

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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[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.

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

[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

UNIFORM LAW CONFERENCE OF CANADA

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.