UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

Presented by Kathryn Sabo

Justice Canada

Halifax, Nova Scotia

August 2010

UNIFORM LAW CONFERENCE OF CANADA

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

August 2010

[1] At the Annual Meeting of the Conference in August 2009, final adoption of the draft Uniform Choice of Court Agreements Convention Act was postponed to allow the text to be reviewed by legislative drafters. That review has now been completed.

[2] There is no change in the text presented this year with the exception of two modifications in the commentary. The first is an addition to the commentary of section 1 addressing the use of a schedule to the Act. The second is a correction to the commentary of section 7 to refer to proclamation rather than royal assent.

[3]. The draft with changes indicated is annexed to this report and submitted to the Conference for adoption.

Uniform Choice of Court Agreements Convention Act

Comment: *This uniform act implements the Hague Convention on Choice of Court Agreements, which sets rules that will apply in States party to it for court jurisdiction where parties have agreed to an exclusive forum and for the recognition and enforcement of the resulting judgment.*

The act adds to the series of uniform acts implementing international conventions. As well, it constitutes an additional element in the suite of uniform acts dealing with jurisdiction and enforcement of judgments and arbitral awards. That set of uniform acts includes, inter alia: the Uniform Arbitration Act, the Uniform International Commercial Arbitration Act, the Uniform Enforcement of Canadian Judgments Act, the Uniform Enforcement of Canadian Decrees Act, the Uniform Enforcement of Canadian Judgments and Decrees Act, the Uniform Court Jurisdiction and Proceedings Transfer Act and the Uniform Enforcement of Foreign Judgments Act. Those acts address jurisdiction, recognition and enforcement of Canadian and non-Canadian judgments, decrees and arbitral decisions.

As the Explanatory Report indicates, the Convention refers to both civil and commercial matters because "in some legal systems "civil" and "commercial" are regarded as separate and mutually exclusive categories. The use of both terms is helpful for those legal systems. It does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings. However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless excluded from the scope of the Convention under Article 2. "

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. *In reviewing the draft Uniform Act, legislative drafters expressed a preference for implementation by transposing the Convention rules into legislative provisions. This approach has not been used because it increases the risk of divergence in interpretation and application from that intended by the negotiated Convention language.*

"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 as they do not appear to be selected as frequently as the courts of some other jurisdictions and the declaration can be made at any time.

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 existing Canadian common and civil law reveals no reluctance to enforce such judgments, and since that position appears to be satisfactory, no declaration is necessary.

Article 21 permits Canada to declare that a province or territory where the Convention is in force by virtue of Article 28 will not apply it to specific matters. Such a declaration should be made with respect to a province or territory which seeks to avoid its courts having to decline jurisdiction in favour of a court chosen by the parties even where its courts would otherwise have exclusive jurisdiction over the matter under local law and where its courts would be required to recognize foreign judgments rendered under the Convention but in breach of its courts exclusive jurisdiction. The declaration shall not be broader than necessary and the excluded matters must be clearly and precisely defined.

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. Although this declaration may assist with the enforcement of Canadian judgments in foreign states where they would otherwise not be enforced, Canada should not make this declaration since it would require enforcement of judgments without the same safeguards as exist under Canadian law. In the context of non-exclusive choice of court agreements, it may be preferable to rely on the UEFJA rather than to oblige Canadian courts to enforce under a Convention designed for exclusive choice of court agreements in a commercial context since the UEFJA provides for greater control over the proper exercise of jurisdiction in the originating forum and assurances of procedural fairness. .

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/expl37e.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 "[i]t 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.

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 in force 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. As the Explanatory Report notes, "proceedings will fall outside the scope of the Convention if they arise from a choice of court agreement concluded in a matter which is not civil or commercial. Thus, a public authority is entitled to the benefits of the Convention, and assumes its burdens, when engaging in commercial transactions[…]. As a general rule, one can say that if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter. If, on the other hand, it is exercising governmental powers that are not enjoyed by ordinary citizens, the case will probably not be civil or commercial."*

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. 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 proclamation or similar means. Enacting jurisdictions will need to communicate with Justice Canada officials to coordinate dates.*

Schedule

Convention on Choice of Court Agreements