

**UNIFORM LAW CONFERENCE OF CANADA**

**THE UNIFORM ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL  
TRADE ACT (FINAL DRAFT AND COMMENTARIES)  
AND RELATED RECOMMENDATIONS**

**CIVIL SECTION**

**REPORT OF THE CHAIR OF THE WORKING GROUP ON THE  
ASSIGNMENT OF RECEIVABLES CONVENTION**

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**Charlottetown, PEI  
September 2007**

UNIFORM ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE ACT  
(FINAL DRAFT AND COMMENTARIES) AND RELATED RECOMMENDATIONS

**Uniform Law Conference of Canada  
Working Group on the Assignment of Receivables**

*Uniform Assignment of Receivables in International Trade Act*  
**(Final Draft and Commentaries)  
and Related Recommendations**

**Report of the Chair**

**September 2007**

**I. OVERVIEW OF ACTIVITIES**

[1] At its August 2005 meeting, the ULCC approved a Pre-Implementation Report prepared by J. Michel Deschamps and Catherine Walsh on *The UN Convention on the Assignment of Receivables in International Trade* (“the Convention”). Acting on the recommendations in that Report, the Conference approved the establishment of a Working Group to prepare a uniform act to implement the *Convention* and to prepare complementary legislation. The Working Group was mandated to conduct its work in collaboration with NCCUSL and the Mexican Uniform Law Centre with a view to coordinating implementation of the Convention in all three NAFTA countries.

[2] In August 2006, the Working Group presented a final draft Uniform Act and commentaries and related recommendations. The Uniform Assignment of Receivables in International Trade Act was approved in principle in August 2006, with final approval postponed until the final meetings on the joint project.

[3] Following the August 2006 annual meeting of the Conference, a joint meeting and consultation session was held in New York on October 16, 2006. This session aimed at determining whether industry supported ratification of the Convention in the United States. Along with representatives of NCCUSL, the Mexican Conference of Commissioners on Uniform State Laws and the ULCC, other participants in the session included the Commercial Finance Association, the American Bankers Association, the American Law Institute, the US Department of State and major commercial lenders.

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[4] A further joint session was held in Chicago in November 2006. Thereafter work continued by conference call through August 2007. Participation of members of the ULCC Working Group in those conference calls decreased since the matters under discussion at that point were essentially internal U.S. issues. In addition to NCCUSL, the U.S. presence included representatives of the U.S. Department of State and the American Law Institute (ALI - the co-sponsor with NCCUSL of the Uniform Commercial Code). Several observers also attended, including a representative from the U.S. banking sector. On behalf of the Working Group, I would like express our appreciation to NCCUSL for organizing and hosting these very productive joint meetings and conference calls and, as Chair of the Working Group, I would like to express my thanks to the ULCC Working Group members whose interest and expertise has made this joint project such a success.

## **II. RESULTS OF COORDINATION ACTIVITIES WITH THE U.S. AND MEXICO**

[5] The joint meetings between representatives of the Working Group and their U.S. and Mexican counterparts produced a consensus that implementation of the Convention in the three countries would produce significant benefits at two levels. First, it would substantially harmonize receivables financing law throughout the NAFTA region. Second, it would encourage other states to adopt the Convention so as to eventually bring about global harmonization.

[6] As the 2006 report of the Working Group indicated, the U.S. State Department has stated that it would take the necessary steps for ratification (an undertaking reiterated at UNCITRAL's annual session in June 2006), provided that support for implementation were forthcoming from industry. At the industry consultation conference of October 16, 2006 in New York, participants were unanimous in their support for ratification of the Convention and the State Department confirmed its commitment to seek ratification. In the result, NCCUSL and ALI subsequent efforts turned to preparation of the documentation needed to support the State Department process.

[7] Although ULCC participation in the discussions tapered off toward early spring 2007 given the increased specific focus on the State Department process, our joint discussions did lead the ULCC Working Group members to conclude that Canada could usefully consider making an additional declaration under the Convention under article 23(3). This declaration would identify to some extent any preferential right arising by operation of law that would have priority over the rights of an assignee in insolvency proceedings.

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[8] This decision is reflected in the modification to the commentary of s. 2 of the draft Uniform Act which now includes mention of article 23(3) of the Convention. That change is the only difference between the version submitted to the Conference in 2006 and this year. The final draft Uniform Assignment of Receivables in International Trade Act and Commentaries is attached to this report as Appendix 1. For completeness, this report includes as Appendix 2 the minor complementary PPSA amendments proposed to ensure that the Convention rules will prevail in Convention cases.

[9] The Conference should recall that in its 2006 report, the Working Group also submitted suggested complementary amendments to the PPSA (see paras 10-20 and Appendix 1 of the 2006 Report) to remedy the incompatibility with the Convention that certain PPSA amendments proposed by Ontario would create. As those amendments have been adopted in Ontario and we understand that other jurisdictions may follow suit, the Conference should ensure that any continued work with respect to personal property security take the 2006 suggested complementary amendments into account and that implementation of the Convention be borne in mind to avoid a situation of incompatibility.

### **III. RECOMMENDATIONS**

[10] It is recommended that the Conference approve and adopt the draft Uniform Assignment of Receivables in International Trade Act and commentaries set out in Appendix 1, along with the proposed PPSA amendments set out in Appendix 2.

[11] Should the Conference undertake work with respect to personal property security, it is recommended that the complementary amendments set out in Appendix 1 to the 2006 Report of the Working Group be considered and that implementation of the Convention be taken into account.

APPENDIX 1

**Draft Uniform Assignment of Receivables in International Trade Act**

*Interpretation*

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

**“Convention” means the United Nations Convention on the Assignment of Receivables in International Trade 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 23, 35, 36, 37, 39, 40, 41 and 42 of the Convention provide for the deposit of declarations by contracting States:*

*Article 23(3) allows a State to deposit a declaration to identify any preferential right arising by operation of law that would have priority over the rights of an assignee in insolvency proceedings. The purpose of such a declaration would be to provide greater transparency for other States as to the application of the Convention in Canada.*

*Article 35 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 35 upon the request of provinces and territories that adopt implementing legislation.*

*Article 36 supplies rules for identifying the particular territorial unit in which a person is located within a federal State where, under the rules of the Convention, that person is located in that State. However, States are allowed to specify by declaration other rules for determining the location of a person within that State. For such a declaration, the appropriate reference to the specific legislation of the enacting jurisdiction should be communicated to the federal Minister of Justice. The Working Group has recommended that the question of the appropriateness of declarations under this Article be considered by a ULCC Secured Transactions Working Group as part of the larger question of reforming and harmonizing PPSA and Civil Code choice of law rules governing the perfection or publication and priority of security rights in intangibles and mobile goods. An adapted version of any reforms to the existing domestic location rules that emerge from that process could be extended to transactions within the scope of the Convention through the vehicle of a declaration.*

*Article 37 provides that a reference in the Convention to the law of a State means, in the case of a federal State, the law in force in the relevant territorial unit. For example, Article 22 of the Convention provides that the law of the State where the assignor is located governs issues relating to the priority of the assignee’s rights. Applied to a Canadian context, the effect of Article 37 is to clarify that the governing law is the law of the province or territory within Canada in which the assignor is located. However, Article 37 allows a State to specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State. As to the appropriateness or desirability of such a declaration, the comments made on the equivalent point in the context of declarations under Article 36 above also apply here.*

*Article 39 allows States to opt out of the independent conflict of laws regime in Chapter V of the Convention (the Chapter V regime is ‘independent’ in the sense that it supplies the general conflicts regime for assignments of receivables, whether or not the transaction falls within the scope of the Convention.) The ULCC Pre-implementation Report of August 2005 recommended that Canada not opt out of Chapter*

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V. However, as a result of the recommendation of the Working Group to limit the choice of law rule for priority in Article 22 of the Convention to receivables transactions within the scope of the Convention, it is now recommended that an opt out declaration be made. Otherwise, the choice of law rule for priority in Chapter V, by virtue of its ‘independent’ application, would apply to assignments of receivables outside the scope of the convention, contrary to the recommendation of the Working Group to minimize the impact of the Convention choice of law rule on the general PPSA and Civil Code conflicts rules.

Article 40 authorizes a State to declare at any time that it will not be bound by Articles 9 and 10 of the Convention where the debtor on an assigned receivable is a governmental entity or other entity constituted for a public purpose. Articles 9 and 10 render ineffective an anti-assignment clause contained in contracts generating ordinary trade-type receivables. Article 40 was introduced in response to the practice of some States of restricting the assignability of debts owing by the government through the device of a contractual anti-assignment clause, particularly in the procurement context. It is the understanding of the Working Group that in Canada, as in most States, restrictions on the assignability of government and other public debts are effected through statutory rather than contractual prohibitions or restrictions. Since Article 8(3) of the Convention preserves the operation of statutory restrictions on assignments, the Working Group does not foresee a need for a declaration under Article 40. Of course it may be that governmental practices in particular jurisdictions warrant a different conclusion.

Article 41 allows a State at any time to declare that the Convention does not apply to the specific types of assignment or to the assignment of specific categories of receivables described in the declaration. The Working Group was not able to conceive of any examples that warranted such an exclusion.

Article 42 of the Convention allows a State to declare that it will be bound by one of the three sets of substantive priority rules set out in the Annex to the Convention. For the reasons set out in the ULCC Pre-implementation Report of August 2005, no declaration is recommended.

**(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**

**(a) the commentary prepared by the United Nations Commission on International Trade Law with respect to the Convention; and**

**(b) the Report of the United Nations Commission on International Trade Law on its thirty-fourth session, 25 June-13 July 2001, General Assembly Official Records, Fifty-sixth session, Supplement No. 17 (A/56/17).**

**Comment:** *The supplementary interpretive sources listed in paragraph (3) conform 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 sources referred to in paragraph (3), enacting jurisdictions may wish to include reference to the UNCITRAL web address from which they may be downloaded in their Gazettes or other appropriate governmental organ.*

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

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*particular, over time UNCITRAL's Case Law on UNCITRAL Texts (CLOUT) will provide a useful source of the evolving jurisprudence on the Convention from the courts in all Contracting States*

### *Purpose*

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

**Comment:** *The authors of the ULCC Pre-implementation Report of August 2005 recommended that implementation of the Convention be accompanied by complementary conforming amendments to the existing provisions of the PPSAs and the Civil Code governing choice of law rule for priority in intangibles and mobile goods. This is no longer necessary in view of the Working Group's recommendation, based on intervening developments, to limit the application of the Convention choice of law rule to receivables transactions within its territorial and subject matter scope. The 2005 Pre-Implementation Report also recommended conforming amendments to the PPSAs and Civil Code to bring them into line with the Convention rules on the effects of contractual anti-assignment clauses. While the Working Group supports this recommendation as a desirable general reform, it does not think it is necessary to tie their timing to implementation of the Convention. For a more detailed explanation of both these points, see the Report of the Working Group.*

### *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:** *Under the Act the Convention is given the 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 35. That date is the first day of the month following the expiration of six months (i) after the date of deposit of Canada's instrument of accession, pursuant to Article 43(3); or (ii) in the case of a jurisdiction adopting implementing legislation after accession by Canada, after the date the declaration extending the application of the Convention to that jurisdiction is received by the depositary, also in accordance with Article 43(3).*

*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*

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**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. Since this is the case with the Personal Property Security Acts, the Report of the Working Group has recommended draft amendments to achieve this result.

*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 receivables transactions otherwise within its scope whether or not they involve governmental entities. This is subject to the preservation of statutory limitations on assignability and the special declaratory power with respect to anti-assignment clauses mentioned in the comment on the definition of declaration above. 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

**United Nations Convention on the Assignment of Receivables in International Trade**

**APPENDIX 2**

**Recommended PPSA Amendment Complementary to Enactment of the  
Uniform Implementing Legislation**

*Note: The amendments shown in bold italic text below are supplementary to section 7 of the draft Uniform Act and are intended to confirm that the Convention prevails in the event of any conflict between the provisions of the PPSA and the provisions of the Convention.*

OPPSA

Conflict with other acts

73. Where there is conflict between a provision of this Act and

(a) a provision of the Consumer Protection Act, 2002, the provision of the Consumer Protection Act, 2002 prevails

***(b) a provision of the Assignment of Receivables in International Trade Act, the provision of the Assignments of Receivables in International Trade Act prevails,***

(c) a provision of any general or special Act, other than the Consumer Protection Act, 2002, or Assignments in International Trade Act, the provision of this Act prevails.

APPSA s. 74 (as representative of the non-Ontario PPSAs)

74(1) If there is a conflict between this Act and:

(a) a provision for the protection of consumers in any Act, the provision of that Act prevails;

***(b) a provision of the Assignment of Receivables in International Trade Act, the provision of that act prevails.***

72(2) Except as otherwise provided in this or any other Act, if there is a conflict between this Act and any Act other than those referred to in subsection (1), this Act prevails.