

Report on Private International Law 1996

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INTRODUCTION

Since the last meeting of the Uniform Law Conference, the Department of Justice continued its efforts toward harmonizing and achieving uniformity in private international law. The following pages summarize our activities within international organizations such as the Hague Conference on Private International Law, Unidroit and the United Nations Commission on International Trade Law (UNCITRAL) as well as regional organizations such as the Organization of American States (OAS) in addition to our activities at the bilateral level.

The Department of Justice consults regularly with the provinces and the territories, with other interested federal Departments, and with the private sector on various conventions adopted by these organizations and on instruments being developed under their auspices. The Department of Justice also benefits from the views expressed by its Advisory Group on Private International Law.

ADVISORY GROUP ON PRIVATE INTERNATIONAL LAW

The Advisory Group on private international law provides the Department of Justice with close and continuing guidance in matters of provincial interest that are under consideration

by organizational organizations or as part of bilateral activities in which Canada is involved. The Group is presently composed of five provincial representatives: one from Saskatchewan representing Manitoba, Alberta, and Saskatchewan; one from Prince Edward Island representing the Atlantic provinces; and one from each of British Columbia, Ontario and Québec. A private practitioner representing the International Law Section of the Canadian Bar Association also participates in the Group as an observer.

The Group met on one occasion since last August in November 1995 and held a conference-call in June 1996. The discussions gave rise to a very productive exchange of views on various private international projects and conventions.

CIVIL JUSTICE COMMITTEE

The Civil Justice Committee, which is composed of provincial, territorial, and federal representatives that report to the Deputy Ministers of Justice, was very active last year in promoting private international law activities, in particular in the field of recognition and enforcement of judgments. As a result, more visibility was given to the work of the Uniform Law Conference in that area as well as to the recommendations aimed at possible law reform in the aftermath of the Department of Justice Law Reform Project.

STATUS CHART OF CANADIAN ACTIVITIES IN PRIVATE INTERNATIONAL LAW

In an effort to better inform provinces, territories and interested groups on developments in private international law in Canada, the Department of Justice of Canada prepares a Status Chart of Canadian Activities in Private International Law. This Chart is intended to give updated information on conventions in private international law to which Canada is a party or to which it is currently considering acceding. A copy of the Status Chart is attached.

LATEST DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW

The main event of the past year was the signing on June 10, 1996, of the *Convention between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Assistance in Maintenance*.

The text of the Convention, the negotiations of which started in 1994, was finalized at the last negotiations session that was held in May 1996.

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law, of which forty-three States are members, organized three meetings this year. A member since 1968, Canada participated in the following activities: the third meeting of the Special Commission on the revision of the Convention on the Protection of Minors from September 11 to 22, 1995; the Special Commission on Maintenance Obligations from November 13 to 17, 1995; and the Special Commission on the question of the recognition and enforcement of foreign judgments in civil and commercial matters from June 4 to 7, 1996.

Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption

The Hague *Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, which was finalized on May 29, 1993, came into force on May 1, 1995. It now applies to Burkina Faso, Costa Rica, Cyprus, Ecuador, Mexico, Peru, Poland, Spain, Romania and Sri Lanka. It will become applicable to the Philippines on November 1, 1996. Fifteen other States, including Canada, have signed the Convention: Brazil, Colombia, Finland, France, Ireland, Israel, Italy, Luxembourg, the Netherlands, Norway, Switzerland, the United Kingdom, the United States and Uruguay.

Canada's signing the Convention on April 12, 1994, was the first step in a process of having the Convention apply to Canada. Ratification by Canada in 1996 is under consideration since implementing measures have now been adopted in four provinces: British Columbia, Manitoba, Prince Edward Island, Saskatchewan. The ratification will proceed as soon as the required minor changes to the Immigration Regulations have been approved.

Decisions will have to be taken in the other jurisdictions on how to implement the Convention. Implementation will be facilitated thanks to the adoption by the Uniform Law Conference in 1993 of the *Uniform Intercountry Adoption (Hague Convention) Act*. Department of Justice officials along with other federal officials from the National Adoption Desk and the Department of Citizenship and Immigration have met with provincial authorities to follow up on the implementation process.

The Convention represents a satisfactory compromise between countries of origin and receiving countries in matters of adoption. It will increase the legal safeguards to guarantee that intercountry adoption takes place only when in the best interests of the child. It will establish a framework for State cooperation to ensure respect for those safeguards and will also provide for the recognition of adoptions made in accordance with the Convention. Overall, the Convention will add certainty and uniformity to the adoption process while allowing for flexibility and timeliness in its application. It is noteworthy that the Convention will change existing Canadian practices in the field of international adoptions.

Convention on the Law Applicable to Trusts and their Recognition

The *Convention on the Law Applicable to Trusts and their Recognition* seeks to make uniform conflict of law rules with respect to trusts and to solve problems associated with the recognition of trusts, particularly in civil law countries. It now applies to the Netherlands in addition to Australia, Canada, Italy, Malta, the United Kingdom and Canada, bringing the number of parties to six. It is worth noting that two such parties, Italy and the Netherlands, are civil law countries.

The Convention came into force for Canada on January 1, 1993, for those provinces which had adopted implementing legislation based on the Uniform Act adopted by the Uniform Law Conference in 1987, namely Alberta, British Columbia, New Brunswick, Newfoundland, and Prince Edward Island. Since then, Manitoba and Saskatchewan have passed the necessary implementing legislation. As a result, the Convention was extended to those provinces in

1994. Other jurisdictions have been encouraged to adopt necessary legislation with a view to having the Convention apply throughout Canada in the near future.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters

This Convention has been in force in Canada since May 1, 1989, and now applies in thirty-four States. It seeks to facilitate the service of documents by establishing certain rules for service of documents abroad and by establishing a system of Central Authorities in each jurisdiction to receive documents for service. It should be noted that the Central Authority system is not the only means of effecting service. Other means, including those used before the Convention came into force, such as the use of postal service, may be available if the State in which the documents are served recognizes them.

In Canada, Central Authorities have been designated in each province and territory. At the federal level, the Legal Advisory Division of the Department of Foreign Affairs and International Trade serves as the Central Authority and is monitoring the application of the Convention with the input of provincial and territorial Central Authorities. The rules of practice in all provinces and territories as well as at the federal level have been amended to comply with the Convention.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

This Convention, which is not yet applicable to Canada, applies to twenty-eight States, including Australia, the United Kingdom, and the United States. The purpose of the Convention is to facilitate the transmission and enforcement of letters rogatory by competent authorities through the establishment of Central Authorities in each State party to the Convention.

Consultation on the desirability of Canada's acceding to the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* was undertaken in 1990. So far, the implementation of this Convention has received the support of six jurisdictions while two provinces are still reviewing the matter. Three jurisdictions have not yet responded to our consultation and one has received clarification on questions regarding the impact of the Convention on existing rules. On the basis of discussions by the Advisory Group in 1994, it was concluded that, although the Convention would not be costly to implement in Canada, the advantages to Canada in acceding to it were far from clear. Contact has been made with the Canadian Bar Association to seek input from practitioners on the problems they face when attempting to obtain evidence abroad. The prospect of a possible new multilateral convention on judgments may also add some impetus on the need to consider acceding to the Convention.

A final consultation with a view to finalizing the Canadian position regarding possible accession to the Convention will be undertaken as soon as a response is received from the bar. There is no federal State clause in the Convention; therefore, the unanimous support of the provinces and territories for its implementation must be obtained in order for Canada to become party to it. It is worth noting that the implementation of the Taking of Evidence

Convention would supplement the application of the Service Convention already in force in Canada.

Convention on the Law Applicable to the Succession to the Estates of Deceased Persons

This Convention determines the law applicable to the estates of deceased persons where more than one State is concerned. The Convention's main feature is the principle of unity whereby the whole succession of an estate is governed by one law.

Canada actively participated in the negotiation of the *Convention on the Law Applicable to the Succession to the Estates of Deceased Persons*, which was adopted in 1988. Professor Donovan Waters from the University of Victoria was appointed Special Rapporteur and Professor Talpis from the Université de Montréal was the expert advisor to the Canadian delegation.

In 1994, consultation regarding possible support in Canada for the implementation of this Convention was suspended. Different positions had been expressed on whether Canada should become a party to the Convention: four jurisdictions expressed their support for the implementation of the Convention while others wished to consult with their local Bars or were not yet prepared to support the implementation of the Convention. In Ontario, the CBA-O Section on Trusts and Estates expressed support for the Convention. Further study of the Convention has been undertaken to answer questions raised as to its interpretation. Consultation may be reactivated pending decisions on work priorities in private international law matters.

Convention on the Civil Aspects of International Child Abduction

The *Convention on the Civil Aspects of International Child Abduction* was the first Convention of the Hague Conference ratified by Canada. It establishes procedures to ensure the prompt return of children wrongfully removed from their State of habitual residence or retained outside of that State. Each State party is required to establish a Central Authority to deal with requests for the return of abducted children or for assistance in the exercise of access rights. The Convention is in force in all provinces and territories.

As of June, 1996, forty-five States from almost all continents are party to the Convention. The most recent States to become party to the Convention are Colombia, Cyprus, and Zimbabwe: their accessions have yet to be accepted by Canada so as to have the Convention applied between them and Canada.

There is a Central Authority under the Convention in every province and territory within the Ministry of the Attorney General or the Department of Justice. The federal Central Authority is located in the federal Department of Justice. A transportation programme facilitates the repatriation of children who have been abducted by a parent; the programme operates throughout Canada and as well as internationally. The programme is coordinated by the R.C.M.P. Missing Children's Registry, in cooperation with the national airlines and Via Rail. A second meeting of all Central Authorities in Canada took place in Toronto in October 1995.

The Convention, which has been incorporated into Canadian law, has been invoked in several cases. The first of these cases to be heard by the Supreme Court is *Thomson v. Thomson*, [1994] 3 S.C.R. 551, in which the Supreme Court upheld an order for the return of a child illegally removed by his mother from Scotland to Canada.

The Hague Conference's Work in Progress

Revision of the 1961 Convention on the Protection of Minors

Canada participated in the third meeting of the Hague Conference Special Commission, held from September 11 to 22, 1995, which is mandated to review the 1961 *Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*. This project constitutes the priority item on the 1993-96 work programme of the Hague Conference with a view to submitting a revised Convention for the agreement of its member States at the Eighteenth Session in October 1996.

The task of the Special Commission was to address problems in matters related to the protection of the person and the property of the child in the context of conflicts of laws and jurisdiction. It is hoped that the revised Convention, unlike the 1961 Convention, will attract common law countries as parties. Consideration is also being given to the rights of the child as embodied in the 1989 *United Nations Convention on*

the Rights of the Child as well as to the relationship between the proposed revised Convention and other Hague Conventions affecting children's issues. As a result of the discussions of the September 1995 meeting, a more complete draft convention, tentatively entitled *Draft Convention on the Protection of Children*, was developed.

The draft Convention gives primary jurisdiction to the authorities of the State of habitual residence of the child to take measures directed at the protection of the person or property of the child. These authorities may on certain conditions, including when in the best interest of the child, transfer their jurisdiction to authorities of other States on the basis of subsidiary grounds. It also provides for the recognition and enforcement of such measures, such as custody orders, as well as for the establishment of cooperation among States' authorities in the application of such measures.

The draft will be reviewed and finalized at the Eighteenth Session of the Hague Conference to be held in October, 1996. The federal Department of Justice has undertaken a major consultation with interested authorities and organizations on the basis of relevant reports and material in order to prepare the Canadian position to be presented at the Eighteenth Session.

The Special Commission was also mandated to look into the matter of the extension of the revised convention to incompetent adults. For lack of time this task was not completed. As recommended by the June 1995 Special Commission on General Affairs and Policy, the drafting of a convention on the protection of incompetent adults could be considered as the second priority item of the next 1996-2000 work programme of the Hague Conference. A decision on the matter will be made by member States at the Eighteenth Session in October 1996.

Recognition and Enforcement of Foreign Judgments

A second meeting of the Special Commission was held from June 4 to 7, 1996, to study further the problems of drafting a new multilateral convention on the questions of jurisdiction and of recognition and enforcement of foreign judgments in civil and commercial matters. The meeting was held at the recommendation of June 1995 Special Commission of the General Affairs and Policy of the Hague Conference.

Discussions focused on the issues of *forum non conveniens* and the practice of awarding punitive damages. Canada, along with Australia, the United Kingdom and the United States, were asked to produce information documents on these questions. A number of additional points, such as the grounds for refusal of recognition and enforcement in connection with the possibility to review the original judgment, and the scope of application of the future convention, which were already covered at the first meeting of the Special Commission on Judgments that was held in June 1994, were also reviewed. The Conclusions of the Special Commission will be distributed once they are available.

The question of the recognition and enforcement of judgments in civil and commercial matters was studied by the member States of the Hague Conference as part of its 1993-1996 work programme. The Special Commission on General Affairs and Policy of the Hague Conference recommended that this work be continued with high priority within the next 1996-2000 work programme. Canada is supportive of this recommendation given that the project represents an opportunity to harmonize Canadian rules with principles of recognition and enforcement of judgments worldwide.

Law Applicable to Civil Liability for Environmental Damages

This project constitutes the third priority item on the current work programme of the Hague Conference. After having been briefly examined by the June 1995 Special Commission on General Affairs and Policy, it was recommended that the matter be kept on the agenda of the next work programme with a lower priority.

Special Commission on Maintenance Obligations

As part of the current work programme of the Hague Conference, a meeting of a Special Commission to review the application of existing conventions on maintenance obligations was held from November 7 to 11, 1995. These conventions are the 1956 and 1973 *Hague Conventions on the Law Applicable to Maintenance Obligations* and the 1958 and 1973 *Hague Conventions on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* as well as the 1956 *New York Convention on the Recovery Abroad of Maintenance* developed under the auspices of the United Nations.

Although Canada is not party to any of these conventions, it was represented at the meeting. Canada took this opportunity to distribute an information document prepared by the Ontario Reciprocity Office on the system of Reciprocal Enforcement of Maintenance Orders (REMO). The Special Commission recommended to the Eighteenth Session that other meetings of the Special Commission on Maintenance Obligations be convened and that a list of state authorities be prepared and forms be drafted to assist in the application of the

existing conventions particularly the 1956 New York Convention. Interested authorities have received the report of the Canadian delegate and will soon obtain a copy of the Conclusions of the Special Commission.

UNCITRAL

The United Nations Commission on International Trade Law is the "core legal body within the United Nations system in the field of international trade law" whose mandate is to further the progressive harmonization and unification of the law of international trade. The instruments chosen for fulfilling this mandate include conventions, model laws, uniform rules and legal guides.

The membership of UNCITRAL is limited at present to thirty-six States, structured so as to be representative of the various geographic regions and the principal economic and legal systems of the world. Members are elected for six-year terms by the United Nations General Assembly. Observers from States and international governmental and non-governmental organizations are welcome to participate at meetings of UNCITRAL and of its working groups which operate by consensus. Canada was a member of UNCITRAL from 1989 to 1995. Our term ended with the opening of the 28th session of the Commission in May, 1995, but Canada still participates in UNCITRAL as an observer.

The Commission currently has three working groups: the Working Group on International Contract Practices (ICP); the Working Group on Insolvency Law (formerly the Working Group on the New International Economic Order (NIEO)); and the Working Group on Electronic Commerce (formerly the Working Group on Electronic Data Interchange). Documents relating to Working Group projects and to the work of the UNCITRAL Secretariat and the Commission itself may be found at UNCITRAL's website at <http://www.un.or.at/uncitral/>.

UNCITRAL's Work in Progress

Working Group on International Contract Practices: Assignment in Receivables Financing

The Working Group on International Contract Practices is continuing to work on uniform rules in the area of assignment in receivables financing. The draft rules will be intended to facilitate such financing by removing uncertainty encountered in various legal systems as to recognition and effects of assignments in which the assignor, the assignee and the debtor are not in the same country. It has not yet been decided whether the result will take the form of a convention or model legislative provisions.

The project to develop uniform rules in the area of assignment in receivables financing arose from a suggestion made at the 1992 UNCITRAL Congress. Prior to the Commission's deciding to have a working group undertake work in the area, the Secretariat prepared background material in collaboration with Unidroit and other international bodies. The project touches on areas which arise in Unidroit's Factoring Convention and in the work

Unidroit is currently doing on secured interests in mobile equipment, particularly with respect to establishing an international registry of such interests. At its 28th session last year, the Commission mandated the Working Group on International Contract Practices to undertake the preparation of uniform rules on the subject.

To date, the Working Group has held two sessions, in November 1995 and July 1996. At its most recent session, the Working Group discussed many issues including: the question of the international assignment of domestic receivables, the extent to which private international law rules can be replaced with substantive law solutions, the feasibility of reliance on an approach which involves a registry or registries, coverage of "conditional" and "possible" receivables, and compatibility of the draft rules with national laws.

At the 29th session of the Commission (May 28 - June 14, 1996), it was not anticipated that the draft uniform rules on assignment in receivables financing would be completed in time for consideration at the 30th session of the Commission in May 1997. There will then likely be further sessions of the Working Group on the subject. The next one will be held in Vienna from November 11-22, 1996.

Working Group on Insolvency Law: Cross-border Insolvency

Trans- or cross-border insolvencies are those where the debtor has assets in more than one jurisdiction. In many cases, administrators are not able to deal effectively with the assets because of the great differences in insolvency legislation from one State to another and because of a lack of procedures to allow cross-border co-ordination of insolvency proceedings.

The Commission has determined that UNCITRAL should attempt to propose solutions to the practical problems caused by the lack of harmony among national laws on cross-border insolvency notwithstanding the failure of other international organizations to achieve results. In collaboration with INSOL, the Working Group on Insolvency Law has been preparing a legislative framework for judicial co-operation and for access and recognition in cross-border insolvencies. It is anticipated that the Model Legislative Provisions will be finished by the spring of 1997.

Working Group on Electronic Commerce: Digital Signatures and Certification Authorities

At its recent 29th session, the Commission renamed the Working Group on EDI after adopting the Working Group's draft Model Law. It is now the Working Group on Electronic Commerce, in keeping with the new Model Law on Electronic Commerce. Following discussion of several proposals for work in the area of EDI and electronic commerce, the Commission agreed that the Working Group should begin considering uniform rules in the area of digital signatures and certification authorities.

The issues to be examined at the next meeting of the Working Group, in February 1997, include: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use

of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.

Case Law on UNCITRAL Texts (CLOUT)

UNCITRAL has set up a system for collecting and disseminating information on abstracts of court decisions and arbitral awards relating to its conventions or model laws. Since the Commission's 28th session in May 1995, three additional sets of abstracts have been produced (document no. A/CN.9/SER.C/ABSTRACTS/7,8 and 9). The Commission has also prepared a thesaurus of the *United Nations Convention on Contracts for the International Sale of Goods*, that is, an analytical list of issues arising in the context of the convention. The Secretariat is preparing a thesaurus on the Model Law on International Commercial Arbitration.

Monitoring Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

In 1995, the Commission approved a project to monitor the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in conjunction with Committee D of the International Bar Association. To that end, the Secretariat has distributed to States a questionnaire relating to the legal regime governing the recognition and enforcement of foreign arbitral awards. Canada will be preparing its reply in collaboration with provincial authorities.

Recently Completed Projects of the Commission

Convention on Independent Guarantees and Stand-by Letters of Credit

The Convention on Independent Guarantees and Stand-by Letters of Credit was prepared by the Working Group on International Contract Practices and adopted by the Commission at its 28th session in May, 1995. The UN General Assembly then adopted the text and opened the Convention for signature by way of a resolution in December 1995. Canada must now consider whether to sign and ratify the Convention.

Model Law on Electronic Commerce

The Working Group on Electronic Data Interchange completed its draft rules on EDI in the form of a Model Law for submission to the Commission's 28th session in May, 1995. The Commission completed its review of the Model Law at its 29th session this year and renamed the text the Model Law on Electronic Commerce.

The Model Law aims to provide a legal framework for electronic commercial practices. We will begin broad consultations in the fall to determine if and how aspects of the Model Law should be implemented in Canada.

UNCITRAL Notes on Organizing Arbitral Proceedings

In 1993, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work on matters relating to arbitral proceedings. The UNCITRAL Secretariat prepared draft "Guidelines for Preparatory Conferences in Arbitral Proceedings" which the

Commission discussed and revised at its 27th session in 1994. Since then the Commission has considered the draft, now called *Notes on Organizing Arbitral Proceedings* at its sessions in 1995 and, most recently, in June 1996. The Commission endorsed the *Notes* with some revisions at this latter session and the final revised version should be available shortly. The Commission intends to distribute the *Notes* widely, including to arbitral institutions, chambers of commerce and relevant national and international professional associations.

The *Notes* have no legal effect and are not intended to impose any legal or other requirement. They simply aim to provide the actors in an arbitral proceeding with information to help avoid potential difficulties in the arbitration process. The *Notes* list and describe questions "on which appropriately timed decisions on organizing arbitral proceedings may be useful." Among the subjects covered are the arbitration rules to be used, the language of the proceedings, administrative considerations, communications, evidence and hearings.

Other Work of the Commission of Interest to Canada

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

The Convention provides a uniform system of rules for the international sale of goods and applies automatically to those contracts subject to it, although parties may choose to exclude its application by expressly stating so. While the Convention applies to contracts for the sale of goods, it excludes the sale of goods for personal use, sale by auction, judicial sales, and the sale of stocks, ships, aircraft or electricity. The provisions of the Convention deal with the formation of the contract and the rights and obligations of the seller and buyer. The Convention does not govern the validity of the contract or its terms, nor does it otherwise deal with the seller's liability.

The Convention came into force for Canada on May 1, 1992. At that time the Convention extended to all Canadian jurisdictions with the exception of the Yukon, which adopted implementing legislation in June, 1992. A declaration extending the Convention to the Yukon was deposited and took effect on January 1, 1993. Since British Columbia then amended its implementing legislation to repeal the provision

rendering Article 1(1)(b) of the Convention inapplicable there, a declaration withdrawing the declaration concerning Article 1(1)(b), made at the time of Canada's accession to the Convention, was deposited and took effect on February 1, 1993. The Convention now applies uniformly across Canada and as of May 1996 had 45 States party.

Convention on the Limitation Period in the International Sale of Goods (New York, 1974)

The United Nations *Convention on the Limitation Period in the International Sale of Goods* grew out of the work of UNCITRAL to unify international sales law. The resulting Convention, as amended by the 1980 Protocol, was intended to dovetail with the United Nations *Convention on Contracts for the International Sale of Goods* (Vienna, 1980). There is substantial similarity between the Conventions, in particular the Articles setting out the

sphere of application, declarations and reservations, the federal State clause, and the final clauses.

The purpose of the Limitation Convention is to eliminate disparities in the national laws governing limitations on the initiation of legal proceedings; these disparities create uncertainty and can create hardship both in cases where meritorious claims are statute-barred by a very short limitation period, and also where parties are left open to liability for an inordinately long time in jurisdictions with very long limitation periods.

The Convention is divided into four Parts, of which Part One, containing the actual limitation provisions, is the most important; it contains a very detailed scheme of substantive law. Parts Two, Three and Four deal with implementation, declarations and reservations, and final clauses, respectively. The Limitation Convention sets a standard four-year limitation period for commercial litigation.

As of May, 1996, there were twenty ratifications, accessions and successions, including our North American trading partners, Mexico and the United States (in force December 1, 1994). The Limitation Convention entered into force August 1, 1988. Now that the Vienna Sales Convention is in force for Canada, we will be seeking approval for a Canadian accession to the Limitation Convention and, eventually, uniform implementing legislation.

Convention on International Bills of Exchange and International Promissory Notes

The United Nations *Convention on International Bills of Exchange and International Promissory Notes* was adopted by the General Assembly of the United Nations on December 9, 1988. Canada participated in drafting the Convention, which will establish a new international regime based on a viable compromise between the common law and the civil law systems. Canada was the first country to sign this Convention; the United States and the USSR (now succeeded by the Russian Federation) have also done so. Guinea and Mexico have acceded to it. The Convention will come into force after ten ratifications or accessions. In order to implement it in Canada, federal legislation would be required.

The Convention is the result of nearly 20 years of work by UNCITRAL to devise a unifying law for international bills and notes. It addresses and regulates a number of complex and difficult issues such as the rights of a holder of a bill or note; forged endorsements; fraud, theft; guarantors; presentment for payment and non-acceptance; notice of dishonour and discharge. Many of the issues regulated by the Convention were treated differently in the various legal systems. When the Convention comes into force, it will therefore introduce more predictability for financial institutions and businesses who use these methods of payment for international transactions.

Model Law on Procurement of Goods and Construction

This subject is considered important by developing States who often perceive their access to markets in developed States as being unnecessarily limited by governmental procurement practices, in particular. The Department of Justice participated very actively in the work on procurement and consulted with federal and provincial departments and with industry as the work progressed in the UNCITRAL Working Group on the NIEO. The Model Law was

submitted to the Commission at its 26th session in Vienna in July, 1993, when it was reviewed, amended and adopted. The UN General Assembly has adopted a resolution urging States to adopt it.

The Model Law is intended to serve as a model law to countries for the evaluation and modernization of their procurement laws and practices and for the establishment of procurement legislation. Basically, it provides for all the essential procedures and principles for conducting procurement proceedings in a transparent and equitable manner. On Canada's initiative, the text was prepared keeping in mind the provisions of the GATT and Article 3 ensures paramountcy of the latter (as well as the WTO Agreement) over the Model Law.

From a practical point of view, the Model Law mandates the use of international tendering as a general rule although limited or domestic tendering can be used in some cases. In exceptional circumstances, it offers other methods. The procedures provided for in the Model Law are designed to maximize competition in accordance with fair treatment to suppliers and contractors bidding to do government work.

Model Law on the Procurement of Goods, Construction and Services

The *Model Law on the Procurement of Goods and Construction* does not apply to the procurement of services except insofar as they are incidental to the procurement contract. The Commission decided at its 26th session that its Working Group on the NIEO should prepare model provisions on procurement of services. The Working Group completed this project in the spring of 1994 in New York and the Commission finalized and adopted the new Model Law at its 27th session in New York from May 31 to June 17, 1994.

The new provisions are contained in a free-standing new Model Law which adds procurement of services to the existing provisions on goods and construction. Building upon the provisions prepared for the procurement of goods and construction, the text maintains Article 3 which ensures paramountcy of the GATT as well as the WTO Agreement over the Model Law. The General Assembly has adopted a resolution recommending that States enact it. States will thus have the option of adopting provisions which apply only to goods and construction, using the first Model Law, or adopting provisions which apply to goods, construction and services, using this new Model Law.

Legal Guide on International Countertrade Transactions

At its 25th session in May, 1992, the Commission reviewed and adopted a draft *Legal Guide on International Countertrade*, the draft chapters of which had been examined and revised by the Commission at its 23rd session in 1990 and by the Working Group on International Payments in September, 1991. It was published by UNCITRAL in 1993 (ISBN 92-1-133444-6).

UNIDROIT

The International Institute for the Unification of Private Law, known as Unidroit, is an inter-governmental organization based in Rome. Canada has been a member since 1968. There are (fifty-six or fifty-seven; Jacqueline Caron will confirmed this later) member States, including the United States, China, Australia, and States from Eastern and Western Europe, South America and Africa. The mandate of Unidroit is to examine ways of harmonizing and coordinating the private law of States. Unidroit drafts conventions and model laws on various private law subjects including the law of sale and related matters, credit law, the law of carriage, security interests, franchising and cultural property. Canada is an active participant in Unidroit.

Leasing and Factoring Conventions

In May, 1988, Canada hosted a Diplomatic Conference, organized by the Department of Justice, for the purpose of adopting two conventions prepared under the auspices of Unidroit, namely, the *Convention on International Financial Leasing* and the *Convention on International Factoring*. Both Conventions were adopted at the Conference. Thus far, France, Italy and Nigeria have ratified both Conventions, and Hungary has acceded to them. The United States may ratify them both soon. The Conventions came into force on May 1, 1995. Eight other States have signed both Conventions: Belgium, the former Czechoslovakia, Finland, Ghana, Guinea, Morocco, the Philippines, and Tanzania. (Both Slovakia and the Czech Republic, as successor states to the former Czechoslovakia, will consider ratifying conventions to which Czechoslovakia was a signatory.) Germany and the United Kingdom have signed the *Convention on International Factoring*, whereas Panama is a signatory to the *Convention on International Financial Leasing*.

In 1991, the Department of Justice consulted with the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions. The responses received indicated that there was some support for Canada becoming party to both Conventions. Because of changes in the leasing industry and in light of the recent coming into force of the Conventions, consultations have been renewed with a view to making a recommendation as to whether Canada should become a party to the Conventions. At the request of the Department, the Uniform Law Conference has prepared draft uniform legislation for the implementation of the Conventions which may be adopted by interested jurisdictions should there be sufficient interest in Canada's becoming a party.

Convention on the Form of an International Will

The purpose of the Convention is to establish an international form of will, additional to the forms in use in Contracting States, which is to be recognized as valid in all Contracting States, with the result that to some extent one may dispense with the search for the applicable law. Article I of the Convention stipulates that each Party undertakes to introduce into its law the rules regarding an international will set out in the Annex to the Convention. Testators who choose the international form of will are guaranteed that it will be recognized in all Contracting States without reference to the conflict of law rules concerning the validity of wills.

The *Convention Providing a Uniform Law on the Form of an International Will* was acceded to by Canada in 1977. Other States parties are Ecuador, Niger, Portugal, Libya, Belgium, Cyprus, Italy, Slovenia, France, and Bosnia and Herzegovina.

The Convention has been extended to six Canadian provinces: Manitoba, Newfoundland, Ontario, Alberta, Saskatchewan and Prince Edward Island.

International Protection of Cultural Property

Unidroit convened a Diplomatic Conference in Rome, Italy, in June, 1995, to consider a *Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*. The draft was prepared by a Committee of Governmental Experts, on which Canada was represented. The Diplomatic Conference adopted the *Convention on Stolen or Illegally Exported Cultural Objects* on June 23, 1995. Twelve States signed the Convention: Burkina-Faso, Cambodia, Croatia, Finland, France, Georgia, Guinea, Hungary, Italy, Ivory Coast, Lithuania and Zambia. The Convention will enter into force after five ratifications, acceptances, approvals or accessions. No State has ratified the Convention yet.

The purpose of the Convention is to set out rules for the restitution or return of stolen or illegally exported cultural objects, as defined in the Convention, provided that certain conditions are met. The questions of compensation for *bona fide* purchasers and limitation periods for bringing actions are addressed, as is the issue of the proper jurisdiction in which to bring a claim.

The Department of Justice will undertake consultations with a view to determining whether Canada should become a party to the new Convention.

Principles for International Commercial Contracts

The Unidroit Working Group that was established to develop an international instrument on principles for international commercial contracts completed its work in 1994 with the publication by Unidroit of the "Principles for International Commercial Contracts". The Working Group was a non-governmental body composed of 13 experts representing various legal systems, including Professor Paul-André Crépeau of McGill University.

The Unidroit "Principles for International Commercial Contracts", which contains over 100 principles as well as commentary on each of them, is now available in English and French. The "Principles" are designed to serve as a kind of model regulation of international commercial contracts, and contain rules relating to the formation, interpretation, validity, performance and non-performance of contracts. The "Principles" are expected to have many practical applications including the following: parties may choose them as the law governing a contract between them; arbitrators may wish to refer to them in settling disputes; and legislators may draw on them in developing national legislation.

Unidroit's Work in Progress

Unidroit has a number of interesting projects on its current Work Programme, some of which include the following:

Security Interests in Mobile Equipment

The subject of security interests in mobile equipment is of particular interest to Canada. Following on the momentum established at the 1988 Diplomatic Conference

on Leasing and Factoring, Canada proposed that Unidroit look into the desirability and feasibility of developing uniform laws on security interests in mobile equipment. Unidroit agreed and requested Professor Ronald Cuming of the University of Saskatchewan to prepare a report on the subject.

In his report, Professor Cuming stated that the conflict of laws rules of Western European and North American jurisdictions are inadequate to meet the needs of those who engage in modern financing transactions involving collateral in the form of mobile equipment (such as trucks and construction equipment). He concluded that there is a need to establish a legal framework within which the financing of high-value mobile equipment can function effectively, although it would not be necessary to develop a complete code on international secured transactions law.

A Unidroit questionnaire circulated in commercial and financial circles elicited numerous responses demonstrating widespread support for the drawing up of an international convention or set of uniform rules as a means of recognizing security interests in movables at the international level. Unidroit has convened a study group to draw up a draft Convention on international interests in mobile equipment.

Unidroit is also studying the possibility of preparing a model law in the general field of secured transactions.

The Franchising Contract

Unidroit is continuing to examine the feasibility of drawing up uniform rules on certain aspects of international franchising. Unidroit has pursued its cooperation on this matter with the international franchising committee of the business law section of the International Bar Association. Unidroit has set up a study group to prepare an international instrument on franchising, beginning with laying down rules relating to disclosure requirements and then considering the issues of choice of law and forum and the tripartite relationship of master franchise agreements.

At its first session, the study group concluded that international franchising does not lend itself to an international convention but that a guide on international franchising would be invaluable. The study group is developing an outline for the proposed guide.

Civil Liability Connected with the Carrying Out of Dangerous Activities

At the urging of the government of India, Unidroit proposed to undertake a study designed to identify issues that might be dealt with as a basis for possible measures designed to ensure compensation for personal injury to the victims of industrial accidents resulting from the carrying out of dangerous activities. The Unidroit Secretariat is currently engaged in exploring the possibility of obtaining special external financing for the study. Once the study is completed, Unidroit may recommend to its members that Unidroit seek to formulate

norms for compensation for victims of industrial accidents resulting from dangerous activities.

WORLD BANK

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

The International Centre for Settlement of Investment Disputes (ICSID) is a public international organization created pursuant to the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*. The Convention was formulated by the Executive Directors of the World Bank and submitted by them on March 18, 1965, to member States of the Bank for consideration with a view to signature and ratification.

In accordance with the provisions of the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The Centre's objective in making such facilities available is to promote an atmosphere of mutual confidence between States and foreign investors conducive to increasing the flow of private international investment.

Since the Convention does not contain a federal state clause allowing the Convention to be implemented in some but not all jurisdictions within a federal state, the support of all of the provinces and territories is necessary for Canada to ratify the Convention. The project has not yet obtained the support of all the provinces and territories.

REGIONAL ORGANIZATIONS

Organization of American States

The General Assembly of the OAS decided at its June 1996 meeting that a Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) be held at such a time and location to be determined later. It also approved a tentative agenda on which the views of member States will be further sought after preliminary studies. Canada participated for the first time as a member of the OAS in the CIDIP-V which was held in Mexico City in March 1994.

Consultations have yet to be initiated in Canada with respect to two Conventions, one in commercial law and the other in family law, which were finalized at the time of CIDIP V. The first Convention is the *Inter-American Convention on the Law Applicable to International Contracts*. This Convention provides for the recognition of the choice of the law applicable to an international contract by the parties to such contract. This rule is in general conformity with existing rules in both common law and civil law regimes in Canada. The Convention also establishes subsidiary rules for the determination of the law applicable. Venezuela has ratified this Convention in February 1996; two ratifications are necessary before the Convention comes into force.

The other convention is the *Inter-American Convention on International Traffic in Minors (Criminal and Civil Aspects)*, which covers a broad range of issues related to child sale, prostitution, exploitation, etc. The Convention is aimed at preventing and punishing illegal acts and sets principles for national action and measures as well as international cooperation. It seeks to facilitate the return of child victims of traffic as well as to provide for civil remedies.

BILATERAL CONVENTIONS ON MUTUAL LEGAL ASSISTANCE

Canada-United Kingdom

The *Convention between Canada and the United Kingdom on the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, concluded in 1984, has now been implemented at the federal level and in all the provinces and territories, except Quebec. In February, 1995, Canada and the United Kingdom completed an Exchange of Diplomatic Notes modifying the Convention.

The changes are aimed at incorporating a reference to the 1988 Lugano *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, with a view to preventing the enforcement of European judgments based on exorbitant grounds of jurisdiction against the interests of Canadian defendants. Since the Canada-United Kingdom Convention already provides for such a clause regarding the 1968 Brussels *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, these modifications are limited in scope and only affect the law in the United Kingdom.

The necessary implementing measures have been adopted in the United Kingdom and the amendments have come into force on December 1, 1995.

Canada-France

Canada and France successfully completed the negotiations concerning the recognition and enforcement of judgments in civil and commercial matters. Following up the first round of negotiations held in Paris in July 1994, two meetings took place in the first part of 1996: the second round of negotiations was held in Ottawa in March and the third and final round was held in Paris on May 13-14, 1996. The provinces and territories were consulted extensively in preparation for these rounds of negotiations.

The final text of the *Convention between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance* was signed in Ottawa on June 10, 1996, at the time of the visit of the Prime Minister of France to Canada.

The main advantage provided by the new Canada-France Convention is similar to that under the Canada-United Kingdom Convention, namely to protect Canadian interests against the enforcement of judgments rendered in European States parties to the Brussels and the Lugano Conventions on the basis of exorbitant jurisdiction. In addition, the Canada-France Convention will allow for the easy enforcement of Canadian judgments in France not only in general civil and commercial matters but also in family matters, including maintenance orders.

The Canada-France Convention is the first treaty on legal assistance with a civil law country. The question of its timely implementation was discussed at the spring 1996 meeting of the Advisory Group. It was recommended that the Uniform Law Conference be asked to embark on the drafting of an implementing uniform act. This task could be considered as part of the project on the enforcement of foreign judgments to be reviewed by the Conference at its August 1996 meeting.

An explanatory report of the Convention to be drafted by the Ontario members of the Canadian delegation to the negotiations will be distributed in all jurisdictions as soon as it is available.

Canada-Egypt

An exploratory mission composed of officials of the Department of Foreign Affairs and International Trade and one federal Justice representative travelled to Cairo, Egypt, from March 18 to 22, 1996. The purpose of the trip was to meet with Egyptian officials to discuss issues of child abduction and personal status matters in the aftermath of the visit of the Canadian Minister of Foreign Affairs in November 1995. The meetings were successful and it was agreed that Canada would draft an agreement on consular matters to be later submitted to Egypt for comments.

The proposed agreement would help resolve issues related to personal status matters involving nationals of either country by the establishment of a joint consultative commission. The report of the Canadian mission as well as the text of the proposed agreement were sent to all jurisdictions for information; they were also invited to submit any comments or questions as the case may be. The process is still ongoing. It is expected that the agreement will be finalized in the fall of 1996.

CONCLUSION

In private international law, the work of the Department of Justice and particularly of the newly created Public Law Policy Section, as successor to the Constitutional and International Law Section, is directed at furthering the interests of Canadians in the international community. To assist us in carrying out that mandate effectively, we appreciate the assistance of the Advisory Group and the Uniform Law Conference.

In particular, the Uniform Law Conference plays an important role on the harmonization of private law by drafting uniform acts that facilitate the implementation in Canada of private international law conventions.

This year we would like to request the Uniform Law Conference in considering the drafting of a uniform act for the implementation of ICSID as well as that of the Canada-France Convention.