

# International Sales Conventions Act Report 1998

**1998 Halifax, NS**

**Tuesday, August 18 , 3:30 p.m. to 4:30 p.m.**

## **REPORT**

### **Introduction**

[1] In August 1997, the Department of Justice of Canada sought the assistance of the Uniform Law Conference of Canada (ULCC) to prepare a uniform act to implement both the *Convention on the Limitation Period in the International Sale of Goods* (the *Limitation Convention*), opened for signature at New York on June 14, 1974, and the *Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods* (the *Amended Limitation Convention* and the *Protocol*, opened for signature at Vienna on April 11, 1980). The texts of both the *Limitation Convention* and the *Amended Limitation Convention* (the *Limitation Conventions*) and the text of the *Protocol* are set out in the schedule of the *Uniform International Sales Convention Act* (Annex A). In 1976, the ULCC had adopted an *Act to amend the Uniform Limitation of Actions Act* which implemented the *Limitation Convention*. It was necessary to revisit that Act since it did not implement the *Amended Limitation Convention* and did not take into consideration the *Sales Convention*; neither existed at the time. Furthermore, the provisions implementing the *Limitation Convention* were not incorporated in the new *Uniform Limitations Act* adopted by the ULCC in 1982. Finally, the *Act to amend the Uniform Limitation of Actions Act* had only been adopted in English. In the fall of 1997, the ULCC agreed to the project and decided to include it in its August 1998 Annual Meeting Agenda.

[2] The objective of this report is to describe the *Limitation Conventions*, the methodology followed to implement them and to provide an assessment of the reservations and declarations allowed under their respective terms. The report also describes the accession options available to Canada under both the *Limitation Convention* and the *Protocol*. This report will lead to a discussion of the *Uniform International Sales Conventions Act* implementing the *Limitation Conventions*.

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## **I - Overview of The Limitation Conventions and the Protocol <sup>1</sup>**

### **A - Purpose (par. 1)**

[3] The *Limitation Convention* provides uniform international legal rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against the other party to assert a claim arising from the contract or relating to its breach, termination or invalidity. This period is referred to in the *Convention* as the "limitation period". The basic aims of the limitation period are to

prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty and injustice that would result if a party were to remain exposed to unasserted claims for an extended period of time.

### **B - History (pars. 2-4)**

[4] The *Limitation Convention* grew out of the work of the United Nations Commission on International Trade Law (UNCITRAL) towards the harmonization and unification of international sales law, which also resulted in the *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature at Vienna, April 11, 1980 (the *Sales Convention*). The Commission observed that, while most legal systems limited or prescribed a claim from being asserted after the lapse of a specified period of time, numerous disparities existed among legal systems with respect to the conceptual basis for doing so. As a result, there were disparities in the length of the period and in the rules governing the limitation or prescription of claims after that period. Those disparities created difficulties in the enforcement of claims arising from international sales transactions, and thus burdened international trade.

[5] In view of those problems, UNCITRAL decided to prepare uniform international legal rules on the limitation period in the international sale of goods. On the basis of a draft *Convention* prepared by UNCITRAL, a diplomatic conference convened in New York by the General Assembly adopted the *Limitation Convention* on June 14, 1974. The *Limitation Convention* was amended by a *Protocol* adopted on April 11, 1980 by the diplomatic conference that adopted the *Sales Convention*, in order to harmonize the *Limitation Convention* with the latter.

[6] The *Limitation Convention* entered into force on 1 August 1988. As of March 16, 1998, 22 States had ratified or acceded to it. Bosnia and Herzegovina, Dominican Republic, Ghana, Norway and Ukraine are only parties to the *Limitation Convention* while Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Moldova, Poland, Romania, Slovakia, Slovenia, Uganda, United States of America, Uruguay and Zambia are parties both to the *Amended Limitation Convention* and the *Limitation Convention*.

### **C - Scope of application (pars. 5-9)**

[7] The *Limitation Conventions* apply to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States. Under the *Protocol* the *Amended Limitation Convention* also applies if the rules of private international law make the law of a Contracting State applicable to the contract. However, in becoming a party to the *Protocol*, a State may declare that it will not be bound by that provision. Each Contracting State must apply the *Limitation Conventions* to contracts concluded on or after the date of the entry into force of the *Conventions*.

[8] The application of the *Limitation Conventions* is excluded in certain situations. Firstly, neither of the *Limitation Conventions* will apply if the parties to a sales contract expressly

exclude its application. This provision gives effect to the basic principle of freedom of contract in the international sale of goods. Secondly, the *Limitation Conventions* will not apply in certain cases where matters covered by the *Conventions* are governed by other conventions. Thirdly, Contracting States are permitted to deposit declarations or reservations excluding the application of the *Limitation Conventions* in the following situations: 1) where Contracting States apply the same or closely related rules to contracts for the international sale of goods between parties with their places of business in those States; and, 2) to actions for the "annulment" of the contract. To date, only Norway has made a declaration for the first case and no Contracting State has made a declaration for the second.

[9] Since the *Limitation Conventions* apply only in respect of international sales contracts, they clarify whether contracts involving certain services are covered in accordance with the provisions of the *Sales Convention*. A contract for the supply of goods to be manufactured or produced is considered to be a sales contract unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Furthermore, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services, the *Limitation Conventions* do not apply.

[10] The *Limitation Convention* contains a list of types of sales that are excluded from the *Convention*, either because of the purpose of the sale [goods bought for personal, family or household use (under the *Amended Limitation Convention* sales of those goods are covered by the *Amended Convention* if the seller could not have known that they were bought for such use)], the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods [stocks, shares, investment securities, negotiable instruments, money, ships, vessels, aircraft or electricity (the *Amended Limitation Convention* adds hovercraft)].

[11] The *Limitation Conventions* make it clear that they apply only to the usual type of commercial claims based on contract. They specifically exclude claims based on death or personal injury; nuclear damage; a lien, mortgage or other security interest; a judicial judgment or award; a document on which direct enforcement or execution can be obtained; and a bill of exchange, cheque or promissory note. The limitation periods for those claims are generally subject to particular rules and it would not necessarily be appropriate to apply the rules applicable to ordinary commercial contractual claims to them.

#### **D - Duration and commencement of limitation period (pars. 10-12)**

[12] The duration of the limitation period under the *Limitation Conventions* is four years. The period cannot be modified by agreement of the parties, but it can be extended by a written declaration of the debtor during the course of the period. In addition, the contract of sale may stipulate a shorter period for the commencement of arbitral proceedings, if the stipulation is valid under the law applicable to the contract. Rules are provided as to how the period should be calculated.

[13 ]A four-year period was thought to accomplish the aims of a limitation period and yet provide adequate time to enable a party to an international sales contract to assert its claim against the other party. Circumstances where an extension or recommencement of the limitation period would be justified are dealt with in particular provisions of the *Limitation Conventions*.

[14] With respect to the time when the limitation period commences, the basic rule is that it commences on the date on which the claim accrues. The *Limitation Conventions* establish when claims for breach of contract, for defects in the goods or other lack of conformity and for fraud are deemed to accrue. Special rules are provided for the commencement of the limitation period in two particular cases: where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a certain period of time, and where a party terminates the contract before the time for performance is due. Rules are also provided in respect of claims arising from the breach of an instalment contract and claims based on circumstances giving rise to termination of such a contract.

#### **E - Cessation and extension of limitation period (pars. 13-18)**

[15] Having established the time of commencement and the length of the limitation period, the *Limitation Conventions* set forth rules concerning the cessation of the period. The period ceases to run when the claimant commences judicial or arbitral proceedings against the debtor, or when it asserts its claim in existing proceedings. A counterclaim is deemed to have been asserted on the same date as the date when the proceedings in which the counterclaim is asserted were commenced, if the counterclaim and the claim against which it is raised relate to the same contract or to several contracts concluded in the course of the same transaction.

[16] Judicial or arbitral proceedings commenced by a claimant within the limitation period might terminate without a binding decision on the merits of the claim, for example, because the court or arbitral tribunal lacks jurisdiction or because of a procedural defect. The creditor would normally be able to pursue its claim by commencing new proceedings. Thus, the *Limitation Conventions* provide that if the original proceedings end without a binding decision on the merits the limitation period will be deemed to have continued to run. However, by the time the original proceedings have ended, the limitation period might have expired, or there might remain insufficient time for the claimant to commence new proceedings. To protect the claimant in those cases the *Limitation Conventions* grant the claimant an additional period of one year to commence new proceedings.

[17] The *Limitation Conventions* contain rules to resolve in a uniform manner questions concerning the running of the limitation period in two particular cases. Firstly, they provide that where legal proceedings have been commenced against one party to the sales contract, the limitation period ceases to run against a person jointly and severally liable with that party if the claimant informs that person in writing within the limitation period that the proceedings have been commenced. Secondly, they provide that where proceedings have been commenced against a buyer by a party who purchased the goods from him, the

limitation period ceases to run in respect of the buyer's recourse claim against the seller if the buyer informs the seller in writing within the limitation period that the proceedings against the buyer have been commenced. Where the proceedings in either of those two cases have ended, the limitation period in respect of the claim against the jointly and severally liable person or against the seller will be deemed to have continued to run without interruption, but there will be an additional year to commence new proceedings if at that time the limitation period has expired or has less than a year to run.

[18] One effect of the provision mentioned above relating to the buyer is to enable the buyer to await the outcome of the claim before commencing an action against the seller. This enables the buyer to avoid the trouble and expense of instituting proceedings against the seller and the disruption of their good business relationship if it turns out that the claim against the buyer was not successful.

[19] Under the *Limitation Conventions* the limitation period recommences in two cases: if the creditor performs in the debtor's State an act that, under the law of that State, has the effect of recommencing a limitation period, or if the debtor acknowledges in writing its obligation to the creditor or pays interest or partially performs the obligation from which its acknowledgement can be inferred.

[20] The *Limitation Conventions* protect a creditor who was prevented from taking the necessary acts to stop the running of the limitation period in extreme cases. They provide that when the creditor could not take those acts as a result of a circumstance beyond its control and which it could neither avoid nor overcome, the limitation period will be extended so as to expire one year after the date when the circumstance ceased to exist.

#### **F - Overall limit of limitation period (par.19)**

[21] Since the limitation period may, under the circumstances noted above, be extended or recommence, the *Limitation Conventions* establish an overall time period of 10 years, from the date on which the limitation period originally commenced to run, beyond which no legal proceedings to assert the claim may be commenced under any circumstances. The theory behind that provision is that enabling proceedings to be brought after that time would be inconsistent with the aims of the *Limitation Conventions* in providing a definite limitation period.

#### **G - Consequences of expiration of limitation period (pars.20-21)**

[22] The principal consequence of the expiration of the limitation period is that no claim will be recognized or enforced in legal proceedings commenced thereafter. The expiration of the limitation period will not be taken into consideration in legal proceedings unless it is invoked by a party to the proceedings. However, in light of views expressed at the diplomatic conference that adopted the *Limitation Convention* that the limitation or prescription of actions was a matter of public policy and that a court should be able to take the expiration of the limitation period into account on its own initiative, a Contracting State is permitted to declare that it will not apply that provision. No State has thus far made such a declaration.

[23] Even after the limitation period has expired a party can in certain situations raise its claim as a defense to or set-off against a claim asserted by the other party.

## **H - Other provisions and final clauses (pars. 22-25)**

[24] Other provisions of the *Limitation Conventions* deal with implementation of the *Conventions* in States having two or more territorial units where different legal systems exist. A series of provisions deals with declarations and reservations permitted under the *Limitation Conventions* and with procedures for making and withdrawing them. The permitted declarations and reservations have been mentioned above; no others may be made under the *Conventions*.

[25] The final clauses of the *Limitation Convention* contain the usual provisions relating to the Secretary-General of the United Nations as depositary of the *Limitation Convention*. The *Limitation Convention* is subject to ratification by States that signed the *Convention* by December 31, 1975 and for accession by States that did not do so. The Arabic, Chinese, English, French, Russian and Spanish texts of the *Limitation Convention* are equally authentic.

[26] The Secretary-General of the United Nations is also the depositary of the *Protocol* amending the *Limitation Convention*, which is open for accession by all States. Since the *Protocol* had already received the necessary number of accessions, the *Amended Limitation Convention* entered into force on the same date as the unamended *Limitation Convention*, i.e., on August 1, 1988.

[27] A State that ratifies or accedes to the *Limitation Convention* now that the *Limitation Convention* and *Protocol* have come into force becomes a party to the *Amended Limitation Convention* if it notifies the depositary accordingly. The *Amended Limitation Convention* will enter into force for that State on the first day of the month following the expiration of 6 months after the date of deposit of its instrument of ratification or accession. Accession to the *Protocol* by a State that is not a Contracting Party to the *Limitation Convention* constitutes accession to the *Amended Limitation Convention* and unless that State notifies the depositary to the contrary, shall also be considered an accession to the unamended *Limitation Convention* in relation to any State which is a Contracting Party only to the *Limitation Convention*.

## **II - Canadian Accession and implementation**

### **A - The Conventions and Protocol - A Priority for Canada**

[28] As mentioned earlier (see paragraph [5]), the *Limitation Convention* of 1974 was amended in 1980 to adapt its provisions so that they would fit with the *Sales Convention*. As all jurisdictions in Canada have enacted legislation to implement the *Sales Convention* and the *Sales Convention* is in force across Canada, the next logical step would be to accede to the *Protocol* and to implement the *Limitation Conventions* in domestic law. Furthermore, there are currently 22 States Party to the *Limitation Convention* and 17 States

Party to the *Amended Limitation Convention* (all of which are Party to the *Limitation Convention*), including our NAFTA trading partners, the United States of America and Mexico. Canadian accession to the *Protocol* and the implementation of the *Limitation Conventions* would harmonize this area of the law and thus facilitate the conduct of business among the three States. Finally, as there are currently 51 States Party to the *Sales Convention*, the number of States Party to the *Limitation Conventions* will only increase with time. In 1995 the federal Department of Justice Advisory Group on Private International Law recommended taking steps to accede to the *Protocol* and to implement the *Conventions*.

## **B - Consultation on Canadian Accession and Implementation**

[29] Consultations with the provinces and territories regarding Canada's accession to the *Protocol* and the implementation of the *Limitation Conventions* will be taking place in the coming year. As the *Limitation Conventions* contain federal State clauses, Canada's accession will be undertaken once sufficient support is expressed and legislation in place to implement the *Conventions*.

## **C - Form of implementation: Stand-alone legislation or amending legislation**

[30] As the *Uniform Limitation of Actions Act* has been enacted in whole or in part in seven jurisdictions in Canada and legislation implementing the *Sales Convention* is already in place in all Canadian jurisdictions, the Working Group queried which of the following three forms of implementation was more appropriate to implement the *Limitations Conventions*:

- (a) preparing uniform stand-alone legislation implementing only the *Limitation Conventions*;
- (b) reviewing the 1976 *Act to amend the Uniform Limitation of Actions Act*, prepared to implement the *Limitation Convention*, so that it would include the *Amended Limitation Convention*; or,
- (c) preparing uniform legislation amending the *Uniform International Sale of Goods Act* to implement both the *Limitation Conventions* and the *Sales Convention*.

[31] One of the reasons to not retain the stand-alone option is because it is faster to adopt amending legislation than stand-alone legislation. The option of reviewing the *Act to amend the Uniform Limitation of Actions Act* was not retained because the Working Group felt that with uniform legislation to implement the *Sales Convention* now in place in all Canadian jurisdictions, it would be better to have every instrument in relation to the international sale of goods in the same act; this reason was also invoked in case of the stand-alone option. Moreover, the Working Group felt that an amendment to the *Uniform International Sale of Goods Act* stood a better chance of success than an amendment to the *Uniform Limitation of Actions Act* since all Canadian jurisdictions have uniformly enacted the former but only seven have enacted the latter in whole or in part.<sup>2</sup> Additionally, the Working Group preferred amending the *Uniform International Sales of Goods Act* because it would allow the implementation of other related international sales conventions such as the *Unidroit Convention of 17 February 1983 on Agency in the International Sale of Goods* or a possible future convention in relation to sale of services. Finally, this last option would allow the modification of the *Uniform International Sales of Goods Act* to bring it into line with federal,

provincial and territorial legislation actually adopted to implement the *Sales Convention*. It was suggested that both uniform stand-alone and uniform legislation to amend the *Uniform International Sales of Goods Act* could be prepared to offer a choice, but the Working Group felt that the present project was not politically charged and did not require this approach. Moreover, a dual approach in this case would defeat the uniformity purpose.

[32] In summary, the Working Group recommended preparing legislation to amend the *Uniform International Sales of Goods Act* for the following reasons:

As the *Amended Limitation Convention* is in line with the *Sales Convention* it would make sense for both conventions to be implemented in the same act;

If the *Amended Limitation Convention* and the *Sales Convention* were both found in the same act, it would promote the uniformity of their application and use;

For information and dissemination purposes, it would be better to have every instrument in relation to the international sale of goods in the same act;

The legislative process is usually faster for adopting amending legislation than for stand-alone legislation;

An amendment to the *Uniform International Sale of Goods Act* was considered to have a better chance of succeeding than one to the *Uniform Limitation of Actions Act*;

It could bring the ULCC *Uniform International Sale of Goods Act* into line with the federal, provincial and territorial legislation implementing the *Sales Convention*; and,

A *Uniform International Sales Conventions Act* will facilitate future implementation of other related international sales conventions such as the *Unidroit Convention of 17 February 1983 on Agency in the International Sale of Goods* or a possible future convention in relation to sale of services.

## **D - Implementation Methods used in Canada**

[33] Generally, there are three methods - options - by which international treaties are implemented in Canada. <sup>3</sup>

[34] Option (1) - The treaty can be incorporated in a short act which expressly gives the force of law to the treaty or certain of its articles. Then the treaty or such articles may be set out as a schedule to the act (e.g.: The *Foreign Missions and International Organisations Act*, C.S.C., c. F-29.4, C.S. (1991), c. 41; and, the ULCC *Uniform International Commercial Arbitration Act*, 23B.1-1).

[35] Option (2) - The treaty may be implemented by an act which may employ its own substantive provisions to give effect to the treaty, the text of which is not directly enacted



or referred to (e.g.: Section 7(2.2) of the *Criminal Code* implementing the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature at Rome on March 10, 1988).

[36] Option (3) - Even where the treaty is referred to in the long and short titles of the Act and also in the preamble and schedule for dissemination purposes, the Act may not expressly give the force of law to the treaty. Rather, contents of the provisions will allow the enforcement of the treaty in domestic law as is necessary to comply with the obligations imposed on the State without expressly giving the force of law to the treaty as Option (1) does. However, the provisions of the act implement the treaty in domestic law (e.g.: *An Act to Implement NAFTA*, C.S.C., c. N-23.8, C.S. (1993), c. 44 and the *ULCC Uniform Settlement of International Investment Disputes Act* implementing the *ICSID Convention*).

[37] In the context of the *Limitation Conventions*, it is the recommendation of the Working Group that the most appropriate, simple and effective means of implementing the *Conventions* in Canada would be through the method described in Option (1) (see paragraph [34]).

## **E - Implementation Principles Followed**

[38] The Working Group adopted the following implementation principles from the collective work edited by Professor Hugh Kindred:

"[T]o what extent may international legal principles be relied upon as imposing legally enforceable obligations, or conferring legally enforceable rights, on individuals that they may use in their domestic system? This question is, in some contexts, referred to as the "direct applicability" or "direct effect" of international law in the domestic legal system. [...] In Canada, [...] [a] good argument may be made [...] that Canada is adoptionist in respect of customary international law and transformationist in respect of conventional law - the latter clearly springing from following the British legal tradition that treaties must be enacted into law by Parliament before they will affect private rights." <sup>4</sup>

"Implementation is the process of giving effect to a treaty within the national legal system. In Canada, the vast majority of treaties have to be implemented by legislation. This requirement is the result of the constitutional separation of powers. Although the executive in exercise of the royal prerogative may conclude a treaty, it cannot make law. That is the responsibility of the legislature. As a result, a treaty made by the federal government will bind Canada as a country, but its provisions do not affect internal law until they have been implemented by legislation. [...] [J]urisdiction to adopt laws for the purpose of implementing treaties is determined by the ordinary rules governing the division of legislative powers under the constitution." <sup>5</sup>

## **F - Implementation Analysis of the Limitation Conventions**

1 - Premise - Type of accession favoured

[39] At the outset, the Working Group suggested aiming for the broadest application

possible of the *Limitation Conventions*. The *Limitation Convention* and the *Protocol* provide for three accession options:

Accession to the *Limitation Convention*

Article 43 of the *Limitation Convention*

Accession to the *Amended Limitation Convention* and to the *Limitation Convention*.

Article X of the *Protocol*

Article 43 bis of the *Amended Limitation Convention*

Accession to the *Amended Limitation Convention* making a notification to the effect that Canada is not bound by the *Limitation Convention* with respect to States parties that are not party to the *Amended Limitation Convention* (currently Bosnia and Herzegovina, Dominican Republic, Ghana, Norway, and Ukraine)

Article VIII(2) and XI of the *Protocol*

Articles 43 ter and 44 bis of the *Amended Limitation Convention*

[40] The Working Group suggested that Canada become at least party to the *Amended Limitation Convention* since it is in line with the *Sales Convention*. The Working Group also considered the *Limitation Convention* with reference to the parts which were amended by the *Protocol* to assess whether a Canadian accession to the *Limitation Convention* would create any difficulty. In summary, the main differences between the unamended and the amended *Limitation Conventions* are the followings:

The *Limitation Convention* excludes the application of the *Convention* through the rules of private international law (see Article I of the *Protocol*);

The *Limitation Convention* could not apply to sales of goods bought for personal, family or household use whether the seller, at any time before or at the conclusion of the contract, knew or ought to have known that the goods were bought for any such use (see Article II of the *Protocol*);

The *Limitation Convention* could apply to hovercrafts (see Article II of the *Protocol*);

The *Limitation Convention* is not clear with regard to the place of business in a federal State of a party to a sales contract (see Article III of the *Protocol*); and,

The similarity rules of the *Limitation Convention* are not as clear as the ones provided under the *Amended Limitation Convention* (see Article IV of the *Protocol*).

[41] Out of those differences, only the lack of clarity in Article 31 of the

unamended *Limitation Convention* with regard to the place of business in a federal State of a party to a sales contract could create some difficulties in applying the *Limitation Convention* in Canada (this lack of clarity is addressed by a new Paragraph (4) under Article 31 of the *Amended Limitation Convention*). In order to avoid the lack of clarity that could result from the absence of Paragraph (4) of Article 31 in the unamended *Limitation Convention*, it would be suggested, subject to consultation with the UNCITRAL Secretariat, that Canada make an interpretative declaration using the wording of Paragraph (4) of Article 31 when becoming a party to the *Limitation Convention*. Such a declaration was made in the case of the *Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* with regard to customary forms of care practised by Aboriginal people of Canada. Since interpretative declarations provide clarity and do not limit the obligations set out in a convention, as reservations do, those declarations are generally permitted even though the convention does not allow for reservations other than those permitted specifically. The case of the *Adoption Convention* leads us to believe that an interpretative declaration might be made for the *Limitation Convention*.

[42] Therefore, it was suggested that the Working Group prepare uniform legislation implementing both the *Amended Limitation Convention* and the *Limitation Convention* and to recommend that, subject to discussions with the UNCITRAL Secretariat, Canada make an interpretative declaration using the wording of Paragraph (4) of Article 31 when acceding to the *Limitation Convention*.

## **2 - Texts set out in the schedules to the Act**

[43] As accession to the *Protocol* to become a party to both *Limitation Conventions* is recommended, the Working Group agreed to set out in the schedules to the Act the text of both *Conventions* given the force of law, even though an amended version of the *Limitation Convention* showing both the modifications and the original text exists. The Working Group thought that setting out only one text in the schedule while giving the force of law to both *Conventions* could result in some confusion. Furthermore, the Working Group agreed to set out the text of the *Protocol* in the schedule to the Act, for information purposes only, since it clearly sets out the modifications to the *Limitation Convention* and as it is the instrument to which Canada will accede. It was generally felt that providing all this information in the act would facilitate the work of those who would be called upon to consult it.

## **3 - General implementation comments on the Limitation Conventions**

[44] The Working Group suggested making as few reservations and declarations as possible in order to make the application of the *Limitation Conventions* as simple as possible and to make Canada an attractive place to conduct business. As most of the reservations and declarations under the *Amended Limitation Convention* are in line with the ones found under the *Sales Convention*, the Working Group suggested dealing with the *Amended Limitation Convention's* reservations and declarations in the same way as those under the *Sales Convention*, as described below.

#### **4 - Declaration under Paragraphs (1)-(3) of Article 34 of the Amended Limitation Convention**

[45] Paragraphs (1)-(3) of Article 34 of the *Amended Limitation Convention* mirror Paragraphs (1)-(3) of Article 94 of the *Sales Convention*. Given that Canada made no declaration under Article 94 of the *Sales Convention*, it would be inappropriate to do so under Article 34 of the *Amended Limitation Convention*. Favouring uniformity in implementing the *Amended Limitation Convention* and the *Sales Convention*, the Working Group suggested that Canada should not make a declaration under Article 34.

#### **5 - Declaration under Article 35 of the Limitation Convention**

[46] It is important to note that no State has made a declaration. At civil law, Article 35 creates no difficulty with regard to Article 2927 of the *Civil Code of Quebec*. At common law, concerns were raised with regard to the annulment of the contract as an equitable remedy. However, Article 35 would not eliminate the possibility of annulling a contract by way of a remedy in equity; it would only make the equitable remedy subject to a limitation period. The question is whether it was possible at common law to provide a limitation period for such a remedy. If so, there are no reasons preventing implementation of Article 35 of the *Limitation Convention*. The Working Group agreed that Canada should not enter a reservation under Article 35. The modern tendency in the reform of limitation laws in Canada is to ensure that, except for very narrow and clearly defined exceptions, all causes of action are subject to some limitation period. Opting out under Article 35 would run counter to this tendency.

#### **6 - Declaration under Article 36 of the Limitation Convention**

[47] Once again, it is important to note that no State has made such a declaration. Since the law in Canada is that the expiry of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings, the Working Group recommended that Canada should not make a declaration under Article 36.

#### **7 - Declaration under Article 36 bis**

[48] Article 36 bis of the *Amended Limitation Convention* mirrors Article 95 of the *Sales Convention*. Since Canada made no declaration under Article 95 of the *Sales Convention*, there is no justification for making a declaration under Article 36 bis of the *Amended Limitation Convention*. Again, in order to achieve uniformity between the *Amended Limitation Convention* and the *Sales Convention*, the Working Group suggested that Canada should not make any declaration under Article 36 bis.

#### **8 - Declaration under Article 38**

[49] Under the terms of the *Limitation Convention*, a declaration under Article 38 could only have effect until the *Sales Convention* came into force. Therefore no effective declaration can be made today under this Article.

## **9 - Ratification - Coming into force**

[50] It is important to provide for an effective and simple provision to coordinate the entry into force of the *Limitation Conventions* for Canada at the international level, the coming into force of domestic implementing legislation, and giving the *Conventions* the force of law. The Working Group does not recommend proclaiming the implementing legislation in force on the day the *Limitation Conventions* come into force for Canada since this may not suit the legislative agendas of all jurisdictions. Instead, the Working Group recommends that the legislation implementing the *Limitation Conventions* come into force on Royal Assent. The Act is drafted such that the *Limitation Conventions* are given the force of law only from the date they come into force for Canada, i.e., the first day of the month following the expiration of six months after the date of the deposit of Canada's instrument of accession. Note that in the case of jurisdictions adopting implementing legislation after the coming into force of the *Limitation Conventions* for Canada, the Act will have to be modified to indicate that the *Conventions* have the force of law, not from their entry into force in accordance with Article 44, but rather on the entry into force of the declaration extending the application of the *Conventions* to that jurisdiction in accordance with Articles 31 and 40.

## **10 - List of provisions of the Amended Limitation Convention modified by the Protocol**

[51] In order to facilitate the understanding of the differences between the *Limitation Convention* and the *Amended Limitation Convention* the following is a list of provisions modified or added by the *Protocol*:

Paragraph 1 of Article 3 of the *Limitation Convention* was deleted and replaced

Paragraph 2 of Article 3 of the *Limitation Convention* was deleted

Paragraph 3 of Article 3 was renumbered as Paragraph 2

Subparagraph (a) of Article 4 of the *Limitation Convention* was deleted and replaced

Subparagraph (e) of Article 4 of the *Limitation Convention* was deleted and replaced

New Paragraph 4 was added to Article 31 of the *Limitation Convention*

The provisions of Article 34 of the *Limitation Convention* were deleted and replaced

New Article 36 bis

The provisions of Article 37 of the *Limitation Convention* were deleted and replaced

Paragraph 1 of Article 40 of the *Limitation Convention* - A provision was added at the end of Paragraph 1

New Article 43 bis (Article X of the *Protocol*)

New Article 43 ter (Article VIII (2) of the *Protocol*)

New Article 44 bis (Article XI of the *Protocol*)

New Article 45 bis (Article XIII (3) of the *Protocol*)

## **G - Miscellaneous Issues**

1 - Address of UNCITRAL and Website

UNCITRAL Secretariat  
P.O. Box 500, E0455  
Vienna International Centre  
A-1400 Vienna  
Austria

Telex: 135612

Telephone: 431-213-45-4060

(Please note that the number 213-45 will change to 260-60 sometime in 1998)

Telefax: 431-213-45-5813

Website: <http://www.un.or.at/uncitral/>

## **2 - Interpretation**

[52] In applying or interpreting the *Limitation Conventions* recourse may be had to:

the Report of the United Nations Commission on International Trade Law on the work of its 5th session (1972), UN GAOR, 27th Session, Supp. No. 17, UN Doc. A/8717, and

the Commentary on the Convention on the Limitation Period in the International Sale of Goods, UN Doc. A/CONF.63/17.

[53] Enacting jurisdictions may simply indicate references for those two United Nations documents in their legislation. Alternatively, some jurisdictions could also publish these documents in their Gazette or make reference to the documents as published in the Canada Gazette.

## **3 - Other useful documents <sup>6</sup>**

"Report of the American Bar Association on the Limitation Convention" (reprinted in (1990) 24 Int'l Lawyer 583.

Krapp T., "The Limitation Convention for the International Sale of Goods" (1985) 19 J.W.T.L. 343.

Smith H., "The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's Firstborn" (1975) 23 Am. J. Comp. L.337.

Sono K., "Unification of Limitation Period in the International Sale of Goods" (1974- 75) 35 Louisiana L. Rev. 1128.

Winship P., "The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn" (1994) 28 Int'l Lawyer 1071.

Sumulong, V.R., "International Trade Law and the United Nations Convention on the Limitation Period in the International Sale of Goods" (1975) 50 Philippine L.J. 318.

## **III - The ULCC-Uncitral Limitation Project Working Group**

[54] A list of the Members of the Working Group, its mandate and a summary of its meetings is set out in Annex B.

#### **IV - Recommendation**

[55] That the Uniform International Sale of Goods Act and the Act to amend the Uniform Limitation of Actions Act (i.e., an Act adopted by the ULCC in 1976 to implement the Convention on the Limitation Period in the International Sale of Goods) be withdrawn, and

[56] That this Report and the attached Uniform Act be discussed and adopted.

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#### **Footnotes**

*Footnote: 1* The text found under this title, more specifically under sub-titles A-H, is drawn from paragraphs 1-25 of the Explanatory note by the UNCITRAL Secretariat on the *Convention on the Limitation Period in the International Sale of Goods* and the *Protocol amending the Convention on the Limitation Period in the International Sale of Goods*; it is not an official commentary on the *Convention*. The paragraph numbers in parentheses beside sub-titles A-H refer to paragraph numbers found in the Explanatory note by the UNCITRAL Secretariat. A commentary on the unamended *Convention* prepared at the request of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods appears in A/CONF.63/17 (reprinted in *Yearbook of the United Nations Commission on International Trade Law, vol. X:1979* (United Nations Publications, Sales No. E.81.V.2), part three, chap. I and in *UNCITRAL: The United Nations Commission on International Trade Law* (United Nations Publication, Sales No. E.86.V.8), Annex II.B).

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*Footnote: 2* Alta. and Man. have enacted the Act with modifications. N.B., N.W.T. and P.E.I. have enacted the Act in part. Sask. and Yukon have uniformly enacted the Act.

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*Footnote: 3* Verdon, Christiane, "Le Canada et l'unification internationale du droit privé" (1994) 32 Can. Y.B. Int'l L. at 30; and Brownlie, Ian, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon, 1973) at 50.

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*Footnote: 4* Kindred, Hugh M., et al., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Edmond Montgomery, 1993) at 147-48 (see also: Arbour, J.-M., *Droit international public*, 3rd ed., (Cowansville: Yvon Blais, 1997) at 158-60).

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*Footnote: 5* Kindred, Hugh M., et al., *ibid.* at 168-69.

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*Footnote: 6* Note that nothing has been written in French on this subject.