

UNIFORM LAW CONFERENCE OF CANADA
CIVIL LAW SECTION

Uniform Electronic Communications Convention Act
Uniform Act

[As adjusted in accordance with the Resolutions of the Conference, effective November 30th 2011]

John D. Gregory
Ontario

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Winnipeg, Manitoba
August 2011

ELECTRONIC COMMUNICATIONS CONVENTION ACT

Uniform Electronic Communications Convention Act

[1] At its 2010 meeting, the Civil Section adopted in principle the report on implementing the UNCITRAL Electronic Communications Convention. The present report proposes the adoption of a Uniform Act to give expression to those principles.

[2] By way of reminder, here are the principles of the 2010 report that can be taken as adopted:

- a) Canada should accede to the Convention, at least for international contracts. (2010 report paragraph 9)
- b) Canada should not make a declaration under article 19(1) that it will apply the Convention only when the states of both parties are Contracting States, or when the parties have agreed that the Convention will apply. (2010 report paragraph 13)
- c) Accede to the Convention without any declarations of exclusion or special inclusion under Article 20. (2010 report paragraph 21)
- d) Restrict the application of the ECC to international contracts, at least at this time. (2010 report paragraph 31)
- e) Adopt a short form implementation statute in the usual form for ULCC uniform acts. (2010 report paragraph 35)
- f) Do not add additional exclusions to those of the ECC, except for land whose transfer requires registration to be effective against third parties. (2010 report paragraph 43) Note that the Section is being asked at its 2011 meeting to remove the land transfer restriction from the Uniform Electronic Commerce Act. If that proposal carries, then the land exception should not be added to the Convention's list.

[3] The reason that the draft uniform statute was not adopted in 2010 was to provide an opportunity for it to be harmonized with a standard form of uniform legislation implementing international conventions. Such a

UNIFORM LAW CONFERENCE OF CANADA

standard form is to be discussed by the Section during the 2011 meeting. However, no draft is available at the time of writing the present report.

[4] To facilitate harmonization, the draft uniform statute in the Schedule to this report contains drafting notes, set off in italics. They explain why certain elements of earlier uniform legislation on implementing conventions have not been reproduced in the current version. The text of the draft uniform statute and its commentaries are the same as in the 2010 draft. The drafting notes would not of course be part of the Uniform Act as adopted, while the commentaries would normally remain in the Uniform Act as a guide for enacting jurisdictions.

[5] **Recommendation:** The ULCC should adopt the draft Uniform Electronic Communications Convention Act that appears in the Schedule to this report, subject to any revisions needed to harmonize it with the standard form discussed at the 2011 meeting. The text of the Uniform Act with revisions, if any, should be subject to in-year negative-option adoption (“the November 30th rule”).

ELECTRONIC COMMUNICATIONS CONVENTION ACT

Uniform Electronic Communications Convention Implementation Act

Comment: This uniform act implements the United Nations Convention on the use of Electronic Communications in International Contracts. The Convention facilitates the use of electronic communications by answering some frequently asked question, such as: where are the parties to the contract? How does one deal with a legal requirement that a document be in writing or signed or in original form? What is the nature of an offer made to the world online? When are electronic messages sent and received?

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 electronic communications. That set of uniform acts includes the Uniform Electronic Commerce Act, which implements the United Nations Model Law on Electronic Commerce, and the Uniform Electronic Evidence Act.

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

“Convention” means the *United Nations Convention on the Use of Electronic Communications in International Contracts* 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 of the Uniform International Trusts Act and subsection 1(2) of the Uniform 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 17, 18, 19 and 20 of the Convention provide for the deposit of declarations by contracting States:

Article 17 allows a Regional Economic Integration Organization to sign, ratify, accept, approve or accede to this Convention and have the rights and obligations of a Contracting State. It is not relevant to Canada.

Article 18 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 is thus in a position to make declarations

UNIFORM LAW CONFERENCE OF CANADA

pursuant to Article 18 upon the request of provinces and territories that adopt implementing legislation.

The other declarations may be made with respect to each enacting jurisdiction. While each province or territory can technically propose its own declarations on these subjects, it would be preferable for declarations to be standardized in practice.

Article 19 allows two declarations. Article 19(1) allows any Contracting States to declare that it will apply the Convention only when the states of both parties are Contracting States, or when the parties have agreed that the Convention will apply. Canada should not make a declaration under article 19(1). The general language of application is satisfactory, and leads to a broader application of the Convention. Similar language is found in the Convention on the International Sale of Goods (CISG). Canada originally made such a declaration under the CISG with respect to British Columbia, but later withdrew the declaration when B.C. changed its implementing statute on the point. There have been no cases of inappropriate application of the CISG since then.

Through the use of article 19(2) of the Convention, Canadian jurisdictions can exclude from its application any of its domestic exceptions, either because they think the exceptions are right in principle for international as well as for domestic transactions, or just to keep the domestic and international laws consistent. The commercial law exclusions of the Uniform Electronic Commerce Act are pretty accurately covered by the Convention's exclusions. No additional exceptions are needed.

The Convention extends its rules to communications about international contracts governed by other conventions. Article 20 spells out six United Nations conventions that fall into that category: two to which Canada is a party – the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the CISG – and four to which it is not yet a party. Applying the Convention to the interpretation of these conventions says that the use of electronic communications in association with contracts that they govern will be understood as in the Convention. This is a very useful means of encouraging the legally effective use of e-communications. The Convention goes further to apply similarly to international contracts governed by any other international convention to which a Contracting State to the Convention is now or later becomes a party.

The declarations under articles 20 (2), (3) and (4) essentially permit Contracting States to have a general rule accepting the Convention's rules for other conventions except as specified, or a general rule rejecting the Convention's rules for other conventions except as specified. In short, a Contracting State may apply the

ELECTRONIC COMMUNICATIONS CONVENTION ACT

Convention to whatever other conventions it chooses.

Canadian experience with generally applicable domestic legislation with similar provisions to those of the Convention have not produced any problems in the decade since that legislation was first adopted. There is no reason to fear that allowing similar uses of e-communications for international contracts governed by other conventions will create issues either. Canada should make no declarations under article 20, so that the Convention will apply to contracts under all other conventions to which Canada is a party – though the number of such conventions affecting international contracts may not be large. Declarations under this article can be made at any time, so if problems arise they can be addressed at that time.

(2) 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 Note on the United Nations Convention on the Use of Electronic Communications in International Contracts* published by the United Nations Commission on International Commercial Law.

Comment: The Explanatory Note is available on the UNCITRAL website at

http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.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.”

For an example of a similar provision, reference may be made to subsection 1(3) of the Uniform Assignment of Receivables in International Trade 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 UNCITRAL address from which it may be downloaded.

UNIFORM LAW CONFERENCE OF CANADA

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. In 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

Publication

2. 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

3. Subject to any declaration that is in force, the Convention has the force of law in *(name of province or territory)*.

Comment: The preferred approach to implementation is to give the force of law to all the provisions of a convention, including the 'final provisions' that do not relate to the subject matter of the 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 Canada in any event.

Inconsistent laws

4. 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 appears to be inconsistent, those other Acts should be amended to give precedence to this Act and the Convention.

Crown

5. This Act binds the Crown.

ELECTRONIC COMMUNICATIONS CONVENTION ACT

*Coming into force***6. This Act comes into force on a day to be fixed by (_____).**

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 18. That date is the first day of the month following the expiration of six months (i) after the deposit of Canada's instrument of accession, or (ii) thereafter, for a province or territory to which the Convention has been extended in accordance with Article 18, after the notification of the declaration referred to in that Article.

There is a need to coordinate 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 in the enacting jurisdiction. 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 can be hard to find later. Instead, this coordination should be achieved by having the legislation proclaimed in force on that day. Enacting jurisdictions will need to communicate with Justice Canada officials to coordinate dates.

Enacting jurisdictions will use their usual language for a proclamation by the usual authority. For example, Ontario statutes say, "This Act comes into force on a day to be named by proclamation of the Lieutenant Governor."

APPENDIX

[*TEXT OF THE CONVENTION*]

The full text is available online: http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf