APPENDIX G

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Canada's place in the private international legal order

Canada's competitiveness in international trade depends on its participation in the private international legal regime.

This can be achieved by step-by-step adoption of existing and future conventions.

This in turn requires dedicated action on the part of several jurisdictions.

SUMMARY

[1] Governments and businesses wish to help make Canadian business competitive in foreign trading. A certain and acceptable legal regime for such trade is part of what makes business competitive.

[2] Provincial and territorial action is often needed for Canada to become a party to international conventions on commercial or personal matters.

[3] Governments should agree to a concerted effort to implement conventions for which the Uniform Law Conference has adopted or will adopt enacting legislation.

[4]Issue: How can Canada improve its participation in international legal regimes on private law matters?

[5]Proposal: The federal, provincial and territorial governments should commit themselves bringing forward regularly legislation to implement international conventions for which the Uniform Law Conference of Canada has prepared harmonized statutes from time to time.

[6]Background: Governments and businesses in Canada frequently note that the country relies increasingly heavily on foreign trade and the movement of people into and out of the country. Only in the past decade, however, has Canada begun to participate in the legal regimes created to provide a framework of certainty to the commercial and personal relations created by this trade and this mobility.

[7] A number of international organizations strive to create these legal regimes, which may be substantive rules or merely rules to determine which national law applies to particular situations. Among these organizations are the United Nations (especially the U.N. Commission on International Trade Law), the Hague Conference on Private International Law, the Institute for the Unification of Private International Law (Unidroit) and the Organization of American States.

[8] After a decade, Canada's participation is at best partial. Canada is a party to the United Nations Conventions on foreign arbitral awards and on the international sale of goods; to the Hague Conventions on child abduction, the service of documents abroad, and the recognition of trusts; and to the Unidroit Convention on the form of an international will. In addition, Canada has a bilateral treaty with the United Kingdom on the enforcement of judgments.

[9] One barrier to greater participation is that on many private law matters, provincial and territorial implementation is needed for constitutional reasons. Moreover few of the conventions attract a great deal of attention in themselves. The cumulative effect of adhering to them is usually much greater than the need to join any particular one. This is not to understate the competitive advantage of being part of modern international law, but this advantage may be hard to quantify when one is drawing up legislative agendas.

[10] The best way to improve Canada's international legal situation appears to be to plan to bring forward implementing legislation regularly, without waiting for public attention to particular conventions. Governments can be guided to some extent by the decisions of the Uniform Law Conference, which consults each jurisdiction and the private Bar in preparing its harmonized implementing legislation.

[11] The ULC in turn relies a good deal on the Minister of Justice's Advisory Group on Private International Law, which solicits the views of regional representatives for the Department of Justice (Canada) on forthcoming and current conventions. This is a reliable screen for a threshold of importance for the Conventions offered.

[12] In addition, Ministers or Deputy Ministers of Justice may ask the Uniform Law Conference to focus on conventions or other international matters that appear to be important.

[13] The work of the ULC therefore substantially reduces the work that any province or territory would have to do itself to implement a Convention. (The Department of Justice is also willing to provide expert advice, as it does to the ULC.)

[14] A few years ago Alberta made even shorter work of the process by combining implementing legislation for three Conventions in its International Conventions Implementation Act, R.S.A. c.I-68.

[15] A list appears below of some of the main conventions now available or shortly to be available for implementation. The case for harmonization is strong:

* first, the federal government will often not ratify a Convention without a significant number of jurisdictions on side, where provincial and territorial implementation is needed;

* second, it is confusing for foreigners to deal with Canada if the legal system is fragmented and hard to predict;

* it is also confusing for Canadians to know their rights in dealing with foreigners, when those rights vary from province to province. Enterprises that carry on business in more than one province are particularly hard hit with this

problem. In short, Canada's legal ability to bring most Conventions into force gradually does not mean that piecemeal lawmaking is desirable.

[16] This proposal covers conventions on which uniform implementing legislation is now available, and conventions that may in the future be the subject of uniform statutes.

current Conventions

Hague Convention on Intercountry Adoption

[17] This Convention was approved by the Hague Conference in 1993; a uniform statute was adopted by the ULC the same year. It provides procedures for adopting children between member states, with a view to protecting the best interests of the children and to ensuring the certainty of the legal relations that result from the adoption.

[18] Five provinces have passed the implementing legislation: Saskatchewan, Prince Edward Island, British Columbia, New Brunswick and Manitoba. In some provinces adoption legislation is the responsibility of a social services department. Deputy ministers responsible for Justice are encouraged to support implementation of the Convention with their colleagues and where legal advice is sought, to support study and approval of the Convention. Canada has now ratified the Convention for the provinces that have passed the legislation.

Unidroit Convention on Financial Leasing

[19] This Convention was adopted in Ottawa in 1988. It governs the relations between an equipment supplier, a financier who buys the equipment and leases it to someone who needs financing to acquire it, and the lessee. The rights between the lessee and the supplier are particularly important, as in many systems of law no direct or enforceable legal relationship exists.

[20] Uniform legislation was approved by the ULC in 1995. Canadian business does engage in some international financial leasing. Much of it is with the United States, which has a similar legal system. However, many Canadians find their American partners unwilling to contemplate any other law but their own. The Convention can

provide a compromise between the national laws of the parties. Where financial leasing is used to fund third-world purchases of development equipment, as it often is, then having clear and acceptable legal rights is even more important.

Unidroit Convention on Factoring

[21] International factoring involves a financier (the factor) buying accounts receivable from a client, generally at a discount to offset risk of non-recovery and to provide a profit for the factor. This Convention was adopted in Ottawa in 1988 as well. It deals with several aspects of the relationship between factor and client (often third-world countries). One of its main terms prohibits attempts to ban assignment of the account to a third party.

[22] The ULC has adopted implementing legislation. International factoring is rare in Canada. Implementing this Convention would probably be worth while only in conjunction with the Leasing Convention and in the context of a general adherence of Canada to international legal regimes. No one opposes it, but the main benefit may be symbolic.

Hague Convention on Recognition of Trusts

[23] This Convention was adopted by the Hague Conference in 1984. It provides means by which countries that do not have trusts in their law, such as civil law countries, can recognize the legal effect of trusts made in common-law countries. The Convention is in force among five countries: Italy, Malta, Australia, United Kingdom and Canada. Seven provinces have implemented it: Ontario, Quebec and Nova Scotia and the territories have not.

[24] Ontario's tardiness grows out of a recommendation by the Canadian Bar Association - Ontario that the province should wait and see if problems develop in recognizing trusts as among common-law countries. Few if any other commentators have shared that concern. It is too early in the life of the Convention to know for sure whether the concern is justified.

Uniform Foreign Money Claims Act

[25] While this statute is not strictly speaking a matter of private international law, it promotes just results in enforcing legal obligations involving Canadian transactions outside Canada. As a result, it is properly the subject of the present proposals.

[26] The Uniform Foreign Money Claims Act changes and codifies the practice for converting an obligation expressed in foreign currency into Canadian currency in a judgment.

[27] Present law in much of Canada requires the conversion to be made at the time the obligation to pay arose - the "date of breach" rule. This rule was founded on English case law that was reversed by the House of Lords in 1976. Canadian courts have wavered since that time but have not clarified the law. As a result, most Canadian law is uncertain.

[28] Ontario legislated on foreign money claims in 1984, with the result that conversion occurs at the date of payment in most cases. Prince Edward Island has similar legislation.

[29] The B.C. Law Reform Commission urged reform on these lines in 1983. The American counterpart of the Uniform Law Conference adopted a uniform statute in 1990 with the same rule as the ULC agreed to in 1989. In short, the change will not be controversial, and the certainty and uniformity of the law will be welcome.

[30] A number of factors urge harmony among Canadian jurisdictions on this topic:

* foreign-money claims have greatly increased as a result of the growth of foreign trade and the parallel expansion of foreign exchange and international banking transactions.

* values of foreign currencies as compared to the Canadian dollar fluctuate much more over shorter periods than was formerly the case.

* Canadian jurisdictions treat recoveries on foreign money claims differently from many of our trading partners.

* A lack of uniformity among Canadian jurisdictions stimulates forum shopping and creates a lack of certainty in the law.

[31] The Uniform Act is only three sections long. The Ontario and PEI provisions on the subject are a single section with five subsections. Drafting is not a problem.

forthcoming Conventions and model laws

Hague Convention on the law applicable to Successions

[32] The Hague Conference adopted this Convention in 1988 to unify the law that applies to an estate that owns assets in different countries. It is not yet in force internationally. The federal government has consulted the provinces and territories and has not found opposition to its implementation. The Canadian Bar Association - Ontario supported this Convention. To date the ULC has not dealt with it.

United Nations Model Law on Electronic Commerce

[33] The U.N.'s Commission on International Trade Law (UNCITRAL) has adopted a model law to harmonize the effect of electronic international commerce. The text deals with the legal effect of electronic signatures, the concept of "original" electronic documents, the law of evidence, and the relationship between sources and communicators of electronic commercial messages. The Commission adopted the model law in June 1996.

[34] While a model law does not need to be adopted as a whole - it can serve as a guide to best practices, for example - the ULC will examine it for Canadian purposes. Much of it seems likely to be very helpful to Canadian business, not only for international commerce but for internal trade too.

Draft Canada-France Convention on enforcement of judgments

[35] Canada and France have recently negotiated a convention on the enforcement

of judgments and mutual legal assistance in recovering maintenance payments. In addition, the Convention applies to many kinds of judgment other than those for money.

[36] The Convention is important for those with commercial or personal relationships in both countries. It also gives Canadians with assets in France some protection against the enforcement in that country of judgments from other European Union countries, where those judgments may have been given without a basis for jurisdiction that would be recognized in Canada. The Canada-U.K. Convention contains such a provision.

Draft Hague Convention on the Protection of Children

[37] This Convention has been the subject of work over the past several years at The Hague. It is due for adoption in the fall of 1996. The provinces and territories have been consulted about Canada's position in the technical discussions leading up to its adoption.

[38] The Convention deals with the right or duty of one country to protect a foreign child within its territory, with the consequences of the child's legal status, and the care of the child's property.

Enforcement of foreign judgments

[39] One of the most pressing concerns in the field today is how foreign civil judgments are to be enforced here. This concern arises for three reasons:

i) the increase in foreign trade, for example under NAFTA, requires greater certainty in how legal rights are to be enforced. Current law in most provinces is old common law.

ii) the *Morguard* decision in the Supreme Court of Canada in 1990 made the enforcement of Canadian judgments within Canada very easy. ([1990] 3 S.C.R. 1077) Several courts have been applying similarly relaxed standards in enforcing foreign judgments. Many private lawyers are seeking more

assurances about the rights of their clients when they are sued abroad: how safe is it not to appear and defend? Traditional answers seem unreliable now.

iii) there is a risk of unfairness if Canadian courts will enforce foreign judgments readily, but foreign courts will not readily enforce Canadian judgments. This puts Canadians at a disadvantage in their foreign dealings.

[40] The Uniform Law Conference has adopted uniform legislation on enforcing Canadian judgments and for determining the jurisdiction of Canadian courts over their civil cases. The final aspect of this subject is the enforceability of foreign judgments. Work has begun on this topic as of 1996.