

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**DRAFT PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION FOR THE
IMPLEMENTATION OF INTERNATIONAL CONVENTIONS**

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Justice Canada

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[1] At the Annual Meeting of the Conference in August 2010, the Conference decided to establish a Working Group to examine the possibility of preparing uniform legislation for the implementation of international conventions and commentaries.

[2] Justice Canada undertook preliminary work on the project from 2010 to 2012. The Conference accepted progress reports prepared by Justice Canada on this preliminary work at its annual meetings in August 2011 and 2012. In August 2012, the Conference resolved that a Working Group prepare drafting conventions for the implementation of international conventions and to report back to the Conference at its 2013 meeting.

[3] The Working Group met bi-weekly by conference call from March 2013. The Working Group is chaired by Valérie Simard, Justice Canada – International Private Law Section and is composed of:

- Kathryn Sabo (Justice Canada – International Private Law Section)
- Russell Getz (British Columbia – Ministry of Justice)
- Nolan D. Steed (Alberta – Justice and Solicitor General)
- Darcy McGovern (Saskatchewan - Ministry of Justice and Attorney General)
- John D. Gregory (Ontario – Ministry of the Attorney General)
- Frederique Sabourin (Quebec – Ministère de la Justice)
- Sylvie Scherrer (Quebec – Ministère de la Justice)
- Nathalie Latulippe (Quebec – Ministère de la Justice)

[4] The Working Group has prepared the annexed draft Drafting Principles for Uniform Legislation for the Implementation of International Conventions with comments.

[5] The Working Group seeks comments and direction from the Conference on the draft which is still under discussion in the Working Group.

[6] It is expected that the Working Group will submit a final report to the Conference and recommend Drafting Principles for Uniform Legislation for the Implementation of International Conventions to the Conference at its annual meeting in August 2014.

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Appendix A - Draft Principles and Commentary

Introduction

[1] These drafting principles apply to the drafting of uniform legislation to implement international conventions on private international law matters. The principles complement the Uniform Law Conference of Canada Legislative Drafting Conventions which provide general rules for drafting uniform legislation.

[2] The drafting principles provide rules for drafting uniform acts to implement conventions by giving them force of law through those acts. Other methods are available to implement international conventions. The decision to focus on the force of law method in these principles should not be understood to exclude consideration of those methods in appropriate cases.

[3] The force of law method has the advantage of being straightforward and of ensuring that all of the obligations set out in a particular convention are implemented in domestic legislation. However, the legislator may opt to implement a convention by another method such as by amending existing statutes to include the obligations set out in the convention within these statutes. This method is useful where the legislative corpus already contains legislation on the subject-matter of the convention.¹ The legislator may also decide to enact a law which transposes the text of the convention into legal terminology that is more familiar in the legislator's jurisdiction.² When opting for the last two methods described, the legislator should ensure to accurately reflect the obligations set out in the convention in the legislation so as to avoid inconsistencies between the text of the convention and the legislation.

1. Title

The title of the uniform act must give a neutral reflection of the act's content, using the act's terminology. It must be as brief and straightforward as possible but also complete and precise. The title should seek to distinguish the act from other acts.

The title should ideally contain the name of the convention being implemented and an indication that the uniform act is an act to implement the convention.

COMMENTARY

It is understood that some jurisdictions do not favour long titles. Where it is not possible to provide the full name of the convention in the title of the implementing act, the title should ideally contain an abridge version of the name of the convention which it seeks to implement. The uniform act should thus accommodate jurisdictions that use long titles and those that do not by providing both a long and a short title.

The title need not include the name of the organization under the auspices of which the convention was concluded or the date on which it was concluded or entered into force internationally. These details can be provided elsewhere in the uniform act, if necessary.

2. Preamble

A preamble is generally not recommended.

3. Purpose

A purpose section is generally not recommended.

COMMENTARY

A purpose section is not necessary as the purpose of the legislation should be apparent from either the title of the act or the force of law provision or from both.

4. Definitions and Interpretation

Definitions should be set out in the first section of the uniform act, unless they apply only to a particular part of the act, in which case they should be placed at the beginning of that part.

The uniform act could include a comment that the decision to put definitions and rules of interpretation under the same or separate subtitles depends on the practice of each jurisdiction.

Definitions should only be used for the following purposes:

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- a) to establish that a term is not being used in a usual meaning, or is being used in only one of several usual meanings;
- b) to avoid excessive repetition;
- c) to allow the use of an abbreviation;
- d) to give notice of the use of an unusual or novel term.

A definition should not give an artificial or unnatural sense to the term defined.

A defined term should only have one meaning in the act.

The word “Convention” should not be defined as the title of the uniform act and the provision giving force of law to the convention set out to which convention the word “Convention” refers.

If necessary, the uniform act may include rules of interpretation such as rules which:

- establish equivalence between the terminology of the act and the terminology of the convention;³
- allow to refer to international material on the convention to interpret it;⁴ and
- require good faith interpretation of the act⁵ and convention.⁶

5. Inconsistent Laws

If necessary, the uniform act may contain a rule providing for the precedence of provisions of the uniform act and convention over other acts of Parliament.⁷

Where a precedence rule is used, it should be as precise as possible and identify the legislation over which the uniform act has precedence.

COMMENTARY

The use of a broad precedence rule should be avoided as such rule imposes upon users the burden of determining to what extent a provision of the implementing act is inconsistent with the provisions of another act of Parliament. A precedence rule may also create difficulties in interpreting subsequent acts dealing with the same subject area.⁸

Rather than including a precedence rule in an implementing act, legislation that is inconsistent with the act should be identified and amended to the extent of its inconsistency. Principle 14 – Consequential Amendments – deals with provisions

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repealing or amending other acts. However, amendments to inconsistent legislation may not be advisable when the inconsistent provisions continue to apply where the convention implemented by the act does not apply.

6. Force of Law

The convention should be annexed to the uniform act.

The force of law provision in the uniform act should give force of law to the entire convention.

Draft Provisions

Option 1

The [name of convention] done on [date on which the convention was done] [at/in place where the convention was done] and set out in the schedule to this act, has force of law in [name of jurisdiction].

Option 2

The [name of convention] done on [date on which the convention was done] [at/in place where the convention was done], and set out in the schedule to this act has force of law in [name of jurisdiction] [period of time after which the declaration has effect internationally as specified in the convention] after Canada has made a declaration extending the application of the Convention to [name of jurisdiction].⁹

COMMENTARY

The convention should be annexed to the uniform act. Simply referring to an external publication which contains the convention, such as the website of the international organization under the auspices of which the convention was concluded may not be sufficient to allow a court to take judicial notice of the convention. The evidence act of some jurisdictions provides that a court shall take judicial notice of conventions that are printed by the Queen's Printer or the official printer of a province or territory.¹⁰ Such jurisdictions may elect not to annex the convention to the implementing act and to have the convention published and to refer to the publication in the act. This approach is less

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transparent than annexing the convention to the act would be and is therefore not recommended.

Giving force of law only to some articles of the convention is not recommended as jurisdictions run the risk of omitting to give force of law to matters over which they have jurisdiction. It may be difficult to distinguish or to separate what is of federal or provincial jurisdiction and if something is clearly of federal jurisdiction.

Two options are available with respect to the force of law provision of the uniform act. The option that should be chosen will depend on the desired time to bring the implementing act into force (the time that is specified in the commencement provision of the act – see Principle 15 – Commencement Provision).

Option 1 is straightforward and gives force of law to the convention being implemented from the day on which the act comes into force in the jurisdiction. Where Option 1 is chosen, the jurisdiction should communicate with Justice Canada officials to coordinate bringing the implementing act into force in the jurisdiction with the date on which the declaration made by Canada to extend the application of the convention to the jurisdiction has effect internationally.¹¹

With Option 2, it is not necessary for the jurisdiction to coordinate bringing into force its implementing act with the date on which the declaration extending the application of the convention to its jurisdiction has effect internationally. The implementing act may be brought into force before such declaration is made or has effect internationally and the convention would have force of law in the jurisdiction only once the declaration is made and has effect internationally.

For practical reasons, it may be difficult for jurisdictions to bring their implementing act into force on the date on which the declaration extending the application of the convention to their jurisdiction has effect. To avoid issues linked to coordinating the dates, jurisdictions may therefore wish to adopt Option 2 to be able to bring their implementing act into force before a declaration is made or has effect for their jurisdiction.

Option 2 is also useful when an implementing act that has been passed but not brought into force by a jurisdiction is subject to so-called “sunset legislation” which provides for

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the automatic repeal of unproclaimed legislation within a certain period of time. Option 2 would thus allow a jurisdiction to bring its legislation implementing a convention into force to avoid the application of sunset legislation without giving force of law to the convention where the application of the convention has not been extended to the jurisdiction by a declaration.

Jurisdictions selecting Option 2 and a commencement provision that enacts the implementing act before the convention applies in the jurisdiction must be mindful of the need to provide notice when the convention starts applying to the jurisdiction. This may be done, for instance by publishing a notice in the jurisdiction's official publication. Ideally the notice will be available indefinitely, so that people will be able to determine, years later, what the effective date was for that jurisdiction.

7. Declarations and Reservations

The uniform act should not contain a provision stipulating that the minister of a named department of a province or territory shall request that the Government of Canada to declare that the convention is extended to its jurisdiction.¹²

The uniform act should not contain a provision stipulating that the minister of a named department may request to that the Government of Canada make a declaration [or reservation] authorized by the Convention.¹³

COMMENTARY

The draft principle reflects only initial discussions of the working group. The principle and commentary need to be further developed.

8. Responsible Authority

The uniform act may include one or more provisions identifying responsible authorities.

Draft Provision

The [name of responsible authority designated by Canada in consultation with the jurisdiction] is the [name of the responsible authority given by the convention] for

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[name of jurisdiction] for the purpose of [the Convention/the purpose specified by the Convention].

COMMENTARY

A convention may require the designation or identification by Contracting States of one or more authorities that will assume various responsibilities under the convention in their territory.¹⁴ These designations and identifications are made at the international level by Canada in consultation with the concerned jurisdictions.

The responsible authorities may be identified in the implementing act.¹⁵ Where responsible authorities have not been identified by a jurisdiction before it adopts an implementing act or where they are liable to change over time, it may be more appropriate for the jurisdiction to identify them in regulations.

Some jurisdictions may choose not to identify responsible authorities in implementing acts or regulations where they may have recourse to other mechanisms to assign authority, such as by orders in council or by simple administrative assignment of responsibilities.

9. Court Designation

The uniform act may include a provision to allow jurisdictions to identify courts designated by Canada for their jurisdiction.

Draft Provision

The [name of court] is the relevant court for the purposes [of Article X] of the Convention.

COMMENTARY

A convention may require or allow Contracting States to designate courts that have responsibilities under the convention in their territory.¹⁶ These designations are made at the international level by Canada in consultation with the concerned jurisdictions.

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Where a designation has been made by Canada, the legislature of a province or territory must decide whether the designation should be reflected in a provision of the legislation implementing the Convention in its jurisdiction. The legislature should take the following matters into consideration in making this decision:

- Does the designation of a court have the effect of limiting the jurisdiction of other courts in the jurisdiction?
- Does the designation limit appeal rights to other courts in the jurisdiction?
- Was the designation made for a specific purpose such as to enforce foreign arbitral awards?
- Are new functions assigned to the court as a consequence of the designation?

An affirmative answer to one or all of these questions may militate in favour of including a provision in the implementing act to specify which court has been designated and the purpose of the designation.

10. Minister Responsible for the Administration of the Act

The uniform act may include a provision to allow jurisdictions to identify a minister responsible for the administration of their act.

Draft Provision

The Minister of [name of Ministry/Department] is responsible for the administration of this act.

COMMENTARY

Naming a minister responsible for the administration of an act in an act depends on the practice of jurisdictions.

11. Regulations

Regulation-making powers should be clearly expressed and should be no broader than is necessary.

Provisions conferring regulation-making powers should come at the end of the act, preceding only the transitional or temporary provisions, those repealing or amending other acts and the commencement provision.

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COMMENTARY

Jurisdictions should consider whether regulation-making powers are needed before providing for them in the implementing act.

12. Binding on the Crown

Where appropriate, the uniform act may include a provision specifying that the Crown is bound or is not bound by the act.¹⁷

Draft Provision

This Act [is/is not] binding on the [Crown/State] [in right of [name of jurisdiction]].

COMMENTARY

When drafting the uniform act, it should be determined whether the Crown should be bound by it. The uniform act should make a recommendation to jurisdictions with respect to binding the Crown. It should also be determined whether the convention applies to the Crown, and if it does, whether this is clear from the text of the Convention. If it is clear that it does and the uniform act gives force of law to the convention, it is not necessary to provide in the uniform act that the convention is binding on the Crown. However, in the interest of transparency, it may be desirable to do so in jurisdictions where such provisions are usually included in acts.

Jurisdictions should consult the relevant interpretation legislation to ascertain the need to specify whether the Crown is bound or not by the legislation in the implementing act.

13. Transitional or Temporary Provisions

Transitional or temporary provisions should follow the subject-matter to which they relate.

If they relate to the act as a whole, they should follow the regulation-making powers.

COMMENTARY

Transitional or temporary provisions may be necessary to “make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force”¹⁸ and to guide the temporal application of the law and the convention.¹⁹

Jurisdictions should consult the relevant interpretation legislation to ascertain the need for transitional or temporary provisions.

14. Consequential Amendments

Provisions repealing or amending other acts should precede the commencement provision.

COMMENTARY

An act implementing a convention may provide for the repeal or amendment of other acts that are inconsistent with it. The repeal or amendment of inconsistent acts is favoured over a provision that provides that the implementing act prevails over other acts to the extent of their inconsistency.²⁰

15. Commencement Provision

The uniform act should offer options for the commencement provision and a comment providing points that should be considered by jurisdictions in choosing which provision to adopt in the implementing act.

Draft Provisions

Option 1 – Commencement on assent before convention applies to jurisdiction

This Act comes into force on assent.²¹

OR

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This Act comes into force on the day on which it is assented to.²²

Option 2 – Commencement on proclamation before convention applies to jurisdiction

(1) Subject to subsection (2), this Act comes into force on a day fixed by proclamation of the [Lieutenant Governor in Council or Commissioner].

(2) Sections [force of law and other sections which should only come into force when the convention applies to the jurisdiction] come into force on the day on which the Convention enters into force for [name of jurisdiction].²³

Option 3 – Commencement on proclamation on day on which convention applies to jurisdiction

This Act comes into force on proclamation.

OR

The provisions of this Act come into force on a day or days to be fixed by proclamation.

Option 4 – Commencement on a specified day which is day on which convention applies to jurisdiction

This Act comes into force on [day on which the convention applies to jurisdiction].

COMMENTARY

Four options are available with respect to the commencement provision in the uniform act. The desired time to bring the implementing act into force will help determine which option should be chosen. The points set out below should be considering in deciding which option to select.

Option 1 and 2 allow the implementing act to commence before the convention applies for the jurisdiction.

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Option 1 can be combined with the second option set out in Principle 6 – Force of Law so that the convention will only have force of law on the day on which it applies to the jurisdiction.

Option 2 allows some sections of the implementing act, such as the section giving force of law to the convention, to come into force only when the convention applies to the jurisdiction.

- Options 1 and 2 avoid the necessity for the federal and provincial or territorial governments to coordinate the application of a convention to a jurisdiction and the commencement of the implementing act, therefore eliminating the risk that it will not have commenced when the convention starts applying to a jurisdiction.
- The actual day that a convention applies to the jurisdiction is not transparent on the face of the legislation and thus users will have to conduct research to know whether the convention applies to the jurisdiction. The need for transparency may take on more or less importance depending on the subject-matter of the instrument being implemented. Where the instrument concerns the rights of sophisticated parties, the need for transparency in the commencement provision may be less important than where the application of the instrument may have an impact on individual personal situations.

Option 3 allows the implementing act to commence on proclamation on the date on which the convention applies to the jurisdiction.

- Having legislation enter into force on proclamation may be consistent with a jurisdiction's normal practice.
- Proclaiming the implementing act into force on the day the convention applies to the jurisdiction may be difficult to achieve in practice because the time between learning the effective date that the convention will apply to the jurisdiction and the date itself may be too short to issue a proclamation.

Option 4 provides that the implementing act commences on the day specified in the commencement provision which is the day on which the convention being implemented applies to the jurisdiction.

- This option avoids the risk that the implementing act would not be in force when the convention starts applying to the jurisdiction.

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- Jurisdictions adopting the uniform act can select this option only if the day on which the convention will apply to their jurisdiction is known.

¹ E.g., the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* was implemented at the federal, provincial and territorial levels by amending rules of civil procedure. The jurisdictions that have implemented the *Unidroit Convention providing a Uniform Law on the Form of an International Will* have done so by including implementing provisions in their laws on wills and estates.

² This method was used by the province of Quebec in the *Act respecting the civil aspects of international and interprovincial child abduction*, RSQ, c A-23.01 to implement the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

³ See e.g. *Uniform International Protection of Adults (Hague Convention) Implementation Act*, s. 3:
Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention.

Uniform Choice of Court Agreements Convention Act, s.1(2):

Unless contrary intention appears, words and expressions used in this Act have the same meaning as in the Convention.

⁴ See e.g. *Uniform Assignment of Receivables in International Trade Act*, s. 1:

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).

Uniform Choice of Court Agreements Convention Act, s. 1(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*.

⁵ See e.g. *Settlement of International Investment Disputes Act*, SC 2008, c 8, s. 2(1):

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.

⁶ It may not be necessary to include this rule of interpretation as Article 31 of the *Vienna Convention on the Law of Treaties* provides that treaties must be interpreted in good faith.

⁷ *Uniform Choice of Court Agreements Convention Act*, s. 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.

⁸ *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp), s. 5:

In the event of any inconsistency between the provisions of this Act, or the Convention, and the provisions of any other law, the provisions of this Act and the Convention prevail to the extent of the inconsistency.

Settlement of International Investment Disputes Act, SC 2008, c. 8, s. 3:

Despite section 5 of the *United Nations Foreign Arbitral Awards Convention Act*, in the event of an inconsistency between that Act — or the *Commercial Arbitration Act* — and this Act or the Convention, this Act or the Convention, as the case may be, prevails to the extent of the inconsistency.

⁹ See e.g. *Settlement of International Investment Disputes Act*, 1999, SO 1999, c 12, Sch D, s. 13. (1):

The Convention applies in Ontario on the day on which it enters into force for Canada in accordance with paragraph 2 of Article 68 of the Convention. 1999, c. 12, Sched. D, s. 13 (1).

¹⁰ E.g. *Evidence Act*, SS 2006, c E-11.2, s. 40(5).

¹¹ The extension of the application of a convention to a jurisdiction is made when Canada makes a declaration to that effect with the treaty depositary. The time at which the declaration comes into effect varies among treaties.

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¹² E.g., the following provisions should not be included in the uniform act: “The Minister of (ministry/department) shall request the Government of Canada to declare that the convention extends to (enacting jurisdiction)”, *Uniform International Factoring (Unidroit Convention) Act*, s. 2.

¹³ E.g., the following provisions should not be included in the uniform act: “The [Minister of _____], at the time a request under section 6 is made, may request the Government of Canada to make a declaration in accordance with Article 39 of the Convention in respect of [name of province or territory]”, *International Interests in Mobile Equipment Act 2001*, s. 7(1).

¹⁴ E.g., the Intercountry Adoption Convention provides for the designation of “Central Authorities” and the naming of “accredited bodies” by Contracting States (see arts. 6 and 13).

¹⁵ See e.g. the uniform *Intercountry Adoption (Hague Convention) Act 1996*, s. 4:

The (Minister of or) is the Central Authority for (enacting jurisdiction) for the purpose of the Convention.

¹⁶ E.g., article 53 of the *Convention on International Interests in Mobile Equipment* allows Contracting States to designate a relevant court.

¹⁷ E.g., the *Uniform International Interest in Mobile Equipment Act (Aircraft Equipment)* gives jurisdictions the option to include a provision to bind the Crown.

¹⁸ G. C. Thornton, *Legislative Drafting*, 4th ed. (London: Butterworths, 1996) at 383.

¹⁹ E.g., the following acts contain transitional provisions:

An Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, RSO, c M-35.1.3

32. Permanent certifications issued under Division VII of Chapter IV of the Youth Protection Act (chapter P-34.1) remain valid until 1 September 2007.

33. An adoption process in respect of a child domiciled outside Québec undertaken by an adopter and authorized by the Minister in writing before the coming into force of section 14 may be continued by the adopter.

34. An adoption process in respect of a child domiciled outside Québec which the Minister agreed, in writing, to undertake on behalf of the adopter before the coming into force of section 14 may be continued by the Minister.

International Interests in Mobile Equipment (Aircraft Equipment) Act, SC 2005, c 3:

9.1 Article XI of the Aircraft Protocol does not apply to an insolvency-related event that occurs before the day on which subsection 4(1) comes into force.

²⁰ Principle 5 deals with the provision on inconsistent laws.

²¹ *Uniform International Factoring (Unidroit Convention) Act*, *Uniform International Financial Leasing (Unidroit Convention) Act*.

²² *Settlement of International Investment Disputes Act*.

²³ *Uniform International Protection of Adults (Hague Convention Implementation Act*, s. 8; also similar: *Parental Responsibility and Measures for the Protection of Children (Hague Convention) Implementation Act*:

(1) Subject to subsection (2), this Act comes into force on a day fixed by proclamation of the [Lieutenant Governor in Council or Commissioner].

(2) Sections 4, 5 and 7 come into force on the day on which the Convention enters into force for [name of province or territory], in accordance with Articles 55 and 57 of the Convention.