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ACTIVITIES AND PRIORITIES OF THE DEPARTMENT OF JUSTICE IN PRIVATE INTERNATIONAL LAW

INTRODUCTION

In the past year the Department of Justice has continued its efforts toward the harmonisation of private international law through multilateral agreements, within international organisations such as the Hague Conference on Private International Law, Unidroit and the United Nations Commission on International Trade Law (UNCITRAL) and in regional organisations such as the Organisation of American States (OAS) and through bilateral agreements.

There have been some notable events on the private international law scene in the past year. Negotiations continued in the Hague Conference on Private International Law, at UNCITRAL and at Unidroit on three major projects which will culminate in new private international law conventions by the end of 2001: the draft Convention of the Jurisdiction and the Effects of Judgements in Civil and Commercial Matters, the draft Convention on International Interests in Mobile Equipment and related Aircraft Protocol; and the draft Convention on Assignment of Receivables. Additionally, the Department of Justice continued its involvement in Private International Law projects at the Uniform Law Conference of Canada.

The goal of this report is to present Canada's accomplishments in private international law over the past year and to describe the projects the Department of Justice, in conjunction with its partners, will work on in the future on a priority basis.

The first part of the report deals with the different **actors in private international law at the Canadian level**. In the course of its activities, the Department of Justice consults regularly with the provinces and territories, as well as with other interested federal departments, the private sector and the members of its Advisory Group on Private International Law.

The **international and regional organisations** involved in private international law and the projects in which Canada has participated will be briefly described in the second part of the report.

Finally, the third part of the report presents the **activities of the Department of Justice** in private international law using a thematic approach.

Furthermore, in light of the ongoing concerns regarding the decrease in governmental resources and the growing importance of globalisation, activities are ranked with respect to their **level of priority**. In order to evaluate

the status of each project, the PIL Team bases itself on the following criteria: international community interest, Canadian interest, and national actors' interest in the project; costs and benefits of the project; and finally, the challenges and difficulties related to implementation.

The projects are therefore presented in the third part by order of priority (high, medium, low) within sections with the following themes:

- International Commercial Law
- Judicial Cooperation and Enforcement of Judgements
- Family Law
- Protection of Property

These projects are also displayed in the same order in the **Chart of Private International Law Priorities** (Annex A). We hope that this presentation is clear and useful and encourage you to provide us with your views on it by contacting the individuals listed at the end of this report.

We also have attached a **Status Chart of Canadian Participation in Private International Law Instruments** (Annex B) which gives updated information on conventions in private international law to which Canada is a party or to which it is considering acceding.

I. NATIONAL ACTORS

As the matters dealt with in private international law most often fall within provincial jurisdiction, federal-provincial cooperation is essential to real progress in this area. The Department of Justice therefore maintains constant communication with representatives from the provincial governments. Furthermore, consultation with the legal and business community, as well as with other private groups, is very useful as the conventions relate so closely to their interests.

A. ADVISORY GROUP ON PRIVATE INTERNATIONAL LAW

The Advisory Group on Private International Law is composed of five provincial representatives (representing British Columbia, the Prairie provinces, Ontario, Quebec and the Atlantic provinces) and federal representatives from the Department of Justice and the Department of Foreign Affairs and International Trade. A private practitioner representing the International Law Section of the Canadian Bar Association also participates as an observer. The Group provides the Department with continuing advice on the provincial aspects of the private international law projects in which Canada

is involved. The Group held two meetings this year, in January and in June 2000. The up-coming meeting of the Group will be held in January 2001.

B. FEDERAL-PROVINCIAL Cooperation

In addition to federal-provincial cooperation through the Advisory Group, the Department also communicates directly with provincial authorities in order to obtain their official views on international instruments. These exchanges take place through written and oral communication and during the presentation of reports at the Uniform Law Conference of Canada (ULCC) and at the Civil Justice Committee.

1. Uniform Law Conference of Canada

Instituted in 1919 with a view to ensuring uniformity in provincial legislation, the ULCC now participates actively in the implementation of international conventions in the realm of private international law. This year, the Department of Justice of Canada continued its work in close collaboration with the ULCC on the preparation of a tentative draft uniform act on the enforcement of foreign judgements. Recent accomplishments include a uniform act to implement the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID), a uniform act to implement the UNCITRAL *Conventions on the Limitation Period in the International Sale of Goods* and a uniform act to implement the Canada-France Convention. Further information may be found in this site.

2. Civil Justice Committee

This committee was first established as an ad hoc committee in the late 1980s to assist in the preparation for and follow-up to the meetings of federal, provincial and territorial Deputy Ministers of Justice. It has become quite active in the field of private international law, especially regarding the adoption of implementation legislation recommended by the ULCC.

C. PRIVATE SECTOR

In addition to consultation with the Canadian Bar Association (CBA), the Department of Justice has increased its efforts to establish contacts with private sector groups, such as the Canadian Exporters' Association and the Arbitrators' Institute. From 1983 to 1993, the Department organised an annual seminar on international trade law. From 1993 to 1995, the seminar was organised in collaboration with the CBA. In the Spring of 2000, a new International Law Seminar was organised by the CBA in collaboration with the Department of Justice and other interested federal departments. Over the last year, members of the Justice PIL Team have participated in conferences, lectured in law faculties, published articles and met with interested parties, all in order to strengthen ties with the business and academic community and the

Bar.

II. INTERNATIONAL ORGANIZATIONS

A. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law, which held its first session in 1893, has 47 member States, including Canada since 1968. Its objective is to work toward the progressive unification of rules of private international law. The Permanent Bureau, the small secretariat of the Conference, is responsible for the administration and supporting research. Its working cycle is four years, at the end of which the Sessions of the Conference are convened and which all member States attend. The member States also meet during the intersessional period in "Special Commissions", which develop draft conventions to be adopted at the next Session. The Hague Conference has adopted 35 conventions, 26 of which are in effect. Further information on The Hague Conference on Private International Law may be found at <http://www.hcch.net>.

The 1997-2000 work programme focused on the drawing up of two conventions, one dealing with the enforcement of judgements and the other on the protection of adults. This latter Convention was completed in October 1999. The 2001-2004 work programme will not be adopted until June 2001 but we anticipate that it will include continued work on jurisdiction and enforcement of judgements, a new convention on maintenance obligations and possibly a convention on the subject of on-line dispute resolution.

Canada participated in the following activities of the Conference: the Special Commission of May 2000 on general affairs and policy of the Conference and the Special Commission on the question of the recognition and enforcement of foreign judgements in civil and commercial matters in October 1999. A Canadian, Mr. T.B. Smith, chaired the latter. In February 2000, Canada hosted a meeting of the Hague Conference to discuss questions of jurisdiction and electronic commerce in the context of the draft Convention on jurisdiction, recognition and enforcement of foreign judgements.

Canada is party to four Hague Conference Conventions in private international law: the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (adoption 1965, in force in Canada 88/05/01); the *Convention on the Civil Aspects of International Child Abduction* (1980, Canada 88/04/01); the *Convention on the Law Applicable to Trusts and on their Recognition* (1985, Canada 93/01/01); and the *Convention*

on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993, Canada 97/04/01).

B. UNCITRAL

The United Nations Commission on International Trade Law, the core legal body within the UN system in the field of international trade law, aims to further the progressive harmonisation and unification of the law of international trade. To reach this goal, the Commission uses various instruments: it has prepared 6 conventions, 6 model laws, uniform rules and a number of legal guides. Further information on UNCITRAL may be found at <<http://www.uncitral.org>>.

The membership of UNCITRAL is currently limited to 36 States, representing various geographic regions and the principal economic systems and legal traditions of the world. The members are elected for a six-year term by the General Assembly. Other States and governmental and non-governmental organisations may participate as observers in meetings of the Commission and its working groups, which both operate by consensus. Canada was a member of UNCITRAL from 1989 to 1995, and since then has participated actively as an observer. During Spring 2000, Canada announced its candidacy for a seat on the Commission, with elections to take place in the fall of 2000 for a term commencing in June 2001.

At the 33^d session of the Commission in June and July 2000, in which Canada actively participated, UNCITRAL instructed the Working Group on Electronic Commerce to continue developing uniform rules for digital signatures and related issues and to complete its work at the fall 2000 session of the Working Group. The Working Group on International Contract Practices presented a draft Convention on Assignments of Receivables to the Commission, which will complete its review of the draft at its 34th session in 2001. The Commission finalised the draft Legislative Guide to Privately-Financed Infrastructure Projects which will be published and distributed by the United Nations.

In terms of future work, the Commission will continue its work in the area of arbitration and will undertake new work in insolvency law. The Working Group on Electronic Commerce will prepare recommendations on future work for the 34th session of the Commission. As a result, the Working Group on International Contract Practices will meet in Vienna from December 11-22, 2000, the Working Group on Insolvency Law will meet in New York from March 26 to April 6, 2001 and the Working Group on Arbitration will meet in Vienna from November 20 to December 1, 2000 and in New York from May 21 to June 1, 2001. The Working Group on Electronic Commerce will meet in

Vienna from September 18-29, 2000 and in New York from February 26 to March 9, 2001. The 34th session of the Commission will take place in Vienna from June 25 to July 13, 2001.

Canada is a party to two UN conventions relating to international commercial law: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958, in force 86/08/10) and the *Convention on Contracts for the International Sale of Goods* (Vienna Convention of 1980, in force in Canada 92/05/01). Canada has also enacted domestic legislation implementing UNCITRAL's *Model Law on International Commercial Arbitration* (1985). Legislation drawing on UNCITRAL's *Model Law on Electronic Commerce* has been adopted by the federal government. This year, relying upon the uniform implementing legislation developed at the ULCC, the Department of Justice expects to undertake consultations with the provinces and territories regarding the accession to and implementation of the *Conventions on the Limitation Period in the International Sale of Goods*.

C. Unidroit

Although the International Institute for the Unification of Private Law, known as Unidroit, was created in 1926 as an organ of the League of Nations, since 1940 it has been an independent inter-governmental organisation based in Rome. There are 58 member States, including Canada since 1968, the United States, China, Australia, and many states from Latin America, Africa, and Eastern and Western Europe. Unidroit's mandate differs from that of the Hague Conference, as it aims to harmonise and co-ordinate the private law of the member states, rather than their private international law rules. Further information on UNIDROIT may be found at <<http://www.unidroit.org>>.

Since its creation, Unidroit has drafted more than seventy studies, model laws and conventions on various private law subjects including the law of sales, international leasing and factoring law, the law of carriage, security interests, franchising and cultural property.

Canada is party to only one of the six Unidroit conventions, the *Convention Providing a Uniform Law on the Form of an International Will* (1973) (in force for Canada on 78/09/02 and was extended to Alberta, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island and Saskatchewan).

D. WORLD BANK

The World Bank has also been active on the private international law scene since the creation of the International Centre for Settlement of Investment Disputes (ICSID) under the *Convention for the Settlement of Investment Disputes between States and Nationals of Other States* (1965). Canada is still

not a party to this convention. However, at the suggestion of the Department of Justice, a Working Group of the ULCC drafted a uniform act to implement the Convention adopted by the ULCC on November 30, 1997, foreseeing a future ratification. Further information on the World Bank can be found at <<http://www.worldbank.org>>.

E. REGIONAL Organizations: THE ORGANIZATION OF AMERICAN STATES

The Organisation of American States, with 34 member States, provides an important forum for political, economic, social and cultural cooperation in the region of the Americas. In the legal field, the Inter-American Judicial Committee, composed of eleven jurists who are nationals of Member States, acts as an advisory body to the member States. The Committee recommends the convening of specialised juridical conferences, such as the Inter-American Conference on Private International Law (CIDIP) which meets approximately every four or five years to deal with technical matters and further cooperation in the area of private international law. Further information on the OAS may be found at <<http://www.oas.org/>>.

Canada is not yet party to any of the 23 OAS conventions in private international law, and had only observer status for the first four CIDIP meetings. Since becoming a member of the OAS in 1990, however, Canada's interest in exploring ways of enhancing legal cooperation with other OAS countries has increased. Canada did participate officially in the 1994 Fifth Inter-American Conference on Private International Law (CIDIP-V) and is closely following preparations for CIDIP-VI, which we expect will take place within the next two years. The Conference will deal mainly with commercial law issues. Consultations could be undertaken in the coming years regarding the possibility of ratifying and implementing the *Inter-American Convention on the Law Applicable to International Contracts* (1994) and the *Inter-American Convention on International Traffic in Minors* (1994).

F. bilateral ACTIVITIES

Canada also negotiates bilateral conventions, which mainly deal with the enforcement of judgements. The first convention of this type was the *Canada-UK Convention on the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters* (1984) which is in force for all provinces and territories except Quebec.

The *Canada-France Convention on the Recognition and Enforcement of Judgements in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance* was signed on June 10, 1996. Consultation with the provinces regarding its implementation is well advanced. A uniform act to implement this

Convention was adopted by the ULCC in August 1997. Saskatchewan (1998) and Ontario (1999) have adopted legislation to implement this Convention.

III. PRIORITIES OF THE DEPARTMENT OF JUSTICE IN PRIVATE INTERNATIONAL LAW

A. International COMMERCIAL LAW

1. HIGH PRIORITIES

a. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) (World Bank)

- *Subject:* This Convention, drafted by the World Bank in 1965, sets up voluntary arbitration mechanisms between States and nationals of other States for investments made by corporations or individuals in foreign countries. The Convention creates an international organisation, the International Centre for Settlement of Investment Disputes (ICSID), which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

Although 131 States are party to the Convention, Canada has not yet ratified it. This may be explained in part by the fact that the Convention does not possess a federal state clause which would allow implementation in some of the provinces or territories but not all. Without such a clause, all provinces and territories must implement the Convention before Canada ratifies it. The project has received the support of ten provinces and territories. Consultation with the two missing provinces (i.e. Quebec and Alberta) is taking place. Shortly Nunavut will also be consulted. Their response is expected before the end of the fall 2000.

At the proposal of the Department of Justice, a Working Group of the ULCC has prepared a draft uniform act for the implementation of the Convention. The *Settlement of International Investment Disputes Act* has been adopted unanimously by the ULCC on November 30, 1997.

- *Action required in Canada:* Finish the consultation with the provinces and territories, sign the Convention, enact implementing legislation, and ratify the Convention.

b. Working Group on Electronic Commerce (UNCITRAL)

- *Subject:* Taking the *Model Law on Electronic Commerce* as a starting point, the Working Group is continuing the development of rules for electronic

commerce. Since its sessions in January and July 1998, the Working Group has been discussing draft provisions on electronic signatures. The next meeting of the Working Group, the seventh since February 1997, will take place in September 2000. The Working Group is expected to complete its draft rules at that session so that they can be adopted by the Commission in June 2001. The winter session of the Working Group should be devoted to a consideration of possible topics for future work.

- *Action required in Canada:* Consultation and participation in the sessions of the Working Group and of the Commission. Consultation on possible topics for future work.

c. Conventions on the Limitation Period in the International Sale of Goods (UNCITRAL)

- *Subject:* These Conventions, which entered into force August 1, 1988, grew out of the work of UNCITRAL to unify international sales law. On August 9, 2000, there were 24 States party to the *Limitation Convention* of 1974, and 17 States party to the *Amended Limitation Convention*, including, in both cases, our North-American trade partners, the United States and Mexico (in force December 1994).

The Conventions dovetail with the United Nations *Convention on Contracts for the International Sale of Goods* (Vienna, 1980), which has entered into force for all of Canada in January 1993. There is substantial similarity between the three 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 Conventions* is to eliminate all disparities in the national laws governing limitations on the initiation of legal proceedings arising from contracts for the international sale of goods, as these disparities can create hardship both in cases where meritorious claims are statute-barred by a very short limitation period, and where parties are left open to liability for an inordinately long time in jurisdictions with very long limitation periods. The Conventions establish a uniform prescription period of four years for commercial litigation.

In 1995, the Advisory Group on Private International Law recommended that the Department take steps toward acceding to and implementing the Conventions. In August 1998, the Uniform Law Conference of Canada adopted the *Uniform International Sales Convention Act*. This Act will implement the *United Nations Convention on Contracts for the International Sale of Goods*, already in force in Canada, and the *Conventions on the Limitation Period in the International Sale of Goods*.

In July 2000, consultations were undertaken with the Canadian Bar Association to obtain the CBA's official position on implementing the Conventions in Canada.

- *Action required in Canada:* Consultation with provinces and territories regarding a future Canadian accession.

d. Draft Convention on Assignment of Receivables (UNCITRAL)

- *Subject:* In 1995, the Working Group on International Contract Practices began the development of uniform rules in the area of assignment of receivables. The draft rules are intended to facilitate 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.

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 decision 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 the *International Factoring Convention* of Unidroit 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.

Canada participated in five Working Group sessions since October 1997. Our civil and common law provincial experts, Me Michel Deschamps and Professor Catherine Walsh, played a key role in the development of the draft Convention.

Following the October 1999 Working Group session, the draft was submitted to the Commission at its 33^d session in June 2000. The Commission completed its review and adoption of Articles 1-17 of the draft, clarifying the types of transactions that are to be excluded from the scope of the Convention and refining the drafting. The remaining articles will be reviewed by the Working Group on International Contract Practices in December 2000 to facilitate completion of the text at the 34th session of the Commission in 2001.

- *Action required in Canada:* Consult on the basis of the new text in preparation for the next Working Group session.

e. Draft Unidroit Convention on International Interests in Mobile Equipment and Related Draft Aircraft Equipment Protocol (UNIDROIT)

- *Subject:* This preliminary draft Convention provides a framework for the creation and effects of an international interest in mobile equipment (i.e.,

airframes, aircraft engines, helicopters, oil rigs, containers, railway rolling stock, space property, and other objects that could be identified in the future), each of these mobile equipment will be the subject of a specific Protocol under the Convention. The preliminary draft Convention is concerned with three types of international interest: (1) those granted under a security agreement; (2) those held under a title reservation; and, (3) those vested in a person who was lessor under a leasing agreement.

In summary, the preliminary draft Convention (1) sets formal requirements for the creation of an international interest; (2) sets out basic default remedies; (3) establishes registration rules; (4) deals with the effect of an international interest as against third parties (priority rules, rules to preserve the efficacy in the event of bankruptcy); (5) contains provisions on assignments; and, (6) deals with registerable national interests.

The preliminary draft Protocol will adapt to aircraft equipment the mechanisms set out in the Convention. Among other things, it will set an international central registry to register interests in aircraft equipment.

Both the preliminary draft Convention and the preliminary draft Aircraft Protocol were laid before the Governing Council of Unidroit at its February 1998 session. At that meeting, the Governing Council considered that the preliminary draft Protocol would need to be aligned more, as to both style and terminology, with the preliminary draft Convention and that some provisions of the Protocol capable of application to all other protocols be moved to the Convention. Thus a Steering and Revisions Committee met in Rome at the end of June 1998 with a view to completing the preliminary draft texts of the Convention and the Protocol. In August 1998, both texts were sent jointly for consultation to governments by Unidroit and the International Civil Aviation Organisation (ICAO).

A first consultation was undertaken in September 1998. Additional information from Unidroit was sent on November 2, 1998 to all Canadians consulted. On November 3-5, 1998 an Informal Preparatory Meeting of States with an interest took place in London at the invitation of the Department of Trade and Industry, United Kingdom. From February 1-12, 1999 the first Joint Unidroit-ICAO Session of governmental experts was held in Rome. In June 1999 a second consultation package was undertaken. On June 17-18, 1999 an informal meeting of the Unidroit-ICAO Registry Working Group was held in New York in order to continue and accelerate the study of the International Registry. The Second Joint Unidroit-ICAO Session met in Montreal from August 24 until September 3, 1999. A Public International Law Working Group, which Canada was a member, met from December 8 to 11, 1999 in

South Africa. A third consultation was undertaken in January 2000. The Third Joint Unidroit-ICAO Session met in Rome from March 20 to 31, 2000.

A fourth consultation was undertaken in April 2000. This fourth consultation will provide guidance to the Government of Canada in order to prepare for the August 28 to September 8, 2000 meeting of the ICAO Legal Committee. The Committee will consider the draft Convention and Protocol on aircraft equipment with a view to determining whether the drafts are ripe for a Diplomatic Conference from a civil aviation perspective. At this moment, it is not known whether other consultations will take place prior to a Diplomatic Conference being held.

At the Third Joint Session, the United States of America and France presented a joint proposal for setting up an *ad hoc* Task Force to prepare for the establishment of the International Registry. The task force is to conclude its work before the meeting of the Legal Committee of ICAO. Canada was a member of the *ad hoc* Task Force for the Establishment of the International Registry that met in Paris on June 19-21, 2000.

- *Action required in Canada* : Ongoing consultations on the draft *Convention* and *Protocol* to develop the Canadian position in order to prepare for the ICAO Legal Committee taking place in Montreal from August 28 until September 8, 2000.

f. Working Group on Arbitration (UNCITRAL)

- *Subject*: A Working Group met from March 20th to 31st 2000 to study and report back to the Commission in July 2000 on the following subjects relating to arbitration: conciliation, requirement of a written form for the arbitration agreement, and enforceability of interim measures. The Secretariat was asked by the Working Group to prepare a set of draft alternatives to be considered during the next winter session. The Report of the Working Group on Arbitration on the work of its thirty-second session is available on the UNCITRAL web site <<http://www.uncitral.org>>.

The next Working Group will meet in Vienna from November 20th to December 1st 2000. The Secretariat will once again prepare working documents for the delegations. Consultations will be undertaken at that time.

- *Action required in Canada*: Consult with FPT governments, private sector, dispute resolution organisations and other interested parties in preparation for the next Working Group.

2. MEDIUM PRIORITIES

a. Questionnaire on the 1958 New York Convention on Foreign Arbitral Awards (UNCITRAL)

- *Subject:* The UNCITRAL Secretariat, in cooperation with the International Bar Association, has distributed a questionnaire concerning the application of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*. This questionnaire will provide valuable information to UNCITRAL and to practitioners on the application of the Convention in Contracting States. This request was sent to us on November 22, 1995.

Answers from the remaining Canadian jurisdictions were received in July 2000. A chart combining all answers will be provided to the UNCITRAL Secretariat shortly.

- *Action required in Canada:* Provide answers to UNCITRAL; Distribute a copy of the chart to all provinces and territories.

b. Sixth Inter-American Specialised Conference on Private International Law (CIDIP-VI)

- *Subject:* The OAS convenes a diplomatic conference, the Inter-American Specialised Conference on Private International Law (CIDIP), irregularly, but usually every four or five years. This Conference produces conventions in the area of private law. The last one, CIDIP-V, was held in 1994. Canada participated for the first time as a member of the OAS in CIDIP-V. Canada has not ratified any CIDIP conventions.

A Canadian delegation attended a preparatory meeting for CIDIP-VI that was held in Washington from February 14-18, 2000. Three agenda items were discussed:

- i) standard commercial documentation for international trade and review of the 1989 *Inter-American Convention On Contracts For The International Carriage Of Goods By Road* with the incorporation of bills of lading;
- ii) international loan contracts of a private nature, in particular secured transactions law; and
- iii) conflict of laws on extracontractual liability, with emphasis on jurisdiction and applicable law with respect to civil international liability for crossboundary pollution.

1) Project on Bills of Lading

Canada did not take an active role on the road transportation matter. A drafting group was established to prepare a draft inter-American bill of lading. The drafting group will be chaired by the delegation of the United States, out of the National Law Center for Inter-American Free Trade in Tucson. Canada

will not participate formally in the drafting group. A meeting to prepare the final version of the form might be held at the end of 2000, if funding is available.

- *Action required in Canada:* Provide information to Transport Canada officials on related items. Once the date for CIDIP-VI is set, finalise Canadian positions and constitute delegations.

2) Project on Secured Transactions

On secured transactions, participants discussed the draft model law proposed by the National Law Center. In reaction to the distinctly common law approach taken in the draft, Mexico proposed a set of "principles" and suggested that the draft Model be adapted and shortened to conform to the principles. This proposal met with widespread agreement. The principles and the draft Model law differ significantly with respect to enforcement provisions. A drafting group was set up, including Canada as a member for our bilingual and bijural expertise. Canada spoke to the value of considering the hybrid Quebec approach to secured interests and our contribution was very well received. The drafting group was to review a revised text or a more developed set of principles by the end of June 2000. To date no documents have been received. Participants agreed that a further meeting should be held in the fall 2000 to finalise the draft model legislation before the diplomatic conference. To date, no OAS funding has been found for such a meeting.

- *Action required in Canada:* Report to provincial stakeholders on secured transactions issues and seek their input. Once the date for CIDIP-VI is set, finalise Canadian position and constitute delegation.

3) Project on Civil Liability in Transfrontier Pollution

On extracontractual liability for cross boundary pollution, Uruguay encouraged the transformation of this item into a draft convention, although this idea had already been rejected by Member States at a 1998 meeting. In spite of the outcome of the 1998 meeting, most States in attendance supported a working group to prepare a draft inter-American convention on international competency of jurisdiction and applicable law in cases of civil liability for transboundary pollution.

Canada and the US expressed their concerns that similar work was underway in other organisations and this work might be more appropriately examined in another fora. Further, concerns were raised that Uruguay's proposal exceeds CIDIP's private international law mandate as the proposal also raises issues of public international law.

The working group's focus will therefore be limited to private international law issues in conformity with CIDIP's mandate. Environment Canada will

participate in the working group. A meeting to complete the final version of the convention might be held at the end of 2000, if OAS funding is available. No action has been taken since the February 2000 meeting.

- *Action required in Canada:* Follow Environment Canada's participation in the Working Group. Once the date for CIDIP-VI is set, finalise Canadian positions and constitute delegations.

c. Convention on International Leasing; Convention on International Factoring (UNIDROIT)

- *Subject:* These Conventions, which are also known as the Ottawa Conventions since they were finalised in Ottawa in 1988, have been in force since May 1, 1995. The *Leasing Convention* is in force for eight States and the *Factoring Convention* is in force for six States. They provide uniform international rules to facilitate the financing of international commercial transactions.

Canada is not yet party to either of the Conventions. In 1991, however, 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, however, consultations will be renewed with a view to making a recommendation as to whether Canada should become a party to the Conventions.

Moreover, 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.

- *Action required in Canada:* Confirm views of the leasing industry, the provinces and territories to determine Canada's interest in joining these Conventions.

3. LOW PRIORITIES

a. Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL)

- *Subject:* This Convention was finalised in 1995 and is not yet in force. It aims to establish greater uniformity in the law relating to independent guarantees and stand-by letters of credit in international transactions.

- *Action required in Canada:* Consultation on signature and ratification and study of implementation mechanisms.

b. United Nations Convention on Contracts for the International Sale of Goods (UNCITRAL)

- *Subject:* The Sales Convention establishes uniform rules for the international sale of goods which will apply in the absence of any expression to the contrary by the parties to the sales contract. 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 deal with the seller's liability outside the contract.

The Convention came into force for Canada on May 1, 1992 and applies uniformly across all of Canada since February 1, 1993 with the exception of Nunavut. However, as legislation to implement the Convention in Nunavut has been adopted, the application of the Convention could be extended to Nunavut in the near future by way of Declaration. As of June 2000, 56 States are party to the Convention. The Convention will come into force for Mauritania on September 1st 2000.

- *Action in Canada:* Receiving and distributing information on the Convention and its current status.

c. United Nations Convention on International Bills of Exchange and International Promissory Notes (UNCITRAL)

- *Subject:* This Convention, which was finalised in 1988, is not yet in force. Canada, which actively participated in its drafting, the Russian Federation and the United States have signed it; Mexico and Guinea have acceded to it. The Convention will enter into force after ten ratifications or accessions. In order to implement it in Canada, federal legislation would be required.

The UNCITRAL Secretariat has prepared a draft Protocol that would bring the Convention into force among NAFTA countries, with provision for additional State parties as required. The objective of this Protocol would be to encourage other States to ratify the Convention and to provide the benefit a uniform set of rules for at least one group of States without having to wait for 10 ratifications.

The Convention is the result of nearly 20 years of work by UNCITRAL to devise a unifying law for international bills and notes. It will create a new international regime based on a compromise between the civil and common

law traditions. 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. 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.

- *Action required in Canada:* Consultation on the proposed Protocol both domestically and with the US and Mexico. If our NAFTA partners demonstrate their intention to proceed and if interested parties in Canada agree, federal implementing legislation could be drafted and ratification of the Convention and signature and ratification of the Protocol could proceed.

d. Principles for International Commercial Contracts (UNIDROIT)

- *Subject:* 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 is now available in English and French, contains over 100 principles as well as commentary on each of them. 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.

A new Unidroit Working Group was established in 1998 for the preparation of a second enlarged edition of the *Unidroit Principles of International Commercial Contracts*. This new Working Group is still a non-governmental body. It is composed of 17 experts representing various legal systems. It includes Professor Paul-André Crépeau who has now retired from McGill University. The enlarged Principles will deal with : agency, limitation of actions, assignment of contractual rights and duties, contracts for the benefit of a third party, set-off, and, waiver.

- *Action required in Canada:* Dissemination of information to practitioners (private sector and government) and academics; no implementation necessary.

e. 1994 Inter-American Convention on the Law Applicable to International Contracts (OAS)

- *Subject:* This Convention, which was finalised under the auspices of (CIDIP-V) in Mexico in 1994, has entered into force with the ratification of two States: Mexico and Venezuela. Bolivia, Brazil and Uruguay are signatories. It provides for the recognition of the parties' choice of law applicable to an international contract, a rule which is in general conformity with the existing rules both in common law and civil law regimes in Canada. The Convention also establishes subsidiary rules for determination of the law applicable.

When the Convention was reviewed by members of the Department of Justice's Advisory Group on Private International Law, the members were of the view that without improvement in the English version in particular, there would not be sufficient support in Canada for signature and ratification.

When the Convention was discussed at the preparatory meeting to CIDIP-VI in December 1998, it was agreed that those States interested in changing the text should bear the responsibility of proposing changes. It was agreed that a proposal for changes would be submitted to the Secretariat which would then circulate it to the States which had signed and ratified the Convention in order to obtain their agreement to a revised text.

Canada is still not party to any of the CIDIP conventions, a situation which does not go unnoticed by other Member States. Given the substantial compatibility of the Convention with Canadian law, Canada could feasibly consider accession to it if the language problems were satisfactorily resolved.

- *Action required in Canada:* Consult with provincial and territorial authorities and other interested parties on proposed changes to the English and French versions of the Convention. Arrive at an agreed proposal with other concerned States to be submitted to the OAS Secretariat for distribution to interested States.

f. UNCITRAL Model Law on Cross-border Insolvency

- *Subject:* Trans- or cross-border insolvency exists where the insolvent 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.

In 1995, UNCITRAL decided to address the issue and 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 organisations to achieve results. In collaboration with INSOL, an

international association of insolvency practitioners, the Working Group on Insolvency Law prepared a legislative framework for judicial cooperation and for access and recognition in cross-border insolvency. The Model Law on Cross-Border Insolvency was finished at the 30th Session of the Commission in May 1997. The adoption of United States legislation implementing the Model Law in their Bankruptcy Code is in progress. Other States, including New Zealand and South Africa, are considering the Model Law.

- *Action required in Canada:* Eventual consultation via Industry Canada when that Department begins its *Bankruptcy and Insolvency Act* reviews as required by statute.

g. UNCITRAL Draft Legislative Guide on Privately-financed Infrastructure Projects (BOTs)

- *Subject:* The purpose of the Guide is to assist national Governments and legislative bodies in reviewing the adequacy of laws, regulations, and decrees relating to transactions for the private financing, construction and operation of public infrastructure facilities. The thrust of the advice provided in the Guide is to achieve an appropriate balance between the need to attract private investment for infrastructure projects and the need to protect the interests of the host Government or the users of the infrastructure facility. During the 30th session in May 1997, the Commission examined the draft Guide prepared by the UNCITRAL Secretariat. A revised version with new chapters was presented at the 31st session in June 1998. A complete revised version was presented at the 32nd session in May 1999.

A final version of the Guide was presented to the Commission for adoption at the 33rd session in June-July 2000. Apart from a few modifications to the 1999 text, the Commission adopted the Guide consisting of the legislative recommendations and the notes. The Commission requested the Secretariat to publish the Guide and to widely disseminate it.

The Commission discussed possible future work based on the Guide, such as developing a model law or model legislative provisions on selected issues covered by the Guide. The Commission requested the Secretariat to prepare a report on possible future work after consulting with experts and organisations in the area and will decide on future work at its session in 2001.

- *Action required in Canada:* Dissemination of the Guide in its final version to private and public sector practitioners and academics; no implementation necessary. Consultation with experts from the government and the private sector as to the need of future work in this field.

h. Case Law on UNCITRAL Texts (CLOUT)

- *Subject*: UNCITRAL has established a system for collecting and distributing judicial and arbitral decisions on the *New York Convention*, the *Model Law on International Commercial Arbitration*, the *Sales Convention* and other UNCITRAL instruments in force. Designated national correspondents contribute summaries of the decisions. Cases which interpret, for example, the *Sale of Goods Convention*, can be found at the UNCITRAL web site. The first Canadian decision on the Sale of Goods Convention was rendered in August 1999: *La San Giusseppe v. Forti Moulding Ltd.*, (1999) O.J. No. 3352.

Professor Geneviève Saumier from the Faculty of Law of McGill University has agreed to be the Canadian National Correspondent for CLOUT, for both the civil and the common law case law.

- *Action required in Canada*: Coordinate and monitor the work of the national correspondent; distribute collections of decisions as they are received; attend annual meetings of national correspondents.

i. Working Group on Insolvency (UNCITRAL)

- *Subject*: At its 32d session in Vienna, the Commission considered a proposal from Australia to do further work in the field of insolvency law and, in particular, to consider the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes. While a great deal of interest was expressed in the idea, there was also a strong note of caution, given the work already being done within a number of other organisations such as the World Bank and the inherent difficulties of attempting uniformity in the area of insolvency law. As a result, the Commission convened one session of the Working Group on Insolvency Law in December 1999 to further study the question and report back to the Commission at the 33d session on the feasibility of doing work in the area. The Working Group recommended that the Commission undertake the preparation of a legislative guide to insolvency law.

At the 33d session, the Commission considered that recommendation. It also considered the suggestion that further work should be done on out-of-court restructuring. A fairly high degree of interest was expressed in that idea as well. The Working Group has been convened for a session in March 2001.

- *Action required in Canada*: Consult and prepare Canada's position for the session in collaboration with Industry Canada officials.

j. Model Law on Electronic Commerce (UNCITRAL)

- *Subject*: This text attempts to provide a legislative framework to overcome legal obstacles to electronic commerce. It was finalised by the Commission in 1996 and is now recommended for domestic adoption. An additional article to

ensure that incorporation by reference is not excluded from electronic commerce, simply because it is in electronic form, was adopted by UNCITRAL at its 31st session in June 1998. The text of the article appears in new editions of the published version of the *Model Law on Electronic Commerce*. The ULCC approved in September 1999 the *Uniform Electronic Commerce Act* which implements many provisions of the Model Law.

- *Action required in Canada*: Consultation on possible adoption by provinces and territories of the *Uniform Electronic Commerce Act*.

B. JUDICIAL COOPERATION AND ENFORCEMENT OF JUDGMENTS

1. HIGH PRIORITIES a. Hague project on jurisdiction, recognition and enforcement of judgements in civil and commercial matters (Hague Conference)

- *Subject*: This project was part of the 1997-2000 work programme of the Hague Conference and will continue as part of the 2001-2004 programme. It is aimed at providing rules in a multilateral convention on acceptable and prohibited bases of court jurisdiction in international litigation, with a view to facilitating recognition and enforcement of judgements in civil and commercial matters. The final Special Commission on the project, again chaired by Canada's T.B. Smith, took place in October 1999. An additional meeting of the Hague Conference on the project was held in Ottawa from February 28 to March 1, 2000. This meeting focussed on the electronic commerce implications of the draft Convention.

The draft Convention was originally to have proceeded to a diplomatic conference in October 2000. At the end of the October 1999 Special Commission, however, a number of States, including Canada, were strongly of the view that the project was not yet ready. A number of important issues remain to be settled, including the suitability of the rules for electronic commerce, the mechanism for coordinating its application with the Brussels Convention, the mechanism for accessions (automatic, reciprocity) and the federal State extension and interpretative clauses. Faced with this view, it was agreed to postpone the diplomatic conference and to find a means of making progress on the negotiations without further Special Commissions.

In February 2000, the United States formally indicated that it finds the current draft unacceptable overall. Among the many problems identified by the US, in its view the prohibited grounds of jurisdiction are too extensive and the rules do not lead to an acceptable outcome in the context of electronic commerce. Generally, the current draft of the Convention would effect changes to US practice that would be too significant to accept.

At the Ottawa meeting in February 2000, participants included representatives from some 23 States and a number of electronic commerce associations and ad hoc experts. A clear consensus emerged that the draft Convention should cover electronic commerce rather than expressly exclude it. On the other hand, there was no consensus on the content the rules should have in order to do so. Work on this aspect of the draft continues. Informal discussions on the negotiation as a whole did not produce any breakthrough, but most States are committed to continuing. The official report of the meeting should be available by the end of August 2000.

In May 2000 the project was discussed at the Special Commission on General Affairs and Policy of The Hague Conference. It was agreed to hold a two-part diplomatic conference, with the first to be held in June 2001 and the second in early 2002. It was recognised that States need to meet informally to make progress on the negotiations before the diplomatic conference.

With the first part of the diplomatic conference scheduled for June 2001, States interested in the project will be meeting to the extent possible over the coming months in an effort to find solutions to the issues on the table and agree to drafting. At this time only two meetings are confirmed: the first will take place in San Francisco in September 2000 in the context of the annual meeting of the Internet Law and Policy Forum; the second will take place in Ottawa from February 26 to March 1 2001 with a focus on electronic commerce and jurisdiction. There may be additional meetings in the fall.

Now that an official version of the draft Convention has been produced, consultation in Canada will take place to prepare our position for the diplomatic conference. The current draft of the Convention is available on the website of the Hague Conference at <http://www.hcch.net/e/workprog/>.

- *Action required in Canada:* Consult with the provinces, territories and other stakeholders to develop Canada's position for the diplomatic conference; promote support for the project; participate in informal meetings where possible; consult on electronic commerce aspects to prepare for February 2001 meeting in Ottawa.

2. MEDIUM PRIORITIES

a. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Conference)

Subject: This Convention, which does not yet apply to Canada, is in force in 63 States. It is aimed at replacing the process of legalisation of documents by diplomatic officials with the simpler method of the "apostille", i.e., a certificate issued in the originating country by a competent authority. At the request of

the Secretary General of the Hague Conference, the Advisory Group recommended that the consultation on the opportunity for Canada to become a party to this Convention, which was suspended in 1993, be reinitiated given the anticipated benefits for private parties particularly under the *Intercountry Adoption Convention*.

Consultations have begun with the provinces through the Advisory Group on Private International Law and some information must be provided with regards to the Convention and its implementation in Canada.

- *Action required in Canada*: Prepare an information note to send to the provinces and territories on the advantages of the Convention and the way other countries implemented it and the costs associated with its implementation.

b. Convention between Canada and France on the Recognition and Enforcement of Judgements in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance (bilateral)

- *Subject*: The *Canada-France Convention*, the first treaty relating to enforcement of judgements negotiated between Canada and a country with a civil law tradition, was signed on June 10, 1996. It will come into force once domestic law measures to give effect to the Convention will have been taken. Its main advantage, similar to that under the *Canada-United Kingdom Convention*, is protecting Canadian interests against the enforcement of judgements 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 judgements in France, not only in general civil and commercial matters, but also in family matters, including maintenance orders.

The ULCC adopted a uniform law to implement the Convention in August 1997. Relevant documents were sent to the provinces and territories. In June 1998, Saskatchewan became the first jurisdiction to enact legislation based on the Uniform Act. In December 1999, Ontario has enacted legislation to implement the Convention also based on the Uniform Act. As is necessary, a federal implementing law will eventually be prepared. Some of the implementation measures deal with family law matters, for example the recovery of alimony. A draft standard administrative agreement is presently being prepared by the concerned authorities.

- *Action required in Canada*: Consultation regarding timely implementation of the Convention; notification to France of the adoption of required measures.

c. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Conference)

- *Subject:* This Convention, which does not yet apply to Canada, is in force in 31 States. Its purpose is to facilitate the transmission and enforcement of letters rogatory by which foreign authorities are requested to obtain evidence for use in ongoing proceedings. This Convention is a complement to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, which is already in force in Canada.

Consultation on the desirability of Canada's acceding to the Convention was undertaken in 1990. So far, the implementation of this Convention has received the support of six jurisdictions. As this Convention does not contain a federal state clause, it will be necessary to receive the support of all jurisdictions before adhering to the Convention. Although the Convention would not be costly to implement in Canada, from a policy perspective the advantages of Canada's accession are not evident. For these reasons, 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 multilateral convention on judgements may also add some impetus to the need to consider acceding to the Convention once the Hague project on jurisdiction, recognition and enforcement of judgement is completed.

- *Action required in Canada:* Consultation on the appropriateness of Canada's acceding to it; implementation by way of amendments to Rules of Courts.

d. Convention on the Service and Notification Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Conference)

- *Subject:* This Convention has been in force all across Canada since 1989 and in Nunavut since April 1st, 1999. It applies also in 39 other States. It is aimed at facilitating the service of documents through Central Authorities established in each State party. Other means of service, such as postal service, are also available provided no objection to their use has been made.

In Canada, Central Authorities have been designated in each province and territory with the exception of Nunavut where the designation of a Central Authority should be completed in the near future. 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 in two territories, as well as at the federal level, have been amended to comply with the Convention.

In 1999, the Permanent Bureau of the Hague Conference on Private International Law has begun the preparation of a new edition of the *Practical Handbook on the Operation of the Hague Convention*. All Canadian jurisdictions were contacted to update the practical information provided in the Handbook. This information has been provided to the Permanent Bureau of the Hague Conference. The new edition will soon be available.

Nunavut has indicated its Central Authority in respect of this Convention.

- *Action required in Canada*: Monitoring of its application; dissemination of information.

3. LOW PRIORITIES

a. Canada/United Kingdom Convention on the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters (Bilateral)

- *Subject*: This Convention, which was concluded in 1984, was the first bilateral treaty entered into by Canada in the area of enforcement of judgements. It now applies to all Canadian jurisdictions except Quebec and Nunavut. However, as legislation to implement the Convention in Nunavut has been adopted, the application of the Convention could be extended to Nunavut in the near future by way of Declaration. The Convention was modified in February 1995 by the incorporation of a reference to the 1988 *Lugano Convention on Judicial Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, in order to protect Canadian interests against enforcement in the United Kingdom of judgements rendered in European countries party to the *Lugano Convention* on exorbitant bases of jurisdiction. The necessary implementation measures were adopted in the United Kingdom and the amendments came into force on December 1, 1995. The modification is in addition to the protection with respect to judgements from countries party to the 1968 *Brussels Convention* already included in the text.

- *Action required in Canada*: Monitoring of its application; extension to Quebec when possible.

C. FAMILY LAW 1. HIGH PRIORITIES

a. Convention on the International Protection of Adults (Hague Conference)

- *Subject*: *Subject*: This project is part of the 1997-2000 work programme of the Hague Conference. The *Convention on the International Protection of Adults* was completed and adopted at the Special Commission with diplomatic

character held from September 20th to October 2nd 1999. The Convention sets a framework for the jurisdiction, the recognition and enforcement, the law applicable and the cooperation in relations to a vast array of issues affecting adults in international situations, such as living wills, the administration of property, and legal representation.

In preparation for the Special Commission for the *Convention on the International Protection of Adults*, the federal government consulted with the provincial and territorial government departments responsible for health/community services/elderly; public trustees/curateur public of provinces and territories; federal government departments (Citizenship and Immigration, Health, and Justice); legal experts; and interested non-governmental organisations. Consultations indicated general support for this Convention.

Action required in Canada: At the ULCC August 2000 meeting, the federal Department of Justice will propose that the ULCC, with the collaboration of FPT Family Law Committee, establish a Working Group to prepare uniform legislation to implement the *1999 Convention on the International Protection of Adults* and the *1996 Hague Convention on the Protection of Children*.

b. Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures of Protection of Children (Hague Conference)

- *Subject:* This Convention, which was finalised on October 19, 1996 during the 18th Session of the Hague Conference, is a revision of the *1961 Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*.

This new Convention provides for harmonised rules to determine which authorities are competent over child welfare and custody matters in international situations, with a view to facilitating the enforcement of their decisions. It also sets rules for selecting the law applicable in such matters. Consideration was given to the relationship between the new Convention and other Hague Conventions affecting children's issues, such as the *International Child Abduction Convention* and other instruments. The Convention is not yet in force.

A major consultation was undertaken with interested authorities before the 18th Session of the Conference in order to prepare the Canadian position. Canada was represented at the Conference by a delegation composed of federal and provincial representatives and obtained the inclusion of a number of important issues in the text of the Convention.

The final explanatory report is now available. This Convention could be useful in the context of the reform presently underway in Canada with respect to custody law.

- *Action required in Canada:* At the ULCC August 2000 meeting, the federal Department of Justice will propose that the ULCC, with the collaboration of the FPT Family Law Committee, establish a Working Group to prepare uniform legislation to implement the *1999 Convention on the International Protection of Adults* and the *1996 Hague Convention on the Protection of Children*.

c. Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Conference)

- *Subject:* The Convention provides rules for an orderly and harmonised process for international adoption encouraging cooperation between countries of origin and receiving countries. It aims to assure a rapid and flexible process, in the best interests of the children concerned. The implementation of the Convention will have real impact on Canadian international adoption practices.

This Convention came into force on May 1, 1995. As of August 1st 1999, 11 States have signed but not yet ratified the Convention. The Convention is presently in force for 40 States (29 ratifications and 11 accessions). The Convention entered into force in Canada on April 1st 1997 in the five provinces which were the first to enact implementing legislation, i.e. British Columbia, Prince Edward Island, Manitoba, New Brunswick and Saskatchewan. On November 1st 1997, the Convention entered into force for Alberta; on August 1st 1998 for the Yukon; on October 1st 1999 for Nova Scotia; on December 1st for Ontario; and the Northwest Territories on April 1st 2000.

A Special Commission will be held at The Hague from November 28th to December 1st 2000 to review the operation of the Convention.

Updated information is available on The Hague Conference web site at <<http://www.hcch.net>>.

- *Action required in Canada:* Follow up on implementation in the provinces and territories which have not enacted implementing legislation; Consultation on the new accessions for. Preparation in view of the upcoming Special Commission.

2. MEDIUM PRIORITIES

a. Convention on the Civil Aspects of International Child Abduction (Hague Conference)

- *Subject:* This Convention, which is the first Hague Convention to be ratified by Canada, has been in force all across Canada since 1983 with the exception of Nunavut. However, as legislation to implement the Convention in Nunavut has been adopted, the application of the Convention could be extended to Nunavut in the near future by way of Declaration. It now applies to 68 States around the world. The Convention is in force for Turkey as of August 1st 2000.

The Convention provides for an expeditious remedy in order to obtain the return to the State of habitual residence of a child who has been unlawfully removed to or who is unlawfully retained in another country in breach of custody rights. 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.

In Canada, there is a Central Authority 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, DFAIT – Legal Services. A transportation programme facilitates the repatriation of children who have been abducted by a parent; the programme operates domestically and as well as internationally. The programme is co-ordinated by the Royal Canadian Mounted Police (RCMP) Missing Children's Registry, (tel.: 1-877-318-3576) in cooperation with the national airlines and Via Rail.

It is worth mentioning that the Convention, which has been incorporated into Canadian law, has been invoked in several cases, the first one to have been heard by the Supreme Court being *Thomson v. Thomson*, [1994] 3 S.C.R. 551 and more recently, *Pollastro v. Pollastro*, (April 1st 1999) Toronto 1846-017, (Ont. C.A.) [non-published].

The Hague Project for International Co-operation and the Protection of Children was launched officially during the Special Commission on General Affairs and Policy in May 2000. The goal of the project is to make information about the operation of the Convention more easily accessible by establishing a database of judicial decisions taken under the *Hague Convention on the Civil Aspects of Child Abduction*. It is hoped that this will facilitate a uniform interpretation of the Convention across all Contracting States. Relevant decisions from the central authorities will be collected and forwarded to the Permanent Bureau of the Hague Conference. The database is available at <<http://www.incadat.com>>.

During this meeting, support was expressed on the desirability and potential usefulness to report on the exercise of access/contact between children and

their custodial and non-custodial parents. A Special Commission to study the operation of the Convention will be held in March 2001 and will address this issue.

The federal Department of Justice is still waiting for a response from some provinces and territories with regard to Canada's position regarding the accessions of Belarus, Costa Rica, Fiji, Moldova, Paraguay, and Turkmenistan.

- *Action required in Canada:* A new round of consultations will be soon initiated on Canada's position regarding the accessions of Brazil, Malta, Trinidad and Tobago, Uruguay and Uzbekistan. Preparation in view of the upcoming Special Commission.

b. Possible Convention on Maintenance Obligations (Hague Conference)

- *Subject:* As part of its 2000-2004 Work Program, the Hague Conference on Private International Law will undertake to draft a new international instrument in relation to maintenance obligations.

In April 1999, a Special Commission of the Hague Conference reviewed the 1956 and 1973 *Hague Conventions on the Law Applicable to Maintenance Obligations*, the 1958 and 1973 *Hague Conventions on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* as well as the United Nations' 1956 *New York Convention on the Recovery Abroad of Maintenance*. Canada is not a party to any of the Conventions, but has an interest in the subject.

Several problems with these Conventions were identified: the complete failure of some States to carry out their obligations under the Conventions; differences of interpretation, practice and enforcement under the Conventions; cumulative application of the Conventions; and practical issues, such as the best method of transferring funds. Moreover, the Conventions have not met the needs of the dependants requiring support, the New York Convention has contributed, in part, to inconsistent interpretation and practice, various changes have occurred in national legislation, and the proliferation of international instruments has created a complex system.

This new international instrument should: contain provisions regarding administrative and State co-operation; be comprehensive in nature and retain the best elements of existing conventions; and be considered in collaboration with other relevant international organisations. In addition, the new instrument should not inhibit continuing work of the Hague Conference in promoting ratification and effective operation of existing Conventions.

- *Action required in Canada:* Consultations on a draft text once received from the Hague Conference.

3. LOW PRIORITIES

a. Working Group on Domestic Partnerships and Non-Marital Cohabitation (Hague Conference)

- *Subject:* At the Special Commission on General Affairs and Policy of the Hague Conference in May 2000, the Commission considered whether to create a working group that would perform an exploratory examination of private international law issues related to both registered partnerships and non-marital cohabitation. The Working Group would make recommendations on this subject.

Certain countries were not yet ready to address this issue and for this reason the Special Commission decided to maintain the topic on the agenda but without priority so it may be returned at a future date.

D. PROTECTION OF PROPERTY

1. MEDIUM PRIORITIES

a. Convention on the Return of Stolen or Illegally Exported Cultural Objects (UNIDROIT)

- *Subject:* This Convention, which was finalised under the auspices of UNIDROIT in June 1995, sets out rules for the restitution or return of stolen or illegally exported cultural objects, subject to certain limitation periods. The Convention also provides for compensation of *bona fide* purchasers and addresses the issue of the proper jurisdiction in which to bring a claim.

Twenty-two States have signed the Convention. It is in force since July 1, 1998 between China, Ecuador, Lithuania, Paraguay and Romania. It entered into force for Peru (98/09/01), Hungary (98/11/01), Brazil (99/09/01), Bolivia (99/10/01), Finland (99/12/01), El Salvador (00/01/01) and Italy (00/06/01).

- *Action required in Canada:* Undertake consultations in conjunction with the Department of Heritage Canada with a view to determining whether Canada should become a party to the new Convention.

b. Convention on the Law Applicable to Trusts and their Recognition (Hague Conference)

- *Subject:* This Convention is now in force in 11 States, including five exclusively civil law jurisdictions. It entered into force in Canada on January 1,

1993 and now applies to seven jurisdictions: Alberta, British Columbia, Prince Edward Island, New Brunswick, Newfoundland, Manitoba and Saskatchewan.

The Convention aims at resolving issues of conflict of laws related to the establishment and management of trusts and problems related to their recognition, especially in countries with a civilian tradition.

- *Action required in Canada:* Consultation with the jurisdictions that have yet to implement the Convention in order to have the Convention in force throughout Canada in the near future.

3. LOW PRIORITIES

a. Convention Providing a Uniform Law on the Form of an International Will (UNIDROIT)

- *Subject:* This Convention applies to 12 States, including Canada where it has been extended to 7 provinces since 1977. To facilitate implementation of the Convention, the ULCC has prepared a Uniform Act.

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 recognised as valid in all Contracting States. Article 1 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. In choosing the form of an international will, testators know that their will is to be recognised in all Contracting States without reference to the conflict of law rules concerning the validity of wills.

- *Action required in Canada:* Consultation with the five other jurisdictions that have yet to implement the Convention.

b. Convention on the Law Applicable to the Succession to the Estates of Deceased Persons (Hague Conference)

- *Subject:* This Convention, which has been signed by Argentina, Luxembourg, Switzerland and the Netherlands and which has only been ratified by the Netherlands, is not in force, as three ratifications are necessary. The 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 entire succession of an estate is governed by one law unless a choice of law has been made.

Canada actively participated in the negotiation of this Convention 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. Since 1994,

consultation regarding possible support in Canada for the implementation of this Convention has been suspended, in order to allow further study of the Convention to answer questions raised as to its interpretation.

At the request of the Secretary General, the Advisory Group considered the suggestion that Canada ratify the Convention soon, after a new round of consultation. It was not felt opportune to undertake such consultation at this point given that the Convention is not in force.

- *Action required in Canada*: Consultation on possible Canadian ratification and implementation, when appropriate.

CONCLUSION

In this report, we have described the activities of the Department of Justice in private international law over the past year, highlighting the participation of Department officials in ULCC projects over the past years, particularly with respect to the development of uniform implementing legislation for the UNCITRAL *Conventions on the Limitation Period in the International Sale of Goods*, the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID) and the *Canada/France Convention*. This year the Department's involvement in the ULCC projects on the preparation of tentative draft of uniform acts on enforcement of foreign judgements and on electronic commerce has also been referred to. It is clear that collaboration between the Department of Justice and the ULCC in matters of private international law is fruitful.

Among the Department's private international law priorities, the accession to and implementation of the *ICSID Convention*, the *Canada-France Convention* and the UNCITRAL's *Conventions on the Limitation Period in the International Sale of Goods* are given a high priority.

Finally, we would also like to reiterate our invitation to members of the ULCC to provide us with comments on the substance and format of this report. We would be particularly interested in knowing whether the ordering of our priorities corresponds to the priorities of the provincial and territorial governments. Your comments or questions may be directed to Elizabeth Sanderson of the Public Law Policy Section at the Department of Justice.