Hague Convention Choice of Court Agreement and the Common Law 2007

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THE HAGUE CHOICE OF COURT CONVENTION AND THE COMMON LAW

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I. Introduction

[1] The task of this report is to provide an assessment of the recently-concluded Hague

Convention on Choice of Court Agreements[1] against the background of existing law on that subject in the common law provinces and the territories and also with respect to Canadian federal law. The report will offer a summary account of the Convention, a description of the ways in which it differs from existing law in common law Canada, some views on whether the scheme embodied in the Convention would represent an improvement on that existing law, and finally some recommendations as to whether the Convention should be adopted. With respect to this last matter it should be noted that (1) there is no other multilateral treaty on this subject under consideration, here or elsewhere, and (2) there are no other Canadian law reform projects under way that touch significantly on this area of the law. Accordingly, the choice to be made at this point would be whether to adopt the Convention (which would require implementing legislation at both the federal and provincial levels[2]) or to do nothing and stick with the present regime, which is made up of judge-made standards supplemented by statutory rules of court and a smattering of other legislated provisions. If the former option – adoption of the Convention – were selected, then some additional decisions would need to be made with respect to six optional parts of the Convention. Section V of this report will offer specific analysis and recommendations with respect to those.

[2] By way of foreshadowing this report's conclusions at this introductory stage, I offer the following. First, the changes the Convention would bring to commercial and legal practice in Canada would not be great. This would be so even if it were adopted both here and in a number of other countries with which Canadian residents do business. This is so for two reasons: (1) the scope of the Convention is narrow (a fact which has generated some negative criticism from those who had hoped for a broader, more ambitious treaty on this subject[3]) and accordingly most commercial practices and legal questions would not be affected by it; and (2) even in those areas that would be covered by the Convention, the difference between the regime found in the Convention and that presently in place in the common law provinces of Canada is not great. Not only are the differences between the Convention and existing Canadian law slim, arguably they are getting slimmer. I make this observation based on the fact that in three recent cases where the Supreme Court of Canada has had the occasion to consider the Convention's main goal – namely, reinforcing and augmenting the role of private autonomy over contractual dispute resolution – the Supreme Court has voiced strong support of that goal.[4] This was a trend that was identified by Professor Catherine Walsh almost a decade ago,[5] and it continues today. Thus, to the extent one can discern a general direction in which Canadian law on this subject seems to be moving, that direction would appear to be one in which the differences between existing law and the law found in the Convention are narrowing. In short, the Convention would not change a lot and accordingly the question of whether to adopt it, while hardly trivial, is not a matter of vital national interest.

[3] Secondly, there would seem to be hardly any down-side risk in adopting the Convention. There seems to be little to lose by implementing it, apart from the fact that doing so would take some time and effort to bring implementing legislation into force and the gains from doing so might not be perceived to reward even that modest expense.

[4] Thirdly, any gains to Canada and Canadians from the Convention will only accrue if the Convention is widely adopted in countries with which Canadian residents do business.

[5] Fourthly, one consideration in favour of adopting the Convention is a symbolic one – namely, that even if the Convention itself will not bring great change, its widespread adoption might signal the potential for future co-operation in the arena of international agreements dealing with court jurisdiction and foreign-judgment enforcement. Canadians almost certainly do stand to gain from broader, more encompassing multilateral agreements on judicial jurisdiction and cross-border judgment enforcement. The Convention is a stride in that direction, albeit not a large one. If it proves unsuccessful due to lack of widespread ratification, that does not bode well for further steps. But if it is adopted, while that adoption might not on its own bring great change or significant gains, it would act as a green light for further evolution in an arena that holds the potential for more tangible benefits to Canadians.

[6] As a brief addendum it should be noted that I know of no useful empirical studies in Canada (and few elsewhere) to back up any assertions about the Convention's likely effects.[6] The Convention looks good on paper, but claims made about its supposed beneficial impact are based only on common sense assumptions about its likely effects. These assumptions are at best unquantifiable (that is, no dollar figure can be put on the estimated benefits to Canada from subscribing to the Convention), and at worst they may turn out to be wrong. Perhaps the most one can say about the claims for the Convention's supposed benefits are that they rest on educated guesses about how it might affect future commercial behaviour. That these guesses can fairly be described as "educated" is due mainly to the perceived success of the highly-regarded 1958 New York Convention on Arbitral Awards.[7] That multilateral convention is generally viewed as a signal success. It is perceived as adding to the efficacy of international commercial arbitration and thus facilitating international commercial relations. The Convention under examination here is regarded as "the litigation counterpart of the New York Arbitration Convention"[8] To expand, the New York Convention encourages contracting parties to include arbitration clauses in their agreements by making sure that arbitral awards will be enforced internationally. No existing multilateral treaty does for contractual choice-of-court clauses what the New York Convention does for arbitration clauses. The Convention under consideration here seeks to fill that widely-acknowledged gap and the claims for its promised benefits are grounded on the supposition that it will parallel the

success of the New York Convention.

[7] I conclude this opening part by drawing attention to one key premise that underpins my general conclusion that the Convention is a good (though modest) step. It is an assumption not often expressly acknowledged in legal analyses of documents like the Convention. It is this: one would only favour the Convention only if one supported increasing international commercial relations by increasing the efficiency by which those relations might be conducted. That goal, increased and more efficient international trade, while widely shared, is hardly uncontroversial. The Convention promises to be yet another aspect of legal change which aims to facilitate the internationalization of trade in goods and services, and those in favour of halting or even retarding the globalization of commercial relations would not be inclined to support it. Arguments about the pros and cons of commercial globalization are far beyond the scope of this report. I raise the issue here only to point out that my conclusion that the Convention is a good thing rests on certain assumptions about the value of international trade.

III. Comparison of the Convention and Existing Law

[20] The focus in this section is on the differences between the rules laid out in the Convention and the rules on the corresponding subjects in common law Canada. This will assist in identifying where modifications would have to be made to Canadian law were Canada to implement the Convention.

[21] There are two parts to this section. The first seeks to make broad observations that are generally applicable to all – or at least most of – the common law jurisdictions in Canada: the nine common law provinces, the territories and, for the most part (though this may be a controversial classification), federal jurisdiction, at least as manifested in the Federal Court of Canada. Such an approach is possible because – again, speaking very generally – the pertinent legal regimes in those jurisdictions are similar and therefore helpful generalizations can be made about them. The second part touches briefly on each of the jurisdictions in turn. This is required since, despite the broad resemblance just alluded to, there are also non-trivial differences among the provinces' and territories' various approaches to the matters addressed in the Convention. These differences are found in part in rules of court, in particular those pertaining to service *ex juris*, which vary from province to province. Differences also arise from variations in other provincial legislation -- in particular statutes that are adoptions of certain ULCC uniform acts bearing on court jurisdiction and enforcement of foreign-country judgments.

A.The Convention *vs*. the Common Law

[22] In para. 2 I claimed that the difference between the regime found in the Convention and that presently in place in the common law provinces of Canada is not great. This part elaborates on that observation, at least insofar as concerns the three main obligations in the Convention set out in the previous section. At the outset I venture a generalization that applies throughout this part of the report. The main dissimilarities between the Convention and the common law relate not to deep discrepancies about the general shape of the law or the goals to be pursued, but rather to legal method – that is, to *how* those goals should be pursued. To be more specific, the Convention seeks to define any exceptions to its general goals in narrow and exhaustive language – language that adopts bright-line rules that could easily be incorporated in a statute without significant change, or indeed without any change. In contrast, the common law, as it frequently does, seeks to preserve a measure of flexibility, open-endedness and judicial discretion, and to eschew a definitive *a priori* inventory of exceptions because such a closed list might render a court incapable of reaching a fair result in all cases. To a considerable extent, therefore, a preference for one or the other of these approaches – the Convention or the common law -- will be conditioned by one's general preference for either (1) certainly and *ex ante* knowability, perhaps at the risk of rigidity and the cost of occasionally failing to do justice in every case, or (2) an adaptable and open-textured regime that prizes justice in the individual case but achieves that (if at all) only at the cost of vagueness of language and consequently less certainty of outcome.

[23] Of course the debate is not whether the common law approach to this subject is so vague and uncertain as to be in need of statutory codification. It is, rather, whether the codification and rigidification which necessarily accompany the drafting of a multilateral convention which promises to secure the advantages of international uniformity and reciprocity is a worthwhile price to pay for the loss of the common law's flexibility.

[24] That choice plays out against each of the three core requirements in the Convention. First, consider the obligation of the chosen court to both have and exercise jurisdiction. As the Supreme Court of Canada noted 17 years ago in *Morguard Investments Ltd. v. De Savoye*,[16]consent of the parties is a long-recognized and unproblematic basis on which to assert personal adjudicatory jurisdiction. Jurisdiction on the basis of consent is not limited to situations where that consent is granted in a contract,[17] but it certainly includes that; contractual submission is a well-recognized species of consent-based personal jurisdiction. In recognition of this, provincial rules of court allow extraterritorial service on defendants,[18] and thus the existence of personal[19] jurisdiction, in contract cases where the parties to the contract have stated that that province's courts shall have jurisdiction over disputes arising from their contract. (Those rules do not require that such choice-of-court provisions be exclusive ones, but they undoubtedly encompass exclusive choice-of-court clauses, and thus provide for the taking of adjudicatory jurisdiction in the

exact circumstances where the Convention requires such jurisdiction to exist.)

[25] However – and this is where the common law's approach departs from that found in the Convention – common law rules relating to *forum non conveniens* permit judges who possess jurisdiction to decline to exercise it in a given case in the interests of justice. Judges can stay or dismiss cases over which they have jurisdiction so that those cases may be resolved in some other court that, in the circumstances of an individual case is the better (fairer, cheaper, more efficient) place to resolve it. This is a power which is confirmed repeatedly in provincial legislation and rules of court.[20] The circumstances in which the common law permits this are broader than those in which the Convention permits the court designated in an exclusive choice-of-court clause to refuse to hear the case (which, it will be recalled from para. 14, is only where the choice-of-court agreement is void). Accordingly, were Canada to adopt the Convention, the implementing legislation would have to remove the judicial discretion to employ *forum non conveniens* where the Convention was applicable.

[26] It should be noted that, while it is hardly uncommon for a Canadian court to order a stay or dismissal of proceedings on grounds of *forum non conveniens*, it is rare indeed for them to do so where sophisticated parties have selected that court in a contract. It would be exceptional for a judge to conclude that the interests of justice were served by ignoring commercial parties' contractual choice in this fashion. However, the possibility remains that it might be done, and moreover done on grounds other than the voidness of the clause in question (which, it will be recalled, is the only exception the Convention permits). So implementing legislation would have to make it clear that the general power which Canadian courts have to stay or dismiss proceedings on grounds of *forum non conveniens* does not operate where the Convention governs.

[27] In passing I note that there seems no reason to expect any difficulty resulting from this. For instance, the *Divorce Act* sets out the circumstances in which Canadian courts have jurisdiction to hear a petition for divorce, and in such circumstances *forum non conveniens* is not applicable.[21] If the statutory jurisdiction over a divorce petition exists then courts should not decline it except in the (limited) circumstances set out in the *Divorce Act*.[22] In short, despite the widespread applicability and inherent nature of *forum non conveniens*, Canada's common law judges are not unfamiliar with regimes which set out circumstances in which they both have *and must exercise* adjudicatory jurisdiction.

[28] A comparable situation exists with respect to the Convention's second key requirement – that of the non-chosen court to decline jurisdiction. Here the problem is, in effect, the opposite of the one just dealt with. Normally, under the common law, the non-chosen court (which otherwise had jurisdiction) would decline to exercise it if the parties

had contractually granted exclusive dispute-resolution authority to another country's judiciary. It would do so pursuant to the doctrine of *forum non conveniens* – an aspect of the inherent power of the common law courts to control abuse of process, and one confirmed in various provincial statutory rules of court. This approach was confirmed just four years ago by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*[23] It is not limited to commercial contracts; however, it is firmly in place there (and indeed operates most strongly in the commercial context). The non-chosen court (assuming it otherwise has jurisdiction over the dispute in question) should normally decline to hear a contractual matter where the parties have exclusively designated some other country's courts.

[29] Of course, as noted above, the Convention also permits the non-chosen court to take jurisdiction in certain circumstances. That is (as outlined in para. 16), the Convention lists some exceptions to the general obligation of the non-chosen court to decline jurisdiction. However, the Convention's exceptions are exhaustively enumerated. By way of contrast, the common law's *forum non conveniens* power is open ended. In the context of exclusive choice-of-court clauses that power finds expression in the strong-cause test confirmed by the Supreme Court in *Z.I. Pompey*: the non-chosen court should heed the choice-of-court clause and refuse to exercise jurisdiction unless there is strong cause to do otherwise, and the burden of proving this is on the party which wants the court to override or ignore the choice-of-court clause. The fact that the common law's exceptions (found in the strong cause test) are broader than those in the Convention may most clearly be seen in some of the factors which the common law permits courts to consider. These include (1) the location of evidence and the effect of that on the relative expense and convenience of trying the matter in the competing forum, (2) which law applies, (3) the relative ease of enforcement of judgments from the respective courts, and (4) how closely the parties are connected with the jurisdictions in question.

[30] The Supreme Court has confirmed that normally commercial parties should "be held to their bargain"[24] and that the non-chosen court should stay or dismiss proceedings. However, it will readily be seen that the factors just listed could permit a non-chosen court to hear a case in circumstances where the Convention would require it to decline to do so. Accordingly, legislation implementing the Convention would have to specify that, where the Convention operated (and where no exception specified in the Convention applied), the non-chosen court simply had to suspend or dismiss proceedings that were brought before it, even if it would otherwise have jurisdiction over them, and that there was no discretion to do otherwise.

[31] Arguably the flexibility of the common law's strong-cause test provides superior protection for unsophisticated commercial parties that may be caught by choice-of-court clauses in adhesion contracts. It should be recalled that, while the Convention does not

apply to consumer contracts or contracts of employment, it would operate in an international commercial agreement between a large, sophisticated commercial entity on one hand and a small business on the other. This would be so even where the choice-of-court clause was contained in a standard-form contract drafted by the former and offered only on a take-it-or-leave-it basis. Of course the Convention offers some resources to the non-chosen court to cope with such situations: it can ignore the obligation to stay the action, doing so on the grounds that giving effect to the choice-of-court clause would lead to a manifest injustice.[25] Arguably this provision – which has been criticized as "seriously detract[ing] from the stated goal of furthering international trade by enhancing predictability in the use of choice of court agreements"[26] – approximates the common law's flexibility. But it does not go as far as the common law's strong cause test. This has led some to claim that the Convention's rules may be a trap for small business,[27] and the matter under consideration here is the most prominent instance of that.

[32] When it comes to the third chief obligation of the Convention – namely, the requirement to enforce foreign judgments where the original rendering court was one designated in an exclusive choice-of-court clause – the situation in the common law jurisdictions of Canada is the same was it was with the Convention's first two principal obligations: the common law provinces already do this. Under the common law, as acknowledged by the Supreme Court of Canada in *Morguard*[28] and *Beals v. Saldanha*[29] (and also under the ULCC's Enforcement of Foreign Judgments Act[30]), the judgment debtor's consent to the adjudicatory jurisdiction of the original court is a sufficient jurisdictional connection to justify that court's judgment being recognized and enforced in Canada.

[33] Of course there are exceptions to that, commonly known as the impeachment defences. These exist both under the Convention and at common law. Under the Convention, a foreign judgment need not be enforced if it is "*manifestly*incompatible with the public policy of the requested State".[31] The common law's formulation of this test may be somewhat broader in that it does not contain the requirement of *manifest* incompatibility but only that the foreign judgment is founded on a law "which is contrary to the Canadian concept of justice."[32] Arguably these are no more than variations in verbal formulation and do not reflect profound or even significant underlying differences. However, the Convention's approach to the impeachment defences might be seen as *slightly* harder-to-meet test than the common law's.

[34] The defence of fraud is somewhat broader at common law than under the Convention; that is, adoption of the Convention might require the enforcement of some foreign judgments that would not presently be enforced. To elaborate, under the Convention, an otherwise enforceable foreign-country judgment need not be enforced if it

"was obtained by fraud in connection with a matter of *procedure*".[33] The Convention's Explanatory Report gives several examples of fraud going to procedure: where the plaintiff deliberately serves the writ at the wrong address or gives wrong information about the date or place of the hearing, where a party seeks to corrupt a witness or juror, or where a party deliberately conceals key evidence.

[35] The limitation of the fraud defence to "procedure" renders it narrower than the fraud defence at common law. That was most recently dealt with by the Supreme Court of Canada in *Beals*.[34] The Supreme Court there made it clear that, although the fraud defence should be narrow, it could include so-called intrinsic fraud. This might include evidence that came to light after the original judgment which showed that the plaintiff's witnesses in the original trial had lied and that the judgment in favour of the plaintiff was attributable to these lies. The burden of proving this would be on the judgment debtor, and the defence could only be established where it was based on new and material facts that "could not have been established by due diligence prior to the obtaining of the foreign judgment."[35] The defence is thus a limited one, but it is broader than the "procedural fraud" found in the Convention.

[36] There is a third difference. Under the Convention a foreign judgment may not be enforced if it is under appeal or if the time for appealing it has not yet run. That is not a defence under the common law. However, in practice a common law court faced with an action to enforce a judgment that was being appealed in the rendering jurisdiction would normally grant a stay of proceedings until that appeal was resolved. In short, this difference between the Convention and the common law seems trivial, and shifting from the current common law approach to the approach in the Convention would not represent a significant change.

[37] Finally, there is the possibility at common law that a judge could invent/recognize a new impeachment defence, simply as a common law development. The Supreme Court of Canada acknowledged this possibility in *Beals* when it wrote that "[u]nusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment."[36] Indeed, even as this report was being written such an argument was entertained by the Ontario Superior Court of Justice.[37] While the argument for the recognition of a new impeachment defence was rejected in that case, the decision does highlight a difference between the existing common law and the Convention – *viz*., the former continues to change and adapt while the latter does not.

B. Individual Jurisdictions Briefly Considered

[38] This part considers the various common law jurisdictions in turn, with particular emphasis on the ways in which legislative provisions in force in those jurisdictions might

alter the common law as described in the preceding part.

Alberta

[39] Alberta has no statutes which make the situation there any different than the general situation described in the foregoing part. The one difference to take note of with respect to Alberta relates to its rules for service *ex juris* with respect to contractual choice-of-court clauses. Unlike other provinces' court rules, Alberta's rules of court do not permit a plaintiff to serve a defendant outside of Alberta without leave of the court. They do, however, expressly provide that contractual submission is one instance where leave may be granted,[38] and presumably it normally would be. The possibility remains, however, that an Alberta judge or master might refuse to grant leave in such circumstances, thus denying the plaintiff access to the Alberta courts and creating a violation of the key art. 5 obligation of the Convention (see para. 14).

[40] Accordingly, if Alberta were to adopt the Convention its rules of court regarding service *ex juris* would have to be modified so as to stipulate that, in cases where art. 5 of the Convention provided that the courts of Alberta had exclusive jurisdiction over a dispute, plaintiffs would have a right (that is, would not require leave of the court) to serve defendants *ex juris*. This does not amount to a significant difference of principle between Alberta law and the general common law described in the last part. As noted in the last part, legislation implementing the Convention would have to override the common law power to decline jurisdiction on grounds of *forum non conveniens*. In Alberta it would also have to override a judge's power to decline to grant leave to serve *ex juris* in situations covered by the Convention.

British Columbia

[41] B.C.'s Rules of Court used to allow service *ex juris* without leave of the court in cases where the parties had contractually accorded jurisdiction to that province's courts. That changed on 4 May 2006 when B.C. brought its *Court Jurisdiction and Proceedings Transfer Act*[39] into force. The *CJPTA* does not allow service *ex juris* without leave simply on the basis that the parties have contractually granted jurisdiction to that province's courts. In B.C. parties who seek to sue there and have the B.C. courts take jurisdiction based solely on a contractual choice-of-court clause (exclusive or otherwise) now have to seek leave of the court to serve defendants outside that province. Accordingly, just as with Alberta, legislation implementing the Convention in B.C. would have to eliminate any chance that a B.C. judge would fail to grant that leave – otherwise there would be a breach of the obligation in art. 5 of the Convention.

[42] In addition, the *CJPTA* has enacted a sort of statutory *forum non conveniens* provision. In British Columbia this is found in s. 11 of the *CJPTA*. This means

that the points dealt with above in paras. 25-31 apply somewhat differently in B.C., since there the power of judges to stay or dismiss proceedings otherwise properly brought before them has been set out in legislation. In particular, s. 11(2)(a) of B.C.'s *CJPTA* invites courts to consider "the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum". This clearly goes against the Convention's approach to court jurisdiction in both art. 5 and art. 6.

[43] In interpreting this provision of *CJPTA* the British Columbia Court of Appeal recently noted that

> the *CJPTA* provisions regarding forum non conveniens were meant to be assimilated into the existing body of common law and that the Chambers judge was required to consider and apply the case law already in existence at the time the statute came into force, as well as cases decided subsequently.[40]

Were British Columbia to adopt the Convention, its implementing legislation would have to state that it prevailed over that province's *CJPTA*, or at least over s. 11 of that statute.

[44] In addition, British Columbia has a provision in its *Court Order Enforcement Act* which precludes enforcement of foreign judgments "given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in British Columbia".[41] That provision could conceivably clash with the Convention. This matter is dealt with below in Section V at para. __.

Manitoba

[45] Manitoba has no statutes that alter the general common law situation described in the previous part. Its *Rules of the Court of Queen's Bench*,[42] permit plaintiffs to serve defendants outside of Manitoba when the parties to a contract have given jurisdiction to the Manitoba courts. The initial requirement of Convention art. 5 is thus satisfied. Manitoba's *Court of Queen's Bench Act*[43] contains statutory confirmation of that court's power to stay proceedings brought before it, which includes the *forum non conveniens* power.

New Brunswick

[46] Like Manitoba, New Brunswick's *Rules of Court* grant plaintiffs the right to serve defendants *ex juris* without leave of the court where the parties have contractually granted jurisdiction to New Brunswick's courts (r. 19.01(g)(iv)). Rule 19.05 is the rule that would permit a defendant so served to bring a motion to stay or dismiss proceedings on grounds of *forum non conveniens*. In that respect, New Brunswick is like Manitoba in conforming to the general common law position outlined in the preceding part. That is, insofar as the Convention's obligations regarding adjudicatory jurisdiction are concerned,

New Brunswick's statutes present no special problems.

[47] However, when it comes to enforcement of foreign judgments there is a New Brunswick act that slightly alters the general common law scenario described above. New Brunswick has a statute that sets out different and more restrictive rules for the enforcement of foreign judgments than are found in the other common law provinces: the *Foreign Judgments Act*.[44] This act is based on the 1933 Foreign Judgments Act promulgated by the ULCC's predecessor, the Conference of Commissioners of Uniformity of Legislation in Canada, though it was not enacted in New Brunswick until 1950. There is a possibility of a clash between this statute and the Convention in that a judgment that New Brunswick would be required to enforce under the Convention might be a judgment that, according to the *Foreign Judgments Act*, must be denied enforcement.

[48] The potential for such clashes does not seem great, but it is certainly conceivable. For instance, the *Foreign Judgments Act* states that judgments foreign judgments involving injury in respect of immoveable property in New Brunswick, shall not be enforced in that province.[45] There are other respects in which New Brunswick's *Foreign Judgments Act* appears to provide defences to enforcement that are at least somewhat broader than those found in the Convention.[46] It is thus possible to imagine a case in which the parties have designated the court of some foreign country as having exclusive jurisdiction over disputes arising from their contract, and where that country's courts have rendered a judgment that has been brought to New Brunswick for enforcement. In such a case there might be no applicable defences to enforcement under the Convention, but New Brunswick's *Foreign Judgments Act* might offer the judgment debtor defences to enforcement. Accordingly, if New Brunswick were to implement the Convention it would have to ensure that the implementing legislation made it clear that if a clash with the *Foreign Judgments Act* arose then the Convention prevailed.

Newfoundland and Labrador

[49] As with Manitoba and New Brunswick, Newfoundland and Labrador's Rules of the Supreme Court allow service *ex juris* in cases where contractual parties have accorded its courts jurisdiction.[47] The *Judicature Act*[48] of Newfoundland and Labrador contains statutory confirmation of that province's courts' powers to stay actions brought before them. These provisions are just instances of the general common law scenario described in the previous part. Implementing the Convention in Newfoundland and Labrador appears to present no special problems.

Northwest Territories

[50] The Northwest Territories' rules of court allow service *ex juris* without leave where there has been contractual designation of N.W.T. courts.[49] Implementing the

Convention in the N.W.T. does not appear to present special problems.

Nova Scotia

[51] Nova Scotia's *Civil Procedure Rules* are unique in their approach to service *ex juris*, a fact which attracted the notice of the Supreme Court of Canada in *Morguard*.[50] Rule 10.07(1) allows service with the leave of the court "on a person elsewhere than in Canada or one of the states of the United States". Where a potential defendant falls outside the scope of r. 10.07(1) – that is, where the defendant is present somewhere in Canada or the U.S. – then no leave is required, and this is so regardless of the presence or absence of affiliating links between the underlying cause of action and the province of Nova Scotia. Accordingly, in a case where the parties to an international commercial contract had given exclusive jurisdiction to the Nova Scotia courts then (1) if the defendant was present in Canada or the U.S. service *ex juris* could be effected without leave, and (2) if the defendant was elsewhere leave would be required under r. 10.07(1), raising the possibility that leave might be denied. Were Nova Scotia to implement the Convention its implementing legislation would have to override r. 10 where the Convention applied. It would have to provide for service ex juris where there was an exclusive choice-of-court clause that fell within the terms of the Convention.

[52] Like other provinces, Nova Scotia has a provision which authorizes stays of jurisdiction. *Civil Procedure Rule*14.25(1)(a) is the rule that authorizes motions for *forum non conveniens*.

[53] Nova Scotia has passed the *Court Jurisdiction and Proceedings Transfer Act*[51] but has not yet brought it into force. If it should bring that statute into force then the observations above with respect to the British Columbia version of that uniform act would apply to Nova Scotia as well.

Nunavut

[54] The situation in Nunavut is the same as in the Northwest Territories.[52] Its *Judicature Act* and rules of court are the same as those of the N.W.T. on the points relevant to the Convention.

Ontario

[55] There are no Ontario statutes which make the situation in that province any different from the general common law scene described in the preceding part. The *Rules of Civil Procedure* provide, in r. 17.02(f)(iii), for service outside Ontario in proceedings on claims

in respect of a contract where . . . the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract . . . .

Motions to set aside that service or to stay the action on grounds of *forum non*

conveniens may be brought under r. 17.06, and the courts' general power to stay matters that are brought before them is confirmed in the *Courts of Justice Act*.[53]

Prince Edward Island

[56] As with Ontario, in P.E.I. there are no statutes which make the situation in that province any different from the general common law scene described in the preceding part. Prince Edward Island's *Rules of Civil Procedure* are modeled closely on Ontario's. As in Ontario, rule 17.02(f)(iii) permits service *ex juris* without leave in cases where contracting parties have given that province's court jurisdiction over disputes arising from their contract. And r. 17.06 allows defendants so served to bring a motion setting aside the service or staying the proceeding on the ground of *forum non conveniens*.

Saskatchewan

[57] Like British Columbia, Saskatchewan has enacted a *Court Jurisdiction and Proceedings Transfer Act*.[54] It came into force on 1 March 2004. So the observations made with respect to British Columbia's version of that statute and its potential to clash with the Convention would apply here too.

[58] To date Saskatchewan is the only province to have enacted the ULCC's Uniform Enforcement of Foreign Judgments Act. That province's *Enforcement of Foreign Judgments Act*[55] came into force in April 2006. Although not as restrictive as the legislation it replaced,[56] the *EFJA*, like the New Brunswick statute discussed above in paras. 47-48, still provides defences to enforcement of a foreign judgment not found in the Convention. The conflict would only come at the enforcement stage; that is, the clash would be with the obligation under art. 8 of the Convention to recognize a judgment given by a court in a contracting state which had taken jurisdiction over a contract with an exclusive choice-of-forum clause. Here are ways that Saskatchewan's *EFJA* differs from the enforcement obligations under the Convention.:

n *EFJA* s. 6(2) permits a Saskatchewan court enforcing a foreign judgment to decline to enforce that portion of the compensatory award that the Saskatchewan court deems to be "excessive in the circumstances". The Convention has no comparable provision (though see below at paras. 69-71).

n *EFJA* s. 4 (e) permits a Saskatchewan court to refuse to enforce an otherwise enforceable judgment if it was "obtained by fraud". The comparable provision in the Convention (art. 9 (d)) is narrower and only permits non-enforcement where the foreign judgment "was obtained by fraud in connection with a matter of procedure".

The former of these is presumably the greater concern. It is aimed at multiple damages in the USA, which can be granted in contract suits in a number of circumstances.[57] If

Saskatchewan implemented the Convention then – like New Brunswick with its *Foreign Judgments Act* – it would have to provide that in the event of a clash the Convention prevails over the *EFJA*.

Yukon Territory

[59] The Yukon has passed the *Court Jurisdiction and Proceedings Transfer Act*[58] based on the ULCC's uniform act, but as of July 2007 that statute has not been brought into force. The Yukon's rules of court are, *mutatis mutandis*, the *Rules of the Supreme Court of British Columbia*.[59] This presents a curious situation when it comes to the Yukon's service *ex juris* rules, since Rule 13(1) of those B.C. rules provides:

Service of an originating process or other document on a person outside British Columbia may be effected without leave in any of the circumstances enumerated in section 10 of the *Court Jurisdiction and Proceedings Transfer Act*.

In other words, although the Yukon Territory has not proclaimed in force its own *Court Jurisdiction and Proceedings Transfer Act*, when it comes to service *ex juris* it seems to have adopted the B.C. version of that statute. The result of this would seem to be that the situation in the Yukon is the same as that set out above in the sub-section on British Columbia.

Federal

[60] Other treaties comparable to the Convention – such as the New York Convention and the Canada-UK Judgments Convention – have been implemented not only at the provincial level but at the federal one as well.[60] The Convention would require such implementing legislation. Presumably Canada's Federal Court would not often be required to act pursuant to the Convention, since most of the subject matter areas that might entail recourse to that court are excluded from the Convention. These include most intellectual property matters, carriage by sea, marine pollution and limitation of maritime claims, antitrust, and validity of entries in public registers. However, there certainly are claims under the Convention that could implicate Federal Court jurisdiction. For instance, proceedings are not excluded from the scope of the Convention merely by the fact that one of the parties to the contract with a choice-of-court clause is a state or governmental agency.[61] So international sale of goods contracts involving the Government of Canada as one of the contracting parties would fall within the Convention, and parties to those might well exclusively designate the Federal Court of Canada as the place to resolve their disputes.

[61] The Federal Court of Canada applies the doctrine of *forum non conveniens* so the point made in paras. 25-31 applies with respect to it. That is, federal legislation implementing the Convention would have to (1) stipulate that where jurisdiction existed

under the Convention the Federal Court should not resort to *forum non conveniens* to stay or dismiss it and (2) where the jurisdiction otherwise existed under the rules of the Federal Court but where the Convention indicated such jurisdiction should be declined, the Convention should prevail.

[62] Under Canada's *Foreign Extraterritorial Measures Act*[62] there are provisions which limit the enforcement of foreign judgments in certain circumstances. Section 7.1 prohibits enforcement of judgments "given under the law of the United States entitled *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*", and s. 8 permits the Attorney General of Canada to declare that foreign-country judgments shall not be enforced in Canada if they will or might adversely affect "significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada". It is not inconceivable that these non-enforcement provisions could clash with an obligation to enforce a judgment under the Convention. Parliament might address this by amending *FEMA*to stipulate that its non-enforcement provisions should never operate to override an obligation arising under the Convention to enforce a foreign judgment. However, the chances of such a clash occurring seem so remote as to hardly be worth bothering about. Note that I mention *FEMA* here under the Federal sub-heading, but its operation is not confined to the Federal Court of Canada. It could employ to enforcement proceedings in any Canadian court.

IV. Other Substantive Features of the Convention

[63] Thus far this report has concentrated on the three principal obligations in the Convention and the ways in which they differ from the regimes currently in place in common-law Canada. As noted in para. 19, this was done in the interest of clarity of explication. The three chief obligations are the most important. However, there are other ways in which the rules of the Convention differ from those currently in place in common law Canada, and they deserve mentioning too. That is the burden of this section.

Formation: The Writing Requirement

[64] The Convention's rules for formation of an exclusive choice-of-court clause differ slightly from those in the common law. While neither the Convention nor the common law require that such a clause appear in a contract that is signed, the Convention does require either that it appear in a contract that is concluded or documented in writing, or, failing that, in one that is documented by some "other means of communication which renders information accessible so as to be usable for subsequent reference".[63] The common law has no such requirement; subject, of course, to issues of proof, the common law would treat a choice-of-court clause in an oral contract the same way it would treat

such a clause in a written agreement.

[65] Not a lot would seem to turn on this. Presumably there are not many international business-to-business contracts that are not documented in writing in a fashion that would meet the requirement of the Convention's formation provision. Where such contracts would be made, they would simply be governed by the common law rather than the Convention. The only point to note here, it would seem, is that contracting parties would have to be educated to appreciate that, if they want to gain the benefits of the Convention they would have to make certain to document their agreements in writing.

Formation: Non-Exclusive Choice-of-Court Clauses

[66] The Convention applies only to *exclusive* choice-of-court agreements. An agreement otherwise covered by the Convention but in which the parties simply say that the courts of, say, Prince Edward Island have non-exclusive jurisdiction over disputes arising from it will not be affected by the Convention. (Art. 22 provides the option for reciprocal agreements that the Convention will apply to non-exclusive choice-of-court clauses. That is not relevant here but is discussed below at paras. 84-85.) The issue addressed here is that which arises from art. 3 b), which stipulates that choice-of-court agreements will be viewed as being exclusive unless they expressly say they are non-exclusive:

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

That differs from the position at common law. Under the common law (which is not modified on this point by any relevant statutes) the question of whether a choice of law clause is exclusive or non-exclusive is simply a matter of contractual interpretation. Thus if parties to a contract simply say, "the courts of New Brunswick have jurisdiction over disputes arising from this agreement" the question of whether they intended to accord the New Brunswick courts *exclusive* jurisdiction is one of interpretation. There is no space here for a complete exposition of principles of contractual interpretation, but it could involve looking at the entire wording of the contract, the context (including previous dealings between the parties and general practice in the relevant industry), negotiations between the parties, and so on. Most commonly, if the parties have not used the word "exclusive" or some synonym the clause in question will not be viewed as an exclusive one, but this result has not been reached uniformly.[64]

[67] Art. 3 b) thus has the potential to take Canadian lawyers and their clients by surprise. They might draft and execute a contract that contains the words "the courts of France have jurisdiction over disputes arising from this agreement". They might do so believing that the contractual context makes it clear that this is a non-exclusive jurisdiction clause

and thus that the Convention does not apply, so that, for instance, they might still sue before a Canadian court since there were other bases on which a court in Canada would take jurisdiction (for instance, because the contract was to be performed here). A dispute might then arise and a party might try to bring an action before court in Canada. Assuming that Canada had adopted the Convention and had implemented it through legislation which replicated the Convention, that Canadian court would have to decline jurisdiction. It would have to do so because (1) art. 3 b) would require that the clause be interpreted as an exclusive one (since it did not expressly state that it was not), and (2) art. 6 thus required it to suspend or dismiss proceedings.

[68] Although this could pose a problem it hardly seems insurmountable, or a reason for not adopting the Convention. First, the Convention only applies prospectively, so contractual provisions pre-dating the Convention's entry into force in Canada would not be effective. Second, the point is a fairly simple one and there does not seem any reason to think that contract drafters, alerted to the change by, for instance, a CLE session, could not easily change their behaviour here.

Damages

[69] Art. 11 of the Convention accords enforcing courts a power that they do not have at common law. The common law does not generally permit a judge enforcing a foreign judgment to decline to enforce it (or part of it) simply on the ground that it is non-compensatory.[65] This is simply a specific instance of the general rule that it is no bar to enforcement of a foreign judgment that the foreign court reached a different decision than the enforcing court would have. Of course, it is a bar to enforcement of a foreign judgment that it is penal in nature, and moreover in *Beals v. Saldanha* the Supreme Court of Canada acknowledged that in extreme cases it might be possible to deploy the public policy defence to block the enforcement of arbitrarily large foreign punitive damages awards.[66] But neither of those bars to enforcement permit common law courts to refuse to enforce a foreign judgment simply on the ground that it is not compensatory.

[70] However, art. 11(1) would permit an enforcing court to do exactly that. It would allow (though not require) an enforcing court to refuse to enforce a judgment under the Convention to the extent that the foreign judgment does "not compensate a party for actual loss or harm suffered." This would include punitive damages (even, it would seem, if the enforcing court might have awarded punitive damages in a case of that sort) and possibly also damages measured by the benefit to the defendant. It would also apply to many instances of (usually statutorily prescribed) multiple damages. Such damages awards should only be denied enforcement to the extent that they are deemed or found to be non-compensatory. Thus art 11 of the Convention paves the way for something not generally practiced in the common law – *viz*., enforcement of part but not all of a foreign

damages award.

[71] Although art. 11 provides for an approach that is different from the one that prevails at common law, it is not clear that it would create any special difficulties. The notion of partial enforcement may be new, but it is hardly repugnant to Canadian legal traditions. Not does it seem particularly difficult to adapt to.

V. Choices within the Convention

[72] Should Canada elect to ratify the Convention there are a number of additional decisions to be made – six in all. These arise from options granted in arts. 19, 20, 21, 22, 26 and 28 of the Convention to modify its scope of operation in limited ways. This section explains those articles, evaluates considerations pertinent to them and offers recommendations as to whether they should be exercised. The assumption necessarily adopted throughout this section is that Canada has elected to implement the Convention and thus has been persuaded that the Convention as a whole is a good thing.

Art. 19 Declarations Limiting Jurisdiction

[73] Art. 19 permits a contracting state to declare that its courts may refuse to determine disputes, even where that state's courts have been designated in an exclusive choice-of-court clause "if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute." Sometimes contracting parties who have no connection with a given country might designate that country's courts as a forum in which to resolve their disputes simply because they see those courts as a neutral forum and because they have confidence in the quality of justice dispensed in them. That puts a strain, financial and otherwise, on a judicial system that is not otherwise affiliated with the parties or transaction in question. This is unfair to the country that must pay to operate that system but which receives in return no significant benefit from resolving disputes that do not involve its citizens or residents. Litigation is subsidized dispute resolution; the salaries of the judges and court officials are not paid for simply out of the fees that courts charge to file a claim, but rather from general tax revenues. Why should any country operate a judicial system to resolve foreigners' contractual dispute?

[74] Accordingly, art 19 provides an option for states party to the Convention to refuse to engage in this sort of subsidization. States may opt to declare that their courts need not entertain litigation, even if those courts are contractually designated as the exclusive forum, if apart from the designation of its courts the state has no connection with the parties or the contract. (Note that if such a declaration was made the court could still hear the dispute if it chose to; the declaration simply gives the court the option to decline

jurisdiction.)

[75] Were Canada to adopt the Convention, should it make a declaration under art. 19? In my view this is a relatively unimportant question; it would not make a lot of difference whether Canada made such a declaration. The opportunity exists under the current common-law regime for commercial parties who have no connection with Canada to opt to litigation in Canada because it provides a neutral forum. Despite this longstanding opportunity, no such practice appears to have developed. If the reported cases are any basis for judgment, parties unconnected with Canada have not hitherto adopted the practice of coming to Canadian courts to resolve their contractual quarrels. There is no reason to think that the Convention's coming into force would do anything to change this state of affairs. So, failing to make an art. 19 declaration would not result in a flood of foreigners rushing to resolve their disputes before Canadian judges. If it did, then Canada could make a declaration at a later time, since art. 32 stipulates that declarations may be made at the time of ratification or at a later time, and that once made they may later be withdrawn.

[76] Note that even if the foregoing assumption is wrong and, following Canada's implementation of the Convention, a practice developed among foreigners of designating Canadian courts as a place to resolve disputes in commercial contracts, it is far from clear that this would be harmful to Canada's balance sheet or Canadian interests generally. Commercial disputes rarely involve jury trials, so if foreigners elected to try their disputes in Canadian courts that would not entail their calling on the time of Canadian citizens to sit as jurors to decide those disputes. Of course, as mentioned above, there would be the time and salaries of judges and court officials to consider. However, that would have to be balanced against the fact that if foreigners fell into the practice of using Canadian courts to resolve their contractual disagreements then they would be engaging Canadian lawyers and litigation support, staying in Canadian hotels, eating in Canadian restaurants and so on. This might more than balance out the cost of the drain on the justice system. I know of no study which offers a full assessment of the net gains or losses a country experiences if foreigners elect to resolve their commercial contractual disputes in that country.

[77] To conclude this subsection, it bears repeating that the scenario of foreigners designating Canadian courts as neutral fora to litigate non-Canadian contracts seems unlikely to develop, but it would not necessarily be a bad thing for Canada if it did. So, while there may be no strong reason not to make an art. 19 declaration, there is equally no convincing reason to make one.

Art. 20 Declarations Limiting Recognition

[78] Art. 20 is the enforcement counterpart of art. 19. It permits contracting states to

make declarations limiting their obligations to enforce foreign-country judgments pursuant to the Convention in one limited set of circumstances – namely

if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

An example might afford some clarification. If the parties and all factors associated with a given contract were Canadian, but their contract contained an exclusive choice-of-court clause in favor of, say, France, then – assuming Canada and France were contracting states and the Convention otherwise applied -- Canada would be obliged to enforce that French judgment (subject, of course, to the defences in arts. 8 and 9). Art. 20, in effect, gives Canada the option of declaring that situations like the one just described are essentially Canadian domestic ones rather than international matters, and that recognition of the French judgment should be a matter of Canadian internal law, not governed by the Convention. Making such a declaration would, at least in theory, tell Canadians that in an entirely intra-Canadian contract they should not designate the courts of other countries to resolve their disputes; such “Canadian” contracts should be litigated in Canada.

[79] In my judgment not a great deal turns on art. 20 so far as Canada is concerned. This is so because, as noted above, common law Canada’s existing regime for enforcement of foreign-country judgments (which is the régime that would govern situations like that just described if an art. 20 declaration were made) does not differ much from the enforcement scheme required by the Convention. That is, it is no part of existing law in the common law jurisdictions of Canada that a court may decline to enforce a foreign judgment on the grounds that the foreign court took jurisdiction pursuant to a choice-of-court clause but was not otherwise connected to the parties. I do not even recall reading a case where a judgment debtor thought to raise the argument that a foreign judgment should be denied enforcement because, despite the existence of a choice-of-court clause in favour of the foreign court, the parties had no connection with that forum. So Canada’s making an art. 20 declaration would not make much difference: the declaration only tells the contracting parties that they cannot count on the Convention to render their foreign judgments enforceable in Canada. But those judgments are enforceable at common law so an art. 20 declaration would have little effect.

[80] Perhaps more to the point, the common law practice on this issue appears to demonstrate that Canadian courts have not in the past been concerned about enforcement of such foreign judgments (that is, foreign judgments where all the parties and the subject matter of the dispute are Canadian). If Canada is not worried about enforcement of such judgments, as seems to be the case, then a declaration offered in

art. 20 need not be made.

Art. 21 Declarations with respect to Specific Matters

[81] Canada was instrumental in getting art. 21 added to the text of the Convention. That article provides that states with a compelling interest in not having the Convention apply to some specific, discrete area may enter a declaration excluding that area from the scope of operation of the Convention so far as they are concerned.

[82] As noted above,[67] British Columbia has legislation precluding enforcement of foreign judgments given in respect of injury arising from asbestos that has been mined in that province.[68] Conceivably that might clash with the Convention. If there were an international contract dealing with sale of B.C. asbestos and that contract contained a choice-of-court clause giving exclusive jurisdiction to the courts of, say, New York, then a resulting New York judgment for injury arising from that asbestos would, according to art. 8 of the Convention, have to be enforced in B.C. Of course the Convention does not apply to "claims for personal injury brought by or on behalf of natural persons",[69] so most asbestos-related judgments would not be enforceable under the Convention anyway. However, possibly asbestos-related claims could be brought by subrogated insurers or reinsurers, and those *would* fall within the scope of the Convention.[70] Art. 21 permits Canada to avoid the conflict between this obligation to enforce and the existing B.C. statute barring enforcement by entering a declaration to the effect that, so far as Canada is concerned, the Convention will not apply to asbestos injuries. Unless B.C. were willing to subordinate its existing legislation to the Convention such a declaration would be necessary. Note that if it were made, other contracting states would be relieved from their obligation under the Convention to enforce asbestos injury judgments from Canadian courts.

[83] This is a political matter and I decline to offer any extended assessment of it here. Presumably a province which feels sufficiently strongly about protecting and subsidizing a given industry, such as asbestos mining, to have enacted legislation precluding enforcement of foreign judgments that affect that industry will want to ensure that such judgments are not enforced under the Convention. That is, there is nothing about the Convention which would make foreign-country judgments in those areas more palatable to such provinces, so they will presumably want to make art. 21 declarations with respect to those areas. Conversely, provinces which do not have existing legislative provisions barring foreign-judgment enforcement in certain fields should see no need to make any art. 21 declarations since, as noted numerous times in this report, the basis for foreign-judgment enforcement pursuant to the Convention differs little from that which already obtains under the common law.

Art. 22 Reciprocal Declarations on Non-Exclusive Choice-of-Court Agreements

[84] The other optional matters dealt with in this section all involve choices whether to *restrict* the operation of the Convention in some fashion. The choice that arises from art. 22 is different. It involves an option to *extend* the scope of the Convention – namely, to enlarge it to cover *non*-exclusive choice-of-court clauses. As noted in para. 10, art. 1(1) provides that the Convention only applies to exclusive choice-of-court clauses. However, art. 22 permits contracting states to declare that their courts will enforce judgments given by the courts of other contracting states designated by non-exclusive clauses.

[85] The effect of such a declaration would be limited in three ways. First, it only affects the obligation to enforce, not the obligations under arts. 5 and 6 related to original adjudicatory jurisdiction. Secondly, it would only relate to non-exclusive choice-of-court clauses that were otherwise covered by the Convention. (That is, the limitations as to subject-matter would still apply, as would those relating to formation – *i.e.*, writing. In addition, any reservations made under art. 21 would operate here as well.) Thirdly, there would be a reciprocity requirement: even where a contracting state had made a declaration under art. 22 it would only affect enforcement of "a judgment given in a Contracting State that has [also] made such a declaration . . . ."[71]

[86] Canada should make a declaration pursuant to art. 22. This country already generally enforces foreign-country judgments where those foreign courts took jurisdiction pursuant to a choice-of-court clause – even a non-exclusive one. So Canada's making a declaration under art. 22 would not commit it to enforcing foreign judgments it does not already enforce (subject to the observations at paras. 33-37 above, which elaborate ways in which the impeachment defences may be *slightly* wider under the common law than under the Convention). However, while making an art. 22 declaration would have little effect on the results of cases where foreign-country judgments are brought for enforcement in Canada, it might result in some Canadian court judgments being enforced abroad in situations where, absent the Convention, they would not. In short, there seems nothing to lose yet something (albeit not a lot) to gain in exercising the right to make a declaration pursuant to art. 22.

Art. 26(5) Declarations Concerning Conflicting Treaties

[87] Art. 26(5) deals with a matter of very restricted scope: clashes between the Convention and other jurisdiction and enforcement treaties if those other treaties operate "in relation to a specific matter" – for instance, marine insurance. Art. 26(5) gives contracting states the option to enter declarations stating that the conflicting treaties take precedence over the Convention, regardless of whether they were made before or after the Convention came into effect.

[88] Although Canada is party to some treaties that deal with jurisdiction over specific

matters – the Hague Convention on the Child Aspects of International Child Abduction, for instance – I am not aware of any that would clash with the Convention. Accordingly I see no need for an art. 26(5) declaration. Note, however, that art. 26(5) allows such declarations to be made with respect to treaties made at any time – that is, before or after the Convention – and that art. 32(1) allows art. 26(5) declarations to be made at any time, so if Canada were to conclude such a specific treaty at a later date then an art. 26(5) declaration could be made at that time.

Art. 28 The Federal State Clause

[89] Art. 28 is a standard federal state clause. It permits non-unified legal systems such as Canada to make declarations that the Convention shall only apply to certain of its territorial units. Such declarations may be modified at any time, but in the absence of any such declaration the Convention would apply to the entire country. Accordingly (since it is assumed for the purposes of this report that, for constitutional reasons, the Convention would require implementation at the provincial level), unless all the provinces were prepared to enact appropriate implementing legislation Canada would, at least initially, have to make art. 28 declarations in respect of all provinces which did not wish to adopt the Convention.

[90] There seems little to discuss here. The various jurisdictions will make their own assessments about whether and when to implement the Convention. Presumably the discussion in the other parts of this report will be of some assistance to the making of such assessment. Even if all the provinces eventually elect to embrace the Convention, not all of them are likely to do so at the same time. Accordingly declarations under art. 28 will have to be made. Those declarations can be withdrawn if those initially reluctant provinces or territories later sign on.

VI. Conclusion

[91] I have read approximately 25 recently-published law review articles describing and assessing the Convention from the point of view of a number of different national systems – including India,[72] China[73] and Mexico.[74] The overwhelming majority of these essays give the Convention good marks. That is, while they raise the expected quota of quibbles and offer some lamentations about how the Convention might have been made even better, they generally take the position that this proposed multilateral treaty is an overdue progressive step and they urge its quick and widespread implementation. Some of the authors of these papers are persons who were involved in the negotiating and drafting of the Convention, so it is not surprising that they should praise it. However, most of the commentators appear to be neutral observers.

[92] Of course, none of that amounts to an argument that Canada should adopt the Convention. I mention it here, however, for two reasons. First, it seems worthwhile pointing out that the view I offer in this report – namely, that the Convention represents a modest but useful initiative – appears to be uncontroversial and fairly orthodox. Secondly, since (as pointed out in para. 4) Canada will benefit only if its trading partners adopt the Convention, it is encouraging to note that the Convention seems to be the subject of a fair amount in international goodwill, at least among academic observers. The chances of its being adopted by a significant number of states are hard to ascertain, however, since they depend on more than just academic goodwill. To date no countries are contracting parties to the Convention. However, it is early days yet.

[93] I wrote in para. 3, that there did not seem to be anything to lose by Canada's adopting the Convention, apart from the expenditure of the resources (*i.e.*, drafting time, time on the legislative agenda) required to implement it. One can, I suppose, conjure up other possible losses which might result from subscribing to this proposed multilateral treaty. Its adoption might result in some contracting parties shifting from arbitration for litigation to resolve their disputes. One could speculate that the consequent drop in the number of arbitrations would mean a loss of business for arbitrators and international commercial arbitration centres, including those in Montréal and Vancouver. Related to that, an increase in litigation resulting from the shift from arbitrators to judges could put additional strain on Canada's commercial courts. That is, it may be the case that the current lack of a choice-of-court convention prompts contracting parties to elect arbitration rather than litigation, which is a loss for them (because other things being equal they would prefer litigation) but has the advantage of effectively privatizing that dispute resolution and making it a user-pay system. The Convention would effectively allow such parties to shift more of their dispute-resolution costs onto a publicly-subsidized system -- namely, the courts. Arguably such a shift could constitute a loss arising from adoption of the Convention, though it would have to be balanced against the gain to international commercial traders of access to superior (or at least preferred) dispute resolution.

[94] Putting aside such speculation as to the Convention's possible redistributive effect, it is hard to imagine any negative effects arising from it. As things stand today, the lack of a multilateral treaty reinforcing the effectiveness of contractual choice-of-court clauses constitutes a generally-acknowledged gap in the international commercial trading regime. The Convention seeks to fill that gap. Although it is narrow in scope – thus leaving part of the gap still unfilled – it is a commendable measure that Canada should support.

VII. Summary of Recommendations

[95] Canada should ratify the Convention. It should refrain from making declarations

under arts. 19 and 20, but should make the declaration under art. 22 dealing with non-exclusive choice-of-court clauses. No declarations need to be made under art. 26 at this time. Declarations will be required under art. 28 for any provinces which do not elect to implement the Convention at this time, and under art. 21 for those provinces which will only implement the Convention if they can prevent its application to specific matters.

FOOTNOTES

[1] *Convention on Choice of Court Agreements of June 30, 2005*, 44 I.L.M. 1294, available online at http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (the Convention).

[2] An argument might be advanced that federal legislative authority under the trade and commerce power would suffice to permit the Parliament of Canada to effectively implement the Convention without the need of co-operation from the provinces, but I do not pursue that here.

[3] That view is reflected in the title of an article on the Convention by Jeffrey Talpis and Nick Krnjevic, “The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse” (2006), 13 Sw. J.L. & Trade Am. 1. I have expressed a similar view myself: V. Black, “The Hague Choice of Court Convention” (2006), 6 Can. Int’l Lawyer 181.

[4] *Z.I. Pompey Industrie v. ECU-Line N.V*, [2003] 1 S.C.R. 460; *GreCon Dimter inc v. J.R. Normand inc.*, [2005] 2 S.C.R. 401; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34. The last two of these cases are Québec ones, but that does not affect the general point.

[5] C. Walsh, “Choice of Forum Clauses in International Contacts” in *Meredith Lectures, 1998-99* (Cowansville, Qué.: Yvon Blais, 2000), 211 at 213.

[6] There are some studies conducted by the International Chamber of Commerce that suggest that international traders would favour increased certainty with respect to the enforcement of choice-of-court clauses, but (1) they do not focus on the Convention *per se* and (2) they are not specific to Canada. http://www.iccwbo.org/law/jurisdiction and http://www.iccwbo.org/policy/law/iccef/index.html.

There is also a bit of empirical work done in 2003 by the American Bar Association Section on International Litigation and Practice that showed some practitioner support for the Convention. Specifically, a substantial majority of participants in that survey indicated that if something like the Convention was in place it would make them more willing to

designate litigation instead of arbitration in those international contracts they were responsible for negotiating. See L.E. Teitz, “Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation” (2004) 10 Roger Williams U.L. Rev. 1 at 63.

Note that neither of these studies show that the Convention will achieve its goal of increasing efficiency in international trade. They only show that international traders and their legal counsel *think* that such a result would follow.

[7] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 10, 1958, 330 U.N.T.S. 38 (entered into force 7 June 1959). This treaty is available on the UNCITRAL website online: UNCITRAL <http://www.uncitral.org/en-index.htm> (*New York Convention*). It currently has 136 parties, including Canada.

[8] Ronald Brand used this phrase in two different papers on the Convention: see R. Brand, “Introductory Note to the 2005 Hague Convention on Choice of Court Agreements” (2005) 44 I.L.M. 1291; see also R. Brand, “The New Hague Convention on Choice of Court Agreements” (2005) ASIL Insight 1. He made a similar point in R. Brand, “A Global Convention on Choice of Court Agreements” (2004) 10 ILSA J. Int’l & Comp. L. 345 at 346, and the same observation is made in Louise Teitz, “The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration” (2006) 53 Am. J. Comp. L. 543 at 548.

[9] Convention, art. 1(1).

[10] This exclusion and the one relating to consumers are found in art. 2(1) of the Convention.

[11] Convention, art. 1.

[12] But see paras. 66-68 below.

[13] These exclusions and the other ones listed in this paragraph are spelled out in art. 2(2) of the Convention.

[14] Convention, art. 2(4).

[15] *Ibid*., art. 5(1). The matter is a little more complicated than mere voidness, in that art. 5(1) contains a choice-of-law provision. It provides that the chosen court shall have and assume jurisdiction “unless the agreement is null and void under the law of that State [*i.e*., the state of the chosen court, including, it would seem, its choice of law rules].”

[16] [1990] 3 S.C.R. 1077, at 1103-04.

[17] It also includes consent by attornment.

[18] And of course if the defendant is present within the jurisdiction of the court then

service may be made without leave, and jurisdiction taken, as well.

[19] The focus throughout this report is on *personal* jurisdiction. Of course to exercise jurisdiction courts must have both personal and subject matter jurisdiction. However, the latter presents little difficulty here. The superior courts of the provinces have subject matter jurisdiction over contract claims. Areas where they might not have subject matter jurisdiction – for instance, over title disputes involving foreign land – are not covered by the Convention.

[20] Generally this power is confirmed several times over. It could be located in the general power in provincial judicature acts that confirms that the provincial superior courts posses the power that the courts of England historically had. (See for instance, *Court of Queen's Bench Act*, CCSM c280, s. 32.) These sections make no express reference to the powers of courts to stay proceedings, but they would be interpreted to include that power. In addition, provincial judicature acts also frequently include a specific reference to courts' powers to stay proceedings brought before them. (See for instance *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106 and *Judicature Act*, R.S.N.L. 19990, c. J-4, s. 97(1).) In two provinces (B.C. and Saskatchewan) this statutory confirmation appears in more detail the provincial version of the ULCC's Court Jurisdiction and Proceedings Transfer Act. In addition, the power to stay proceedings on grounds of *forum non conveniens* others is generally found in provincial rules of court. For details see the next part.

[21] R.S.C. 1985, c. 3 (2nd Supp.), s. 3(1).

[22] *Ibid*., s. 3(2) and (3).

[23] Supra note 4..

[24] *Z.I. Pompey Industrie v. ECU-Line N.V* , *ibid*., para. 29.

[25] Convention, art. 6 (c).

[26] Talpis & Krnjevic, *supra* note 3 at 24.

[27] A.E. Kerns "The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match" (2006) 20 Temple Int'l & Comp. L. J. 509.

[28] *Supra* note 16.

[29] [2003] 3 S.C.R. 416 at 453

[30] Section 8(a).

[31] Convention, art. 9(e).

[32] *Beals*, *supra* note 29 para. 71.

[33] Convention, art. 9 (d), italics added.

[34] *Beals*, supra note 29.

[35] *Beals*, *ibid*., para. 52, *per* Major J. for the majority.

[36] *Ibid*. para. 42.

[37] *King v. Drabinsky*, [2007] O.J. No. 2901.

[38] Alta. Reg. 390/1968, s. 30(f)(iv).

[39] S.B.C. 2003, c. 28.

[40] *Lombard General Insurance Co. Of Canada v. Teck Cominco Ltd.*, 2007 BCCA 249, para. 60.

[41] R.S.B.C. 1996, c. 78, s. 40. Québec has a comparable provision, but that is outside the scope of this report.

[42] Man. Reg. 553/88, r. 17.02(f)(iii).

[43] C.C.S.M. c. C280, s. 38.

[44] R.S.N.B. 1973, c. F-19. Saskatchewan had a similar statute but repealed it in April 2006.

[45] *Ibid*., ss. 3(b). To expand, take a case of a New York resident with a cottage in New Brunswick who hires a New Brunswicker to do work on the cottage. The contract has an exclusive choice-of-court clause in favour of New York. The N.B. renovator accidentally burns down the cottage and the New York resident sues in N.Y. The Convention would require enforcement of that N.Y. judgment in N.B., but the *Foreign Judgments Act* would preclude such enforcement.

[46] The impeachment defences in the *Foreign Judgments Act* are phrased more broadly than those in the Convention.

[47] S.N.L. 1986, c. 42, Sch. D, s. 6.07(1)(f)(iv).

[48] *Supra* note 20.

[49] N.W.T. Reg. 010-96, s. 47(f)(iv).

[50] *Morguard* actually made reference to the C.P.R. rules of both Nova Scotia and Prince Edward Island: *supra* note 16 at 1104. However, since that time P.E.I. has changed its rules and adopted the Ontario model.

[51] S.N.S. 2003, (2nd Sess.), c. 2.

[52] *Judicature Act*, S.N.W.T. 1998, c. 34, s. 59(2).

[53] *Supra* note 20.

[54] S.S. 1997, c. C-41.1

[55] S.S. 2005, E-9.121 (*EFJA*).

[56] *The Foreign Judgments Act*, R.S.S., c. F-18.

[57] See *Old North State Brewing Co. v. Newlands Service Inc*. (1998) 58 B.C.L.R. (3d) 144 (C.A.).

[58] S.Y. 2000, c. 7.

[59] *Judicature Act*, R.S.Y. 2002, c. 128, s. 38.

[60] *Commercial Arbitration Act*, S. C. 1986, c. 22; *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30.

[61] Convention, art. 2(5).

[62] R.S.C. 1986, c. F-29.

[63] Convention art. 3(c)(ii).

[64] *E.K. Volkswagen Ltd. v. Volkswagen Canada Ltd*., [1973] 1 W.W.R. 466 (Sask C.A.*); Khalif Commercial Bank v. Woods* (1985), 29 B.L.R. 69 (Ont. H.C.); *Old North State Brewing Co. v. Posen*, [1999] 4 W.W.R. 466 (B.C.C.A.) at paras. 34-37. And in *GreCon Dimter*, the Supreme Court of Canada wrote that a choice-of-court clause "must clearly and precisely confer exclusive jurisdiction on the foreign authority." (*Supra* note 4 at para. 27.) However, for a case that went the other way on this point see *Northern Sales Co. v. Sask. Wheat Pool* (1992), 78 Man. R. (2d) 200 (C.A.).

[65] *Beals v. Saldanha*, *supra* note 29 at 453.

[66] *Beals*, *ibid.,* at para. 76.

[67] At para. 44.

[68] *Supra*, note 42. Québec has an analogous provision.

[69] Convention, art. 2(2)(j).

[70] Convention, art. 17.

[71] Convention, art. 22(2). There are also additional limitations that arise from the need, in this context, to deal with enforcement of competing judgments, actual and prospective.

[72] A. Asif Rashid, "The Hague Convention on Choice of Court Agreements 2005: An Overview" (2005) 45 Indian J. Int'l Law 558.

[73] Guangjian Tu, “The Hague Choice of Court Convention – A Chinese Perspective” (2007) 55 Am. J. Comp. L. 347.

[74] E. González de Castilla del Valle, “The Hague Convention on Choice of Court Agreements of June 30, 2005: A Mexican View” (2006) 13 Sw. J.L. & Trade Am. 37.

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