



UNIFORM LAW CONFERENCE OF CANADA

***UNIFORM ACT TO IMPLEMENT THE UNITED NATIONS  
CONVENTION ON THE USE OF ELECTRONIC  
COMMUNICATIONS IN INTERNATIONAL CONTRACTS  
(2020)***

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For more information, please contact  
[info@ulcc-chlc.ca](mailto:info@ulcc-chlc.ca)

**Uniform Act to Implement the United Nations Convention on the Use of Electronic Communications in International Contracts (2020)**

**Comment:** This Uniform Act implements the *United Nations Convention on the Use of Electronic Communications in International Contracts*. The Convention facilitates the use of electronic communications by answering some frequently asked questions, such as: where are the parties to the contract? How does one deal with a legal requirement that a document be in writing or signed or in original form? What is the nature of an offer made to the world online? When are electronic messages sent and received?

The ULCC adopted the Uniform Electronic Communications Convention Act in 2011. 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 2011 act, it is addressed at jurisdictions that have not adopted that act. The 2011 act was withdrawn by the ULCC with the adoption of this act.

The Uniform 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 electronic communications. That set of uniform acts includes the Uniform Electronic Commerce Act, which implements the *United Nations Model Law on Electronic Commerce*, and the Uniform Electronic Evidence Act.

Articles 18, 19 and 20 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.

Article 18 is a standard provision in private international law conventions. It allows federal states to identify by declaration 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 18 is reflected in the force of law provision of this Uniform Act.

While each province or territory can technically propose its own declarations under Article 19 and 20, it would be preferable for declarations to be standardized. 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. The following describes the declarations permitted by Articles 19 and 20 and explains why they are not recommended.

Article 19 allows two declarations. Paragraph 19(1) allows any Contracting States to declare that it will apply the Convention only when the states of both parties are Contracting States, or when the parties have agreed that the Convention will apply. Canada should not make a declaration under paragraph 19(1). The general language of application is satisfactory, and leads to a broader application of the Convention. Similar language is found in the *United Nations Convention on Contracts for the International Sale of Goods* (CISG). Canada originally made such a declaration under the CISG with respect to British Columbia, but later withdrew the declaration when British Columbia changed its implementing statute on the point.

Through the use of paragraph 19(2) of the Convention, Canadian jurisdictions can exclude from its application any of its domestic exceptions, either because they think the exceptions are right in principle for international as well as for domestic transactions, or just to keep the laws applicable to domestic and international transactions consistent. The commercial law exclusions of the Uniform Electronic Commerce Act are pretty accurately covered by the Convention's exclusions. No additional exceptions are needed.

The Convention extends its rules to communications about international contracts governed by other conventions. Article 20 spells out six United Nations conventions that fall into that category: two to which Canada is a party – the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the CISG – and four to which it is not yet a party. Applying the Convention to the interpretation of these conventions says that the use of electronic communications in association with contracts that they govern will be understood as in the Convention. This is a very useful means of encouraging the legally effective use of e-communications. The Convention goes further to apply similarly to international contracts governed by any other international

convention to which a Contracting State to the Convention is now or later becomes a party.

The declarations under paragraphs 20(2), (3) and (4) essentially permit Contracting States to have a general rule accepting the Convention's rules for other conventions except as specified, or a general rule rejecting the Convention's rules for other conventions except as specified. In short, a Contracting State may apply the Convention to whatever other conventions it chooses.

Canadian experience with generally applicable domestic legislation with similar provisions to those of the Convention have not produced any problems in the decade since that legislation was first adopted. There is no reason to fear that allowing similar uses of e-communications for international contracts governed by other conventions will create issues either. Canada should make no declarations under Article 20, so that the Convention will apply to contracts under all other conventions to which Canada is a party – though the number of such conventions affecting international contracts may not be large. Declarations under this article can be made at any time, so if problems arise they can be addressed at that time.

### ***Interpretation***

**1. In interpreting the Convention, recourse may be had to the *Explanatory Note on the United Nations Convention on the Use of Electronic Communications in International Contracts* published by the United Nations Commission on International Commercial Law.**

**Comment:** The Explanatory Note was prepared by the UNCITRAL Secretariat and is available on its 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 for 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 Use of Electronic Communications in International Contracts 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 extending the application of the Convention to [jurisdiction] in accordance with paragraph 21(3) of the Convention.**

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

**3. The *United Nations Convention on the Use of Electronic Communications in International Contracts* set out in the Schedule has force of law in [jurisdiction] from the date determined in accordance with paragraph 21(3) of the Convention.**

*Option B*

**3. The *United Nations Convention on the Use of Electronic Communications in International Contracts* 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 short period of time set out in paragraph 21(3) between the deposit by Canada of a declaration extending the application of the Convention to the jurisdiction and the application of the Convention 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 21(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. For a declaration deposited before the Convention applies to Canada, the period would be six months from the deposit of the declaration if the declaration accompanies Canada's instrument of accession. For a declaration deposited after the instrument of accession but before the Convention has become applicable to Canada internationally, the time will be the remainder of the six months calculated from the date of deposit of the instrument of accession. For a declaration deposited after the Convention applies to Canada internationally, the period would be six months from the date of the receipt by the depositary of the notification of the declaration.

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.

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.

***[Minister Responsible for the Administration of the Act]***

**4. 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]***

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

**Comment:** 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 a provision stating that it is bound.

***[Regulations]***

**6. The *[name of regulation-making authority]* may make regulations for carrying out the purposes of this Act.]**

**Comment:** Jurisdictions should consider whether regulation-making powers are needed before providing for them in the act. Regulation-making powers should be clearly expressed and should be no broader than is necessary.

***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 adopting the Uniform Act 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/Publication/UNTS/Volume%202898/Part/volume-2898-I-50525.pdf>]