

Draft Guide for Provinces and Territories that Wish to Implement an International Private Law Treaty

Supporting presentation

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Implementing private international law treaties

- The force of law technique has the following advantages and disadvantages:
 - It is very straightforward. Once the legislator has an idea of the scope of the obligations in the treaty, it can give the treaty – or just some of its articles – force of law in its territory.
 - It avoids misunderstandings that can arise from the legislator's interpretation of the obligations set out in the treaty that it wishes to assume and that it has to transfer into its domestic law.
 - Considerations of legislative policy disappear: there is no more need for creativity or strategy, and the legislator is bound only by what is found in the treaty, which is the outcome of negotiations that may have been unclear in their outlines at times but are now complete.
 - Any grey areas in the treaty are now incorporated into internal law, with expressions and terminology that are different from the legislator's legislative language or even completely unknown, vague or plain wrong.
 - The treaty's travaux préparatoires, which the legislator sometimes makes reference to in the implementation Act, can help to clarify the meaning of certain obligations and the context in which the treaty was made.

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- The reformulating obligations technique has the following advantages and disadvantages:
 - The legislator is forced to do an exhaustive analysis of the obligations arising from the treaty, which requires both time and expertise, but its choices with regard to legislative policy will be more enlightened.
 - The implementation of the obligations is closer to the legislator's true intentions because it can make choices where the text of the treaty gives it the latitude to do so, and so can be clearer or more precise about the scope of the obligations that it decides to make part of its law.
 - Reformulating allows the legislator to use its familiar language to incorporate obligations that sometimes contain concepts, terms or legislative procedures that are not used in its internal law.
 - There will be greater consistency between the new law and existing law, both in substance and in how they are expressed.
 - If every jurisdiction in Canada reformulates treaty obligations, there will be less consistency in the law across Canada. From an international point of view, Canada's legal situation will become more heterogeneous, more complex.
 - Reformulating forces the legislator to acquire a complete understanding of its obligations. If it overlooks something, it will not have incorporated that part of the treaty into its internal law.

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for the recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Québec Code of Civil Procedure

CHAPTER III RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

786. ...

All documents drafted in a language other than French or English must be accompanied with a translation authenticated in Québec.

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Title

The title must be evocative, and give in a few words an accurate summation of the Act's content. In some cases, it can serve all on its own as the statement of the Act's purpose.

Non-recommended precedents:

- *International Sale of Goods Act*
- *An Act respecting the United Nations Convention on Contracts for the International Sale of Goods*

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Definitions and rules of interpretation

- The usefulness of a definition must be clearly established because resort to definitions is still artificial, especially for terminological definitions: ordinary dictionary definitions must be insufficient, and the defined term must be used in the Act sufficiently often.
- The provision that establishes equivalence between the terminology of the internal law and the terminology of the treaty is a rule of interpretation, and so normally follows the definitions. The same goes for the provision that refers to the text of the treaty to clarify the meaning of terms used in the Act.
- However, a provision that provides that the treaty prevails over any inconsistent provision of internal law may appear elsewhere in the Act. Its placement will be determined by the logical organization of the Act.

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Definitions and rules of interpretation (continued)

4. The certification issued to a body in accordance with the *Youth Protection Act* shall, in [province X], stand in place of the authorization required by article 12 of the Convention.

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Definitions and rules of interpretation (continued)

Non-recommended precedent:

In this Act, "Convention" means the United Nations Convention on Contracts for the International Sale of Goods set out in the Schedule.

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Definitions and rules of interpretation (continued)

Non-recommended precedent:

46. (1) In this section,

“convention” means the Convention on the Civil Aspects of International Child Abduction, set out in the Schedule to this section.

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Definitions and rules of interpretation (continued)

Non-recommended precedents:

5. This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.

(No Act is to be interpreted in bad faith. The notions “ordinary meaning”, “terms in their context” and “object and purpose” are matters of fundamental principle that it is unnecessary to provide for in an Act.)

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Definitions and rules of interpretation (continued)

Non-recommended precedents:

1. In this Act,

“North American Agreement on Environmental Cooperation” means the North American Agreement on Environmental Cooperation entered into by the Government of Canada, the Government of the United States of America and the Government of the United Mexican States, and signed on 14 September 1993;

“North American Agreement on Labor Cooperation” means the North American Agreement on Labor Cooperation entered into by the Government of Canada, the Government of the United States of America and the Government of the United Mexican States, and signed on 14 September 1993;

(continued on the next slide)

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Definitions and rules of interpretation (continued)

“North American Free Trade Agreement” means the North American Free Trade Agreement entered into by the Government of Canada, the Government of the United States of America and the Government of the United Mexican States, and signed on 17 December 1992.

“Agreement Establishing the World Trade Organization” means the Agreement Establishing the World Trade Organization, including the agreements set out in the annexes to that Agreement to which Canada is a party, all forming an integral part of the Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations, signed at Marrakesh on 15 April 1994;

2. The object of this Act is to implement the following agreements:

- the North American Free Trade Agreement;
- the North American Agreement on Environmental Cooperation;
- the North American Agreement on Labor Cooperation;
- the Agreement Establishing the World Trade Organization.

The Government may, by order and subject to the terms and conditions it determines, make this Act applicable to any other international trade agreement.

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Definitions and rules of interpretation (continued)

The examples on the two previous slides clearly show the artificial character of terminological definitions: all section 2 had to do was identify each Agreement more precisely for there to be no need for definitions.

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Definitions and rules of interpretation (continued)

What to say about the following examples?

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

...

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

(3) In interpreting the Convention and the Aircraft Protocol, recourse may be had to

- (a) the *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment*, as approved for distribution by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT); and
- (b) the *Consolidated Text of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* set out in Schedule 3.

Interpretation aid sources may be accessed through the URL of the institution that has custody of them; the address would be written as a hyperlink.

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Definitions and rules of interpretation (continued)

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

This subsection is well-drafted and very clear. It is logical in an Act that merely gives force of law to a treaty. But it imposes on the reader the burden of acquiring detailed knowledge of the Convention and Protocol.

If there are any terms in the treaty that could create problems of interpretation, the drafter can provide for a particular rule of interpretation in the Act that indicates the scope of the term. This can be done by reference to travaux préparatoires or interpretation aid sources.

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Definitions and rules of interpretation (continued)

(3) In interpreting the Convention and the Aircraft Protocol, recourse may be had to

(a) the *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment*, as approved for distribution by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT); and

(b) the *Consolidated Text of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* set out in Schedule 3.

This subsection gives the reader, clearly and simply, the two sources of interpretation of the treaty that is incorporated into the law of the province.

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Precedence of one text over another

- A provision that provides that the treaty prevails over other law is a shortcut that is all but necessary when force of law is given to an entire treaty. This does not relieve the drafter of the duty to confirm with the instructing officers his or her interpretation of the extent to which there is any inconsistency, because if there is no inconsistency or at worst it is highly unlikely, it is better not to have such a rule.
- If the legislator chooses to reformulate international obligations, the analysis of the scope of these obligations will necessarily focus on consistency between the treaty and the Act, which may make it pointless to draft a provision establishing a hierarchy between the rules of the treaty and of the Act.

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Precedence of one text over another (continued)

Non-recommended precedents:

4. Where there is a conflict between this Act and any other Act on recognition and enforcement of foreign judgments, this Act prevails.

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Precedence of one text over another (continued)

Non-recommended precedents:

5. If there is conflict between this Act and any other enactment, this Act prevails.

*

4. Where there is a conflict between this Act and any other Act on recognition and enforcement of foreign judgments, this Act prevails.

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Force of law

- As we saw in the introductory note, the legislator can also transpose international obligations by reformulating them, enacting only the measures that are necessary to implement those obligations and doing so in the language that it normally uses in its Acts and regulations.
- Clearly, if there are provisions in the treaty that are not within the legislative competence of the province, the provision that gives force of law to the treaty will not apply to them.
- A treaty does not apply within a province merely because the implementation Act states that it has force of law: the implementation Act must itself be in force.

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Force of law (continued)

Example of transposing international obligations without using the force of law technique

...

Whereas [province X] subscribes to the principles and rules set forth in the [Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980] and it is expedient to apply them to the largest possible number of cases;

...

1. The object of this Act is to secure the prompt return to the place of their habitual residence of children removed to or retained in [province X] or a designated State, as the case may be, in breach of custody rights.

A further object of this Act is to ensure that the rights of custody and access under the law of a designated State are effectively respected in [province X] and the rights of custody and access under the law of [province X] are effectively respected in a designated State.

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Force of law (continued)

Force of law applying to a varying extent

Article 28 – Declarations with respect to non-unified legal systems

- (1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
- (2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
- (4) This Article shall not apply to a Regional Economic Integration Organisation.

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Force of law (continued)

Force of law applying to a varying extent

4. (1) Subject to subsection (2), to the extent that they apply to Canada as described in declarations, the Convention and the Aircraft Protocol have the force of law with respect to aircraft objects during the period that the Aircraft Protocol is, by its terms, in force in respect of Canada.

(2) Subsection (1) does not apply in respect of Articles 47 to 62 of the Convention and Articles XI and XXVI to XXXII of the Aircraft Protocol.

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Force of law (continued)

In the section 4 example (previous slide) the force of law is qualified, being subject to three limitations:

- 1- “to the extent that [the Convention and the Aircraft Protocol] apply to Canada as described in declarations”
- 2- “with respect to aircraft objects”
- 3- “during the period that the Aircraft Protocol is, by its terms, in force in respect of Canada”

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Force of law (continued)

Non-recommended precedents:

(2) On, from and after the 1st day of December, 1983, except as provided in subsection (3), the convention is in force in [the province] and the provisions thereof are law in [the province].

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Force of law (continued)

CONVENTION APPROVED

3. The Convention is approved and declared to have the force of law in Canada during such period as, by its terms, the Convention is in force.

What does “approved” mean here?

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Federal-provincial relations

Non-recommended precedents:

2. The Minister of Justice shall request the Government of Canada to declare, in accordance with article 93 of the Convention, that the Convention extends to [the province].

3. The Convention comes into force in [the province] on the day the Government of Canada declares, pursuant to a request of the Minister of Justice under section 2, that the convention extends to [the province].

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Federal-provincial relations (continued)

2. The Attorney General shall,

(a) request that the Government of Canada designate [the province] as a territorial unit to which a convention extends;

(b) determine the courts in [the province] to which application for registration of a judgment rendered by a court of a country with which a convention has been concluded may be made, and request the Government of Canada to designate those courts for the purpose of the convention.

...

5. The Lieutenant Governor in Council may make regulations to,

(a) specify when a new convention comes into force in [the province] (in which case the text of the convention shall be set out in the regulation);

...

Article 30 [of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters]

Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of this Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

This Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

The Parties to a Supplementary Agreement concluded under Article 21 shall determine its territorial application.

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Federal-provincial relations (continued)

CONVENTION ON THE CHOICE OF COURT

Article 19

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 20

...

Each Contracting State may also, when notifying an extension of the Convention in accordance with Article 19, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.

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Reservations and declarations

PUBLICATION

7. The Minister of Justice shall cause a notice of the day the Convention comes into force and of the day it ceases to be in force to be published in the *Canada Gazette* within sixty days after its coming into force or ceasing to be in force, and a notice so published shall be judicially noticed.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

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Reservations and declarations (continued)

4. The commitments, reservations, measures and programs of Québec which are to appear in the Schedules of Canada annexed to the agreements forming part of the Agreement Establishing the World Trade Organization shall be the commitments, reservations, measures and programs set out in the list established by the Gouvernement du Québec.

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Reservations and declarations (continued)

[CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS]

ARTICLE I

- 3.** When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

The Convention does not provide for made-to-measure application by federal entities, as it does not have a “federal clause”.

Two means of implementation:

- 3.** This Act applies only to the recognition and enforcement of awards made in another State respecting differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of the Yukon.

*

- 785.** An application for recognition and enforcement of a decision rendered outside Québec is made by way of a motion to institute proceedings. The time limit within which to appear is 20 days and the application may not be presented before at least 40 days have elapsed.

Such an application may also be made incidentally, even by the party contesting, provided the application comes within the jurisdiction of the Québec court.

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Responsible authority

The implementation of international obligations may require a province to designate an administrative authority responsible for coordinating the application of the treaty on its territory. It may also mean designating a court for proceedings taken directly or indirectly under the treaty:

4. Her Majesty's Court of Queen's Bench for Manitoba is the court to which application may be made for registration of a judgment given by a court of a country with which a convention has been concluded.

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Minister responsible for the administration of the Act

2. The Minister of Justice is responsible for the implementation of this Act.

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Coming into force

8. This Act comes into force on the day it receives the royal assent.

S. 9. (1) of *The Interpretation Act* of Manitoba:

An Act comes into force on the day it receives royal assent, unless it states otherwise.

(Section 8, above, therefore wasn't necessary.)

*

2. On the coming into force of the [foreign arbitral awards] convention in the Yukon, the convention applies in the Yukon in accordance with article 12 of the convention.

Article 12. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

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Coming into force (continued)

HAGUE-VISBY RULES

43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.

...

(4) The Hague-Visby Rules do not apply in respect of contracts entered into after the coming into force of section 45.

HAMBURG RULES

44. The Minister shall, before January 1, 2005 and every five years afterwards, consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules and cause a report setting out the results of that consideration to be laid before each House of Parliament.

45. (1) The Hamburg Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules.

...

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Coming into force (continued)

3. From the date a convention enters into force in respect of Ontario as determined by the convention, the convention is in force in Ontario and its provisions are law in Ontario.