds, it must **at least violate some fundamental principle of justice, some prevalent conception of**

good morals, or some deep-rooted tradition of the forum ", (id. pp. 163- 164).
(Emphasis added).

In the context of its implementing legislation, the enacting jurisdiction could therefore identify the rules that would constitute exceptions to the prevalence of the treaty rules on the basis of the above-mentioned principles. It should however be understood that in doing so the rules of the convention cannot not be modified, limited or otherwise thwarted by the prevalence of domestic rules with the result of putting Canada in breach of szits international obligations.

Regulations

6. *The [Lieutenant Governor in Council] may make regulations to:*

- (a) prescribe the proceedings necessary for maintenance recovery;*
- (b) designate the competent authority to certify copies of judgments to be enforced abroad;*
- (c) designate the countries with which a convention has been concluded ; or*
- (d) otherwise carry out the intent and purpose of this Act.*

Comment: This section on regulations is a standard provision which is usually drafted in very broad terms (See the Canada-UK Convention implementing legislation). It has appeared opportune to list a number of possible subject matters as general guidance.

NOTE: Special attention should be drawn early in the implementation process to the need for changes to the Rules of Court. Some measure of uniformity would appear desirable between various rules of court applicable to enforcement proceedings including that under specific conventions. See for instance in the case of the Canada-United Kingdom Convention: PEI (R.73); Ontario (R.73); B.C. (R.54); Manitoba (R.65).

Proclamation

7. *(Proclamation section)*

Comment: Some jurisdictions have legislation implementing a convention come into force on Royal Assent with the understanding that the law has no effect until the convention comes into force for that jurisdiction. Other jurisdictions prefer to wait and proclaim the legislation in force the day the convention comes into force.

Note: For reasons mentioned already, the proposed implementing legislation does not contain a schedule to the act to include the text of the convention being implemented.

OPTION 2: A specific act with substantive provisions

This section is aimed at proposing to the ULC a new approach to the implementation of conventions in Canada. This approach would consist of the drafting of a specific act with all the necessary implementing provisions in a "stand-alone" format. The sections of such an act would mirror the text of those provisions in the convention to which it is necessary to give force of law in the enacting jurisdiction.

This implementing technique is recognized in the legal systems of countries, such as Canada, that have followed the British tradition regarding the relationship between international law and domestic law and the incorporation of treaties into domestic law. A number of jurisdictions have used that technique with several conventions already and Canadian courts have been ready to give effect to the intent of the legislature. The leading authority on this point is the 1994 S.C.C. decision in *Thomson.v. Thomson* relating to the *Hague International Child Abduction Convention*.

Option 2 raises a number of stimulating questions for the consideration of the ULC as it proposes a new approach for the implementation of conventions. In addition, this option might be linked to the discussion also to held in August 1997 on the project on the general enforcement of foreign judgments as it could be a suitable substitute to a uniform act on general enforcement of foreign judgments.

This possibility would be particularly welcome in the context of the enforcement of maintenance orders. For that reason, the following text already incorporates such an extension. The federal/provincial/ territorial Family Law Committee has been consulted on the matter. See the note at the end of this discussion paper.

Uniform Recognition and Enforcement of Judgments in Civil and Commercial Matters and Legal Cooperation in Maintenance Matters Act

Comment: This title is only provisional and may be modified in order to avoid confusion or repetition. Such a long title can be understood in the context of the proposed act which is intended to give force of law not only to conventions on enforcement of foreign judgments but also to arrangements for the enforcement and recovery of maintenance with countries designated by the enacting jurisdiction along the lines of the Canada-France Convention.

Since the primary purpose of the Act is to implement the Canada-France Convention, without being limited to it, the drafting of the sections of the act are modelled as closely as possible on those provisions of the Convention which impose obligations on Canadian jurisdictions and which have to become part of their laws. For this reason, a number of articles are not reproduced here as they do not meet these requirements. It is the case with articles 8 and 9 of the Convention which deal with the exception to the obligation of France to enforce judgments rendered in other European countries as well as articles on conflicts between conventions (article 17), federal State clauses (article 20) and final clauses.

Scope of this Act

1 (1) This Act shall apply to judgments in civil and commercial matters, including judgments in maintenance matters, status of nature persons, matrimonial matters, and custody and access to children.

(2) This Act shall not apply to judgments in the following matters:

- (a) recovery of taxes, duties, fines or monetary penalties;*
- (b) bankruptcy, insolvency or the winding up of companies or other artificial persons;*
- (c) legal capacity of natural persons;*

- (d) guardianship of children involving public authorities;*
- (e) management of the affairs of persons not capable of managing their own affairs; and*
- (f) succession to or the administration of the estates of deceased persons.*

Comment: The scope of application of the act is limited in a manner similar to article 1 of the Canada-France Convention (CFC). These rules largely meet the Canadian rules on recognition and enforcement.

Part I: Judgments other than maintenance

Comment: It would appear desirable to deal with the conditions for the recognition and enforcement of judgments in general civil and commercial matters, including family law matters, as a whole in Part I, subject to the exception for maintenance orders which are dealt with in a separate part as in CFC.

Recognition of judgments

2. Judgments, other than in maintenance matters, rendered by a court of a designated country, shall be recognized if the following conditions are met:

- (a) the judgment was rendered by a court having jurisdiction pursuant to section 4 or the rules recognized in the law of the enacting jurisdiction;*
- (b) the judgment is no longer subject to appeal in the designated country and is enforceable, and in matters of custody of and access to children, even on an interim basis;*
- (c) in the case of a default judgment, the defendant was lawfully served or received notice of the commencement of the proceedings in sufficient time to present a defence;*
- (d) the order is not contrary to public policy;*
- (e) no proceedings between the same parties, based on the same facts and having the same purpose,*
 - (i) are pending before a court of the enacting jurisdiction that was seized of the matter prior to it being brought before the court of the designated country;*
 - (ii) have resulted in an order rendered by a court of the enacting jurisdiction, or*
 - (iii) have resulted in an order rendered by a court of a third country that meets the conditions for its recognition and enforcement in the enacting jurisdiction*

Comment: It would appear important to provide for the recognition of judgments covered by the act independently from their enforcement, to reflect the obligations created under article 4 of CFC with respect to automatic recognition. In most Canadian jurisdictions recognition is often combined with enforcement proceedings although enforcement cannot be granted to a judgment that has not been recognized. In a number of cases it may be sufficient for a foreign judgment creditor in matters such as status of natural persons only to seek recognition of his or her judgment. The conditions for recognition are compatible with those under Canadian law.

Enforcement of judgments

3. *Judgments that are recognized may be registered for the purpose of their enforcement if the conditions listed in section 2 are met.*

Comment: This section supplements the previous section in recognition and deals separately with the enforcement of judgments covered by this Part of the act. Conditions for enforcement, similar to those for recognition, are not repeated here since a reference to section 2 would suffice.

Rules on jurisdiction

4. *For the purpose of articles 2 and 3, the court that has rendered the judgment in the designated country shall be deemed to have jurisdiction in addition to any other applicable rule if, in particular,*

- (a) the defendant had his or her habitual residence, if a natural person, or its principal place of business, if an artificial person, in that country when the proceedings were started;*
- (b) the defendant had a place of business or branch in that country when the proceedings were started and was served in that country in connection with a dispute related to the activities of that place of business or branch;*
- (c) in an action for damages in tort, the wrongful act occurred in that country;*
- (d) the claim is related to a dispute in connection with rights in rem in immovable property located in that country;*
- (e) the defendant expressly submitted in writing to the jurisdiction of the court;*
- (f) the defendant appeared without challenging the court's jurisdiction or presented a defence on the merits;*
- (g) the contractual obligation that is the subject of the dispute was or should have been performed in that country;*
- (h) for any question related to the validity or administration of a trust established in that country or to trust assets located in that country, the trustee, settlor or beneficiary had his or her habitual residence or its principal place of business in that country;*
- (i) in matters of custody of access to children, the child had his or her habitual residence in that country at the commencement of the proceedings on the merits;*
- (j) in matrimonial matters, both spouses had their last common habitual residence in that country.*

Comment: As in article 5 of CFC, this Part should include a list of grounds of jurisdiction which would be deemed to be examples of a "real and substantial connection" in support of the foreign court's jurisdiction. Grounds mentioned in this section are generally acceptable under Canadian rules. However the list is not intended to be exhaustive and could be supplemented by other grounds also deemed acceptable in the enacting jurisdiction.

Application for registration

5(1) *Judgments to be enforced shall be registered on the application of any interested party to the [court to named by the enacting jurisdiction].*

5(2) *The procedure for registration shall be [described by regulation or governed by the rules set forth in {applicable statute}].*

5(3) *The registering court shall not examine the merits of the judgment.*

5(4) *Unless the defendant presents proof to the contrary, the findings of fact on which the court that has rendered the judgment has based its jurisdiction shall be presumed valid.*

Comment: This section only deals with the minimal requirements for the enforcement proceedings of judgments rendered in designated countries as set out in article 6 of CFC. As mentioned in section 5(2), relevant rules on procedure can be found in existing acts on general enforcement of judgments, the reference to which may be added if needed. This would include rules on production of documents and translation as long as they comply with article 7 of CFC. Other existing rules, such on the effects of the recognized or enforced foreign judgment, could also apply.

Designation of countries

6. *A country may be designated by [regulation] [order] for the purpose of the recognition and enforcement of orders under this Part [if a convention exists with that country].*

Comment: This section would enable a jurisdiction to implement more than one convention, in addition to CFC, by designating which countries to which the conditions of recognition and enforcement of judgments other than maintenance will apply under this act. The condition for such designation could be the existence of a convention. This phrase is between brackets as it may be possible that other conditions would be attached to the designation, for example if the act were to cover enforcement of all foreign judgments.

Part II: Recognition and enforcement of maintenance

Comment: It would appear desirable to treat maintenance separately for two reasons.

First, the Canada-France Convention deals with maintenance in a separate chapter, c. IV, which is aimed to establish a framework of cooperation for the recovery of maintenance and also to provide for common rules on jurisdiction, recognition and enforcement.

Second, it might be convenient to consider such a scheme for countries, mostly with a civil law background, which are seeking maintenance arrangements but do not meet the conditions under REMO/RESO legislation. In addition, it might not be appropriate to develop a full convention similar to CFC with all such countries.

Thus a separate part on maintenance would enable an enacting jurisdiction to extend the benefit of maintenance orders enforcement provisions to countries without the requirement of a convention as well as to countries with whom a convention could be finalized in the coming years along the lines of CFC.

Definitions

7. In this Part,

"authority" means the [Attorney General or a person authorized by the AG to act under this part] [the authority identified in the arrangement];

"claimant" means a person who has or is alleged to have a right to recover maintenance on the basis of an order rendered by a competent court;

"maintenance" means payment for support granted to children or the spouse who have their habitual residence in [the enacting jurisdiction] ;

"order" means an order establishing or varying maintenance;

["habitual residence" means habitual residence in Canada.]

Comment: Definitions in this part may be particularly desirable in light of the meaning of the words claimant, maintenance, and order under article 11 of CFC. In addition, the "authority" that will be designated responsible in the enacting jurisdiction for the recovery of maintenance, as required by article 10(3) of the Convention, could be identified either in this section of definitions or, as an alternative, in the arrangement to be concluded between the enacting jurisdiction and France on the basis of article 26 of CFC.

It could also be important to include a definition of habitual residence to expand its territorial scope to the whole of Canada so as to reflect the specific rule of interpretation of such terms for maintenance matters under article 20(c) of the Convention. This definition is put between brackets as it may be redundant in light of section 8 on jurisdiction.

Jurisdiction of the court

8. A court is considered competent if

(a) both the claimant and the respondent were habitually resident in [Canada or in] the designated country where the order was made; or

(b) the respondent, who was not habitually resident in [Canada or in] the designated country, submitted clearly to the jurisdiction of the court.

Comment: The act should include a provision like section 8 which would establish the bases of jurisdiction in maintenance matters. This would be part of the conditions for recognition and enforcement of maintenance orders between Canada and countries designated under section 17. Section 8, which is modelled on article 11(3) of the CFC, would presumably also be acceptable to other countries because it would resolve issues raised by the enforcement, particularly in civil law countries, of provisional orders and the need for confirmation hearings under REMO/RESO.

The reference to Canada is put between brackets in light of the comments made under the definitions section with respect to the definition of "habitual residence" (section 7). If no definition of the words "habitual residence" is included, the words "in Canada" should be incorporated in section 8. This would allow one to take into account various types of

maintenance orders, including variation orders covered under this Part (see section 7), so as not to limit the scheme to orders originally made in the enacting jurisdiction and to facilitate the enforcement of Canadian orders abroad. However, if section 8 were read only to verify the jurisdiction of a foreign court on an application to recognize and enforce its orders in the enacting jurisdiction, the words "in Canada" might be dropped.

Application for assistance

9. (1) *The claimant may apply for assistance to the authority [in the enacting jurisdiction] where the order was made in order to have the order enforced in a designated country.*

(2) *The application for assistance shall be transmitted to the authority of a designated country where the order has to be enforced if the application contains information and documents [prescribed by regulation] [identified in the arrangement].*

Comment: This section would clarify how a designated country provides assistance for the recognition and enforcement of maintenance orders rendered in the enacting jurisdiction, along the lines of article 14 of CFC. It would appear sufficient to refer to the need to apply for assistance with the local authority and its transmission to the foreign country

The details regarding the application itself and other requirements could be provided either by way of regulation or in the complementary arrangement to be concluded between the enacting jurisdiction and the other country (e.g. France.)

Reception of an application

10. *Upon receiving an application from an authority of a designated country, if the application contains the information and documents [prescribed by regulation] [identified in the arrangement], the authority in the enacting jurisdiction shall take the appropriate measures :*

(a) *to locate the debtor; and*

(b) *to initiate proceedings on behalf of the claimant for the recognition and enforcement of the order.*

Comment: This section would ensure that the responsible authority for the recovery of maintenance in the enacting jurisdiction fulfills its primary duties as set out in article 12 (a) and (b) of CFC, once an application for assistance is received from a designated country for the purpose of the recognition and enforcement of an order rendered there. The details of such an application could be provided either by regulation or in the arrangement as under the previous section.

Recognition

11. *An order shall be recognized if the following conditions are met:*

(a) *the order was issued by a competent court pursuant to article 8;*

(b) *the order is enforceable in the designated country even on an interim basis;*

(c) *in the case of an order obtained by default, the respondent was lawfully served or*

received notice of the commencement of the proceedings in sufficient time to present a defense;

(d) the order is not contrary to public policy;

(e) no proceedings between the same parties, based on the same facts and having the same purpose,

(i) are pending before a court of the enacting jurisdiction that was seized of the matter prior to it being brought before the court of the designated country;

(ii) have resulted in an order rendered by a court of the enacting jurisdiction, or

(iii) have resulted in an order rendered by a court of a third country that meets the conditions for its recognition and enforcement in the enacting jurisdiction.

Comment: This section provides conditions for the recognition of maintenance orders covered by this Part along the lines of section 16 of CFC.

Enforcement

12. An order that has been recognized may be registered for the purpose of its enforcement if the conditions set forth in section 11 are met.

Comment: This section provides for the enforcement of the maintenance order once recognized on the basis of the conditions provided for its recognition as stated in article 16 of CFC.

Registration

13(1) A certified copy of the order to be enforced shall be filed for registration with the court designated in the enacting jurisdiction.

(2) Notice of the registration shall be given to the respondent.

(3) The respondent within one month after receiving notice may apply to the registering court to set the registration aside in accordance with the conditions for enforcement referred to in section 11.

(4) The registering court shall not examine the merits of the order.

(5) Unless the respondent presents proof to the contrary, the findings of fact on which the court of the designated country based its jurisdiction shall be presumed valid.

Comment: This section on registration is adapted from the relevant rules of the REMO/RESO legislation as well as in CFC (article 15) for the purpose of registration in the enacting jurisdiction of a foreign maintenance order rendered in a designated country. It would not appear convenient to simply refer to the registration procedure rules set under the REMO/RESO scheme.

Compulsory enforcement

14. The authority [in the enacting jurisdiction] shall take all appropriate measures to enforce an order registered under this Part.

Comment: This section reflects one of the duties imposed on the authority responsible for

the recovery of maintenance under article 12(c) of CFC. It is partially drafted on the basis of an equivalent REMO/RESO provision.

Transfer of money recovered

15. *The authority [in the enacting jurisdiction] shall take appropriate measures to transfer to the claimant sums of money recovered once the order has been enforced.*

Comment: This section reflects another duty imposed under article 12, in this case 12(d).

Costs

16. *The authority [in the enacting jurisdiction] shall not impose any charges on the claimant or the designated country in relation to proceedings under this Part.*

Comment: This section would also appear necessary in light of article 13.2 of CFC.

Designated country

17. *A country may be designated by [regulation] [order] for the purpose of the recognition and enforcement of orders under this Part if the following conditions are met:*

- (a) an authority is responsible for the recovery of maintenance;*
- (b) the conditions for recognition and enforcement in that country are similar to those provided under this Part.*

Comment: This section would enable the enacting jurisdiction to designate countries to which this Part would apply. In contrast to the REMO/RESO legislation, it would not be necessary to conduct a review of the maintenance legislation in those countries in order to establish the similarities with the REMO/RESO scheme before such countries be considered reciprocating jurisdictions. This designation could be established on the basis of the principles found in CFC, i.e., the existence of a responsible authority and the compliance with requirements regarding recognition and enforcement, as reproduced in this Part. These principles could be extended to other countries under this Part, regardless whether a treaty existed with them.

Part III: General/ Miscellaneous provisions

Comment: This Part is intended to give force of law to any provisions in CFC that would apply to judgments in civil and commercial matters as well as to maintenance orders, such as those under Chapter V on general clauses. The decision on whether additional provisions are needed in this Part would be made after an examination of existing laws in each enacting jurisdiction .

Currency conversion and interest

18.(1) *The conversion into the currency of Canada of the sum payable into the currency of a designated country shall be done at the exchange rate on the day the judgment is registered under Part I or II as ascertained from any branch of any chartered bank.*

(2) The determination of the interest payable at the time of conversion, if not otherwise provided for in the judgment, shall follow the rules set forth in [identify applicable law].

Comment: This section reflects the rules in article 18 of CFC.

Limitation period of registration proceedings

19. (1) The time within which any interested party may apply for registration of a judgment under Part II, except in maintenance matters and matters of custody and access to children, is within six years after the date of the judgment.

(2) Judgments in maintenance matters and in matters of custody and access to children may be registered at any time.

Comment: This section reflects the rules in article 19 of CFC.

Dates of judgments to which the Act applies

20(1) Except in the case of judgments in maintenance matters, status of natural persons, and custody and access to children. this Act applies to judgments rendered after its coming into force.

(2) In the case of judgments in maintenance matters, status of natural persons, and custody and access to children, the Act applies regardless of the date on which these judgments were rendered.

Comment: This section reflects article 2 of CFC.

Part IV: Final provisions

Regulations

21. The [Lieutenant Governor in Council] may make regulations necessary to carry out the intent and purpose of this Act.

Proclamation

22. [enacting jurisdiction to decide]

Comment: These are standard provisions to be incorporated at the end of the proposed act.

OPTION 3: Incorporation of Implementing Provisions in a General Statute

This option represents the "minimalist" option by which the implementation of the Canada-France Convention and other similar conventions would be ensured. It would be sufficient to enact a limited number of provisions to give force of law to these conventions as part of a general statute on court orders enforcement, and not as a specific implementing act as proposed in option 1.

The provisions to be recommended by the ULC under option #3 would only be those that are necessary and essential in order to provide for the implementation of conventions into domestic law. The decision on the final format of the act would remain with each enacting jurisdiction. For that reason there is no need to provide for sections on the title of the act, definition, courts designation, regulations and entry into force.

Option 3 raises a number of stimulating questions for the consideration of the ULC as it proposes a different approach for the implementation of conventions. In addition, it should be linked to the discussion to be held in August 1997 on the project on general enforcement of foreign judgments, as the following provisions could be incorporated in a new uniform act on that subject. Such a uniform act could be drafted in two parts, the first one dealing with enforcement of judgments from non-treaty countries, the second part dealing with the enforcement of judgments from countries with which a convention exists, along the lines of the implementing provisions reproduced below.

Generic provisions

Conventions in force

X. Conventions existing with countries designated by order of [Lieutenant Governor/ Minister] have force of law in the [enacting jurisdiction] at the time of their coming into force.

Publication

Y. The [Minister] shall publish the date a convention comes into force.

Prevalence

Note on Family Law Implications

A consultation group of family law experts has reviewed these three options. Its report is attached to the English text of this paper. In short, the group preferred Option 1 because it is most likely to reflect faithfully the terms of the Convention. However, it would require some detailed work on the "arrangements" for the mutual legal assistance on maintenance orders. It was also less flexible than Option 2 in adding new countries, particularly civil law countries, to the list. The group thought it unlikely that Canada would soon have conventions with a significant number of countries, but Option 1 applied only where such conventions exist. The long-term solution was in a revision to the REMO/RESO legislation, which was on the table for the federal-provincial-territorial committee on family law.

FAMILY LAW CONSULTATION GROUP REPORT TO THE UNIFORM LAW CONFERENCE ON OPTIONS FOR THE IMPLEMENTATION OF THE CANADA-FRANCE CONVENTION

Activities of the Consultation Group

The group was formed, at the request of the federal Department of Justice, in order to provide the ULC with formal input from family law experts and representatives as the Conference conducts its discussions of the options presented for the draft implementing act

for the Canada-France Convention. It is crucial that there be family law consultation in the process as, unlike the Canada-U.K. Convention, the Canada-France Convention will involve provincial and territorial authorities in the on-going recognition and enforcement of maintenance and family support orders from France. In addition, since the convention provides for the establishment of a governmental authority as a transmitting body, provincial authorities will also be required under the terms of the Convention to ensure that maintenance orders sent from Canada to France meet the *prima facie* requirements of the Convention.

The Consultation Group consisted of the following members:

Joan MacPhail Q.C., Director of Family Law Branch, Manitoba Department of Justice
Judy Haldeman, Legal Counsel, Attorney General's Division, Government of P.E.I.
Cynthia Davis, Legal Counsel, Research and Planning , Government of New Brunswick
Charlene Lafleur-Graham, Department of Justice, Saskatchewan
Kathleen Fawcett, Legal Counsel, Child Support Team, Department of Justice, Ottawa
Wendy Bryans, Legal Counsel, Family Law Policy Section, Department of Justice, Ottawa
Mary Ann Kelly, former Reciprocity Counsel, Ministry of the Attorney General, Ontario, member of the Canadian Delegation negotiating the Convention

The Consultation Group met by way of two conference calls and reviewed a number of reports and documents, including the Report of the ULC Working Group on the Enforcement of Foreign Judgments.

General Comments Relating to the Family Law Aspects of the Convention

While the family law aspects of the convention include maintenance, matrimonial matters and custody of and access to children, it is primarily Chapter IV on the Mutual Legal Assistance for the Recovery of Maintenance which attracted the most discussion amongst the Consultation Group.

Other than for maintenance matters, the treatment of family law matters is similar to the treatment of all other civil orders which fall within the ambit of the Convention. That is, recognition and enforcement of orders pertaining to general matrimonial matters and to custody of and access to children will be left to private parties and their lawyers. Governmental authorities will not be involved and these matters will proceed in much the same manner as they presently do. That is, the recognition and enforcement of French matrimonial, custody and access orders will essentially follow the procedure now in place for the recognition and enforcement of other foreign judgments of this nature.

The recognition and enforcement of maintenance orders are however, a different matter.

As noted above, Article 10 of the Convention requires that each contracting state designate a governmental body or bodies for the provision of "mutual legal assistance" to the other for the recovery of family support judgments. Article 12 then prescribes the duties of these authorities, which include the initiation of both a procedure and proceedings for the recognition and enforcement of the maintenance order on behalf of the claimant. Since the

subject matter of maintenance enforcement falls within the jurisdictional competence of the provinces, it is obviously provincial and territorial authorities to which these duties, imposed by the Convention, will fall.

While authorities in the provinces and territories already bear responsibility for the recognition and enforcement of many foreign maintenance orders through the reciprocal and maintenance enforcement statutes, the scheme contemplated by the Canada-France Convention offers some particular challenges. The existing reciprocal statutes are drafted to primarily facilitate reciprocal arrangements with other common law jurisdictions. They operate only with difficulty in relation to civil law jurisdictions. It is for this reason that the model for recognition and enforcement with France differs significantly from existing reciprocal process given that France is a civil law state. The provincial/territorial reciprocal and maintenance enforcement programs are therefore faced with one set of recognition and enforcement procedures which work relatively well in reciprocal arrangements with other common law states and a separate process for maintenance orders from France.

Throughout the course of the initial consultations with the Federal/Provincial/Territorial Family Law Committee and provincial maintenance enforcement programs, family law experts repeatedly expressed an interest in the implementation of the Convention in such a manner that it would which serve as system for the addition of other civil law jurisdictions which do not now fit well under the existing reciprocal scheme. The Family Law Consultation Group therefore examined the three options put forward by the ULC Working Group/Sub-Group on the Implementation of the Canada-France Convention with a view to examining them for flexibility and clarity in maintenance procedure.

Comments on the Three Proposed Options for a Canada-France Implementing Statute

Option 1

This is, of course, a modified version of the customary ULC approach to implementation of private international law conventions. Since the model consists of the minimum number of provisions necessary to give force of law to the Convention, it is the option most likely to faithfully reflect the terms of the Convention. As such, this option received a considerable amount of support from the Family Law Consultation Group.

Nevertheless, certain problems were identified with the option from a family law perspective. These concerns are as follows:

- * given the lack of procedure for the recognition and enforcement of maintenance orders, each provincial and territorial jurisdiction will find it necessary to conclude longer and more specific individual arrangements with France pursuant to Article 26 in order to actually give affect to the maintenance terms in the Convention

- * major coordination will be required between the provinces and territories in order to avoid inconsistent and contradictory arrangements.

* as presently worded, this option does not provide for the addition of other countries to this scheme contemplated by Canada\France unless that country enters into a convention with Canada similar to the one with France. There are a good number of civil law jurisdictions in Europe who would like to have reciprocal enforcement arrangements with Canadian jurisdictions but, because they cannot deal with provisional orders, their laws are not similar enough for them to be designated reciprocating jurisdictions under the present reciprocal scheme. However, it is unlikely that Canada will be negotiating conventions with any of these jurisdictions in the foreseeable future and they are therefore eliminated as potential reciprocal partners.

* provincial and territorial authorities would be dealing with one Act for France and another Act for all other jurisdictions

Option 2

This option suggests a new implementation approach to the ULC in which the implementing statute would incorporate the provisions of the Convention into a "stand alone" statute.

While this option held considerable appeal for some members of the Family Law Group due to its clarity and flexibility in proposing the extension of the maintenance provisions of implementing statute to other civil law jurisdictions, many members were concerned that it had the most potential for interpretation problems.

Option 3

Very little discussion was afforded this option as it was not favoured by any members of the Family Law Group primarily as it was not quite clear how it would operate in relation to maintenance matters.

Amendment of the Uniform Reciprocal Enforcement of Maintenance Orders Act

During the course of the conclusion of the Canada-France Convention, the Federal/Provincial/Territorial Family Law Committee had embarked on a project to amend the present uniform reciprocal statute to make it more amenable to inter-provincial recognition and enforcement of orders within Canada and to make it more compatible with and understandable to the American jurisdictions. Most of the present volume of extra-jurisdictional enforcement of maintenance orders comes first from sister provinces and territories and then from the United States.

No particular thought was given, in the initial project stages, to the development of an additional process which could be extended to civil law jurisdictions in what would essentially result in a two-tiered system of reciprocity. There would be one system for Canadian, U.S. and other common law jurisdictions. The second system would deal with non-common law jurisdictions and would be similar to the scheme of the Canada-France Convention. Both systems could be incorporated into separate Parts of a new reciprocal Act.

The Canada-France Convention would require implementation but, once that Convention had been enacted into law, France could be designated by the enacting jurisdiction as a

country within the second tier of the reciprocal Act. While there would still be two statutes, the implementing Act for the Convention and the new uniform reciprocal statute, for practical purposes, the provincial/territorial authorities would only need refer to the reciprocal statute for recognition and enforcement of maintenance which would mirror the Canada-France Convention in relation to maintenance orders.

Preferences of the Family Law Consultation Group for the Implementation of Canada-France

It would therefore be the preference of the Family Law Consultation Group that the ULC draft an implementing statute along the lines of Option 1. The inherent limitations for maintenance orders in that Option, identified above, could then be addressed through the F/P/T Family Law Committee's redrafting of the existing reciprocal statute. In the meantime, Canada-France enacting jurisdictions could be dealt with by way of negotiated procedural arrangements under article 26 of the Convention. These arrangements would then ultimately be mirrored in the new reciprocal Act.

(Report finalized June 23, 1997)