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UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

Review of Uniform Acts in Light of the Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention

PROGRESS REPORT OF THE WORKING GROUP

Presented by Valérie Simard

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 not 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.

Québec
Québec
August 2018

UNIFORM LAW CONFERENCE OF CANADA

Progress Report of the Working Group

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[1] The Uniform Law Conference of Canada adopted the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* (Principles) in 2014. The Principles apply to the drafting of uniform legislation to implement international conventions on private international law matters. The Advisory Committee on Project Development and Management has approved the establishment of a Working Group to amend certain uniform acts adopted by the ULCC before 2014 to ensure their conformity with the Principles.

[2] The Working Group will review the six uniform acts that have not yet been implemented by all jurisdictions in Canada:

- Uniform International Trusts Act (Hague Convention) (1989)
- Uniform International Sales Conventions Act (1998)
- Uniform Parental Responsibility and Measures for the Protection Of Children (Hague Convention) Implementation Act (2001)
- Uniform International Protection of Adults (Hague Convention) Implementation Act (2001)
- Uniform Hague Convention on Choice of Court Agreements Act (2010)
- Uniform Electronic Communications Convention Act (2011)

[3] In addition, the Working Group will prepare a French version of the Uniform International Trusts Act (Hague Convention) (1989).

[4] The mandate of the Working Group is limited to amending the six uniform acts and comments thereto to ensure their conformity with the Principles and does not include reviewing the Principles. In addition, the mandate does not include any substantive review of the conventions themselves, as such reviews were conducted before the respective uniform acts were adopted by the Conference. It is expected that the amended uniform acts will replace the unamended acts and be recommended by the ULCC for adoption by jurisdictions that have not yet adopted the unamended acts.

[5] The Working Group is chaired by Valérie Simard, Justice Canada – Constitutional, Administrative and International Law Section (CAILS) and is composed of:

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Giving Force of Law to an International Convention

- Emmanuelle Jacques (Justice Canada – CAILS)
- Russell Getz (British Columbia – Ministry of Justice)
- Sarah Dafoe (Alberta – Ministry of Justice and Solicitor General)
- Peter Lown (Alberta – Past President of the Alberta Law Reform Institute)
- Darcy McGovern (Saskatchewan – Ministry of Justice and Attorney General)
- John A. Lee (Ontario – Ministry of the Attorney General)
- Frédérique Sabourin (Québec – Ministère de la Justice)

[6] The Working Group has started working on amendments to the Uniform Choice of Court Agreements Convention Act and Comments. A red-line version of a draft Amended Uniform Choice of Court Agreements Convention Act is annexed to this Report as an example of the work to be undertaken. The Working Group will complete its review of the Uniform Choice of Court Agreements Convention Act and will submit a revised version to the Conference for approval in August 2019.

[7] The Working Group will conduct its work through electronic means and by conference call. It expects to present its final report and amended uniform acts to the Conference in 2019 at its annual meeting.

Annex

Draft Amended Uniform Act to Implement the Hague Convention on Choice of Court Agreements Convention ~~Act~~

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

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

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

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

Interpretation

1. (1) The following definition~~s~~ appli~~es~~~~y~~ in this Act.

~~**"Convention" means the *Hague Convention on Choice of Court Agreements* set out in the schedule. (*Convention*)**~~

~~**Comment:** *This is a standard provision in uniform acts implementing international conventions. For previous examples, reference may be made to subsection 1(2) of the Uniform International Commercial Arbitration Act and subsection 1(2) of the Settlement of International Investments Disputes Act. In reviewing the draft Uniform Act, legislative drafters expressed a preference for implementation by transposing the Convention rules into legislative provisions. This approach has not been used because it increases the risk of divergence in interpretation and application from that intended by the negotiated Convention language.*~~

"declaration" means a declaration made by Canada under the Convention with respect to [*jurisdiction*](~~*name of province or territory*~~). (*déclaration*)

Comment: Articles **19, 20, 21, 22, 26, 28, 29 and 30** of the Convention provide for the deposit of declarations by contracting States:

Article 19 permits Canada to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if the only connection between Canada and the parties or the dispute is the selection of Canada as the forum for dispute resolution. Canada need not make this declaration because its courts are already permitted to hear such disputes under domestic law. Moreover, failure to make this declaration will not detrimentally affect Canadian courts as they do not appear to be selected as frequently as the courts of some other jurisdictions and the declaration can be made at any time.

Article 20 permits Canada to declare that its courts may refuse to recognize or enforce a judgment given by a court of another Contracting State if the parties were resident in that state and the relationship of the parties and all other elements relevant to the dispute, other than their choice of court, were connected only with the other Contracting State. Since existing Canadian common and civil law reveals no reluctance to enforce such judgments, and since that position appears to be satisfactory, no declaration is necessary.

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

Article 22 allows Canada to declare that its courts will enforce judgments given by courts of other Contracting States as designated by non-exclusive choice of court agreements, in addition to those designated by exclusive choice of court agreements. Although this declaration may assist with the enforcement of Canadian judgments in foreign states where they would otherwise not be enforced, Canada should not make this declaration since it would require enforcement of judgments without the same safeguards as exist under Canadian law. In the context of non-exclusive choice of court agreements, it may be preferable to rely on the UEFJA rather than to oblige Canadian courts to enforce under a Convention designed for exclusive choice of court agreements in a commercial context since the UEFJA provides for greater control over the proper exercise of jurisdiction in the originating forum and assurances of procedural fairness.

Article 26(5) indicates that this Convention shall not affect the application by Canada of another treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if it is concluded after this Convention, but only if Canada has made a declaration in respect of the treaty under this article. Since none of

Canada's current treaty commitments conflict with the Convention, this declaration is unnecessary.

Article 28 is a standard provision in private law conventions. It allows federal States to identify by declaration the territorial units to which the convention is to extend. Canada will make declarations pursuant to Article 28 upon the request of provinces and territories that adopt implementing legislation.

Articles 29 and 30, which allow a Regional Economic Integration Organisation to sign, accept, approve or accede to this Convention and have the rights and obligations of a Contracting State, are not relevant to Canada.

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

(3) In interpreting this Act and the Convention, recourse may be had to the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*.

Comment: The Explanatory Report was prepared by Trevor Hartley & Masato Dogauchi and is available on the Hague Conference website at http://www.hcch.net/upload/expl37e.pdf. This supplementary interpretive source conforms to the interpretive sources sanctioned by Article 32 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37. The object of permitting judicial recourse to these sources is reflected in the observation of Justice La Forest in Thomson v. Thomson, [1994] 3 S.C.R. 551, at pp. 577-578, that "[i]t would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689."

For an example of a similar provision, reference may be made to subsections 14(1) and (2) of the Uniform International Commercial Arbitration Act.

To facilitate ease of access to the Explanatory Report referred to in paragraph (3), enacting jurisdictions may wish to include reference in their Gazettes or other appropriate governmental organ to the Hague Conference web address from which it may be downloaded.

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

~~*Purpose*~~

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

~~*Publication*~~

~~**3. A notice shall be published in (*name of publication*) of the day on which the Convention comes into force, or a declaration or withdrawal of a declaration takes effect, in (*name of province or territory*).**~~

Force of law

~~**4. Subject to any declaration that is in force, the Convention has the force of law during the period that it is, by its terms, in force in (*name of province or territory*).**~~

Option A

2. The Convention set out in the schedule to this act has force of law in [*jurisdiction*] on the first day of the month following the expiration of three months after the [deposit of Canada's instrument of ratification / the notification by Canada of a declaration to extend the Convention to [*jurisdiction*]] in accordance with Article 28 and Article 31 of the Convention.

Option B

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

Comment: ~~This Convention is given force of law domestically only from the date the Convention comes into force at the international level for Canada in the jurisdictions declared pursuant to Article 28. That date is the first day of the month following the expiration of three months (i) after the deposit by Canada of the second instrument of ratification, acceptance, approval or accession referred to in article 31, or; (ii) in the case of Canada's subsequent ratification or accession to the Convention, after the deposit of its instrument of ratification or accession; or (iii) thereafter, for a province or territory to which the Convention has been extended in accordance with Article 28(1), after the notification of the declaration referred to in that Article.~~

The ULCC Uniform International Interests in Mobile Equipment Act (Aircraft Equipment) excluded specific (final) provisions from having the force of law. However, the preferred approach has been to give the force of law to all the provisions of a Convention. This approach eliminates the risk of inadvertently overlooking provisions or omitting substantive provisions. To the extent that the final provisions of the Convention are not substantive but are binding as to States on an international level, they would produce no legal effect in provinces or territories in any event.

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 it 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.

The Uniform Act offers two options with respect to the force of law provision. Each jurisdiction should determine which option is the most appropriate. Because of the short period of time set out in Article 31 between the deposit by Canada of its instrument of ratification or a declaration extending the application of the Convention to a jurisdiction and the application of the Convention to the jurisdiction at international law, 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 Section 6 allow jurisdictions to bring their act into force without giving force of law to the 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 it at international law. Cases where the 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 does not yet have effect; or
c) where Canada has not yet become party to the Convention.

Option A is also useful when a jurisdiction has legislation that provides for the repeal of unproclaimed legislation within a certain period of time. 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 to 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 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.

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 the Convention already applies to the jurisdictions at international law. Paired together, Option B of this section and Option B or C of section 6 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.

[*Declarations*

3. *Where appropriate, insert provision providing the content of a declaration made by Canada that is applicable to the enacting jurisdiction.*

Comment: Giving force of law to the Convention gives force of law to its provisions on declarations, which will, in many cases, operate to make the declarations 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 act, especially a declaration which narrows or widens the scope of application of the Convention. See comment below the definition of "declaration" in section 1]

Inconsistent laws

4~~5.~~ If a provision of this Act or a provision of the Convention that is in force is inconsistent with any other Act, the provision prevails over the other Act to the extent of the inconsistency.

Comment: The Act and Convention need to prevail over inconsistent provisions in other Acts to ensure that Canada is in conformity with its international obligations. To avoid internal conflict, enacting jurisdictions should ensure that if an equivalent provision appears in other Acts with which this Act or the Convention might potentially be inconsistent, those other Acts should be amended to give precedence to this Act and the Convention.

Binding on Crown

5~~6~~. This Act is binding on the [Crown/Government/State of *jurisdiction*] ~~in right of (*name of province or territory*)~~.

Comment: The Convention is drafted on the assumption that it applies to all exclusive international choice of court agreements concluded in civil or commercial matters, whether or not they involve governmental entities. Section ~~5~~6 merely confirms this. As the Explanatory Report notes, "proceedings will fall outside the scope of the Convention if they arise from a choice of court agreement concluded in a matter which is not civil or commercial. Thus, a public authority is entitled to the benefits of the Convention, and assumes its burdens, when engaging in commercial transactions[…]. As a general rule, one can say that if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter. If, on the other hand, it is exercising governmental powers that are not enjoyed by ordinary citizens, the case will probably not be civil or commercial."

Of course, if a jurisdiction's interpretation legislation already provides that the Crown is bound unless otherwise stated in the particular act, there is no need to include it.

~~*Coming into force*~~*Commencement*

~~**7. The provisions of this Act come into force on a day or days to be fixed by (_____).**~~

Option A – Commencement on assent before the Convention applies to jurisdiction

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

Option B – Commencement on proclamation on day on which the Convention applies to jurisdiction

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

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

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

Comment: There is a need to co-ordinate the entry into force of the Convention at the international level, the coming into force of domestic implementing legislation, and giving the Convention force of law. ~~*A provision in the implementing legislation stating that the Act comes into force when the Convention enters into force for enacting jurisdictions is not recommended since the actual date is not transparent on the face of the legislation. Accordingly, it is recommended that the legislation implementing the Convention state that it comes into force on proclamation or similar means. Enacting jurisdictions will need to communicate with Justice Canada officials to coordinate dates*~~.

Three options are available with respect to the commencement provision in the 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 section 2 – 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 section 6 combined with Option A of section 2 – Force of Law avoids the necessity for the federal and provincial or territorial governments to coordinate the application of the 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 the comment to section 2, jurisdictions selecting this option should publish the date on which the 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 section 2.
- 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 the comment to section 2, 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 section 2 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 section 2.
- Jurisdictions adopting the uniform act can select this option if the day on which the Convention will apply to their jurisdiction is known.