

# Activities and Priorities of Dept. Justice in Private International Law 2003



**2003 Fredericton, NB**

## **ACTIVITIES AND PRIORITIES OF THE DEPARTMENT OF JUSTICE IN PRIVATE INTERNATIONAL LAW REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA**

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## INTRODUCTION

[1] 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), in regional organisations such as the Organisation of American States (OAS) and through bilateral agreements.

[2] There have been some notable events on the private international law scene in the past year. Negotiations continued at UNCITRAL and at Unidroit on projects which will culminate in new private international law instruments. For example, at the Hague Conference on Private International Law, the Convention on the law applicable to certain rights in respect of securities held with an intermediary was adopted and negotiations on maintenance obligations were undertaken.

[3] 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.

[4] 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.

[5] 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.

[6] Finally, the third part of the report presents the **activities of the Department of Justice in private international law** by theme. These activities are ranked with respect to their **level of priority**. In order to evaluate the priority of each project, the PIL Team considers the following: the interest of the international community, Canada's interest and the interest of national actors; its costs and benefits; and the challenges and difficulties related to implementation

[7] 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 Judgments**
- **Family Law**
- **Protection of Property**

[8] These projects are 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.

[9] 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

[10] 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 seeks to maintain regular 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

[11] 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 one meeting by conference call this year, in June 2003.

## **B. FEDERAL-PROVINCIAL-TERRITORIAL COOPERATION**

[12] In addition to federal-provincial-territorial cooperation through the Advisory Group, the Department also communicates directly with provincial and territorial 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**

[13] 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 to participate in the ULCC's activities. From the perspective of the Department of Justice, the ULCC constitutes the key mechanism for facilitating implementation of PIL instruments via the development of uniform implementing legislation. Given that the majority of PIL current projects fall in the area of commercial law, the ULCC's establishment of the Commercial Law Strategy is a welcome development.

### **2. Civil Justice Committee**

[14] 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 responsible for Justice matters. Its efforts in the adoption of implementing legislation recommended by the ULCC are greatly appreciated.

## **C. PRIVATE SECTOR**

[15] In addition to consultation with the Canadian Bar Association (CBA), the Department of Justice 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. Since the spring of 2000, an annual International Law Seminar has been 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, drafted discussion papers and met with interested parties, all in order to strengthen ties with the business and academic community and the Bar.

[16] This fall, the Department of Justice will be seeking to formalize contact with the academic community. For PIL, we anticipate this taking the form of regular meetings with representatives of the academic community to exchange views and information on PIL projects.

## **II. INTERNATIONAL ORGANIZATIONS**

### **A. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW**

[17] The Hague Conference on Private International Law, which held its first session in 1893, has 62 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 approximately four years, at the end of which the Sessions of the Conference are convened, attended by all member States. 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 36 conventions, 27 of which are in force. Further information on The Hague Conference on Private International Law may be found at <http://www.hcch.net>.

[18] The 2001-2004 work programme was adopted in June 2001 and April 2002 and it includes continued work on jurisdiction and enforcement of judgments and a new convention on maintenance obligations.

[19] Over the last year, Canada participated in the following activities of the Conference: the Part II of the 19<sup>th</sup> Diplomatic Session in December 2002, experts and drafting group meetings, Special Commissions and the Special Commission of April 2003 on general affairs and policy of the Conference.

[20] Canada is party to four Hague Conference Conventions in private international law: the *Convention on the Service Abroad of Judicial and Extra-judicial 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). Not all jurisdictions in Canada have implemented all 4.

### **B. UNCITRAL**

[21] 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 9 conventions, 7 model laws, uniform rules and a number of legal guides. Further information on UNCITRAL may be found at <http://www.uncitral.org>.

[22] Recognizing the growing importance of commercial law in the world, the General Assembly of the United Nations agreed in December 2002 to increase the membership of UNCITRAL from 36 to 60 States, representing various geographic regions and the principal economic systems and legal traditions of the world. 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, participated actively as an observer from 1995 to the fall of 2000, and was elected to the Commission again in the fall of 2000 for a term commencing in June 2001.

[23] At the 36<sup>th</sup> session of the Commission in July 2003, in which Canada actively participated, UNCITRAL finalized and adopted the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.

[24] In terms of future work, the Commission decided to continue the work undertaken by its Working Groups on: arbitration, electronic commerce, transport, insolvency law, and security interests, and will undertake further work in the area of public procurement. The dates and locations of the Working Group sessions are available on the UNCITRAL website.

[25] Canada is a party to two UN conventions relating to international commercial law: the *U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958, in force 86/08/10) and the *U.N. 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 and a number of provincial and territorial jurisdictions. This year, relying upon the uniform implementing legislation developed at the ULCC, the Department of Justice expects to continue consultations with the provinces and territories regarding accession to and implementation of the *Conventions on the Limitation Period in the International Sale of Goods*.

### **C. UNIDROIT**

[26] 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 59 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 harmonize 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>.

[27] 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.

[28] Canada is party to only one of the ten 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 has been extended to Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan).

[29] Unidroit organized a Congress in Rome from September 27-28, 2002, to celebrate its 75<sup>th</sup> founding anniversary. The theme of the Congress was the worldwide harmonisation of private law and regional economic integration. The Congress gathered representatives from Member States of Unidroit, from international organisations as well as practitioners and scholars.

[30] Finally, Unidroit has recently begun a project on Transactions on transnational and connected capital markets. This project comprises 5 items: (1) the creation of clear and consistent rules for the taking of securities, especially securities held indirectly through intermediaries in multi-tiered holding patterns and evidenced by book entries in the investor's account, as collateral; (2) the creation of -called "delocalised" transactions; and (5) the examination of the desirability and feasibility of rules for world-wide takeover bids.

[31] As a first step, Unidroit has set up a restricted Study Group of experts and practitioners on Item 1 ( <http://www.unidroit.org/english/workprogramme/main.htm#NR1>

[32] To date, the Study Group has held 2 meetings.

## **D. WORLD BANK**

[33] The World Bank's role on the private international law scene stems in part from 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. Foreseeing a future ratification, the ULCC has prepared a uniform act to implement the Convention. Further information on the World Bank and the ICSID Convention can be found at <http://www.worldbank.org>.

## **E. REGIONAL ORGANIZATIONS: THE ORGANIZATION OF AMERICAN STATES**

[34] The Organisation of American States, with 35 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/>.

[35] 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 in CIDIP-VI which was convened in February 2002, particularly regarding the drafting of a Model Law on Secured Transactions.

## **F. BILATERAL ACTIVITIES**

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

[37] The *Canada-France Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance* was signed on June 10, 1996. A uniform act to implement this Convention was adopted by the ULCC in August 1997. Saskatchewan (1998), Ontario (1999) and Manitoba (2001) 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 (ICSID) (World Bank)**

[38] - *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.

[39] Although 139 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 contain a federal state clause. The federal government has been working to obtain the agreement of all provinces and territories to implement the Convention. Uniform adoption of implementing legislation would allow Canada to ratify it. The project has received the support of eight provinces and two territories. Consultations with the two remaining provinces (Quebec and Alberta) are taking place. Nunavut will also be consulted. A uniform act for the implementation of the *Convention for the Settlement of International Investment Disputes Act*, was adopted unanimously by the ULCC on November 30, 1997.

[40] - *Action required in Canada*: Complete consultations with the provinces and territories, sign the Convention, enact implementing legislation, and ratify the Convention.

#### **b. Conventions on the Limitation Period in the International Sale of Goods (UNCITRAL)**

[41] - *Subject*: These Conventions, which entered into force August 1, 1988, grew out of the work of UNCITRAL to unify international sales law. On July 1, 2003, 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.

[42] 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. A declaration was recently made with regard to Nunavut. 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.

[43] 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.

[44] 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 Conventions Act*. This Act would 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*.

[45] The Minister of Justice of Canada has undertaken consultations with his provincial and territorial counterparts on the desirability of implementing the Limitation Conventions. Some provinces have already expressed support for the implementation and Nunavut has already enacted the *International Sales Conventions Act*, which received assent on June 6, 2003.

[46] *Action required in Canada:* the federal government will be considering the adoption of federal implementing legislation on the Limitation Conventions, which would apply to contracts for the sales of goods involving the Crown in right of Canada. Once enacted, the federal implementing legislation, and in particular the schedules, could be adopted by reference by provinces and territories.

### **c. Convention on International Interests in Mobile Equipment (UNIDROIT)**

[47] - *Subject:* This Convention, not yet in force, provides a framework for the creation and effects of an international interest in mobile equipment (i.e., aircraft equipment, registered ships, oil rigs, containers, railway rolling stock, space property, and other objects that could be identified in the future). Each type of mobile equipment would be the subject of a specific Protocol under the Convention.

[48] The Convention is concerned with three types of international interest:

- (1) those granted under a security agreement;
- (2) those held under a title reservation agreement; and,
- (3) those vested in a person who was lessor under a leasing agreement.

[49] In summary, the 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 registrable national interests.

### **Aircraft Protocol**

[50] The Aircraft Protocol, not yet in force, adapts 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.

[51] The 2001 Diplomatic Conference in Cape Town resulted in the adoption of the Convention on International Interests in Mobile Equipment and its Related Aircraft Equipment Protocol. The texts of the Convention, Protocol and a consolidated version can be found at the Internet address of Unidroit.  
(<http://www.unidroit.org/english/internationalinterests/conference2001/main.htm>)

[52] The following steps have been or will be undertaken in order to advance the setting up of the International Registry and preparation for the signature and implementation of the Convention and Aircraft Protocol in Canada.

#### **- International Registry**

[53] The international registry is an important part of the Convention and Protocol. It will enable registration of convention-based international security interests in aircraft equipment, and will facilitate searches. Canada, given its role in international civil aviation and its expertise in electronic registries, has announced an interest in *hosting* the registry. Ireland and Singapore have also done so.

[54] Canada is among 20 states appointed to an ICAO-guided preparatory commission that will govern the bidding process for candidates wishing to *operate* the registry. The bidding process will begin once ICAO obtains the necessary funding. Interested states will then submit candidatures. Steps to put forward a Canadian candidate to operate the registry are being taken by Quebec in co-ordination with the Departments of Industry, Foreign Affairs and Transport. Early signature of the Convention and Protocol by Canada will more than likely be considered a prerequisite for bidding.

#### **- Signature of the texts**

[55] In order to be well placed as a candidate to host the International Registry and after having received substantial support from provincial authorities, necessary arrangements are being made at the federal level to be able to sign the instruments as soon as possible to show our interest.

#### **- Update of the ULCC Uniform Act**

[56] The ULCC Working Group on International Interests modified the version of the Uniform Act and its related Report that was submitted at the ULCC Annual Meeting in August 2001 in order to adapt them to the final wording and substance of the Convention and Aircraft Protocol as they were adopted at the Diplomatic Conference.

[57] The Uniform Act was officially adopted by the ULCC in May 2002 and a copy was sent to ULCC members for information and follow-up.

#### **- Implementation of the instruments in Canada**

[58] Canadian jurisdictions will be asked to consider adopting legislation to implement the Convention and Aircraft Protocol.

#### **- Ratification of the Convention and Protocol**

[59] When sufficient support for ratification will have been demonstrated by the adoption of implementing legislation, the federal government will seek authority to ratify the Convention and Protocol, with the relevant declarations in order for the instruments to apply in the jurisdictions that so wish, with as well as other important declarations related to preserving the status quo of existing rights. Recently, in order to facilitate the process of drafting declarations and as decided by the ULCC working group, the federal government requested information from provinces and territories on existing non consensual interests in their jurisdictions. Responses have been received from Québec, British Columbia and Yukon.

[60] - *Action required in Canada:* Continue with the appropriate steps for Canada to sign the instruments and continue positioning itself as a possible host for the International Registry; reaffirm the support of the provinces and territories and invite them to consider adopting legislation to implement the instruments; continue work to facilitate the drafting of declarations.

### **d. Working Group on Arbitration (UNCITRAL)**

[61] -*Subject:* In 1999, the Commission mandated the Working Group on Arbitration to examine four subjects: 1) conciliation, 2) requirement of written form for the arbitration agreement, 3) enforceability of interim measures of protection, and possibly 4) enforceability of an award that had been set-aside in the State of origin.

[62] To date, the Working Group has only examined the first 3 subjects. The Model Law on International Commercial Conciliation was adopted in June 2002. Once work on interim awards is completed, the Working Group will resume its work on the written form of the arbitration agreement.

[63] *Enforceability of Interim Awards*: The Working Group continued its discussions on harmonized texts on the enforcement of interim measures at the October 2002 and May 2003 meetings. The Canadian delegation comprises Manon Dostie (federal Department of Justice), Professor Guy Lefebvre (civil law expert) and Robert Cosman (common law expert).

[64] Further to the completion of instruments on all three subjects noted above, the ULCC will be requested to consider convening a Working Group to draft implementing legislation. The Reports of the Working Group on Arbitration and background documents are available on the UNCITRAL web site <<http://www.uncitral.org>>.

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

#### **e. Working Group on Electronic Commerce (UNCITRAL)**

[66] - *Subject*: The Working Group on Electronic Commerce continues to have on its agenda a possible instrument on electronic contracting as a means of increasing legal certainty or commercial predictability in electronic business transactions. The Working Group has not agreed on the scope of the instrument (for example, the instrument may deal with the formation of contracts for sale of goods only, or of most or all other types of contracts). Once the scope and thrust of the uniform text has been considered, the Working Group will be in a better position to make a decision on the form of the instrument.

[67] In June 2002 at its 35<sup>th</sup> session, the Commission reviewed the reports of the Working Group and considered concerns that had been raised as to the appropriateness of proceeding with work on electronic contracting in light of the many obstacles to electronic commerce in existing conventions and the need to deal with them. As a result, the Commission then opted to change the focus of the Working Group's mandate so that at its 40<sup>th</sup> Session in Vienna in October 2002, the Working Group concentrated on existing multilateral treaty regimes and their possible amendment to facilitate the increased use of electronic commerce. Details on the possible scope of treaties to be considered are contained in the Annex to A/CN.9/WG.IV/WP.94 on the UNCITRAL website. The Commission and Working Group subsequently returned to issues of electronic contracting.

[68] The focus of the 41<sup>st</sup> Session of the Working Group, May 2003, in New York City, was on a draft convention on electronic contracting prepared by the Secretariat. The most current version of the draft can be found at [http://www.uncitral.org/english/workinggroups/wg\\_ec/wg4-wp100-e.pdf](http://www.uncitral.org/english/workinggroups/wg_ec/wg4-wp100-e.pdf)

[69] Just prior to the last Session, a consultation (ULCC Ecom distribution list) was launched in order to obtain comments on the Secretariat's draft. Comments would be considered in determining the Canadian position on the following key questions:

1. Should the convention be limited to sales of goods contracts (like the UN Convention on Contracts for the International Sales of Goods) or should it apply to all electronic contracts in respect of their formation as well as to their administration or execution?
2. Should the convention explicitly exclude consumer transactions?
3. Should a state be able to exclude specific transactions from the application of the convention?
4. Should parties to a transaction be able to opt out of certain provisions of the convention?
5. Is the provision proposed in Article 11 for time of receipt acceptable as a rule or should it be only a presumption, given the uncertainties of email delivery?
6. Of the two variants proposed for Article 9, which variant is preferable for an apparent offer in an automated system?
7. What should the consequences to a party be for that party's failure to provide the information set out in Article 15?

[70] A discussion paper was prepared by John Gregory, General Counsel, Ministry of the Attorney General for Ontario, raising narrower issues with recommendations for the Canadian delegation.

[71] At the 41<sup>st</sup> Session, the debate centred mostly on issues of scope, exclusions, location of the parties, and a technical discussion on issues surrounding dispatch and reception of data messages.

[72] A report by the Secretariat of the 41<sup>st</sup> Session is available at <http://www.uncitral.org/english/sessions/unc/unc-36/acn9-528-e.pdf>

[73] A new version of the draft Convention is being prepared by the Secretariat for the next Session in November in Vienna.

[74] - *Action required in Canada*:

Continued consultation with provinces, territories, stakeholders and experts for consideration in determining Canadian positions on various outstanding issues. Review of the secretariat's revised draft.

#### **f. Working Group on Security Interests (UNCITRAL)**

[75] - *Subject*: In July 2001 at its 34<sup>th</sup> session, UNCITRAL mandated a Working Group to begin developing a uniform legal regime for security rights in tangible goods of a commercial nature. The work is to include the form of the security instrument, the scope of goods that can serve as collateral, perfection, formalities, enforcement, publicity, priority, and creditors' and debtors' rights.

[76] The UNCITRAL work on security interests was initiated because it was felt that modern secured credit laws could alleviate inequalities in access to lower-cost credit between parties in developed countries and parties in developing countries, which would overall contribute to foster international trade. It was also widely recognised that an appropriate balance needed to be struck in the treatment of privileged, secured and unsecured creditors. States agreed that a flexible approach aimed at the preparation of a set of principles in a guide, rather than a model law, would be advisable. Furthermore, given the close link between security interests and the work on insolvency, countries recognised that any effort on security interests would need to be co-ordinated with efforts on insolvency law.

[77] In the fall 2001, the UNCITRAL Secretariat invited experts from several States, including Canada, to assist with the preparation of a draft legislative guide, which constituted the working document for the first session of Working Group VI on the subject. Me Michel Deschamps of McCarthy Tétrault in Montreal and Professors Catherine Walsh and Roderick Macdonald of McGill University collaborated on the draft text with experts from other States. Since then, three meetings have been held and work is progressing. However, it is not expected to conclude before the fall of 2004.

[78] One issue that appears to have been resolved is the orientation of the draft guide toward a public notice-filing registry, which had been strongly opposed by representatives of one State. Other countries had also expressed some reservations. Many delegations, however, remain with fundamental questions about the costs and operation of a registry system as well as questions about the legal framework. Some key countries will be compelled to support a non-registry approach if they are not reassured with respect to their questions.

[79] From a Canadian perspective, the government monitors the trends the global model is taking with the view of ensuring that it does not take a direction that is not inconsistent with our security interests regimes here in Canada. Although the draft Guide would not be particularly useful for Canadian jurisdictions given that our legal framework for secured interest is already relatively modern, our aim is to ensure that countries where Canadians do business have similar regimes.

[80] The next meeting of the Working Group takes place in Vienna from September 8-12, 2003. Canada chairs the sessions of the Working Group.

[81] - *Action required in Canada*: Distribute Working Papers for comments. Consult with officials from provincial/territorial registries.

## **2. MEDIUM PRIORITIES**

#### **a. Convention on the Assignment of Receivables (UNCITRAL)**

[82] - *Subject*: In July 2001 UNCITRAL adopted the Convention on the Assignment of Receivables in International Trade after six years of development. The Convention was opened for signature in December 2001. The 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. Canada was an active participant in the development of this Convention.

[83] In May 2003, consultations were undertaken with lawyers in the private sector, in order to understand their degree of knowledge and interest in the Canadian ratification and implementation, of this convention and the two Unidroit conventions on international factoring and international leasing.

[84] - *Action required in Canada*: Consult with the private sector, federal, provincial and territorial authorities on implementation, have preliminary implementation study done, and request the ULCC to prepare uniform implementing legislation as part of the Commercial Law Strategy.

#### **b. Convention on securities held by intermediaries (Hague Conference)**

[85] *Subject*: Canada actively participated in the negotiations of the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*. The Convention was finalized and adopted during the Diplomatic Session held from December 2 to 12, 2002 in The Hague.

[86] This Convention is a first attempt worldwide to draft cross border rules on the law applicable to securities held with an intermediary. The objective is to enable financial market participants in the global market to ascertain readily and unequivocally which law will govern the proprietary aspects of transfers and pledges of interests in respect of securities held through indirect holding systems. This Convention is intended to provide certainty and predictability on a limited but crucial aspect of such transactions.

[87] The Canadian delegation included Manon Dostie from the PIL Team at the federal Department of Justice, two practitioners: Brad Crawford (common law expert) and Michel Brunet (civil law expert), and two experts from the Canadian securities commissions: Eric Spink (Alberta) and Daniel Laurion (from Québec, absent at the last meeting). Maxime Paré from the Ontario Securities Commission participated as a representative of IOSCO and represented Canada on the Drafting Group leading up to the Diplomatic Conference.

[88] The Permanent Bureau is working with experts to draft the Explanatory Report to the Convention.

[89] *Action required in Canada*: Request ULCC to prepare uniform implementing legislation as part of the Commercial Law Strategy; continue to consult the delegation on the draft Explanatory Report.

### **3. LOW PRIORITIES**

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

[90] - *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.

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

#### **b. Convention on Contracts for the International Sale of Goods (UNCITRAL)**

[92] - *Subject*: The Sale Convention establishes uniform rules for the international sale of goods, which 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.

[93] The Convention came into force for Canada on May 1, 1992, and applies uniformly across all of Canada since February 1, 1993. A declaration was recently made with regard to Nunavut.

[94] The ULCC has recommended that the Sale Convention be amalgamated with other conventions on the international sale of goods. To that end, it has proposed in 1998 the *Uniform International Sales Conventions Act*.

[95] As of July 1 2003, 62 States are party to the Convention.

[96] - *Action required in Canada*: Consideration to adopting the *Uniform International Sales Conventions Act* should be given. Nunavut adopted the Uniform Act in 2003.

#### **c. Convention on International Bills of Exchange and International Promissory Notes (UNCITRAL)**

[97] - *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.

[98] 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.

[99] 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 that use these methods of payment for international transactions.

[100] In late 2000, the Department of Foreign Affairs was consulted on the feasibility of a Protocol between NAFTA parties to bring the *Convention* into force among them. In March 2001, the United States was consulted to determine whether they are interested in such an arrangement, but to date we have not received a response.

[101] - *Action required in Canada*: Consultation on the proposed Protocol both domestically and with 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. Inter-American Convention on the Law Applicable to International Contracts (OAS)**

[102] - *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.

[103] *When members of the Department of Justice's Advisory Group on Private International Law reviewed the Convention, 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.*

[104] 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.

[104] 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.

[105] - *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.

#### **e. Model Law on Cross-border Insolvency (UNCITRAL)**

[106] - *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.

[107] 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 co-operation 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. Since then, Eritrea, Japan, Mexico, the United Kingdom and South Africa have enacted the Model Law. Other States, including Australia, New Zealand and the United States are considering its adoption.

[108] Industry Canada is including consideration of the Model Law in its reform consultations and the Senate Standing Committee on Banking, Trade and Commerce reviews the administration and operation of the *Bankruptcy and Insolvency Act*.

#### **f. Case Law on UNCITRAL Texts (CLOUT)**

[109] - *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 Giuseppe v. Forti Moulding Ltd.*, (1999) O.J. No. 3352.

[110] Professor Geneviève Saumier from the Faculty of Law of McGill University is the Canadian National Correspondent for CLOUT, for both civil and common law cases.

[111] - *Action required in Canada*: Support the work of the national correspondent; distribute collections of decisions as they are received; attend annual meetings of national correspondents.

#### **g. Working Group on Insolvency Law (UNCITRAL)**

[112] - *Subject*: Following a preparatory Working Group session in 1999 and conferences and colloquia in 2000 and 2001, UNCITRAL held a Working Group session in July-August 2001 to begin preparing a legislative guide on insolvency law. The Working Group has met five times since then to continue its work. Canadian representatives from the Departments of Justice and Industry have participated in the sessions.

[113] *In essence, the Legislative Guide provides a framework for countries wishing to adopt modern insolvency legislation. Although Canada could adopt concepts articulated in the Legislative Guide, in general the Guide would not be used as a basis for a reform in Canada as the Bankruptcy and Insolvency Act is already a modern and relatively comprehensive insolvency regime.*

[114] Although the review of addenda 1, 2 and 14 to 17 to the Legislative Guide remains to be done, the Commission has approved the scope of the draft and has given its preliminary approval to the key objectives, general features and structure of insolvency regimes set out in the Guide.

[115] Industry Canada has carried out consultations on a possible reform of the *Bankruptcy and Insolvency Act*. Canadian stakeholders have been informed of recent developments with respect to international insolvency. With few minor exceptions, the Legislative Guide is consistent with the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

[116] Joint sessions of the Working Group on Security Interests and the Working Group on Insolvency have been taking place to ensure consistency in areas of overlap between the two mandates.

[117] - *Action required in Canada*: Consult and prepare Canada's comments for the next session in collaboration with Industry Canada officials. The Working Group on Insolvency will be meeting in September 2003 to discuss remaining business.

#### **h. Model Franchise Disclosure Law (Unidroit)**

[118] - *Subject*: The Model Franchise and Disclosure Law originated from a proposal made in 1985 by the then Canadian member of Unidroit's Governing Council, Mr. T.B. Smith Q.C. A Study Group on Franchising was set up in 1993. In 1998, the Study Group completed the *Unidroit Guide to International Master Franchise Arrangements*. In December 2000, the same Study Group finalised both the Model Law and an Explanatory Report on the Model Law. On September 25, 2002 the Governing Council of UNIDROIT adopted the Model Franchise Disclosure Law.

[119] The Canadian expert to the study group was Mr. Alexander Konigsberg, in his personal capacity.

[120] The purpose of the Model Law is to establish obligations on the part of franchisors regarding disclosure of information and in particular, to determine the information to be disclosed in the "disclosure document". Some exceptions from the obligation to disclose are also mentioned. Finally, the Model Law creates remedies for the franchisee.

[121] In Canada, only Alberta and Ontario have enacted legislation regarding disclosure of information in the field of franchise law, in 1995 and 2000 respectively.

[122] In June 2002, the ULCC set up a new project to consider and make recommendations for the adoption of uniform franchise legislation throughout Canada.

[123] *Action required in Canada*: Consider the Unidroit Franchise Model Law in developing uniform Canadian Legislation.

#### **i. Convention on International Leasing and Convention on International Factoring (UNIDROIT)**

[124] - *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.

[125] 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.

[126] Moreover, the Uniform Law Conference has prepared draft uniform legislation that may be adopted by interested jurisdictions for the implementation of the Conventions should there be sufficient interest in Canada's becoming a party.



[127] In May 2003, consultations were undertaken with lawyers in the private sector, in order to understand their degree of knowledge and interest in the Canadian ratification and implementation, of the two Unidroit conventions on international factoring and international leasing and the UNCITRAL Assignments Conventions.

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

#### **j. Draft Railway Rolling Stock Protocol to the Convention on International Interests in Mobile Equipment (Unidroit)**

[129] The draft *Railway Rolling Stock Protocol (Rail Protocol)* will adapt to railway rolling stock equipment the mechanisms set out in the Convention. As railway rolling stock usually stays on the same continent where it has been bought and rarely leaves for another continent, it remains to be decided whether the framework will be global (universal) or regional (continental). Another possibility would consist in having a universal Protocol and regional registries (whether integrated or not).

[130] Joint meetings of governmental experts were held in June and October 2002 to continue the examination of the draft *Rail Protocol*. A Canadian delegation attended the meeting to gauge the interest of other States and the industry in such a Protocol.

[131] In October 2002 and March 2003, meetings have been held in Ottawa and Washington between several national delegations - among which the Canadian delegation - and representatives of the Association of American Railroads.

[132] A Second Joint Session of governmental experts was held in May 2003 to continue the study of the draft *Rail Protocol*. Several Canadian experts from the Departments of Transport and Industry took part. During that Session, sufficient on the structures and functions of an international registry was made to make convening of a diplomatic conference in 2004 a priority.

[133] The latest version of the draft Rail Protocol may be found on Unidroit's website at <http://www.unidroit.org/english/internationalinterests/draftrailprotocol/draftrailprotocol.pdf>

[134] - *Action required in Canada*: Ongoing consultations on the Convention and the latest version of the draft *Rail Protocol* to develop the Canadian position on this project.

#### **k. Draft Space Protocol to the Convention on International Interests in Mobile Equipment (Unidroit)**

[135] The preliminary draft *Space Protocol* will adapt to space equipment the mechanisms set out in the Convention. Cooperation between Unidroit and the United Nations Committee for the peaceful Utilisation of Outer Space (COPUOS) is being sought.

[136] The Legal Subcommittee of COPUOS met in Vienna on March 24, 2003. The Subcommittee explained that its role did not consist in the drafting of the Draft Protocol, but in the informing of the participants about the role of the United Nations, especially as supervising Authority for the implementation of a possible treaty. Discussions were held about the jurisdiction of the UN on that subject-matter, and about the means and the potential responsibilities of the Organization. Discussions were also held about the functions of other treaties that structure space law.

[137] The latest version of the draft Space Protocol may be found on Unidroit's website at <http://www.unidroit.org/english/internationalinterests/draftspaceprotocol/draftspaceprotocol.pdf>.

[138] - *Action required in Canada*: Ongoing consultations on the Convention and the draft *Space Protocol* to develop the Canadian position in order to prepare for the Unidroit session of governmental experts in the fall 2002 or the winter 2003.

## **B. JUDICIAL COOPERATION AND ENFORCEMENT OF JUDGMENTS**

### **1. HIGH PRIORITIES**

#### **a. Judgments Project - Draft Text On Choice Of Court Agreements (Hague Conference on Private International Law)**

[139] - *Subject*: This project was part of the 1997-2000 work programme of the Hague Conference and it will continue as part of the 2001-2004 programme. The project aims at a multilateral convention with rules on acceptable and prohibited bases of court jurisdiction in international litigation, and corresponding rules for the recognition and enforcement of judgments in civil and commercial matters.

[140] Formal negotiations ended in June 2001 with a new draft text on which there was little consensus. Member States decided in April 2002 that a small group of experts reflecting the make-up of the Conference should meet informally to examine the possibility of preparing a more limited text that would avoid the most contentious issues and would resolve other issues.

[141] In 2002, the Permanent Bureau of the Hague Conference established an Informal Working Group to attempt to prepare a new draft convention, in accordance with the mandate given to it at the April 2002 meeting of Member States. The Working Group met 3 times, in October 2002, January 2003 and March 2003. Kathryn Sabo participated in the meetings. At the end of the March session, the Working Group submitted a draft text that recognizes exclusive choice of forum clauses in business-to-business contracts and provides for recognition and enforcement of judgments based on choice of court clauses.

[142] The Report on the Work of the Informal Working Group on the Judgments Project (Prel. Doc. No 22) dated June 2003, details the discussions of the March meeting and sets out the draft text. It should be noted that although the draft provides for only one ground of jurisdiction, an *exclusive* choice of court clause in a business-to-business contract, its rules on recognition are broader to the extent they allow a judgment to be recognized if it were based on a choice of court agreement, even if the agreement was not exclusive.

[143] Overall, the text is much narrower than the 1999 or the 2001 draft, but it is technically more complete and simpler. While it does avoid many of the most contentious issues those drafts contained, it still presents some issues. For example, it provides that a State may opt to refuse to recognize certain exclusive choice of court agreements. Additionally, while the rules are intended to apply only to business to business contracts, the latter are not clearly defined; the approach adopted is rather to state the types of contracts that are not covered.

[144] The draft was submitted to a Special Commission on General Affairs and Policy of the Commission in April 2003. The Special Commission concluded that Member States should inform the Secretary General before the end of July whether the draft should be the basis for a Special Commission that would be convened in December to prepare a completed draft for a diplomatic session that would be held in 2004.

[145] The Department of Justice's Advisory Group on Private International Law at its June 2003 meeting was of the view that the project should proceed to a Special Commission. This view was communicated to the Secretary General of the Hague Conference. Canada has been advised that all the responses received by the Secretary General were in favour of a Special Commission, including the response from the European Commission on behalf of EU States. We anticipate receiving formal notice of the December Special Commission very shortly.

[146] *Action required in Canada*: Undertake broad consultation on the draft in preparation for the Special Commission; work with delegation to prepare Canada's position.

#### **b. Convention on Service Abroad (Hague Conference)**

[147] - *Subject*: This Convention has been in force all across Canada since 1989 and in Nunavut since April 1<sup>st</sup>, 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.

[148] In Canada, Central Authorities have been designated in each province and territory. At the federal level, the Legal Advisory Division of the Department of Foreign Affairs and International Trade serves as the Central Authority and is monitoring the application of the Convention with the input of provincial and territorial Central

Authorities. The rules of practice in all provinces and in two territories, as well as at the federal level, have been amended to comply with the Convention.

[149] In 1999, the Permanent Bureau of the Hague Conference on Private International Law began 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 be available for the Special Commission.

[150] Following a request for information by the Slovak Republic concerning the methods of payment of the 50 dollar fee requested for the service of foreign documents in Canada, in the provinces and in the territories, the PIL Team prepared and sent a questionnaire to all federal, provincial and territorial authorities concerned to determine the methods of payment accepted in their jurisdictions. Answers have been received, compiled and sent back for comments. Research is underway on possibility of recommending several universal modes of payment accepted in all jurisdictions. The Hague Convention will hold a special commission on this convention in October 2003.

[151] - *Action required in Canada*: Monitor its application; provide information; constitute delegation for Special Commission

### **c. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Conference)**

[152] *Subject*: This Convention, which does not yet apply to Canada, is in force in 77 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 consultation on the suitability of Canada becoming 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*. The operation of this Convention and its information technology implications will be considered at the October Special Commission.

[153] Discussions have begun with the provinces and territories through the Advisory Group on Private International Law, and information is being prepared about the convention and its implementation in Canada.

[154] In order to understand the nature and the volume of needs, the Department of Foreign Affairs and International Trade was asked, in 1999 and then in November 2002, to provide us with statistics concerning the number of legalizations made every year through its services.

[155] Discussions were also begun in May, 2003, with the Canadian Bar Association in order to distribute to the CBA's members a questionnaire from the PIL Team on the advantages and disadvantages of the present legalization system. The answers to the questionnaire should form the basis of a campaign for the sensitization of the Legal profession and the federal and provincial/territorial authorities for the ratification and implementation of the Convention by Canada and all provinces and territories.

[156] A slightly modified questionnaire has been prepared for the provinces and territories for the same purpose.

[157] In March and May 2003, complaints were made by some members of the public to the PIL Team about false advertising on some internet web sites of « diploma mills » concerning the international value of the apostille. Discussions were held with the Bureau of The Hague Conference on that topic, which will be discussed further during the next Special Commission.

[158] - *Action required in Canada*: Prepare an information note to send to the provinces and territories on the advantages of the Convention and its implementation in other countries, including any costs associated with it.

### **d. Convention on the Taking of Evidence Abroad (Hague Conference)**

[159] - *Subject*: This Convention, which does not yet apply in Canada, is in force in 40 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.

[160] 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 accession is possible. Although the Convention would not be costly to implement in Canada, from a policy perspective the advantages of Canada's accession may not be obvious. The Canadian Bar Association has therefore been requested to seek input from practitioners on the problems they face when attempting to obtain evidence abroad. The prospect of a multilateral convention on judgments may also add some impetus to the need to consider acceding to the Convention once the Hague project on jurisdiction and foreign judgments is completed. \*

[161] Discussions were also begun in May, 2003, with the Canadian Bar Association in order to distribute to the CBA's members a questionnaire from the PIL Team on the advantages and disadvantages of the present for the taking of evidence abroad system. The answers to the questionnaire should form the basis of a campaign for the sensitization of the Legal profession and the federal and provincial/territorial authorities for the ratification and implementation of the Convention by Canada and all provinces and territories.

[162] A slightly modified questionnaire has been prepared for the provinces and territories for the same purpose.

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

## **2. LOW PRIORITIES**

### **a. Canada/United Kingdom Convention on Recognition and Enforcement of Judgments (Bilateral)**

[164] - *Subject*: This Convention, which was concluded in 1984, was the first bilateral treaty entered into by Canada in the area of enforcement of judgments. 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 Judgments in Civil and Commercial Matters*, in order to protect Canadian interests against enforcement in the United Kingdom of judgments 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 judgments from countries party to the 1968 *Brussels Convention* already included in the text. The Hague Conference anticipates holding a Special Commission to examine the operation of this Convention and its information technology implications in 2003.

[165] The 1984 Convention is used from time to time by parties in order to obtain from the courts of one of the State-parties the recognition of the judgments obtained from the courts of another. However, the Convention does not apply to a certain number of areas of the law, like judgments in family matters, in which case the Hague convention on the abduction of children provides a more appropriate legal framework by imposing the use of national central Authorities.

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

### **b. Canada-France Convention on Recognition and Enforcement of Judgments (bilateral)**

[167] - *Subject*: The *Canada-France Convention*, the first treaty relating to enforcement of judgments 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 judgments rendered in European States parties to the *Brussels* and the *Lugano Conventions* on the basis of exorbitant jurisdiction. In addition, the *Canada-France Convention* will allow for the simplified enforcement of Canadian judgments in France, not only in general civil and commercial matters, but also in family matters, including maintenance orders.

[168] Since the Brussels II convention, of January 2000, France has transferred to the European Union an important part of its jurisdiction over the administration of justice, especially concerning the recognition and enforcement of foreign judgments. But the effects of this transfer of jurisdictions are not yet known with certainty. On the

one hand, the legislative, regulatory and administrative measures necessary to effect the transfer are not yet decided with certainty. On the other hand, the effects of the jurisdictional transfer with regard to countries that are not members of the European Union should be null, but it is still necessary to discuss with the Union and its members the practical consequences for third countries, like Canada.

[169] 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 and August 2000 respectively, Ontario and Manitoba enacted legislation to implement the Convention also based on the Uniform Act. To the extent necessary, a federal implementing law will 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.

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

## **C. FAMILY LAW**

### **1. HIGH PRIORITIES**

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

and

#### **b. Convention on Parental Responsibility and Measures of Protection of Children (Hague Conference)**

[171] - *Subject*: In November 2001, the Uniform Law Conference of Canada adopted two Uniform Acts for the implementation of both the *2000 Hague Convention on the International Protection of Adults* and the *1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*. The Working Group was led by Manon Dostie, Legal Counsel of the Private International Law Team of the Department of Justice of Canada, and included representatives from many provinces.

[172] *These Conventions create global legal solutions to address the problems raised by the increase in the transborder movement of children and adults in need of protection.*

[173] More specifically, the 1996 *Hague Convention on the Protection of Children* deals with parental responsibility, as well as its delegation; rights of custody; guardianship, curatorship and analogous institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; the supervision by a public authority of the care of a child by any person having charge of the child; and the administration, conservation or disposal of the child's property.

[174] Modelled after the 1996 Convention, the *2000 Convention on the International Protection of Adults* provides for the protection of those adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect the interests of their own person or property. This Convention deals in particular with the determination of incapacity and the institution of a protective regime; the placing of the adult under the protection of a judicial or administrative authority; guardianship, curatorship and analogous institutions; the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult; the placement of the adult in an establishment or other place where protection can be provided; the administration, conservation or disposal of the adult's property; and the authorisation of a specific intervention for the protection of the person or property of the adult.

[175] The final explanatory reports of the Conventions are available on the Hague Conference web site at: [www.hcch.net](http://www.hcch.net).

[176] *Action required in Canada*: Consult with provinces and territories and encourage them to implement these Conventions.

#### **c. Possible Convention on Maintenance Obligations (Hague Conference)**

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

[178] 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.

[179] 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.

[180] In June 2001, the Hague Conference decided to include the project as a priority for its 20<sup>th</sup> Diplomatic Session. In July 2002, a note and a questionnaire were sent to the governments in preparation of the Special Commission. Canada's answer to the Questionnaire is available upon request. A Special Commission was held from May 5 - 16, 2003.

[181] The Canadian delegation to the Special Commission comprised Manon Dostie, Counsel with the Private International Law Team; Danièle Ménard, Counsel with the Family, Children and Youth Section and federal co-chair of the Interjurisdictional Support Sub-Committee; Denise Gervais, civil law expert from Québec, and Tracy Morrow, common law expert from Manitoba and the provincial co-chair of the Interjurisdictional Support Sub-Committee.

[182] *Action required in Canada*: Consultations in preparation for the next Special Commission (May 2004).

### **2. MEDIUM PRIORITIES**

#### **a. Convention on Intercountry Adoption (Hague Conference)**

[183] - *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.

[184] The Convention entered into force in Canada on April 1<sup>st</sup> 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 1<sup>st</sup> 1997, the Convention entered into force for Alberta; on August 1<sup>st</sup> 1998 for the Yukon; on October 1<sup>st</sup> 1999 for Nova Scotia; on December 1<sup>st</sup> 1999 for Ontario; the Northwest Territories on April 1<sup>st</sup> 2000, Nunavut on September 1<sup>st</sup> 2001 and Newfoundland on December 1<sup>st</sup> 2003.

[185] *Action required in Canada*: *Possible implementation in Quebec.*

#### **b. Convention on the Civil Aspects of International Child Abduction (Hague Conference)**

[186] - *Subject*: This Convention, which is the first Hague Convention to be ratified by Canada, has been in force across Canada since 1983 with the exception of Nunavut. The Convention was extended to Nunavut on January 1<sup>st</sup>, 2001.

[187] 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.

[188] 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 Legal Services Unit at the Department of Foreign Affairs. 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.

[189] A database of judicial decisions taken under the *Hague Convention on the Civil Aspects of Child Abduction* is available at <<http://www.incatat.com>>. 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.

[190] A new round of consultations has been initiated on Canada's acceptance of the accessions by Brazil, El Salvador, Estonia, Malta, Nicaragua, Peru, Sri Lanka, Trinidad and Tobago, Uruguay and Uzbekistan to the Convention.

[191] The Permanent Bureau convened a Special Commission from September 27 to October 1, 2002 to discuss a Good practice guide, transfrontier access and judicial communications. The Commission adopted a Good Practice Guide which includes both implementing measures and Central Authority practices. Canada was unable to attend due to budgetary constraints.

[192] - *Action required in Canada*: Follow-up on the accession process.

## **D. PROTECTION OF PROPERTY**

### **1. LOW PRIORITIES**

#### **a. Convention on the Form of an International Will (UNIDROIT)**

[193] - *Subject*: This Convention applies to 12 States, including Canada where it has been extended to 8 provinces and territories since 1977. To facilitate implementation of the Convention, the ULCC has prepared a Uniform Act.

[194] 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.

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

#### **b. Convention on the Law Applicable to Successions (Hague Conference)**

[196] - *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.

[197] 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.

[198] 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.

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

#### **c. Convention on the Return of Stolen or Illegally Exported Cultural Objects (UNIDROIT)**

[200] - *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.

[201] The Convention has 17 States party including China, Ecuador, Lithuania, Paraguay and Romania. It entered into force for Spain on November 1, 2002 and for Cambodia on January 1, 2003.

[202] In January 2002, Unidroit sent to the Stat-parties to the convention an Explanatory report about the convention and its implementation.

[203] - *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.

#### **d. Convention on the Law Applicable to Trusts (Hague Conference)**

[204] - *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.

[205] 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.

[206] - *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.

## **CONCLUSION**

[207] In this report, we have described the activities of the Department of Justice in private international law over the past year.

[208] It is clear that collaboration between the Department of Justice and the ULCC in matters of private international law is key and we look forward to continuing private international law work with the Conference, and with the Commercial Law Strategy in particular.

[209] We would like to reiterate our invitation to members of the ULCC to provide us with comments or questions arising from 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 Kathryn Sabo of the Private International Law Team at the Department of Justice.

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Bilateral Conventions on Recognition and Enforcement of Judgments (Canada-UK Convention, Canada-France Convention)		