

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION GIVING FORCE OF
LAW TO AN INTERNATIONAL CONVENTION**

REPORT OF THE WORKING GROUP

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Toronto, Ontario

August 2014

PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION GIVING FORCE OF LAW TO AN INTERNATIONAL CONVENTION

Report of the Working Group

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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 should prepare drafting conventions for the implementation of international conventions and to report back to the Conference at its 2013 meeting. The Conference accepted the progress report of the Working Group at its meeting in August 2013.

[3] The Working Group met bi-weekly by conference call from January to June 2014. 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 prepared the annexed *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* and Commentary which it recommends to the Conference.

[5] This final report highlights some of the decisions that were taken by the Working Group with respect to the content of the Principles and Commentary.

[6] The Working Group noted that while some drafting principles are inherent to the drafting of uniform acts to implement international conventions, others, such as the principles on the preamble and the purpose provisions are general drafting principles reflected in the Canadian Legislative Drafting Conventions adopted by the ULCC. The Working Group decided to refer to these general principles in the Principles so that all of

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the principles relevant to drafting uniform acts to implement international conventions can be found in one document.

[7] In preparing the Principles, the Working Group analysed and compared provisions of the uniform acts that implement international conventions that have been adopted by the ULCC. The Working Group also discussed current drafting practices in jurisdictions and consulted with drafters.

[8] **Principle 1** provides that the title of the uniform act should contain the name of the convention and indicate that it is implemented by the act.

[9] **Principle 2** refers to the Canadian Legislative Drafting Conventions and recommends against the use of a preamble in the uniform act.

[10] **Principle 3** recommends against a purpose section in the uniform act.

[11] **Principle 4** refers to the Canadian Legislative Drafting Conventions on definitions and sets out additional principles on definitions for uniform acts implementing international conventions. Notably, Principle 4 departs from the practice of defining the word “Convention” in uniform acts. It is deemed that such definition is unnecessary because the title of the uniform act and provision giving force of law to the convention should set out the name of the convention to which the word “Convention” refers.

[12] **Principle 5** sets out rules of interpretation which may be included in the uniform act. The Working Group decided against recommending a provision which requires good faith interpretation of the act and of the convention even though this rule is present in a few of the uniform acts adopted by the ULCC. The Working Group understands that this rule is not necessary to allow courts to interpret and act, and the convention to which it gives force of law.

[13] **Principle 6** provides that, where appropriate, the uniform act may include a rule on the precedence of provisions of the act and the convention over other acts of Parliament. It also recommends against the use of a broad precedence rule.

[14] **Principle 7** provides that the uniform act should contain a provision giving force of law to the convention which it implements and reproduce it in an annex. It recommends the inclusion, in the uniform act of two uniform provisions, Options A and B, for the force of law provision. The Commentary provides guidance to jurisdiction on these options. The Working Group discussed the options and the Commentary to Principle 7 along with Principle 16.

[15] The Working Group examined how a uniform act can be drafted so as to avoid issues linked to coordinating the date on which the act, which gives force of law to the convention, comes into force with the date on which the convention starts applying to a

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jurisdiction at international law. The Working Group noted that two approaches were taken in ULCC uniform acts to solve this problem. Both approaches allow jurisdictions to bring an act into force while deferring giving force of law to the convention to the date on which the convention starts applying to the jurisdiction. Under the first approach, the act's force of law provision gives force of law to the convention on the date on which it starts applying to the jurisdiction. Under the second approach, the convention is given force of law and the commencement provision specifies that the act is in force except for the force of law provision which enters into force on the date on which the convention starts applying to the jurisdiction. The Working Group noted that the second approach could be problematic in jurisdictions that have legislation which provides for the repeal of unproclaimed legislation within a certain period of time given that the force of law provision, being unproclaimed, could be subject to such repeal. The Working Group decided therefore to retain the first approach and prepared Option A of the force of law provision. Option A combined with Option A of the uniform commencement provision set out in Principle 16 would allow a jurisdiction to have its act commence before the convention starts applying to the jurisdiction. This would allow a jurisdiction to avoid difficulties linked to coordinating both dates and to legislation which provides for the repeal of unproclaimed legislation.

[16] The Working Group prepared Option B of the force of law provision which could be selected by a jurisdiction and paired with Options B or C of the uniform commencement provisions when the date of the application of the convention to the jurisdiction at international law is known. Option B could also be selected by a jurisdiction where additional steps are necessary such that it is problematic to bring the act with Option A into force or where a convention which is the object of the implementing legislation already applies to the jurisdictions at international law.

[17] **Principle 8** provides that the uniform act should not contain a provision stipulating that the minister of a named department of a province or territory shall request the Government of Canada to make a declaration or reservation. The Commentary explains that legislation is not needed to enable a minister of a jurisdiction to request to the federal government that Canada make a declaration or reservation. This is a departure from some uniform acts adopted by the ULCC which contain this type of provision. Principle 8 and its Commentary also provide guidance on when it may be advisable to include the content of a declaration or reservation modifying the substantive legal scope of a convention in the uniform act.

[18] **Principle 9** sets out a uniform provision to allow a jurisdiction adopting the uniform act to identify authorities responsible to exercise functions prescribed by a convention.

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The Commentary provides guidance to the jurisdiction to help it decide on the inclusion of the provision.

[19] **Principle 10** sets out a uniform provision to allow a jurisdiction adopting the uniform act to identify courts competent to exercise functions prescribed by a convention. The Commentary provides guidance to the jurisdiction to help it decide on the inclusion of the provision.

[20] **Principle 11** sets out a uniform provision to allow a jurisdiction adopting the uniform act to designate a minister responsible for the administration of the act where appropriate.

[21] **Principle 12** on regulations refers to the Canadian Legislative Drafting Conventions.

[22] **Principle 13** states that where appropriate, the uniform act may include a provision specifying that the Crown is bound or not bound by it and sets out a uniform provision.

[23] **Principle 14** on transitional or temporary provisions refers to the Canadian Legislative Drafting Conventions.

[24] **Principle 15** on consequential amendments refers to the Canadian Legislative Drafting Conventions.

[25] **Principle 16** on commencement provisions refers to the Canadian Legislative Drafting Conventions. It also provides three uniform provisions which should be included in the uniform act. The Commentary provides guidance to jurisdictions on selecting an option.

PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION GIVING FORCE OF LAW TO AN INTERNATIONAL CONVENTION

Introduction

[1] These drafting principles apply to the drafting of uniform legislation to implement international conventions on private international law matters. Uniform legislation is a framework established to implement a given convention, seeking uniformity in federal, provincial and territorial implementing provisions. The principles complement the Uniform Law Conference of Canada Legislative Drafting Conventions which provide general rules for drafting uniform legislation.

[2] Although several methods are available to implement conventions,¹ these principles seek to provide guidance to drafters in preparing uniform acts that implement conventions by giving them force of law. The decision to focus on the force of law method in these principles should not be understood to exclude the adoption of another method 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 comply with the obligations set out in the convention. This method is useful where the legislative corpus already contains legislation on the subject-matter of the convention and avoids duplicating legislative provisions on the same subject-matter.² 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.³ When opting for either of the last two methods described, the legislator should ensure the obligations set out in the convention are accurately reflected in the legislation so as to avoid inconsistencies between the text of the convention and the legislation.

¹ Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill Law Journal 573, identify no fewer than 13 methods to implement international conventions in federal and provincial law.

² 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.

³ This method was used by Quebec in the *Act respecting the civil aspects of international and interprovincial child abduction*, CQLR, c. A-23.01 to implement the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

1. Title

According to Principle 17 of the Canadian Legislative Drafting Conventions, the title should succinctly indicate the Act's subject-matter.

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.

COMMENT

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 act, the title should ideally contain an abridged 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 name of the organization which adopted the convention or the date on which it was adopted or entered into force internationally can be included in the title if this information is needed to clarify the convention to which the uniform act applies. If the convention is annexed to the uniform act as recommended in Principle 7, it should be clear which convention is being implemented and so including this information would not be necessary.

2. Preamble

According to Principle 18 of the Canadian Legislative Drafting Conventions, a preamble is not recommended. If a preamble is to be included in the act, Principle 7 of the Drafting Conventions provides that it should follow the title.

3. Purpose

A purpose section is generally not recommended.

COMMENT

As indicated in Principle 19 of the Canadian Legislative Drafting Conventions, explicit statements of purpose are rarely necessary, since the object of well-drafted legislation should become clear to the person who reads it as a whole. In general, legislation should not contain statements of a non-legislative nature. However, a specific statement of purpose is occasionally required (for example, to give guidance to the courts).

4. Definitions

According to Principle 8 of the Canadian Legislative Drafting Conventions, definitions should be set out in the first section of the 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.

According to Principle 21 of the Canadian Legislative Drafting Conventions, a defined term should not give an artificial or unnatural sense to the term defined.

Principle 21 of the Canadian Legislative Drafting Conventions also provides that definitions should be used sparingly and only for the following purposes:

- 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 signal the use of an unusual or novel term.**

In addition to the Canadian Legislative Drafting Conventions, the following principles on definitions apply to uniform acts implementing international conventions:

- a) A definition may be used to specify the meaning of a term that is not defined in domestic law or in the convention or to reject, for the purposes of the convention, the meaning assigned to the term by domestic law.**
- b) A definition should not give a meaning to a term that deviates from the meaning given to it by the convention.**

COMMENT

The decision to put definitions (Principle 4) and rules of interpretation (Principle 5) under the same or separate subtitles depends on the practice of each jurisdiction.

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

5. Interpretation

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

- a) establish equivalence between the terminology of the act and the terminology of the convention;⁴ and
- b) allow reference to international material on the convention to interpret it.⁵

COMMENT

The purpose of the interpretation rule which refers to international material on a convention is to ensure that courts or parties will refer to this material before domestic law to interpret the convention. This provision is in addition to the treaty interpretation principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*⁶ that have been accepted in Canadian law by court decisions. In *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-578, Justice La Forest wrote with regard to those Articles and more specifically about the recourse to preparatory work to interpret a treaty “[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”.

⁴ E.g., *Uniform International Protection of Adults (Hague Convention) Implementation Act*, s. 1(2):
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.

⁵ 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*.

⁶ Can. T.S. 1980 No. 37.

6. *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 the Legislative Assembly.⁷

Where a precedence rule is used, it should be as precise as possible and identify the legislative provision over which the uniform act has precedence. Where this is not possible, the uniform act can contain a rule that provides that the provisions of the uniform act prevail over any contrary provision of a subsequent general law or special act unless the latter act expressly states that it applies notwithstanding the uniform act.⁸

COMMENT

The use of a broad precedence rule should be avoided as such rule imposes upon users the burden of determining the extent to which a provision of the act is inconsistent with the provisions of another act of the Legislative Assembly. A precedence rule may also create difficulties in interpreting subsequent acts dealing with the same subject-matter.⁹

Rather than including a precedence rule in the act, legislation that is inconsistent with the act should be identified and amended to the extent of its inconsistency.¹⁰ Principle 14 – Consequential Amendments, deals with provisions repealing or amending other acts. Moreover, since amendments to inconsistent legislation are aimed only at eliminating the inconsistency and not necessarily at changing the general regime set out by the legislation, the amendments need not change the general regime except in instances where the convention applies.

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 E.g., *An Act respecting access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1, s. 168:

The provisions of this Act prevail over any contrary provision of a subsequent general law or special Act unless the latter Act expressly states that it applies notwithstanding this Act.

⁹ *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 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, S.C. 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.

¹⁰ E.g., *An Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and to amend various legislative provisions in relation to adoption*, S.Q. 2004, c. 3.

7. Force of Law

The uniform act should contain a provision giving force of law to the entire convention and reproduce the convention in an annex.

The uniform act should offer two options for the force of law provision and a commentary providing advantages and disadvantages linked to each.

Uniform Provisions

Option A

The [convention] set out in the schedule to this act has force of law in [jurisdiction] [mechanism in convention for calculating date from which the declaration/ instrument of ratification or accession has effect internationally] in accordance with Article [Article #] of the Convention.¹¹

Option B

The [convention] set out in the schedule to this act, has force of law in [jurisdiction].

COMMENT

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 which adopted the convention 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.¹²

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. Furthermore, it may be difficult to distinguish or to separate what is of federal or provincial jurisdiction. Where a convention includes a preamble, it should be reviewed to ensure that giving force of law to the entire text of the convention would not give rise to unintended consequences, for example, where the preamble includes reference to other conventions.

¹¹ E.g., *The Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* set out in the schedule to this act has force of law in [jurisdiction] on the sixtieth day after the deposit of Canada's instrument of ratification in accordance with Article 28 of the Convention.

¹² E.g., *Evidence Act*, S.S. 2006, c. E-11.2, s. 40(5).

The uniform act offers two options with respect to the force of law provision. It is up to each jurisdiction to determine which option is appropriate. Because the time between the deposit by Canada of its instrument of ratification or accession or a declaration extending the application of the convention to a jurisdiction and the application of the convention to the jurisdiction at international law may be very short, the time required to take measures necessary to bring the act into force will be relevant in deciding which option to select.

Together, Option A of the force of law provision and Option A of the commencement provision in Principle 16 allow jurisdictions to bring their act into force without giving force of law to a convention until it applies to their jurisdiction at international law. A jurisdiction may select these options to avoid problems linked to coordinating the day on which the act enters into force with the day on which the convention applies to them at international law. Cases where a convention would not yet apply to a jurisdiction would include:

- a) where Canada's declaration (extending the application of the convention to the jurisdiction) does not yet have effect;
- b) where Canada's instrument of ratification or accession does not yet have effect;
- c) where Canada has become party to the convention but it has not yet entered into force internationally; or
- d) where Canada has not yet become party to the convention.

Option A is also useful when an act that has been passed by a jurisdiction but not brought into force is subject to legislation which provides for the repeal of unproclaimed legislation within a certain period of time.¹³ Option A would thus allow a jurisdiction to bring its legislation into force to avoid the application of such legislation but the convention would not have force of law until it applies to the jurisdiction at international law. Where the convention already applies in the jurisdiction at international law, Option A should not be used as it may raise issues with respect to the retroactive effect of the convention. In such cases, it would be expected that the law would be brought into force as soon as it had been adopted and so Option B would be used instead.

A jurisdiction selecting Options A of the uniform force of law and commencement provisions should note that this approach is not entirely transparent as on the face of the act it is not apparent if the convention has started applying. The jurisdiction may wish therefore to provide notice to the public when the convention starts applying. This may be done, for instance, by publishing a notice in the jurisdiction's official publication. Ideally the notice would be available indefinitely, so that people would be able to determine the effective date years later. Additionally, according to the jurisdiction's practice, a

¹³ E.g., *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 10.1.

reference to the date on which the convention applies could be included in the published version of the law. The publication of the notice in the jurisdiction's official publication or of the date in its act must not be a condition precedent to the application of the convention.

The wording of Option A can be reduced to refer to the article of the convention that prescribes the mechanism for calculating the date on which the declaration or instrument of ratification or accession has effect internationally without repeating the wording of the article in question.¹⁴

The need to include a number of provisions addressing the operation of the convention in the implementing act and where there may be a lengthy period between the coming into force of the law and the convention for the jurisdiction may tip the balance in favour of Option B if it is considered that Option A may mislead the public or courts as to the application of the convention.

Option B allows a jurisdiction to give force of law to the convention from the day on which its act comes into force. Option B may be needed by those jurisdictions where additional steps are necessary such that Option A is problematic or where a convention which is the object of the implementing legislation already applies to the jurisdictions at international law. Paired together, Option B of Principle 7 and Option B or C of the uniform commencement provisions of Principle 16 ensure that the convention will not have effect in the jurisdiction by legislation before it applies to the jurisdiction at international law.

Jurisdictions selecting Option B must be able to bring their acts into force on the day on which the convention applies to their jurisdiction at international law. They should communicate with Justice Canada officials to coordinate the day on which the act enters into force with the day on which the convention applies to them at international law.

8. 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 the Government of Canada to make a declaration or reservation.¹⁵

¹⁴ E.g., the [*convention*] reproduced as a schedule to this Act, has force of law in [*jurisdiction*] and has effect from the date determined under its Article [*Article #*].

¹⁵ E.g., the following provisions should not be included in the uniform act:

6. The [Minister of _____] shall request the Government of Canada to declare, in accordance with Article 52 of the Convention and Article XXIX of the Aircraft Protocol, that the Convention and the Aircraft Protocol extend to [name of province or territory].

It may sometimes be advisable to include the content of a declaration or reservation modifying the substantive legal scope of a convention in the uniform act.

COMMENT

Legislation is not needed to enable a minister of a jurisdiction to request the federal government to make a declaration or reservation. Both declarations and reservations are made by the federal government in consultation with the concerned jurisdictions.

A convention may authorize states party to make declarations to extend its application only to identified territorial units.¹⁶

A convention may also authorize states party to make declarations or reservations to modify its legal scope. The effects of such declarations or reservations include:

- a) narrowing the scope of application of the convention by excluding specified matters;¹⁷
- b) narrowing part of its scope by excluding the application of specified articles;¹⁸ or
- c) widening its scope.¹⁹

Giving force of law to the convention gives force of law to its provisions on declarations and reservations, which will, in many cases, operate to make the declarations and reservations made by Canada effective in internal law. Nonetheless, in the interest of transparency, clarity and legal certainty it might be advisable to reflect their content in the

7. (1) 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*)

(2) The [Minister of _____], from time to time, may request the Government of Canada to make a subsequent declaration in accordance with Article 57 of the Convention and Article XXXIII of the Aircraft Protocol, in relation to Article 39 of the Convention, in respect of [name of province or territory].

¹⁶ E.g., *Convention of 13 January 2000 on the International Protection of Adults*, art. 55.

¹⁷ E.g., Article 41(1) of the *United Nations Convention on the Assignment of Receivables in International Trade* (New York, 2001) allows states party to declare by way of reservation that the Convention will not apply to the assignment of specific types of assignment or to the assignment of specific categories of receivables.

Article 21 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention)*, allows states party to declare that the Convention will not apply to a specific matter.

¹⁸ E.g., Article 26 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* allows states party to declare by way of reservation, that they will not apply Article 16(2) of the Convention.

¹⁹ E.g., Article 2(3) of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* allows any contracting state to declare that it will extend the application of the convention to more maintenance obligations than provided by Article 2(1)(a); article 22 of the *Choice of Court Convention* allows States party to make a reciprocal declaration to extend the application of the convention to non-exclusive choice of court agreements.

uniform act. This would be particularly so where, for example, a declaration or reservation narrows or widens the scope of application of the convention. A jurisdiction may have other practices to reflect the content of a declaration or reservation.²⁰

Any amendment by a jurisdiction of a provision giving effect to a substantive declaration or reservation would have to be coordinated with a subsequent declaration or reservation to the same effect.

9. Responsible Authority

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

Uniform Provision

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

COMMENT

A convention may require the designation or identification by states party of one or more authorities that will assume various responsibilities under the convention in their territory. Jurisdictions implementing such conventions designate or identify the responsible authorities in their jurisdiction and Canada communicates this information at the international level.²¹

The responsible authorities may be identified in the act.²² 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.²³

²⁰ E.g., section 41 of the *Act respecting the civil aspects of international and interprovincial child abduction*, CQLR c. A-23.01 which implements the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* in Quebec provides that the government shall designate by order any state to which the Act takes effect. This order would be done to coincide with a declaration made by Canada under Article 38(4) of the Convention to accept the accession of a state to the Convention.

²¹ E.g., Article 6 of the *Hague Convention on the Civil Aspects of International Child Abduction* provides for the designation of “Central Authorities” by states party.

²² 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.

²³ E.g., uniform *Intercountry Adoption (Hague Convention) Act 1996*, s.10:

The (Lieutenant Governor in Council) may make regulations necessary to carry out the intent and purpose of this Act and, without limiting the generality of the foregoing, may

[...]

Some jurisdictions may choose not to identify responsible authorities in their act 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.

10. Court Designation

The uniform act may include a provision to allow jurisdictions to designate courts in accordance with the convention.

Uniform Provision

The [name of court] is the competent court for the purposes of Article [Article #] of the Convention.

COMMENT

A convention may require or allow the designation of courts that have responsibilities under the convention.²⁴ Jurisdictions implementing such conventions designate the responsible courts in their jurisdiction and Canada communicates this information at the international level by way of declaration or notice to the treaty depository. Jurisdictions in which such a designation is made must decide whether it should be specified in their implementing act or regulation. Jurisdictions should take the following matters into consideration in making this decision:

- a) Does the designation of a court have the effect of limiting the jurisdiction of other courts in the jurisdiction?
- b) Was the designation made for a specific purpose such as to enforce foreign arbitral awards?
- c) Are new functions assigned to the court as a consequence of the designation?
- d) Would reflecting the designation in the act provide helpful guidance to those seeking to have recourse to the designated court?

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

11. 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.

(b) designate the competent authority for any provision of the Convention.

²⁴ E.g., Article 53 of the *Convention on International Interests in Mobile Equipment* allows states party to designate a relevant court.

Uniform Provision

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

COMMENT

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

12. Regulations

According to Principle 28 of the Canadian Legislative Drafting Conventions, regulation-making powers should be clearly expressed and should be no broader than is necessary.

According to Principle 10 of the Canadian Legislative Drafting Conventions, 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.

COMMENT

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

Some conventions may require more detailed implementation, or implementation that may vary as to administrative detail over time. These are the kinds of considerations that could justify regulation-making powers. For example, the right to prescribe forms or fees for activity under a convention or to designate a competent authority to carry out functions under the convention may be left for regulation.²⁵

13. Binding on the Crown or Government

Where appropriate, the uniform act may include a provision specifying that the Crown or Government is bound or is not bound by the act.²⁶

²⁵ E.g., uniform *Intercountry Adoption (Hague Convention) Act 1996*, s.10(b).

²⁶ E.g. the *Uniform International Interest in Mobile Equipment Act (Aircraft Equipment)* gives jurisdictions the option to include a provision to bind the Crown.

Uniform Provision

This Act [is/is not] binding on the [Crown/Government of *jurisdiction*].

COMMENT

When drafting the uniform act, it should be determined whether the Crown or Government should be bound by it. The uniform act should make a recommendation to jurisdictions with respect to binding the Crown or Government. It should also be determined whether the convention applies to the Crown or Government, 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 specify that the convention is binding on the Crown or Government. 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 or Government is bound by the act.

14. Transitional or Temporary Provisions

According to Principle 11 of the Canadian Legislative Drafting Conventions, 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.

COMMENT

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”²⁷ and to guide the temporal application of the law and the convention.²⁸

²⁷ G. C. Thornton, *Legislative Drafting*, 4th ed. (London: Butterworths, 1996) at 383.

²⁸ 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, CQLR 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.

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

15. Consequential Amendments

According to Principle 12 of the Canadian Legislative Drafting Conventions, provisions repealing or amending other acts should precede the commencement provision.

COMMENT

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 act prevails over other acts to the extent of their inconsistency.²⁹

16. Commencement

According to Principle 13 of the Canadian Legislative Drafting Conventions, the provision dealing with the coming into force of the Act should be its last section.

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

Uniform Provisions

Option A – Commencement on assent before convention applies to jurisdiction

This Act comes into force on [assent³⁰/insert the date of assent to this Act].

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

This Act comes into force on [proclamation/ the date or dates to be set by the Government].

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.

²⁹ Principle 6 deals with the provision on inconsistent laws.

³⁰ E.g., *Settlement of International Investment Disputes Act*; *Uniform International Factoring (Unidroit Convention) Act*, *Uniform International Financial Leasing (Unidroit Convention) Act*.

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

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

COMMENT

Three options are available with respect to the commencement provision in the uniform act. The points set out below should be considered by jurisdictions in deciding which option to select.

Option A can be combined with the Option A set out in Principle 7 – Force of Law so that the convention will only have force of law on the day on which it applies to the jurisdiction.

- Option A of the uniform commencement provisions combined with Option A of the uniform provisions in Principle 7 – Force of Law avoids 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.
- As stated in Principle 7, jurisdictions selecting this option should publish the date on which a convention starts applying to their jurisdiction.

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

- When the act commences on proclamation on the date on which the convention applies to the jurisdiction, Option B would be combined with Option B of the uniform provisions in Principle 7.
- Jurisdictions selecting Option B when the date on which the convention will apply to the jurisdiction is not yet known must ensure that the proclamation will be issued on the date on which the convention will start applying once the date is known. Proclaiming the act into force 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.
- As stated in Principle 7, Option B may be needed for those jurisdictions where additional steps are necessary such that it is problematic to bring the Act into force with Option A.

- Option B would be combined with Option A of the uniform provisions in Principle 7 if proclamation is issued before the convention starts applying to the jurisdiction.

Option C allows the act to commence on the day specified in the commencement provision which is the day on which the convention applies to the jurisdiction.

- This option would be combined with Option B of the uniform provisions in Principle 7.
- Jurisdictions adopting the uniform act can select this option if the day on which the convention will apply to their jurisdiction is known.