ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

UNIFORM ACT TO IMPLEMENT THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (2020)

As adopted – February 1, 2020

Uniform Act to Implement the United Nations Convention on the Assignment of Receivables in International Trade (2020)

Comment: This Uniform Act implements the *United Nations Convention on the Assignment of Receivables in International Trade* which promotes the movement of goods and services across national borders by facilitating increased access to lower-cost credit.

The present Uniform Act is drafted 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). The Uniform Assignment of Receivables in International Trade Act (2007) was withdrawn by the ULCC with the adoption of this Uniform Act.

The authors of the ULCC Pre-implementation Report of August 2005 recommended that implementation of the Convention be accompanied by complementary conforming amendments to the existing provisions of the personal property security acts (PPSA) and the *Civil Code of Québec* governing choice of law rule for priority in intangibles and mobile goods. This is no longer necessary in view of the recommendation of the Working Group on the Assignment of Receivables in International Trade Act, based on intervening developments, to limit the application of the Convention choice of law rule to receivables transactions within its territorial and subject matter scope. The 2005 Pre-Implementation Report also recommended conforming amendments to the PPSAs and Civil Code to bring them into line with the Convention rules on the effects of contractual anti-assignment clauses. While the Working Group supported this recommendation as a desirable general reform, it did not think it was necessary to tie their timing to the implementation of the Convention. For a more detailed explanation of both these points, see the Report of the Working Group.

Articles 23, 35, 36, 37, 39, 40, 41 and 42 of the Convention permit declarations that may be deposited by a Contracting State at the time of ratification, accession, acceptance or approval of the Convention or anytime subsequently. An enacting jurisdiction will have to indicate to Justice Canada whether Canada shall make for that jurisdiction any of the declarations permitted by the Convention. If a declaration authorized by Article 23, 36, 37, 39, 40, 41 or 42 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 35 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, accession, acceptance or approval or at any time thereafter. The content of Article 35 is reflected in the force of law provision of this Uniform Act.

Paragraph 23(3) allows a state to deposit a declaration to identify any preferential right arising by operation of law that would have priority over the rights of an assignee in insolvency proceedings. The purpose of such a declaration would be to provide greater transparency for other States as to the application of the Convention in Canada.

Article 36 supplies rules for identifying the particular territorial unit in which a person is located within a federal State where, under the rules of the Convention, that person is located in that State. However, States are allowed to specify by declaration other rules for determining the location of a person within that State. For such a declaration, the appropriate reference to the specific legislation of the enacting jurisdiction should be communicated to Justice Canada. The Working Group has recommended that the question of the appropriateness of declarations under this Article be considered by a ULCC Secured Transactions Working Group as part of the larger question of reforming and harmonizing PPSA and Civil Code choice of law rules governing the perfection or publication and priority of security rights in intangibles and mobile goods. An adapted version of any reforms to the existing domestic location rules that emerge from that process could be extended to transactions within the scope of the Convention through the vehicle of a declaration.

Article 37 provides that a reference in the Convention to the law of a State means, in the case of a federal State, the law in force in the relevant territorial unit. For example, Article 22 of the Convention provides that the law of the State where the assignor is located governs issues relating to the priority of the assignee’s rights. Applied to a Canadian context, the effect of Article 37 is to clarify that the governing law is the law of the province or territory within Canada in which the assignor is located. However,

Article 37 allows a State to specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State. As to the appropriateness or desirability of such a declaration, the comments made on the equivalent point in the context of declarations under Article 36 above also apply here.

Article 39 allows States to opt out of the independent conflict of laws regime in Chapter V of the Convention (the Chapter V regime is "independent" in the sense that it supplies the general conflicts regime for assignments of receivables, whether or not the transaction falls within the scope of the Convention.) The ULCC Pre-implementation Report of August 2005 recommended that Canada not opt out of Chapter V. However, as a result of the recommendation of the Working Group to limit the choice of law rule for priority in Article 22 of the Convention to receivables transactions within the scope of the Convention, it is now recommended that an opt out declaration be made. Otherwise, the choice of law rule for priority in Chapter V, by virtue of its "independent" application, would apply to assignments of receivables outside the scope of the Convention, contrary to the recommendation of the Working Group to minimize the impact of the Convention choice of law rule on the general PPSA and Civil Code conflicts rules.

Article 40 authorizes a State to declare at any time that it will not be bound by Articles 9 and 10 of the Convention where the debtor on an assigned receivable is a governmental entity or other entity constituted for a public purpose. Articles 9 and 10 render ineffective an anti-assignment clause contained in contracts generating ordinary trade-type receivables. Article 40 was introduced in response to the practice of some States of restricting the assignability of debts owing by the government through the device of a contractual anti-assignment clause, particularly in the procurement context. According to the Working Group, in Canada, as in most States, restrictions on the assignability of government and other public debts are effected through statutory rather than contractual prohibitions or restrictions. Since paragraph 8(3) of the Convention preserves the operation of statutory restrictions on assignments, the Working Group did not foresee a need for a declaration under Article 40. Of course, it may be that governmental practices in particular jurisdictions warrant a different conclusion.

Article 41 allows a State at any time to declare that the Convention does not apply to the specific types of assignment or to the assignment of specific categories of receivables described in the declaration. The Working Group was not able to conceive of any examples that warranted such an exclusion.

Article 42 allows a State to declare that it will be bound by one of the three sets of substantive priority rules set out in the Annex to the Convention. For the reasons set out in the ULCC Pre-implementation Report of August 2005, no declaration is recommended.

Interpretation

1. In interpreting 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, *Yearbook of the United Nations Commission on International Trade Law, 201*, vol. XXXII, (New York: UN, 2003) (Doc. NU A/CN.9/SER.A/2001); 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).**

Comment: At the time of adoption of this Uniform Act by the ULCC, the Commission had not adopted an official commentary for the Convention. Enacting jurisdictions should verify whether an official commentary has been adopted by the Commission and update the reference in clause 1(a) to the corresponding document accordingly.

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 other helpful resources will emerge. In particular, over time UNCITRAL's Case Law on UNCITRAL Texts (CLOUT) will provide a useful source for the evolving jurisprudence on the Convention from the courts in all Contracting States.

[*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.1 - In cases where Canada has acceded to the Convention and the Convention is already applicable to Canada, jurisdictions can enact:

3. The *United Nations Convention on the Assignment of Receivables in International Trade* set out in the Schedule has force of law in [*jurisdiction*] on the first day of the month following the expiration of six months after the receipt by the depositary of the Convention of a notification by Canada of a declaration to extend the application of the Convention to [*jurisdiction*] in accordance with paragraph 43(3) of the Convention.

Option A.2 - In all other cases, jurisdictions can enact:

3. The *United Nations Convention on the Assignment of Receivables in International Trade* set out in the Schedule has force of law in [*jurisdiction*] from the date determined under paragraph 43(3) of the Convention.

Option B

3. The *United Nations Convention on the Assignment of Receivables in International Trade* 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 main options with respect to the force of law provision with option A subdivided further into sub-options A.1 and A.2. Each jurisdiction should determine which option is the most appropriate. Because of the possible short period of time set out in Article 43 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.

Sub-option A.1 reproduces in full the mechanism for calculating the date on which the Convention would start applying to the jurisdiction internationally. As indicated above, this sub-option can be selected when, at the time of enactment, Canada has acceded to the Convention and the Convention is already applicable to Canada (i.e. when the depositary will be receiving the notification of the declaration extending the application of the Convention to the enacting jurisdiction after the Convention has become applicable to Canada internationally).

Sub-option A.2 refers to paragraph 43(3) of the Convention. The reader of the Act would need to refer to the text of the Convention to calculate the date on which the Convention would start applying to the jurisdiction internationally. Sub-option A.2 would have to be selected by a jurisdiction that enacts its implementing act before the Convention applies to Canada internationally because the period after which the Convention would apply to the jurisdiction would not be known at the time of enactment. The period is different if a declaration is deposited: (1) before the convention enters into force internationally; (2) with a state's instrument of ratification, accession, acceptance or approval when the Convention is not yet in force internationally; (3) with a state's instrument of ratification, accession, acceptance or approval when the Convention is in force internationally or (4) after the deposit of the state's instrument but before the convention starts applying to it internationally. In any of these situations, it would not be possible to set out the period after which the Convention would apply to the jurisdiction in the force of law provision because the time of deposit of a declaration is generally not known at the time of enactment of the act.

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 unproclaimed legislation 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.

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 officials to coordinate these events.

[*Application of the Convention*

4. Chapter V of the Convention does not apply in [*jurisdiction*].]

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, if a declaration is made by Canada in relation to a jurisdiction under Article 39 of the Convention, it might be advisable to reflect its content in the act, since it narrows the scope of application of the Convention.

[*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 receivables transactions otherwise within its scope whether or not they involve governmental entities. This is subject to the preservation of statutory limitations on assignability and the special declaratory power with respect to anti-assignment clauses mentioned in the introductory comment. Section 6 merely confirms this.

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://treaties.un.org/doc/Treaties/2001/12/20011212%2001-35%20PM/Ch_X_17p.pdf]