



Hague Convention on Choice of Court Agreements 2008

[HOME](#) / [SPECIALPAGES](#) / [DOCUMENT SEARCH...](#) / [UNIFORM ACTS](#) / [HAGUE CONVENTION ON CHOICE OF COURT...](#)

404

Document
Search Pages



FooterNavigation



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CIVIL SECTION

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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Please note that the ideas and conclusions expressed in this document, as well as any proposed legislative terminology and any comment or recommendation, have not been adopted by the Uniform Law Conference of Canada. They do not necessarily represent the views of the Conference or of its participants.

[1] At the Annual Meeting of the Conference in September 2007, Frédérique Sabourin and Vaughan Black presented their reports analysing the 2005 *Hague Convention on Choice of Court Agreements* from the perspective of the civil and common law. In light of the analyses presented, the Conference decided to establish a Working Group “to prepare a uniform implementing act and commentaries for consideration at the 2008 meeting.”

[2] The Department of Justice Canada was not able to convene a Working Group in 2007-2008 but would do so in the coming year in order to present a draft act and commentaries for the 2009 meeting of the Conference.

[3] To facilitate the Working Group's task, a draft act and commentaries have been prepared in accordance with the 2007 resolution of the Conference. They may serve as a point of departure for discussions. The draft is annexed to this report.

[4] It should be noted that in 1998, the Conference adopted the Uniform Enforcement of Judgments Conventions Act which was intended to remove the need to pass a separate implementing act each time a convention has to be implemented. Since 1998, this uniform act does not appear to have been used. The Uniform Enforcement of Judgments Conventions Act was not raised during the discussion in 2007 and it may be that it is not an appropriate vehicle for implementation of the Hague Convention on Choice of Court Agreements.

[5] The draft follows the approach frequently used for implementation of international private law conventions which do not require significant consequential amendments to other legislation. As such, the draft provisions do not specifically touch on the substance of the Convention's rules.

[6] For the substance of the Convention, section 1(3) of the draft refers to the Explanatory Report on the 2005 Hague Choice of Court Agreements as an aid to interpretation to clarify how the Convention is intended to apply. As a document prepared under the auspices of the Hague Conference, the Explanatory Report is aimed at an international audience and does not specifically address the impact of the Convention's application in Canada.

[7] The 2006 reports from Frédérique Sabourin and Vaughan Black constitute key reference documents from a Canadian perspective. Among the differences between the Convention and Canadian law that were identified are:

- the Convention establishes a presumption that the choice of court clause is exclusive the notion of *forum non conveniens* is limited under the Convention
- the Convention would allow a court to reduce the damages awarded under certain conditions
- rules for service outside the jurisdiction may require modification in some cases.

[8] While the draft uniform act does not touch particularly on the substance of the Convention, the draft commentary under section 1(1) does do so to a certain extent in the explanations provided for the declarations that are possible.

[9] In terms of next steps, the Working Group should be convened early in the fall. It

should include members of the Canadian delegation to the negotiations of the Convention in The Hague, members of the Working Group on the Uniform Enforcement of Foreign Judgments Act and other interested persons.

[10] Depending on the Conference's views as to the vehicle, the Working Group will need to consider a new uniform act or simply use the 1998 Uniform Enforcement of Judgments Conventions Act. If the latter is not appropriate, the Working Group should review the implementation approach of the draft and determine whether changes are required. For example, section 4 of the draft gives force of law to the Convention as a whole. It may be preferable to give force of law only to those provisions of the Convention which fall within provincial legislative authority. In addition, the Working Group will need to consider whether the draft uniform act would be the appropriate form for Quebec where provisions on the same subject matter are found in the Civil Code and the Code of Civil Procedure. With regard to the draft commentaries, the Working Group will need to review the draft and consider whether further explanation should be provided, in particular where amendments to rules of court may be needed. In addition, the French version of the commentaries needs to be completed.

[11] Guidance from the Conference on these or other points would be welcome.

[12] The services of legislative drafters will be needed later this year to verify the draft in both languages.

Draft Uniform Convention on Choice of Court Agreements Act

Interpretation

1. (1) The following definitions apply in this Act.

“Convention” means the *Hague Convention on Choice of Court Agreements* set out in the schedule. (*Convention*)

Comment: *This is a standard provision in uniform acts implementing international conventions. For previous examples, reference may be made to subsection 1(2) of the Uniform International Commercial Arbitration Act and subsection 1(2) of the Settlement of International Investments Disputes Act.*

“declaration” means a declaration made by Canada under the Convention with respect to (*name of province or territory*). (*déclaration*)

Comment: *Articles 19, 20, 21, 22, 26, 28, 29 and 30 of the Convention provide for the deposit of declarations by contracting States:*

Article 19 permits Canada to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if the only connection between

Canada and the parties or the dispute is the selection of Canada as the forum for dispute resolution. Canada need not make this declaration because its courts are already permitted to hear such disputes under domestic law. Moreover, failure to make this declaration will not detrimentally affect Canadian courts.

Article 20 permits Canada to declare that its courts may refuse to recognize or enforce a judgment given by a court of another Contracting State if the parties were resident in that state and the relationship of the parties and all other elements relevant to the dispute, other than their choice of court, were connected only with the other Contracting State. Since Article 20 reflects existing common and civil law in Canada, no declaration is necessary.

Article 21 permits Canada to declare that it will not apply this Convention to specific matters. The declaration shall not be broader than necessary and the excluded matter must be clearly and precisely defined. Those provinces that wish to avoid the enforcement of judgments against certain domestic industries should make this declaration. Other provinces will derive no benefit from doing so.

Article 22 allows Canada to declare that its courts will enforce judgments given by courts of other Contracting States as designated by non-exclusive choice of court agreements, in addition to those designated by exclusive choice of court agreements. Canada should make this declaration since it may assist with the enforcement of Canadian judgments in foreign states where they would otherwise not be enforced.

Article 26(5) indicates that this Convention shall not affect the application by Canada of another treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if it is concluded after this Convention, but only if Canada has made a declaration in respect of the treaty under this article. Since none of Canada's current treaty commitments conflict with the Convention, this declaration is unnecessary.

Article 28 is a standard provision in private law conventions. It allows federal States to identify by declaration the territorial units to which the convention is to extend. Canada will make declarations pursuant to Article 28 upon the request of provinces and territories that adopt implementing legislation.

Articles 29 and 30, which allow a Regional Economic Integration Organisation to sign, accept, approve or accede to this Convention and have the rights and obligations of a Contracting State, are not relevant to Canada.

(2) Unless a contrary intention appears, words and expressions used in this Act have the same meaning as in the Convention.

(3) In interpreting this Act and the Convention, recourse may be had to

the Explanatory Report on the 2005 Hague Choice of Court Agreements Convention.

Comment: *The Explanatory Report was prepared by Trevor Hartley & Masato Dogauchi and is available on the Hague Conference website at <http://www.hcch.net/upload/exp137e.pdf>. This supplementary interpretive source conforms to the interpretive sources sanctioned by Article 32 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37. The object of permitting judicial recourse to these sources is reflected in the observation of Justice La Forest in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp.577-578, that “It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in Canada (*Attorney General v. Ward*, [1993] 2 S.C.R. 689.”*

For an example of a similar provision, reference may be made to subsections 14(1) and (2) of the Uniform International Commercial Arbitration Act.

To facilitate ease of access to the Explanatory Report referred to in paragraph (3), enacting jurisdictions may wish to include reference in their Gazettes or other appropriate governmental organ to the Hague Conference web address from which it may be downloaded.

The list in paragraph (3) is not intended to be exhaustive. It merely indicates the principal source to be used in interpreting the Convention. It is expected that over time other helpful resources will emerge.

Purpose

2. The purpose of this Act is to implement the Convention.

Comment:

Publication

3. A notice shall be published in (*name of publication*) of the day on which the Convention comes into force, or a declaration or withdrawal of a declaration takes effect, in (*name of province or territory*).

Force of law

4. Subject to any declaration that is in force, the Convention has the force of law during the period that it is, by its terms, in force in (*name of province or territory*).

Comment: *This Convention is given force of law domestically only from the date the Convention comes into force at the international level for Canada in the jurisdictions declared pursuant to Article 28. That date is the first day of the month following the expiration of three months (i) after the deposit by Canada of the second instrument of ratification, acceptance, approval or accession referred to in article 31, or; (ii) in the case of Canada's subsequent ratification or accession to the Convention, after the deposit of its instrument of ratification or accession; or (iii) thereafter, for a province or territory to which the Convention has been extended in accordance with Article 28(1), after the notification of the declaration referred to in that Article.*

The ULCC Uniform International Interests in Mobile Equipment Act (Aircraft Equipment) excluded specific (final) provisions from having the force of law. However, the preferred approach has been to give the force of law to all the provisions of a Convention. This approach eliminates the risk of inadvertently overlooking provisions or omitting substantive provisions. To the extent that the final provisions of the Convention are not substantive but are binding as to States on an international level, they would produce no legal effect in provinces or territories in any event.

Inconsistent laws

5. If a provision of this Act, or a provision of the Convention that is given the force of law by section 6, is inconsistent with any other Act, the provision prevails over the other Act to the extent of the inconsistency.

Comment: *The Act and Convention need to prevail over inconsistent provisions in other Acts to ensure that Canada is in conformity with its international obligations. To avoid internal conflict, enacting jurisdictions should ensure that if an equivalent provision appears in other Acts with which this Act or the Convention might potentially be inconsistent, those other Acts should be amended to give precedence to this Act and the Convention.*

Binding on Crown

6. This Act is binding on the Crown in right of (name of province or territory).

Comment: *The Convention is drafted on the assumption that it applies to all exclusive international choice of court agreements concluded in [civil or] commercial matters, whether or not they involve governmental entities. Section 6 merely confirms this. Of course, if a jurisdiction's interpretation legislation already provides that the Crown is bound unless otherwise stated in the particular act, there is no need to include it.*

Coming into force

7. This Act comes into force on (_____).

OR

7. The provisions of this Act come into force on a day or days to be fixed by (_____).

Comment: *There is a need to co-ordinate the entry into force of the Convention at the international level, the coming into force of domestic implementing legislation, and giving the Convention force of law. A provision in the implementing legislation stating that the Act comes into force when the Convention enters into force for enacting jurisdictions is not recommended since the actual date is not transparent on the face of the legislation. Accordingly, it is recommended that the legislation implementing the Convention state that it comes into force on Royal Assent or similar means. Enacting jurisdictions will need to communicate with Justice Canada officials to coordinate dates.*

Schedule

Convention on Choice of Court Agreements

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