



UNIFORM LAW CONFERENCE OF CANADA

MINUTES OF THE CIVIL SECTION, 2022

**Prepared by:
Opeyemi Bello and Mandy Kinzel
Edmonton, Alberta**

August 2022

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
info@ulcc-chlc.ca

HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2019)

Oral Pre-implementation Report

Presenter: Catherine Walsh, McGill University

The Hague *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Convention) was adopted by the Hague Conference on Private International Law in 2019. Canada participated in its negotiations. The Convention is intended to operate in tandem with the Hague *Convention of 30 June 2005 on Choice of Court Agreements*. The Convention addresses only direct jurisdiction while the Choice of Court Convention, to which Canada is not party, addresses both direct and indirect jurisdiction. Currently, the enforcement of foreign judgments in Canada is based on common law, except in Saskatchewan and New Brunswick where statutory regimes are in place.

Scope of the Convention

The Convention obligates domestic courts to recognize judgments of foreign courts, provided the judgment is rendered in accordance with the provisions of the Convention. The Convention only applies in private law, civil, and commercial matters. It also outlines specific exclusions, such as areas already covered by other instruments (e.g. arbitration, carriage of goods, insolvency, etc.) and areas that are sensitive and unripe for international coordination (e.g. intellectual property, privacy, defamation, etc.). The Convention only applies to judgments that have effect and are enforceable in the originating state. If the judgment is pending appeal or still within time for appeal in the court of origin, the court of enforcement *may* postpone its decision or refuse recognition and enforcement, thereby accommodating both common law and statutory approaches. Finally, the Convention recognizes non-monetary judgments, but imposes conditions that these judgments be clear and specific.

Accepted Bases of Exercise of Indirect Jurisdiction (Jurisdictional Filters)

The Convention has three categories of grounds for recognition:

- Connection between the defendant and the state of origin of the judgment (e.g. habitual residence),
- Consent of the defendant (e.g. participation without objection to jurisdiction), and
- Connection between the subject matter and the state of origin of the judgment (e.g. tenancies, torts, contract, trusts, etc.).

Grounds of Non-Recognition

Grounds for non-recognition include procedural injustice, lack of notification of the foreign proceedings to the defendant, fraud, and public policy. The Convention also gives discretion to the domestic court to reduce damages ordered by the court of origin.

Procedures for Recognition

The Convention leaves the establishment of procedures to the contracting states.

Conclusion

The advantages of adopting the Convention include:

- No foreseeable adverse impact on the volumes of foreign judgments seeking enforcement within Canada,
- Domestic-court discretion on damages,
- Detailed rules on submission of judgments for recognition and enforcement,

- Rules of priority where there are concurrent proceedings in multiple jurisdictions,
- Reciprocal enforcement of Canadian judgments in contracting states,
- Narrowly couched but effectively wide grounds of jurisdiction, and
- Overall higher levels of certainty.

Discussion

Treatment of consumers and employees: there is recognition if the action is by a consumer/employee.

Forum non conveniens: It cannot be raised. The domestic court must enforce a foreign judgment if there are no grounds for refusal in the Convention, even if a party argues that there were courts better suited to provide relief.

Objective of Canada's delegation to the negotiations: the focus of the delegation was the recognition and enforcement of Canadian judgments abroad while preserving Canadian rules as much as possible. The assessment is that these objectives were achieved.

RESOLVED:

THAT the preliminary pre-implementation report on the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* be accepted.

DRAFT UNIFORM GRATUITOUS CROWDFUNDING ACT

Final Report and Uniform Act

Presenter: **Michelle Cumyn, Université de Laval**

The *Uniform Gratuitous Crowdfunding Act* (UGCA) is the civil law version of the common law *Uniform Benevolent and Community Crowdfunding Act* (UBCCA) 2020. The UGCA and UBCCA build on and are intended to replace the civil and common law versions of the *Uniform Informal Public Appeals Act* (UIPAA). Both versions of the UIPAA address public appeals made locally through traditional means of communication and did not anticipate crowdfunding through online platforms and social media networks.

The UGCA and UBCCA reform the UIPAA by adapting it to the current crowdfunding context while maintaining their relevance for traditional public appeals for funds. In order to adapt to the current crowdfunding context, the UGCA uses the civil law UIPAA as its starting point and makes changes like those introduced in the UBCCA. These changes include:

- Application of trust principles to crowdfunding campaigns without wholesale reform of trust laws;
- Focus on donation-based crowdfunding, to the exclusion of profit-oriented fundraising or fundraising governed by election legislation;
- Focus on donations sought on behalf of others, to the exclusion of donations sought for oneself;
- Exclusion of registered charities and other qualified donees as defined by the federal *Income Tax Act*, while still applying to non-continuous and non-permanent fundraising by organizations;
- Permission of the campaign organizer, under certain conditions, to stipulate rules different from the rules under the Act;

Uniform Law Conference of Canada

- Recognition, largely through an extension of the cy-près doctrine, of the validity of certain types of trusts that would ordinarily be ineffective, such as non-charitable-purpose trusts;
- Mechanisms for the disposal of surpluses or residues; and
- Although not covered by the UBCCA, reimbursement to the donors if a trust is contrary to public order.

The UGCA is in harmony with the Civil Code of Québec. The rules needed in Québec to achieve solutions equivalent to those of the UBCCA will sometimes be different, due to the difference in legal traditions.

Discussion

The UGCA is not meant to only apply to internet crowdfunding. Any mass message by whatever means, requesting donations is generally within scope.

The Act is not clear on the termination of campaigns where there are multiple beneficiaries. Depending on the situation, the Act might be interpreted to exclude just that beneficiary or halt the campaign entirely. The working group has not considered this. Although one could say the singular includes the plural but the scenario could get complicated if there are thousands of beneficiaries. Ultimately, a lot will depend on judicial review, on request of any beneficiary.

RESOLVED:

THAT the report of the Working Group on the *Uniform Gratuitous Crowdfunding Act* be accepted;

THAT the Working Group make stylistic and concordance revisions between the French and English versions of the Uniform Act as required and resolve the difficulty raised with respect to the wording of section 22 (end of the crowdfunding campaign) by October 31, 2022;

THAT the revised Uniform Act be circulated to federal, provincial and territorial representatives of the Civil Section by the ULCC Project Coordinator;

THAT following such circulation, unless two or more objections are received by the ULCC Project Coordinator by November 30, 2022, the Uniform Act be deemed adopted and recommended for enactment; and

THAT if this Uniform Act is so adopted, the *Uniform Informal Public Appeals Act (Civil version)* be withdrawn.

DEFAMATION LAW IN THE INTERNET AGE

Progress Report

Presenter **Peter Lown, K.C., Alberta**

Mr. Lown presented a progress report on work on defamation in the internet age. The ULCC resolved in 2020 that work should commence on this subject but work has not progressed to the working-group stage yet for two reasons:

- (i) The subject-matter expert involved retired from the Law Commission of Ontario.

- (ii) The Government of Canada examined the regulation of online harm and the Civil Section decided to wait for the outcome of that work before proceeding with the project.

Online defamation needs to be considered within a broader context than the making of untrue statements. Therefore, there is a need to rethink the definition of “publication”. The key questions across jurisdictions are: Is there a legislation? Is there a regulator? Is there a takedown remedy (including administrative or criminal sanctions)? The report reviewed six jurisdictions against the backdrop of these questions: Australia, New Zealand, Canada, the EU, and Ireland.

Discussion

Should provinces and territories wait for the federal government? Mr. Lown suggests to wait but monitor other jurisdictions in the meantime. If this is the consensus, do we do anything on the *Uniform Defamation Act*? If not waiting should there be tweaks to the *Uniform Defamation Act* to update the definition of “publication”? Would that provide remedies?

Amendments to the *Uniform Defamation Act* might not be high on the legislative agenda of PTs so it might be preferable to instead actively watch other jurisdictions and proceed even if the federal government does not.

Creating a whole regime of administrative and regulatory structures might prove difficult. In a similar vein, defamation reform might not interest policy and lawmakers. The middle ground might be one that integrates online / cyber safety concepts into defamation reform.

RESOLVED:

THAT the update on the topic of Defamation Law in the Internet Age be accepted; and

THAT the Advisory Committee on Program Development and Management maintain an active watching brief on developments in Canada and elsewhere on the topic of online harm and conduct background research as needed; and

THAT the Advisory Committee on Program Development and Management examine the opportunity for the Civil Section to amend the *Uniform Defamation Act*.

REFORM OF GENERAL PARTNERSHIP LAW/ JOINT-VENTURES

Progress Report

Presenter: Maya Cachecho, Université de Montréal

Partnership

It is a simple form of business organization, although there are risks associated with its lack of a separate legal personality. In Quebec, case law evolved to recognize some level of autonomy for partnerships. A ULCC working group in 2005 recognized that some uniformity already existed across provinces and territories in partnership law, although the question remained if they should have distinct legal personality. A ULCC working group drafted a document in 2007 on pros and cons of attributing legal personality to partnerships and the same questions remain fifteen years later.

Joint ventures

There is a degree of legal framework for partnerships, despite its formation in contract. There is no corresponding framework for joint ventures. It is purely grounded in contract and each party retains its identity. However, there are similarities between a general partnership and a joint venture and in the event of a dispute, a judge could decide from the facts that the intent of the parties was to create a partnership. Third parties could also mistake a joint venture for a partnership and interact with it as such. Both scenarios could have serious unintended liability implications for the joint venture parties.

Roadmap

The working group has decided to base its work on the 2012 report of the Alberta Law Reform Institute. The group will consult experts in the fall, present a final report with multiple options to the Civil Section, and have a draft Uniform Act ready for presentation at the next annual meeting. Interim focus will be on joint ventures (draft Uniform Act by next year) and subsequent focus will be on partnerships (draft Uniform Act by the year after).

Discussion

Companies generally wish to retain their distinct identities within joint ventures but that often proves difficult during litigation. Some possible options are:

- (i) Declaring in their contracts that they are joint ventures, although the court and counterparties could still treat them as a partnership.
- (ii) Announcing to the public that they are a joint venture comprising distinct entities.
- (iii) Making joint venture parties jointly and severally liable, provided that their contract with a third party does not state otherwise.
- (iv) Clarifying distinct identities and the desire not to create a partnership clear in contract documents.

The scope of liability being considered includes tort liability.

RESOLVED:

THAT the progress report of the working group on Reform of General Partnership Law/Joint Ventures be accepted; and

THAT the working group continue its work and prioritise working on joint-ventures; and

THAT the working group report back to the ULCC at the 2023 Meeting.

CONVENTIONS ON DRAFTING

Progress Report

Presenter: John Mark Keyes, University of Ottawa

Professor Keyes reviewed the history on the Drafting Conventions which go back to 1919 and have been revised four times since. The current revisions commenced in 2019. Overall, the goal is to inform the drafting of Uniform Acts and reflect good practices in general. More recently, it has been recognized that

Drafting Conventions can have an influence on the court's interpretation of legislation. In the latest edition of *Construction of Legislation*, Sullivan speaks to the effects of the Drafting Conventions on interpretation of legislative text.

The working group originally identified eight topics for revision. The COVID-19 pandemic considerably slowed the progress of the working group. As such currently, only four parts are addressed:

- (i) Introduction
- (ii) Elements of legislative texts
- (iii) Arrangement
- (iv) Drafting Principles

The topics of Language and Bilingual and Bijural Drafting will be addressed next year.

This structure aims to reflect drafting practices across Canada and leaves scope for variation among jurisdictions. The goal is uniformity in the preparation and drafting of uniform acts, following the Drafting Conventions, and supplemented by a style guide.

Introduction

General drafting principles are applicable: draft simply, concisely, and clearly, with the intended audience in mind.

Elements of Legislative Texts

The revisions identify both substantive and optional elements. From there, the revisions consider arranging these into parts, divisions or groupings inclusive of sections and subsections. Building on the previous revisions, there is a discussion regarding paragraphing to address grammatical parallelism. This assists with readability and concerns with ambiguity.

Arrangement

The general principle is to adhere to a logical arrangement. This may vary from one text to another. For example, it is best to structure general provisions at the beginning and detailed provisions thereafter. Transitional provisions have developed over the last 20 years where transitionally now may be paired with the substantive provisions such as in situations where the transitional may have application for an extended period of time.

Drafting Principles

- *Preamble:* Traditional guidance is to not have preambles. However, the political reality may be different. The proposed version accepts preambles where they are needed. Preambles may assist with constitutional questions surrounding legislation. Preambles may act as a way for law maker to have views in front of court if legislation is contested. However, avoid political fluff and ensure accuracy.
- *Titles:* There are differences between Acts and Regulations in some jurisdictions. Some jurisdictions do not use titles for Regulations.
- *Purpose Clauses:* Treated the same way as preambles. There is a recognized case for them if legislation is general in nature and the clauses set a framework. They can inform the exercise of powers and facilitate judicial review of those powers.
- *Definition:* There is an over-inclusive nature in the common law community regarding definitions. Definitions are required if elaborating the substantive provisions or if a clarification is needed. If drafting in plain language, courts presume words to be given their ordinary meaning. There is

room to leave flexibility for interpretation, if that is the intent. Vagueness is not necessarily a bad thing, in the world of drafting, as it provides flexibility. However, avoid ambiguity.

- *Verbs*: The approach with obligations is to default to “shall” but many jurisdictions do use “must”. Ontario uses them interchangeably. The Convention do not favour one over the other. The expression “It is prohibited” is frequently present in French and is regular in Federal legislation. The first major piece was *Cannabis Control Act*.
- *Internal References*: Goals to minimize them. If legislation is well organized and flows, then do not need a lot of cross references. Cross references to proceeding subsections are likely not needed.
- *Derogations and Restrictions*: Goal is to minimize. Pay attention to potential conflicts between the provisions and how to resolve them.
- *Regulation Making Powers*: Goal is to supplement the legislation and be careful about over delegation.
- *Inserting New Provisions*: Existing systems promote the decimal numbering system. The problem is that most people do not understand decimal numbering. Alternatively it would be an alpha numeric system. For example, instead of 1.1 it would be 2(a) but there is nothing before 2(a), so problems occur with later amendments.
- *Drafting Tables, Math Formulas, Graphic Materials*: These are being used more frequently. Goal is to improve the readability of the legislation.

Language

- *Terminology (ordinary, technical, legal, current)*: The divide between ordinary and technical language is not clear. SCC jurisprudence lends to the tendency to apply the legal meaning of words not the ordinary meaning. Thus, when using legal terms that is the sense the court will give it even if there is an ordinary meaning as well. It is recommended to use care when using these terms as the courts will favor the legal meaning over the ordinary. Occasionally, it may not be clear what the technical meaning is as this depends on the audience or on the nature of the topic.
- *Consistency, Redundancy and Conjunctions*: The introduction of guidance on conjunctions, and to be wary of reliance on the terms and/or as these terms can be ambiguous due to their overlapping meanings. Questions to ask is if it is a purely conjunctive or disjunctive relationship, or perhaps joint and several.
- *Gender Inclusivity*: The UK guides have assisted. The singular “they” is widely accepted in Canada, but be cautious of ambiguity (eg singular or plural). Overall, the Conventions reject him/her pronouns as they only acknowledge two genders. This is acknowledged in some interpretation legislation in Canada.

Bilingual and Bijural Drafting

For the purposes of uniform legislation, it is important to think in bijural terms as the drafts are for the entire country. We are moving towards recognizing two methods for bilingual text: co-drafting or translation. The different models will be recognized, and guidance will be provided on how the models will operate, for example, timeframes for translation, access to the drafter, opportunities to comment on how the drafting is proceeding, and paying attention to the civil and common law context to work towards using common and uniform terms.

There are new questions related to drafting multilingual or multijural. As Nunavut drafts in three languages, there may be a direction to consider how indigenous language may need to be reflected. Additionally, there may be consideration of how to bring the different legal systems together. For

example, federally and in BC there is legislation for the implementation of the UNDRIP which puts an obligation on government to ensure laws are harmonized with Indigenous rights.

Discussion:

There were concerns with adopting parts 1-4 at the Civil section given additional comments from members and the delay in completing parts 5-6.

Delegates expressed interest in gender neutral drafting. There may be potential inconsistency with the *Model Interpretation Act* and the proposed Drafting Conventions. One of the criticisms of *Interpretation Act* provisions in jurisdictions is they perpetuate the problem where it states masculine means feminine etc.

Regarding titles, there is caution against the use of a “pet name”, for example *Claire’s Law*. The significant purpose of a title is to allow citizens to find law. The working group discussed how to push back by giving drafters tools against any political push with the focus of ensuring “access to law”.

RESOLVED:

THAT the progress report of the working group on Conventions on Drafting be accepted; and

THAT the working group continue its work; and

THAT report back to the ULCC at the 2023 Meeting.

CHARITABLE ORGANIZATIONS

Progress Report

**Presenters: C. Yvonne Chenier, K.C., Canadian Bar Association
Peter Lown, K.C., Alberta**

The presenters indicated that the central challenge has been to determine how to manage a multi-unit, multi-year project. The chosen solution was to create a template to help focus by deciding (amongst other things):

- (i) Which topics?
- (ii) What priority?
- (iii) Who is involved and who is impacted?
- (iv) What is the demand for reform?

The volunteers generated issue-spotting documents and each document attempted to “sell” topics for the working group to prioritize. The following topics were the top four: (i) Redefinition of charity (ii) Who regulates charities? (iii) Hybrid organizations (iv) *Cy pres* application

Why let the tax collector decide what a charity or a charity’s objective is? Constitutionally, charities are a matter of provincial jurisdiction.

The next step towards addressing the above four topics was to create an order of operations as follows:

- (i) Establishing the knowledge base,
- (ii) Identifying issues,
- (iii) Identifying policy options,
- (iv) Identifying policy choices,
- (v) Giving drafting instructions, and
- (vi) Drafting the legislation.

Discussion

Participants outlined legislative, judicial, policy, and practical considerations across PTs on the definition of “charity”, the regulatory responsibility for charities, and the rules on hybrid organizations.

RESOLVED:

THAT the progress report of the working group on Charitable Organizations be accepted;

THAT the working group continue its work in accordance with the directions of the ULCC; and

THAT the Working Group report back to the ULCC at the 2023 Meeting.

IMPLEMENTATION ACTIVITIES

Oral report from jurisdictions on implementation activities

Presenters: Elizabeth Strange, New Brunswick
Tyler Nyvall, British Columbia
Blair Barbour, Prince Edward Island
Christine Badcock, Yukon
Maria Markatos, Saskatchewan
Donna Molzan, K.C., Alberta

New Brunswick

New Brunswick enacted the following statutes based on the *Model Acts*:

- *Intimate Images Unlawful Distribution Act, 2022* (based on *Uniform Non-Disclosure of Intimate Images Act*),
- *Debtor Transaction Act, 1999* (based on the *Uniform Reviewable Transactions Act*),
- *Enforcement of Money Judgments Act, 2019* (based on the *Uniform Civil Enforcement of Money Judgments Act*), and
- *Trustees Act, 2016* (based on *Uniform Trustee Act*).

British Columbia

British Columbia adopted the ULCC Electronic Wills Amendment to the *Uniform Wills Act*. The jurisdictional representative for British Columbia notes that:

- Remote witnessing of wills is in force immediately with retroactive effect to March 2020,
- Recognition of electronic wills commenced in 2019,

Uniform Law Conference of Canada

- Under the *ULCC Act* there may be multiple electronic originals that are unaltered since signed and saved in its original electronic format. This can be checked to verify authenticity. This does not change if multiple versions are shared,
- Electronic copies (digital reproductions) are versions saved in new file format or changes in metadata are treated as photocopy of an original,
- Recipient of a notice of an application can receive electronic will in original electronic form,
- There is an ability to file a copy of electronic will if saved in format in pdf. Courts are accommodating other formats now,
- Requirements to search for documents are now updated to search for electronic locations, and
- First electronic will in Canada was in BC. Given that early adopters are young persons, it may be a while before courts see these electronic wills.

British Columbia adopted the *ULCC Uniform Liens Act* to the *Commercial Liens Act* in March 2022

- Scheduled to be in force in 2023,
- Will consolidate BC's lien laws and replace three lien Acts and repeal two obsolete Acts,
- BC offered the following reasons to modernize by adopting *Uniform Liens Act*:
 - One set of rules will make it easier for service providers to understand and accept payment,
 - Vision for one set of lien rules throughout Canada,
 - Based on established rules throughout Canada and similar to US commercial code,
 - Creates liens for services as soon as service begins,
 - Removes requirement of possession of goods, and
 - Anyone who signs acknowledgement still has the right to dispute.

PEI

PEI advised it adopted so many uniform because its statute book is old and a strategic priority is to update statute book. Opposition and government members find ULCC uniform acts to be a good product as reflected by the fact that very few amendments are made to them prior to their enactment in PEI. The length of time for adoption was approximately 12-18 month cycle inclusive of public consultation for two months. PEI enacted the following statutes based on uniform acts.

- *Access to Digital Assets Act* in 2021 based on the *Uniform Access to Digital Assets by Fiduciaries Act*.
- *Children's Law Act* including parentage provisions are based in part on the *Uniform Child Status Act*.
- *Class Proceedings Act* in 2021.
- *Interpretation Act* in 2021 based primarily on *Model Interpretation Act*.
- *Missing Persons Act* in 2021 is enacted but not proclaimed yet and is based on the Uniform Act.
- There is a proposed new *Justice of the Peace Act* but is delayed.
- *Intimate Images Protection Act* in 2020 based on the *Model Act* and N.S. similar statute.
- Three bills currently tabled and may be passed:
 - *Arbitration Act* as based on the 2016 Uniform Act.
 - *Powers of Attorney and Personal Directive Act* as based on the 2015 *Uniform Enduring Powers of Attorney Act*.
 - *Act to Amend the International Commercial Arbitration Act* which will align the older Act with the 2014 *Uniform International Commercial Arbitration Act*.
- Consulting on future statute amendments:
 - *Benevolent and Community Crowd Funding Act* (spring 2023).

- *Reviewable Transactions Act* (spring 2023).

Yukon

Yukon adopted two uniform acts:

- *Missing Persons Act* (not yet in force) in response to the calls for action from the Truth and Reconciliation Commission and the Murdered and Missing Indigenous Girls Inquiry.
- 2020 amendments to the *Wills Act* based on the 2015 *ULCC Model Act*.

Yukon echoed the respect and confidence regarding ULCC products that come before the legislature.

Saskatchewan

The jurisdictional representative for Saskatchewan noted that the government and the opposition understand the work of the ULCC, and recognize it is nonpartisan. Saskatchewan adopted many uniform acts, inclusive of:

- *Reviewable Transactions Act* which included amendments to the PPSA, Enforcement of Money Judgments (passed in 2022, not in force).
- *Intimate Images* (which is an amendment of the *Privacy Act*) added “take down”, “uttering threats” and “deep fakes” provisions.
- *Fiduciaries Access to Digital Assets* in 2020
- Updated *Children’s Law Act* in 2021 based on *Uniform Child Status Model Act*.
- Upcoming there may be implementation of new Franchises legislation and updates to Electronic Wills.

Alberta

Alberta reported enacting the new *Trustee Act* in March 2022 (in force on later proclamation likely in 2023). This was based on the Uniform Act and an Alberta Law Reform Institute report (ALRI) (the report recommended adopting the ULCC uniform act with minor changes to fit trust laws of Alberta). It was advantageous that Justice partnered with ALRI to engage in community discussions based on the 2015 ALRI Report. Alberta’s Hansard reflects the respect for the ULCC and ALRI.

Alberta reported the lessons learned or suggestions to have ULCC uniform acts enacted include focusing on the benefit of the legislation and what it will do for different people in different circumstances. Alberta demonstrated how the prior *Trustee Act*, which only focused on wills, was improved with the new *Trustee Act* which applies to various investment vehicles etc. Alberta expressed highlighting that vulnerable persons and charities will benefit from a uniform act Further, stakeholder support was key, inclusive of the consultation process with ALRI throughout the province resulted in significant buy in.

RESOLVED:

THAT the reports from jurisdictions on implementation activities be received.

RULES OF PROCEDURE AND POLICIES OF THE CIVIL SECTION

Oral Report

Presenter: Valérie Simard, Canada

Uniform Law Conference of Canada

Ms. Simard discussed the working group's progress since 2021 as captured in the *Report of the Civil Section Steering Committee Subcommittee on Rules of Procedure and Policies*. The subcommittee developed two policies which were adopted by the Steering Committee:

- (i) Policy on Adoption and Amendment of Civil Section Rules of Procedure or Policy, and
- (ii) Policy on the Distribution of Materials to the Civil Section for its Annual Meeting.

The Steering Committee submits for approval the *Policy on Adoption and Amendment of Civil Section Rules of Procedure or Policy*. The second policy ceases to have effect after the annual meeting and will be reconsidered when the Steering Committee reconvenes in Fall 2022.

The committee will continue its work this year and drafting other policies. There is a potential policy to handle documents that are transmitted for the annual meetings. The goal is to prepare a policy to set standards for documents presented at the annual meeting.

RESOLVED:

THAT the report of the Steering Committee Sub-Committee on Rules of Procedure and Policies of the Civil Section be accepted;

THAT the *Policy on Adoption and Amendment of Civil Section Rules of Procedure or Policy* annexed to the Report be approved by the Civil Section; and

THAT the Sub-Committee continue to consider rules of procedure and policies for the Civil Section in conjunction with the Civil Section Steering Committee and report back to the ULCC at its 2023 Meeting.

INTERNATIONAL LAW SESSION

United States Uniform Law Commission

Presenters: **Tim Berg, Chair of Executive Committee of Uniform Law Commission**
 Carl H. Lisman, Esq., Past President of Uniform Law Commission
 Pascal Pichonnaz, President European Law Institute

Uniform Law Commission

Mr. Lisman, Esq., presented on the challenges of drafting during the COVID-19 pandemic. Due to the nature of the ULC meetings and work transitioning to online, it became possible to involve more individuals. He encouraged observers to become participants with the drafting committees. Involvement of observers improved work product; however, the absence of "in person" meetings had challenges.

Mr. Lisman, Esq., revisited the strength of the strong relationship between the ULC and ULCC due to the common respect for each other's legal systems and legislatures. Over the years, the two organizations engaged in joint drafting projects, joint studies of potential products, and meetings of leadership teams.

Mr. Berg lists the uniform acts recently approved by the ULC:

- *Amendments to Uniform Commercial Code,*
- *Uniform Tele-Health Act,*
- *Uniform Electronic Estates Planning Documents Act,*
- *Uniform Alcohol Direct Shipping Compliance Act, and*

- *Model Public Meetings During Emergencies Act.*

When drafting the *Uniform Commercial Code* Amendments, there were more than 100 people participating due to the use of technology including remote working opportunities. There was a robust variety of participants including individuals from Canada, Latin America, Australia and Europe. The Uniform Act will be a challenge as it focuses on digital assets and how to take a security interest. It is a very technical piece of legislation. This takes a lot of explaining as it deals with property issues linked to cloud computing etc. ULC is considering working with interested parties, such as the banks, to get these amendments passed by state governments.

Several states had adopted similar legislation to the *Uniform Tele-Health Act* before drafting the Uniform Act. Those Acts are not uniform and this may hinder the ability to use tele-health across state lines. This Uniform Act should help with tele-health across state lines. Included in the Uniform Act is the creation of a registration system for physicians across state lines.

Currently, there is a drafting committee working on the *Uniform Termination of Death Act* which is out of date. This is a complex, technical topic with political and religious considerations.

A drafting committee is working on conflicts of laws in the area of trusts and estates. The draft focuses on resolving issues of which states laws govern various aspects of the trusts and estates. Similar issues may arise in cross border situation between USA and Canada.

Study committees are looking at potential projects including *Uniform Remodel Act* dealing with the assignment of benefits to creditors including the opportunity to close a business without proceeding through bankruptcy. Committees are studying how best to implement the Hague Judgments Convention and the *United Nations Convention on International Settlement Agreements resulting from mediation*.

Mr. Berg expressed initiatives used to improve processes:

- (i) Created a stakeholder outreach committee to ensure the correct stakeholders participate.
- (ii) Expanded the role of the committee for review of ULC uniform acts to review the experiences in drafting acts to improve their rate of enactment.
- (iii) Drafting committees to be in person if possible and remote participation only where appropriate.

Discussion

Mr. Berg indicated the hard work at the front-end to draft a widely accepted uniform act, may result in easier acceptance where traditionally there may have been pushback to the process to get consensus on common definitions on some subjects, for example digital access.

Mr. Berg reflected on how to bring the general population to think about law by offering the advice to identify citizens or business groups who have an interest in the product to support the initiative.

European Law Institute

Professor Pichonnaz discussed the history of the European Law Institute (ELI) including its goal to conduct research and provide guidance in legal development, but not just for the European Union, as well to create a vigorous European legal community with lawyers of varied backgrounds in varied professions. ELI maintains regular contact with the EU. There are considerations to have the ULCC as an observing member of the ELI.

To ensure the European legal community is aware of the progress, ELI has national hubs to organize dissemination events. ELI also welcomes special interest groups.

The current projects include:

- Rule of Law in the 21st Century (admissibility of e-evidence, judicial independence, third party funding of litigation),
- Law and Governance in the Digital Age (access to digital assets, algorithmic contracts, workers' rights to disconnect), and
- Sustainable Life and Society (climate justice project, eco-crime).

Later projects include:

- Corporate Criminal Liability,
- Biometric Techniques and Harmonizing, and
- Principles for Data Economy (joint project with ALI to have 40 principles from transactional rights to data, code generated date, consideration of private international law rules).

An example completed project includes the *Biens Numeriques Comme Suretes* which involves use of digital assets as security. There were three drafters including legal counsel from Germany, a professional from Finland bringing the Scandinavian approach which is "less codified", and a lawyer from Brussels. This project resulted in 5 principles. In particular related to definitions, as the content for digital assets security diverges, definitions become difficult, but broad definitions result in capturing core attributes. The other principles are provided in the disseminated report.

RESOLVED:

THAT the ULCC express its thanks to Mr. Carl Lisman and Mr. Tim Berg of the Uniform Law Commission, for their presentation; and

THAT the ULCC express its thanks to professor Pascal Pichonnaz of the European Law Institute, for his presentation.

PRIVATE INTERNATIONAL LAW REPORT

Report

Presenter: Kathryn Sabo, Canada

Who? (The Team)

This team handles private international law matters within the Constitutional, Administrative, and International Law Section of the Department of Justice (Canada).

What? (The Work)

Generally, the team works in two areas:

- (i) International harmonization of the rules of private law, i.e. contracts, torts, succession, marriage, divorce, dispute settlement, and other substantive rules of private law; and

- (ii) Harmonization of the rules of private international law, i.e. harmonization of the rules determining the laws that apply in a given international situation or determining when a court has jurisdiction in an international situation.

The harmonization happens on both domestic and international levels and the work products include treaties, model acts, guide to good practice, guide to legislators, or principles.

Where? (The Venues)

Apart from the team's work with the ULCC, the team works within three main multilateral organizations:

- (i) The Hague Conference on Private International Law,
- (ii) The International Institute for the Unification of Private Law (UNIDROIT), and
- (iii) The United Nations Commission on International Trade Law (UNCITRAL).

The team also occasionally works within the Commonwealth through the law ministries and in the context of the Asia-Pacific Economic Cooperation (APEC). Previously, there was some private law harmonization work done in the Organization of American States (OAS).

How? (The Methodology)

The multilateral organizations base their work programs on ideas from member states and other stakeholders. The work products are negotiated by experts who come together with a common purpose to produce texts that work for everybody. Prior to participating, the Canadian team consults with the departmental advisory group on private international law, ULCC jurisdictional representatives, industry, the CBA, and other stakeholders. If the consultations result in interest, the team then sets priorities based on criteria such as the benefit(s) for Canada and Canadians, stakeholder interest in the project, overall costs and benefits, and feasibility of implementation in Canada. The team consults further to determine Canada's position and to enlist representatives from PTs, the private sector, law reform bodies, and the academia.

Why?

These are international matters but they fall under provincial/territorial legislative authority within Canada's constitutional framework. Federal involvement is therefore required, due to the international character of the work and since provinces and territories do not have capacity at international law.

Some of the Ongoing Work

Work is mostly in preparatory phases and nothing has firmed up yet. Areas being worked on at the different venues include the following:

Hague Conference: judgments and jurisdiction in parallel proceedings, parentage, surrogacy, adoption and child protection.

UNIDROIT: enforcement (judicial and extra judicial) in the context of secured transactions and tangible/intangible assets, factoring (secured transactions), warehouse receipts (in conjunction with UNCITRAL), and digital issues (data and digital transactions, artificial intelligence, etc.)

UNCITRAL: access to credit, tech-related dispute resolution, electronic commerce, insolvency, and negotiable multi-modal transport documents.

Priorities: The two key priorities are:

- (i) Encouraging PTs to implement the 2007 *Hague Convention on Reciprocal Enforcement of Maintenance Obligations* and the 1996 Child Protection Convention, and
- (ii) Gauging interest on *United Nations Convention on International Settlement Agreements Resulting from Mediation*. Others include post-final-report work on the 2005 *Convention on Choice of Court Agreements* and the 2019 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* as well as preliminary work on the 2005 *Convention of 13 January 2000 on the International Protection of Adults*.

This report is not subject to a resolution.

**REVIEW OF JOURNALS AND JUDGMENTS REFERENCING ULCC
REVIEW OF ULCC UNIFORM ACTS**

Report

Presenter: Clark Dalton, K.C., ULCC (oral report)

The ULCC has 130 Uniform Acts recommended for adoption by the PTs, with the oldest being recommended for adoption in 1927 and continuing to be recommended for adoption today. However, of the 130, only 88 are in both English and French and the remaining 42 are only in English. In addition, many of the acts were prepared with old drafting techniques and usages.

Some consideration needs to be given to translation of the English-only acts into French and/or updating the older acts. Attempts at revisions were made in 1978 when the ULCC first adopted simultaneous interpretation and a committee recommended deleting four obsolete acts but this recommendation was never implemented. A drafting section that existed between the 1960s and the 1990s also discussed revising French-language statutes but never completed the exercise.

The proposed project here is to review the list of the ULCC's Uniform Acts for items that need to be translated into French, updated with newer drafting techniques and usages, categorized as legacy acts that are no longer recommended for adoption, or withdrawn completely.

Discussion

There is value in a review to determine which acts should continue to be recommended for adoption. However, redrafting old acts might be unnecessary because an adopting PT would usually recognize that an old Uniform Act should be updated during its adoption and the ULCC can conserve its resources by not having to concern itself with such updates.

RESOLVED

THAT the Review of Journals and Judgments referencing the ULCC and the Review of the ULCC Uniform Acts be received.

UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT PROJECT (UECJDA)

Progress Report

**Presenters: Stephen Pitel, Western University
Peter Lown, K.C., Alberta**

Mr. Lown thanked the working group and expressed a desire to have them acknowledged in the minutes: Stephen G.A. Pitel, Peter Lown, K.C., Joost Blom K.C., Bradley Albrecht, Frank Pignoli, John Lee, Blair Barbour, Darcy McGovern, K.C., Laurence Bergeron, Michael Hall, Geneviève Saumier, and Clark Dalton, K.C.

The working group identified 16 issues to consider in modernizing the UECJDA and the commentary:

- (i) *Overarching Considerations*: Since 2005, the statute and commentary have underwent changes and additions which need to consolidation to improve use. For example, the commentary needs to better capture guidance from the Supreme Court of Canada and thirty years of change. Finally, the working group is examining the translations to French.
- (ii) *Limits on the defendant's ability to challenge the rendering court's jurisdiction*: The working group spent the most time on this issue and discussed if the fundamental underpinnings should be questioned. The report discusses this at length, but the working group is not recommending change.

Regarding judgment enforcement, the UECJDA speaks to the enforcing court's inability to scrutinize the rendering court decision as there is no need to re-do the judgment. This would reflect "judgment portability". The UECJDA includes "no review" as opposed to a full review of the jurisdiction. The working group debated this approach given the common law approach allows a review to ensure the rendering court had requisite jurisdiction. The UECJDA broke with the common law. Is this fair to the defendant? The UECJDA requires the defendant to respond. Finally, if there is a power imbalance in litigants, the UECJDA may be more challenging.

Discussion

The provision in Saskatchewan has not led to trapping of unaware parties nor negative judicial commentary. BC has this design in force.

WG Recommendation: no change; affirm the current approach.

Confirmed: Civil Section agrees with the recommendation

- (iii) *The role of jurisdiction agreements and limits on subject-matter jurisdiction*: One of the larger changes dealt with jurisdiction agreements and addressing subject matter jurisdiction. These were omissions from the original uniform act.

(iv)

WG Recommendation: no change; affirm the current approach.

Confirmed: Civil Section agrees with the recommendation

- (v) *Application to registrations or judgments enforcing judgments*: This contemplates "ricochet judgments" where three jurisdictions are involved. For example, a foreign judgment is recognized

in a province or territory and then the judgment recognizing the foreign judgment is recognized in another province or territory. The recommendation to change the statutory scheme was prompted by court cases engaging elements of the provision.

Discussion

If we do not amend, then it may invite forum shopping.

WG Recommendation: amend the UECJDA to exclude judgments recognizing a foreign judgment.
Confirmed: Civil Section agrees with the recommendation

- (vi) *Procedural elements: notice, time limit, limitations period*: A comparison of various statutory schemes reveals procedural issues. The current UECJDA is “process light” and heavy on substantive ideas of registration. Perhaps the commentary can be enhanced to address this.

WG Recommendation: amend s 5(1) to make the language clearer and broader, addressing the prospect that a province or territory might not have a limitation period on a domestic judgment’s enforceability.
Confirmed: Civil Section agrees with the recommendation

- (vii) *The requirement of a final judgment*: Terms used in the UECJDA come from private international law regarding final judgments and does not capture interlocutory judgements. There is no definition of “final”. Including statutory definitions could lose some of the robustness of the jurisprudence.

WG Recommendation: amend the commentary to provide a clearer indication of what the statute means by a “final” judgment in s 2(1) and s 2(2).
Confirmed: Civil Section agrees with the recommendation

- (viii) *Setting aside registration*:

WG Recommendation: amend s 6 to provide a clear process for setting aside a registration.
Confirmed: Civil Section agrees with the recommendation.

- (ix) *Seeking directions*: Section 6 is limited to a “party to the judgment/proceedings”. The working group considered whether third parties with an interest in the judgment should be able to seek directions. Third parties are covered under different mechanisms and should not be inserted in s.6.

WG Recommendations: no change.
Confirmed: Civil Section agrees with the recommendation.

- (x) *The role of public policy*: The UECJDA preserves the common law right for a defendant to resist enforcement if it is contrary to public policy. The working group considered it is a fundamental matter of a jurisdiction’s sovereignty to have a public policy override. Application is very narrow as outlined in jurisprudence. Mr. Lown advised we must trust jurisdictions will take a pragmatic approach in application. There may be amendments to the commentary to address this.

Discussion

Professor Pichonnaz gave an example of public policy application regarding unfair terms in consumer contracts in Spain. A mobile phone contract included an arbitration clause to deal with

absent payments. The consumer did nothing and the default judgement went to appeal where the court said the arbitration clause was an unfair term and struck down. In another matter, at enforcement of a default judgment, the EU Court of Justice determined it was a matter of public policy to protect consumers against unfair terms and disallowed the enforcement.

Professor Pitel provided the Canadian context indicating it is unlikely Canadian courts would consider those types of contract terms on a public policy basis. It is a matter of context and would need to be more fundamental and perhaps “abhorrent”. The working group prefers to leave the concept of public policy open to allow court to probe the boundaries of the concept. A Canadian court would develop the concept in accordance with Canadian cases.

Professor Pitel confirmed the case cited in the report is a foreign judgment, but the public policy focus is always on the local value structure.

WG Recommendation: no change to the statute; add discussion in the commentary.

Confirmed: Civil Section agrees with the recommendation.

- (xi) *Civil protection orders*: The working group considered if civil protection orders, Canadian and foreign, should be in the UECJDA or another statute and agreed it is acceptable to address in the UECJDA. The goal is to have an integrated regime especially where time is of the essence. Currently, there are no issues within this regime.

Discussion

To clarify the recommendation, the working group will leave the UECJDA as is unless there is guidance for reform. The “as is” contemplates the registration of Canadian civil protection orders but does not contemplate the registration of foreign civil protection orders.

WG Recommendation: await direction as to whether to consider revisions to the schemes for Canadian and foreign civil protection orders, including whether those schemes should remain a part of the UECJDA.

Confirmed: Civil Section agrees with the recommendation to leave the provisions alone.

- (xii) *Restitution orders*: A restitution order in a criminal proceeding is covered as enforceable as civil judgment. However, this does not fit in the definition in the statute of a “Canadian judgment” which is a “civil proceeding”. Section 741(1) of the *Criminal Code* addresses the enforceability of restitution orders across Canada.

WG Recommendation: revise the commentary to explain that restitution orders are not covered by the UECJDA but rather by s 741(1) of the Criminal Code, RSC 1985, c C-46.

Confirmed: Civil Section agrees with the recommendation.

- (xiii) *Interest*: Section 7 deals with interest on judgement registered. An interpretation is that interest continues to run post registration. A further interpretation is that from the date of registration, the rate of post judgment interest swaps over from the rendering court and becomes the post judgment interest rate from place where registered. Different provinces have widely different regimes for post judgment interest; some have a variable rate and others have a fixed rate. This is even more problematic if the parties contractually agreed to the interest rates. The working group proposes

the registering of the judgment does not affect the underlying right to post judgment interest flowing on the award per the rendering court.

Discussion

It was suggested there should there be alternates. Professor Pitel noted the wording works as the law applicable to the calculation of interest would be a law including the court's ability to stipulate the rate. It only operates independently where the terms of judgement do not specify something else.

Alberta's *Judgment Interest Act* allows the court the ability to vary the amounts set in the Act, and most jurisdictions have this ability. The courts have flexibility. Professor Pitel noted this would be caught by the terms of the judgment. If it didn't, the default would be applicable. The working group will consider if this needs to be tiered. It could say, "in accordance with the terms of the judgment, or in the absence of such terms, the law applicable to the calculation of interest thereon in the province..."

WG Recommendation: change s 7 to provide that the applicable rate of post-judgment interest is to be the same as was accruing where the judgment as rendered.

Confirmed: Civil Section agrees with the recommendation and requests the working group to consider the comments from Alberta in the discussion.

- (xiv) *Interaction with other statutes and common law*: The working group considered that section 9 is worded incorrectly. The intention is, with the creation of a registration scheme, the parallel common law of suing on the judgment was still available. This provides plaintiffs with choice. However, section 9 does not do this, in effect, and does not preserve the common law action on the judgment, it only preserves the ability to sue on the original cause of action which is not the same as suing on the rendering court judgment at common law. Preserving it in section 9, in the face of a registration, is not duality or alternative, this is a conflict. There may be concerns that some provinces would have multiple statutory routes to achieve the same thing.

Discussion

Professor Pitel confirmed if nothing is said in section 9, this would leave it open, resulting in an interpretation there is nothing in the statute eliminating the common law right to sue.

Request for the working group to consider including a clarification regarding the common law right to sue in the commentary, if section 9 is amended.

WG Recommendation: (1) amend s 9 to make clear the continued ability to sue on the judgment at common law, and (2) revise the commentary to indicate that enacting jurisdictions should consider consequential amendments to other statutes necessary to avoid multiple possible processes for registration of Canadian judgments.

Confirmed: Civil Section agrees with the recommendation, and the working group will consider including a discussion in the commentary regarding comments from the discussion.

- (xv) *Transition*: Transitory element for tax judgments. This can be treated as subsumed in a Canadian judgment.

WG Recommendation: delete s 17(c) as unnecessary.

Confirmed: Civil Section agrees with the recommendation.

- (xvi) *Effectiveness in handling non-monetary orders*: The working group is not aware of any issues unique to non-money judgments.

WG Recommendation: no change; affirm the current approach.

Confirmed: Civil Section agrees with the recommendation.

- (xvii) *Scope of judgments: administrative tribunals*: The definition of “Canadian judgments” includes monetary awards by tribunals that are enforceable as though they are court orders. The concern is the differing scope of various tribunals. Should all tribunal monetary orders be treated on the same footing?

Discussion

There was a question regarding the preservation of “public policy”, and perhaps tribunals may be a reason why courts in another province may decide this is not accordance with their public policy. The response included a consideration that it is unlikely, in the federal context, the scope would fall within a public policy consideration. Reasons for rejecting jurisdiction are mostly found in fundamental rights to participate, prejudicial proceedings etc. This could be close to the public policy argument.

WG Recommendation: no change.

Confirmed: Civil Section agrees with the recommendation.

General Discussion

Regarding the comments about international conventions, there are two distinct spheres operating. If jurisdictions took the rules from 2019 Hague Convention, and imported them into statute, what would be lost is the safety valve at Article 15. This says if you cannot enforce under rules of the Convention then this can be done under domestic law. It is important to preserve this. It is better to have a separate statute as they are two regimes. Professor Pitel indicated the notion is not to smash the regimes together. They could still be kept discreet but in an intergraded statute. For example, in a certain set of circumstances the domestic provisions would be used or the international conventions used, while being bundled in the same statute, even if they mean different things.

Mr. Lown clarified the working group recognized the symbiotic relationship for enforcement of foreign judgments. The order will be maintained: court jurisdiction first, enforcement of Canadian judgment and decrees second, and a final contemplation of the Hague conventions.

Delegates discussed nothing needs to be adjusted regarding the 2005 or 2019 Hague Conventions as they can be applied in their own separate spheres. Professor Pitel noted the 2005 Convention covers most of the cases dealing with exclusive jurisdiction agreements, so why is it not in the main statute? Delegates confirmed that it only applies when two states party to the Convention. It is unlikely for a convention to be in force in all countries, so you will always need non-convention rules.

The delegate from Quebec noted when the time comes to analyze the best way to integrate the policy choices, Quebec will need to decide if it will change the *Civil Code* or craft a distant Uniform Act similar to the *Crowdfunding Act*.

RESOLVED:

THAT the report of the working group be accepted;

THAT the working group prepare uniform legislation and commentaries on enforcements of the Canadian judgments and decrees in accordance with the directions of the ULCC, and;

THAT the working group report back to the ULCC at the 2023 meeting.

ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT & MANAGEMENT (ACPDM)

Report

Presenter: Peter Lown, K.C., Alberta

Class Action Project Proposal

Professor Pierre Noreau (Institut québécois de réforme du droit et de la justice) presented a project proposal on class actions. He outlined previous ULCC work on the topic from the 1970s all the way to a report prepared in 2006/2007. The 2006/2007 report addressed multijurisdictional class actions and forum shopping. The report also resulted in the creation of a class action registry, which helped map class actions across jurisdictions. Since then, there has been a significant increase in class actions, driven largely by law firms that were, in turn, influenced by the success of class actions in the United States. In the end, class actions do not fulfil their intended purposes, such as access to justice. The judicial response across PTs has also tended to be incoherent. A solution that promotes access to justice and provides a coherent judicial response is a Uniform Act adapted to the current realities of class actions. This Uniform Act project will be conducted by both academics and practitioners and can be executed over 3 years. If this project is accepted, it can result in a report by 2025, especially as there is already some foundational work on the issue that was done in 2019 with the support of the Ontario Law Commission.

Feedback: it is a timely and important proposal that is worth consideration by the ACPDM, because multijurisdictional class actions are an area of concern of judicial policy across jurisdictions. Further scoping work may be required, as the focus appears to be from a multijurisdictional angle but other angles include damages and the disposition or investment of unclaimed awards. In the meantime, the project is accepted and a progress report will be delivered in 2023, a draft report with policy issues in 2024, and the final report in 2025.

ACPDM Report

Mr. Lown outlined developments in the ACPDM's budget and project-development processes.

Mr. Lown also outlined a feasibility study on Non-Disclosure Agreements and the consensus from participants is that the ULCC can add value on the issue, given the legislative, policy, and practical considerations across provinces and territories. The section recommended further scoping and investigation, as well as a more specific proposal.

Finally, Mr. Lown sought feedback on potential work on (i) the *Fatal Accidents Act*, in light of the no-fault schemes now common across PTs; and (ii) the possibility of expanding remote witnessing of documents

Uniform Law Conference of Canada

to make it more available on a more generic basis rather than limiting it to certain types of documents. On the *Fatal Accidents Act*, the Section agreed that further scoping is needed and on remote witnessing, the Section agreed to summarize what has been done by Manitoba and the United States' Uniform Law Commission and the section will then decide whether these will form the basis for further work.

RESOLVED

THAT the report of the Advisory Committee on Program Development and Management and the direction undertaken by the advisory committee in accordance with the discussion of the Civil Section be accepted.