ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

UNIFORM ACT TO IMPLEMENT THE 2005 CONVENTION ON CHOICE OF COURT AGREEMENTS (2020)

As adopted – February 1, 2020

Uniform Act to Implement the 2005 Convention on Choice of Court Agreements (2020)

Comment: This Uniform Act implements the *2005 Convention on Choice of Court Agreements*. The Convention helps ensure that courts in Contracting States will recognize choice of court agreements between parties to international commercial transactions and judgments rendered by the chosen court will generally be recognized and enforced in other Contracting States.

The ULCC adopted the Hague Convention on Choice of Court Agreements Act in 2010. The present act updates that act in accordance with the 2014 *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* as well as the *Guidelines for Drafting Uniform Legislation Giving Force of Law to an International Convention* (2019). As the act does not bring any substantive changes to the 2010 act, it is addressed at jurisdictions that have not adopted that act. The 2010 act was withdrawn by the ULCC with the adoption of this act.

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, as well as 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."

The Convention permits Contracting States to make several declarations as described below. An enacting jurisdiction will have to indicate to Justice of Canada whether Canada shall make for that jurisdiction any of the declarations permitted by the Convention. If a declaration is deposited by Canada in relation to a jurisdiction following the enactment of the implementing legislation, the jurisdiction may amend its act to reflect the content of such a declaration. In addition, any amendment by a jurisdiction of a provision giving effect to a substantive declaration would have to be coordinated with a subsequent declaration.

Article 28 is a standard provision in private international law conventions. It allows federal states to identify the territorial units to which the application of the Convention will extend by making a declaration to this effect either upon signature, ratification, acceptance, approval or accession or at any time thereafter. The content of Article 28 is reflected in the force of law provision of this Uniform Act.

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. The implementing act should thus not contain a provision related to this declaration.

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. The implementing act should thus not contain a provision related to this declaration.

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. A jurisdiction to which a declaration under Article 21 applies may include a provision in its implementing act which provides the declaration's content.

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. Jurisdictions should thus not include a provision with respect to Article 22 in their implementing act. 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.

Paragraph 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. The implementing act should thus not contain a provision related to this declaration.

The title of the act includes the year the Convention was adopted by the Hague Conference on Private International law. This additional information is needed to avoid any confusion with the *1965 Convention on the Choice of Court* which has a similar title to the 2005 Convention in English and an identical title to the 2005 Convention in French.

Interpretation

1. In interpreting the Convention, recourse may be had to the *Explanatory Report on the 2005 Choice of Court Agreements Convention*.

Comment: The Explanatory Report was prepared by Trevor Hartley & Masato Dogauchi and is available on the Hague Conference on Private International Law website. The purpose of this interpretation rule is to ensure that courts and parties will refer to the material set out in the provision before referring to 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*, Can. T.S. 1980 No. 37. The object of permitting judicial recourse to supplementary sources of interpretation is reflected in the observation of Justice La Forest in *Thomson v. Thomson,* [1994] 3 S.C.R. 551, at p. 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.

Section 1 is not intended to have the effect of excluding other possible sources of interpretation. It merely indicates the principal source to be used in interpreting the Convention. It is expected that over time other helpful resources will emerge.

[*Inconsistent Acts*

2. In the event of any inconsistency between this Act and any other Act, this Act prevails to the extent of the inconsistency.]

Comment: Legislation that is inconsistent with the act should be identified and amended to the extent of its inconsistency. If necessary, the act may contain the precedence rule set out by this provision; however, such a provision should be avoided as it 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. To avoid internal conflict, enacting jurisdictions should ensure that if an equivalent provision appears in other acts with which this act might potentially be inconsistent, those other acts should be amended to give precedence to this act.

Force of Law

Option A

3. The *2005 Convention on Choice of Court Agreements* set out in the Schedule has force of law in [*jurisdiction*] on the first day of the month following the expiration of three months after the notification by Canada of a declaration extending the application of the Convention to [*jurisdiction*] in accordance with subparagraph 31(2)(b) of the Convention.

Option B

3. The *2005 Convention on Choice of Court Agreements* set out in the Schedule has force of law in [*jurisdiction*].

Comment: The force of law provision gives force of law to the entire Convention. 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.

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 legislation governing evidence 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 the jurisdiction in question.

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 subparagraph 31(2)(b) between the deposit by Canada of 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 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.

Option A is also useful when a jurisdiction has legislation that provides for the repeal of legislation that is not in force within a certain period of time. Option A would thus allow the jurisdiction to bring its implementing act 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.

Each jurisdiction should ensure that its act is in force when the Convention starts applying to it at international law (see the comment accompanying the commencement provision). Where this has not been possible and the Convention starts applying to the jurisdiction at international law before the act comes into force, option A should not be used as it may raise issues with respect to the retroactive effect of the Convention. In

such a case, it would be expected that the act would be brought into force as soon as it had been adopted and so option B would be used.

A jurisdiction selecting option A of both the force of law and the commencement provisions should note that this approach is not entirely transparent: on the face of the act it is not apparent if the Convention has started applying to the jurisdiction at international law. 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 act. The publication of the notice in the jurisdiction's official publication or the inclusion of the application date in its act must not be a condition precedent to the application of the Convention.

The wording of option A can be limited to referring to subparagraph 31(2)(b)of the Convention which prescribes the mechanism for calculating the date on which the Convention starts applying to the jurisdiction internationally:

> **The *2005 Convention on Choice of Court Agreements* set out in the schedule has force of law in [*jurisdiction*] from the date determined in accordance with subparagraph 31(2)(b) 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 the Convention already applies to the jurisdiction at international law. Paired together, option B of this section and option B or C of the commencement provision 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 act into force on the day on which the Convention applies to their jurisdiction at international law. They should communicate with Justice Canada to coordinate these events.

[*Application of Convention*

4. In accordance with Articles 21 and 32 of the Convention, the Convention shall not apply to [*description of matter to which Convention shall not apply*].]

Comment: The declarations permitted by the Convention are described in the introductory 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 those that narrow or widen the scope of application of the Convention such as the declaration permitted by Article 21 which narrows the Convention's scope.

[*Minister Responsible for the Administration of the Act*

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

Comment: Specifying which minister is responsible for the administration of an act in the act depends on the practice of jurisdictions.

[*Binding on Crown/Government/State*

6. This Act is binding on the [Crown/Government/State [of *jurisdiction*].]

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 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.

If a jurisdiction's interpretation legislation already provides that the Crown/Government/State is bound unless otherwise stated in the particular act, there is no need to include this provision.

Commencement

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

7. 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

7. 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 the day on which the Convention applies to jurisdiction

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

Comment: There is a need to ensure that the Convention has force of law in the implementing jurisdiction when it starts applying to the jurisdiction at international law. The force of law and commencement provisions offer options which help avoid issues linked to coordinating the occurrence of these two events.
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 of the force of law provision so that the Convention will only have force of law on the day on which it applies to the jurisdiction at international law.

- Option A combined with option A of the force of law provision 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 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 the force of law provision, jurisdictions selecting this option should publish the date on which the Convention starts applying to their jurisdiction.

Under option B, the jurisdiction must proclaim its act on the same day that the Convention applies to the jurisdiction at international law.

- 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 force of law provision
- A jurisdiction that adopts this approach faces some risk. If the date on which the Convention will apply to the jurisdiction is not yet known, the jurisdiction 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 the force of law provision, a jurisdiction may choose option B if 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 force of law provision 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 at international law.

- This option would be combined with option B of the force of law provision.

- Enacting jurisdictions can select this option if the day on which the Convention will apply to their jurisdiction is known at the time of the adoption of the act.

Schedule [*Insert the full text of the Convention. It is available on the treaty depositary's website at: https://verdragenbank.overheid.nl/en/Verdrag/Details/011343/011343_Gewaarmerkt_0.pdf*]