

## **APPENDIX J**

[ See page 49]

### **REPORT OF THE DEPARTMENT OF JUSTICE** **TO THE UNIFORM LAW CONFERENCE**

INTRODUCTION 257

ADVISORY GROUP ON PRIVATE INTERNATIONAL LAW 257

CIVIL JUSTICE COMMITTEE 258

STATUS CHART OF CANADIAN ACTIVITIES IN PRIVATE  
INTERNATIONAL LAW 258

STATUS REPORT ON PRIVATE INTERNATIONAL LAW AND THE  
INTERNATIONAL UNIFICATION OF PRIVATE LAW 258

THE DEPARTMENT OF JUSTICE LAW REFORM PROJECT 259

LATEST DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW 259  
THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 259

The Hague Conference's Work in Progress 264

UNCITRAL 266

UNCITRAL's Work in Progress 273

UNIDROIT 275

Unidroit's Work in Progress 277

WORLD BANK 279

REGIONAL ORGANIZATIONS 280

Organization of American States 280

BILATERAL CONVENTIONS ON MUTUAL LEGAL ASSISTANCE 280

CONCLUSION 281

## APPENDIX J

### **REPORT OF THE DEPARTMENT OF JUSTICE TO THE UNIFORM LAW CONFERENCE**

#### **INTRODUCTION**

Since the last meeting of the Uniform Law Conference, Canada has continued to participate actively in the activities of the Hague Conference on Private International Law, UNCITRAL and Unidroit. The Department of Justice has consulted regularly with the provinces and the territories, with other interested federal Departments, and with the private sector on various conventions adopted by these organizations and on instruments being developed under their auspices. The Department of Justice also benefits from the views expressed by its Advisory Group on Private International Law.

#### **ADVISORY GROUP ON PRIVATE INTERNATIONAL LAW**

The Advisory Group on Private International Law was first established by the Department of Justice in 1973 to provide it with close and continuing guidance in matters of provincial interest that are under consideration by certain international organizations in private international law. The Group, which was reconstituted in 1994, is now composed of a private practitioner and five regional representatives: one from Saskatchewan representing Manitoba, Alberta and Saskatchewan; one from Prince Edward Island representing the Atlantic provinces; and one from each of British Columbia, Ontario and Quebec.

The Group met on two occasions since last August: in November, 1994, and April, 1995. A representative of the International Law Section of the Canadian Bar Association attended these meetings as an observer. The agenda for both meetings was very full and gave rise to a very productive exchange of views on various projects and conventions of The Hague Conference, Unidroit and UNCITRAL as well as other related matters in private international law such as bilateral cooperation and law reform in the field of recognition and enforcement of foreign judgments.

The Group again made useful suggestions for improving the consultation process regarding private international law activities and Canadian participation in international meetings.

## UNIFORM LAW CONFERENCE OF CANADA

### **CIVIL JUSTICE COMMITTEE**

The Civil Justice Committee, which is composed of provincial, territorial and federal representatives that report to Deputy Ministers of Justice, has begun to play a major role in the coordination of the consultations undertaken by the federal Department of Justice with respect to private international law activities. In 1994, the Committee made useful comments concerning past consultations and undertook to consider actions with respect to future consultations, such as the designation of lead jurisdictions responsible to provide input on draft conventions or other texts prepared by international organizations.

### **STATUS CHART OF CANADIAN ACTIVITIES IN PRIVATE INTERNATIONAL LAW**

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

### **STATUS REPORT ON PRIVATE INTERNATIONAL LAW AND THE INTERNATIONAL UNIFICATION OF PRIVATE LAW**

The federal Department of Justice has played a lead role in the fields of private international law and the international unification of law over the past 25 years. The purpose of the *Status Report on Private International Law and the International Unification of Private Law* is to summarize the work done in the field of private international law of interest for Canada, either in a bilateral or multilateral context. The report is divided into four parts.

Part I deals with the subject matter of private international law and discusses Canada's involvement. Part II outlines the activities of international organizations dedicated to the development of private international law and unification of private law. Part III addresses the question of mutual legal assistance at the bilateral level, an area in which Canada has not been very active but that has generated more

## APPENDIX J

interest recently. Part IV discusses the mechanisms to encourage greater provincial and private sector participation.

### **THE DEPARTMENT OF JUSTICE LAW REFORM PROJECT**

In the past year, the Department of Justice undertook a study and consultation project in order to seek recommendations aimed at possible law reform in the field of recognition and enforcement of foreign judgments in Canada. Two major academic papers were prepared on the status of the law in Canada, the first by Professors Joost Blom from the University of British Columbia and Vaughan Black from Dalhousie University with special emphasis on the common law rules, and the second by Professors Jeffrey Talpis and Gérald Goldstein from the Université de Montréal on the rules of the new Quebec *Civil Code*. More than thirty academics, practitioners, judges, officials from law reform bodies and officials of Justice Departments participated in meetings held across Canada in the spring of 1995. The final report is now being completed and will soon be distributed to all interested government authorities and private bodies.

This work is related to the work of the Hague Conference on Private International Law on recognition and enforcement of judgments and also the current negotiations with France on a bilateral convention on the same subject matter. Recent developments on recognition and enforcement of judgments in Canada in the aftermath of the Supreme Court's decision in *Morguard*, along with the recent work of the Uniform Law Conference, have also been taken into consideration.

### **LATEST DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW**

The main event of the past year was the finalizing in June, 1995, of the Unidroit *Convention on Stolen or Illegally Exported Cultural Objects*. The Convention was adopted on June 23, 1995, after a compromise draft was prepared by an informal working group in which Canada played a leading role.

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

The Hague Conference on Private International Law, of which forty-two States are members, organized three meetings this year. A member since 1968, Canada

## UNIFORM LAW CONFERENCE OF CANADA

participated in the following activities: the Special Commission on the implementation of the Intercountry Adoption Convention from October 17 to 21, 1994; the Special Commission on the revision of the Convention on the Protection of Minors from February 6 to 17, 1995; and the Special Commission on General Affairs and Policy of the Hague Conference from June 20 to 23, 1995.

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

The Hague *Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, which was finalized on May 29, 1993, came into force on May 1, 1995, for the following three ratifying States: Mexico, Romania and Sri Lanka. Since then, the Convention entered into force for Cyprus on June 1, 1995, and will come into force for Poland on October 1, 1995. Seventeen other States, including Canada, have signed the Convention: Brazil, Burkina-Faso, Colombia, Costa Rica, Ecuador, Finland, France, Israel, Luxembourg, the Netherlands, Peru, Spain, Switzerland, the United Kingdom, the United States and Uruguay.

Canada's signing the Convention on April 12, 1994, was the first step in a process of having the Convention apply to Canada. Ratification by Canada in the autumn of 1995 is now under consideration since implementing measures have now been adopted in Prince Edward Island, Saskatchewan and British Columbia. Decisions will have to be taken in the other provinces and the territories on how to implement the Convention. Implementation will be facilitated thanks to the adoption by the Uniform Law Conference in 1993 of the *Uniform Intercountry Adoption (Hague Convention) Act*. Department of Justice officials along with other federal officials from the National Adoption Desk and the Department of Citizenship and Immigration have met with some provincial authorities and will continue to meet in the coming months with others to follow up on the implementation process.

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

## APPENDIX J

application. It is noteworthy that the Convention will change existing Canadian practices in the field of international adoptions.

Canada participated in a meeting on the implementation of the Intercountry Adoption Convention at The Hague in October, 1994. Discussions at that Special Commission led to the drafting of a recommendation for States parties that they should interpret the Convention with respect to refugee and other displaced children by taking into consideration the vulnerable situation of these children. Standard forms for obtaining consent to an intercountry adoption and for certifying the conformity of an adoption with the Convention were also developed last October. The conclusions and other documents produced at that meeting along with the report of the Canadian delegation to the October meeting have recently been distributed.

### **Convention on the Law Applicable to Trusts and their Recognition**

*The Convention on the Law Applicable to Trusts and their Recognition* seeks to make uniform conflict of law rules with respect to trusts and to solve problems associated with the recognition of trusts, particularly in civil law countries. It applies to Australia, Italy, the United Kingdom and Canada. Malta acceded to the Convention on December 7, 1994, bringing the number of parties to five.

The Convention came into force for Canada on January 1, 1993, for those provinces which had adopted implementing legislation based on the Uniform Act adopted by the Uniform Law Conference in 1987, namely Alberta, British Columbia, New Brunswick, Newfoundland, and Prince Edward Island. Since then, Manitoba and Saskatchewan have passed the necessary implementing legislation. As a result, the Convention was extended to those provinces; it entered into force for Manitoba on July 1, 1994, and for Saskatchewan on September 1, 1994. Other jurisdictions will be encouraged to adopt necessary legislation with a view to having the Convention apply throughout Canada in the near future.

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

This Convention has been in force in Canada since May 1, 1989, and now applies in thirty-three States. It seeks to facilitate the service of documents by establishing certain rules for service of documents abroad and by establishing a system of Central

## UNIFORM LAW CONFERENCE OF CANADA

Authorities in each jurisdiction to receive documents for service. It should be noted that the Central Authority system is not the only means of effecting service. Other means, including those used before the Convention came into force, may be available if the State in which the documents are served recognizes them.

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

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

The purpose of the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* is to facilitate the transmission and enforcement of letters rogatory. Twenty-six States are party to this Convention, including the United States.

Consultation on the desirability of Canada's acceding to this Convention was undertaken in 1990. So far, the implementation of this Convention has received the support of six jurisdictions while two provinces are still reviewing the matter. Three jurisdictions have not yet responded to our consultation and one has received clarification on questions regarding the impact of the Convention on existing rules. The issue of the costs of application of the Convention was reviewed by the Advisory Group at its November, 1994, meeting on the basis of information received from Australia, the United States and the United Kingdom. It was concluded that, although the Convention would not be costly to implement in Canada, the advantages to Canada in acceding to it were far from clear. Contact has been made with the Canadian Bar Association to seek input from practitioners on the problems they face when attempting to obtain evidence abroad.

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

## APPENDIX J

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

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

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

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

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

### **Convention on the Civil Aspects of International Child Abduction**

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



## UNIFORM LAW CONFERENCE OF CANADA

As of June, 1995, more than forty States from almost all continents are party to the Convention. The most recent States to become party to the Convention are Monaco, Romania, the Bahamas, Chile, Honduras, Mauritius, Panama, Saint Kitts and Nevis, and Slovenia.

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

The Convention, which has been incorporated into Canadian law, has been invoked in several cases. The first of these cases to be heard by the Supreme Court is *Thomson v. Thomson*, an appeal from a decision of the Manitoba Court of Appeal. The Attorney General of Canada, as well as the Attorneys General of Manitoba and Ontario, intervened before the Supreme Court of Canada in January, 1994, in the *Thomson* appeal. In a decision given from the bench for which reasons followed on October 20, 1994, the Supreme Court upheld an order for the return of a child illegally removed by his mother from Scotland to Canada.

### **The Hague Conference's Work in Progress**

#### **Convention on the Protection of Minors**

Canada participated in the second meeting of the Hague Conference Special Commission, held in The Hague, from February 6 to 17, 1995, which is mandated to review the 1961 *Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*. This project constitutes the priority item on the 1993-96 work programme of the Hague Conference with a view to submitting a revised Convention for the agreement of its member States at the Eighteenth Session in October, 1996. This revision might also encompass the extension of the Convention to incompetent adults. Consultation took place before the second meeting of the Special Commission.

## APPENDIX J

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

A draft revised Convention, as proposed by the drafting committee following the discussions in February, 1995, is now being circulated for comments. It is intended to give primary jurisdiction to the authorities of the State of habitual residence of the child to take measures directed at the protection of the person or property of the child. It also provides for the recognition and enforcement of such measures, such as custody orders, as well as for the establishment of cooperation among States' authorities in the application of such measures. No decision has yet been taken on the extension of the revised Convention to incompetent adults.

The draft will be reviewed at the third and final meeting of the Special Commission to be held September 11 to 22, 1995. The federal Department of Justice has now initiated consultations with interested authorities on the draft revised Convention on the basis of the explanatory documents recently distributed.

### **Recognition and Enforcement of Foreign Judgments**

A Special Commission met in June, 1994, as part of the 1993-1996 work programme of the Hague Conference, to study further the problems of drafting a new multilateral convention on the questions of jurisdiction and of recognition and enforcement of foreign judgments in civil and commercial matters. The conclusions of this Special Commission were reviewed at a recent meeting of the Special Commission of the General Affairs and Policy of the Hague Conference. The participants in this meeting, at which Canada was represented, recommended the continuation of the work on this high priority project. Canada was supportive of this recommendation given that the project represents an opportunity to harmonize Canadian rules with principles of recognition and enforcement of judgments worldwide.

Before a final decision on the matter is taken by Member States in October, 1996, another meeting of experts will be convened in June, 1996, to explore issues left

## UNIFORM LAW CONFERENCE OF CANADA

undecided at the June, 1994, meeting. The conclusions of the June, 1994, meeting along with the report of the Canadian delegation have recently been distributed. The Department of Justice will consult the provinces and territories and solicit the views of practitioners and academics interested in the matter prior to the meeting of the Special Commission in June, 1996.

### **Law Applicable to Civil Liability for Environmental Damages**

The progress of the work on this third priority item on the current work programme of the Hague Conference was briefly examined by the June, 1995, Special Commission on General Affairs and Policy. The conclusions of a symposium held at Osnabrück, Germany, in April, 1994, and co-sponsored by the Hague Conference, calling for the drafting of a convention in the field, were mentioned. Conflicting views were expressed on whether to pursue the project at this time. It was recommended that the matter be kept on the agenda of the next work programme with a lower priority.

### **Special Commission on General Affairs and Policy**

As already mentioned, this Special Commission, in which Canada participated, was held June 20 to 23, 1995, to review the current 1993-96 work programme of the Hague Conference and to examine recommendations with respect to future work for 1996-2000. Tentatively, the following items were given priority: 1) a convention on jurisdiction, recognition and enforcement of judgments; 2) a convention on the protection of incompetent adults; and 3) further study on the problems of the law applicable to civil liability for environmental damages.

Other topics were also recommended to be added or kept on the agenda without priority. A discussion on better coordination between international organizations involved in the area of private international law took place. Decisions on these points will be taken at the Eighteenth Session in October, 1996.

### **UNCITRAL**

The United Nations Commission on International Trade Law is the "core legal body within the United Nations system in the field of international trade law" whose mandate is to further the progressive harmonization and unification of the law of

## APPENDIX J

international trade. The instruments chosen for fulfilling this mandate include conventions, model laws, uniform rules and legal guides.

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

The Commission currently has three working groups: the Working Group on International Contract Practices (ICP); the Working Group on Insolvency Law (formerly the Working Group on the New International Economic Order (NIEO)); and the Working Group on Electronic Data Interchange (EDI, formerly the Working Group on International Payments).

The Working Group on International Contract Practices has completed its work on a draft Convention on Independent Guarantees and Stand-by Letters of Credit, the Working Group on EDI is completing a project and the Working Group on Insolvency Law will undertake a new project.

Draft instruments developed at meetings of these working groups are sent to the Commission for adoption at its annual session. They are then adopted by the General Assembly of the United Nations which may, in the case of a convention, convene a diplomatic conference where the convention will be adopted and opened for signature.

UNCITRAL has set up a system for collecting and disseminating information on abstracts of court decisions and arbitral awards relating to its Conventions or Model Laws. These abstracts are prepared by national correspondents; in Canada, Professor Robert Paterson of the University of British Columbia agreed to serve in this capacity for the common law provinces and the territories, while Professor Claude Samson has agreed to assume responsibility for decisions of the Quebec courts.

## UNIFORM LAW CONFERENCE OF CANADA

Abstracts regarding the Model Law on Arbitration have been sent to UNCITRAL on a regular basis.

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

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

The Convention came into force for Canada on May 1, 1992. At that time the Convention extended to all Canadian jurisdictions with the exception of the Yukon, which adopted implementing legislation in June, 1992. A declaration extending the Convention to the Yukon was deposited and took effect on January 1, 1993. Since British Columbia then amended its implementing legislation to repeal the provision rendering Article 1(1)(b) of the Convention inapplicable there, a declaration withdrawing the declaration concerning Article 1(1)(b), made at the time of Canada's accession to the Convention, was deposited and took effect on February 1, 1993. The Convention now applies uniformly across Canada.

### **Convention on the Limitation Period in the International Sale of Goods**

The United Nations *Convention on the Limitation Period in the International Sale of Goods* (New York, 1974) (the "Limitation Convention") grew out of the work of UNCITRAL to unify international sales law. The resulting Convention, as amended by the 1980 Protocol, was intended to dovetail with the United Nations *Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (the "Sales Convention"). There is substantial similarity between the Conventions, in particular the Articles setting out the sphere of application, declarations and reservations, the federal State clause, and the final clauses.

## APPENDIX J

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

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

At the date of the latest UNCITRAL session (May, 1995), there were eighteen ratifications, accessions and successions, including our North American trading partners, Mexico and the United States (May 5, 1994). The Limitation Convention entered into force August 1, 1988. Now that the Vienna Sales Convention is in force for Canada, we are considering whether there is sufficient interest for accession to the Limitation Convention.

### **Convention on International Bills of Exchange and International Promissory Notes**

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

The Convention is the result of nearly 20 years of work by UNCITRAL to devise a unifying law for international bills and notes. It addresses and regulates a number of complex and difficult issues such as the rights of a holder of a bill or note; forged endorsements; fraud, theft; guarantors; presentment for payment and non-acceptance; notice of dishonour and discharge. Many of the issues regulated by the Convention

## UNIFORM LAW CONFERENCE OF CANADA

were treated differently in the various legal systems. When the Convention comes into force, it will therefore introduce more predictability for financial institutions and businesses who use these methods of payment for international transactions.

### **Convention on the Liability of Operators of Transport Terminals in International Trade**

The purpose of the Convention is to promote world-wide uniformity of liability laws in order to facilitate international trade. One purpose of the project to unify the law is to close gaps in the liability systems outside of the existing transportation conventions. Such conventions have been adopted widely; for example, the Warsaw Convention on air carriers' liability has been adopted by more than 100 countries; maritime bills of lading are governed by the Brussels Convention of 1924; and most European countries have adopted international conventions on road and rail carriers' liability. The liability system in this Convention is designed to be compatible with all the existing transportation regimes.

Specifically, the Convention seeks to remedy a situation which can be highly detrimental to parties engaged in international trade. At best, the movement of goods that undergo handling operations is regulated on a contractual basis that favours professional loaders, unloaders and warehouse operators. Very often the absence of any legal basis means that persons entitled to make a claim for damaged goods receive no compensation.

We will be undertaking a process of final consultation with other Canadian jurisdictions and interested parties to determine whether Canada should become a party to the Convention. As of May, 1995, five States had signed the Convention: France, Mexico, the Philippines, Spain and the United States. The Convention will come into force after it has received five ratifications or accessions.

### **Convention on the Carriage of Goods by Sea (Hamburg, 1978)**

This Convention, better known as the Hamburg Rules, aims to replace the Hague and Hague/Visby Rules, which govern the responsibilities of the carrier in marine transport, with a more modern distribution of responsibility. The Hamburg Rules came into force in November, 1992 among twenty nations which have signed and ratified the Convention.

## APPENDIX J

In May of 1993, the federal government adopted the Carriage of Goods of Water Act, S.C. 1993, c. 21, which implements the Hague/Visby Rules and will eventually implement the Hamburg Rules.

### **Model Law on International Credit Transfers**

At the 25th session in New York in May, 1992, the Commission completed its review of and adopted the *Model Law on International Credit Transfers* (formerly the *Model Law on Electronic Funds Transfer*) that had been prepared by the Working Group on International Payments. By resolution in October, 1992, the U.N. General Assembly recommended that all States give consideration to enacting legislation based on the Model Law. The Model Law achieves an acceptable compromise on issues that arise because of the speedy nature of electronic funds transfers (EFTs) on the one hand and the need to give as much protection as possible to clients of financial institutions using EFT systems. An example is found in the provision relating to the consequences of failed, erroneous or delayed credit transfers. Implementation of the Model Law in Canada would fall under the responsibility of the Canadian Payments Association which under its legislation is mandated to operate the national clearings and settlement system and to plan the evolution of the national payments system.

### **Model Law on Procurement of Goods and Construction**

This subject is considered important by developing States who often perceive their access to markets in developed States as being unnecessarily limited by governmental procurement practices, in particular. The Department of Justice participated very actively in the work on procurement and consulted with federal and provincial departments and with industry as the work progressed in the UNCITRAL Working Group on the NIEO. The Model Law was submitted to the Commission at its 26th session in Vienna in July, 1993, when it was reviewed, amended and adopted. The U.N. General Assembly has adopted a resolution urging States to adopt it.

The Model Law is intended to serve as a model law to countries for the evaluation and modernization of their procurement laws and practices and for the establishment of procurement legislation. Basically, it provides for all the essential procedures and principles for conducting procurement proceedings in a transparent and equitable manner. On Canada's initiative, the text was prepared keeping in



## UNIFORM LAW CONFERENCE OF CANADA

mind the provisions of the GATT and Article 3 ensures paramountcy of the latter (as well as the WTO Agreement) over the Model Law.

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

### **Model Law on the Procurement of Goods, Construction and Services**

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

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

### **Legal Guide on International Countertrade Transactions**

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

## APPENDIX J

### **Independent Guarantees and Stand-by Letters of Credit**

The Working Group on International Contract Practices held its final meeting on rules governing independent guarantees and stand-by letters of credit at a meeting in New York in January, 1995. The Working Group finalized the text which takes the form of a draft Convention. The draft was sent to the Commission for consideration and adoption at its 28th session in May, 1995. The Commission adopted the draft Convention and decided to forward it to the U.N. General Assembly for adoption by a resolution rather than to call a diplomatic conference to do so. The draft Convention remains to be considered by the Sixth Committee of the General Assembly.

### **UNCITRAL's Work in Progress**

#### **Electronic Data Interchange**

The Working Group on Electronic Data Interchange met in Vienna from October 3 to 14, 1994, and again in New York from February 27 to March 10, 1995. The Group completed its draft rules on EDI in the form of a Model Law for submission to the Commission's 28th session in May, 1995, but the Commission has not completed its review of the Model Law.

The Working Group dealt with a number of EDI issues, including the substantive scope of application of uniform rules, the notion of EDI, definitions of parties to an EDI transaction, form requirements, obligations of parties, formation of contracts, liability and risk and the questions of electronic signatures and evidence. The Group had before it the relevant provisions of the Quebec Civil Code concerning these latter questions and adopted a similar approach, although the language is not identical.

At its next session, the Working Group will carry on work on bills of lading associated with maritime commercial activities.

#### **Draft Guidelines for Pre-hearing Conferences in Arbitral Proceedings**

At its 26th session, the Commission considered some of the proposals put forward at the Conference on Uniform Commercial Law in the 21st Century. The

## UNIFORM LAW CONFERENCE OF CANADA

Commission decided that the Secretariat should prepare for consideration by the 27th session of the Commission a draft of guidelines on pre-hearing conferences in arbitral proceedings. Such guidelines would be useful because pre-hearing conferences between arbitrators and parties could make it easier for participants to prepare for the various stages of arbitral proceedings.

The Commission reviewed the draft at its 27th session and suggested a number of changes to the Secretariat. The draft guidelines were discussed and reviewed by the ICCA at its congress in November, 1994. The Secretariat revised them and resubmitted them to the Commission for consideration at the 28th session in 1995. A revised version will be submitted to the Commission for final approval at its 29th session in 1996. After work on the guidelines is complete, the Commission will decide whether it should undertake any work on multi-party arbitration and the taking of evidence in arbitral proceedings.

### **Future Work Program**

The Commission has decided that the Secretariat should, in consultation and cooperation with Unidroit, which is studying the feasibility of a model law on security interests, prepare a study on work on the unification of law on the assignment of claims.

The Commission has also determined that the practical problems caused by the lack of harmony among national laws on cross-border insolvency warrant an in-depth study by the Secretariat notwithstanding the failure of other international organizations to achieve results. Beginning with information obtained at a colloquium on cross-border insolvency held in Vienna in April, 1994, in conjunction with INSOL at which experts and government representatives were invited to participate and provide their views, the Secretariat considered what aspects of cross-border insolvency law might lend themselves to harmonization and the most suitable vehicle therefor. The Secretariat carried out this work in collaboration with INSOL. UNCITRAL's collaboration with INSOL also extended to a judges conference on international insolvency which was held in Toronto on March 22 to 23, 1995. The result is that the Working Group on the NIEO was renamed the Working Group on Insolvency Law and will work on cross-border insolvency, focusing on a legislative framework for judicial cooperation and for access and recognition in cross-border insolvencies.

## APPENDIX J

The Working Group on International Contract Practices will now devote its attention to receivables financing.

### **UNIDROIT**

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

### **Leasing and Factoring Conventions**

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

In 1991, the Department of Justice consulted with the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions. The responses received indicated that there was some support for Canada becoming party to both Conventions. Because of changes in the leasing industry and in light of the recent coming into force of the Conventions, consultations will be renewed with a view to making a recommendation as to whether

## UNIFORM LAW CONFERENCE OF CANADA

Canada should become a party to the Conventions. At the request of the Department, the Uniform Law Conference has prepared draft uniform legislation for the implementation of the Conventions which may be adopted by interested jurisdictions should there be sufficient interest in Canada's becoming a party. [See page 156 for the Uniform Act on the factoring convention and page 160 for the leasing convention.]

### **Convention on the Form of an International Will**

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

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

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

### **International Protection of Cultural Property**

Unidroit convened a Diplomatic Conference in Rome, Italy, in June, 1995, to consider a *Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*. The draft was prepared by a Committee of Governmental Experts, on which Canada was represented. The Diplomatic Conference adopted the *Convention on Stolen or Illegally Exported Cultural Objects* on June 23, 1995. Ten States signed the Convention: Burkina-Faso, Cambodia, Croatia, France, Guinea, Hungary, Italy, Ivory Coast, Lithuania and Zambia. The Convention will enter into force after five ratifications, acceptances, approvals or accessions.

## APPENDIX J

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

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

### **Principles for International Commercial Contracts**

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

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

### **Unidroit's Work in Progress**

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

#### **Security Interests in Mobile Equipment**

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

## UNIFORM LAW CONFERENCE OF CANADA

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

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

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

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

### **The Franchising Contract**

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

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

## APPENDIX J

### **Industrial Accidents Resulting from Dangerous Activities**

At the urging of the government of India, Unidroit proposed to undertake a study on safety standards for multinational corporations operating in Third World countries and on compensation for victims of industrial accidents resulting from the carrying on of dangerous activities. Once the study is completed, Unidroit may recommend to its members that Unidroit seek to develop uniform safety standards and to formulate norms for compensation for victims of industrial accidents resulting from dangerous activities.

### **WORLD BANK**

#### **Convention on the Settlement of Investment Disputes Between States and Nationals of other States**

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

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

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



## UNIFORM LAW CONFERENCE OF CANADA

### REGIONAL ORGANIZATIONS

#### Organization of American States

Consultations have yet to be initiated in Canada with respect to two Conventions, one in commercial law and the other in family law, which were finalized at the Fifth Inter-American Conference on Private International Law (CIDIP V) which was held in Mexico City from March 14 to 18, 1994.

The first convention concluded at the time of CIDIP V is the *Inter-American Convention on the Law Applicable to International Contracts*. This Convention provides for the recognition of the choice of the law applicable to an international contract by the parties to such contract. This rule is in general conformity with existing rules in both common law and civil law regimes in Canada. The Convention also establishes subsidiary rules for the determination of the law applicable.

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

The Final Act of CIDIP V, which was received last April, will be distributed in the coming months once the explanatory reports of the Canadian delegation to CIDIP V have been completed.

### BILATERAL CONVENTIONS ON MUTUAL LEGAL ASSISTANCE

#### Canada-United Kingdom

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

## APPENDIX J

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

### Canada-France

Canada has entered into negotiations with France to develop a convention on the recognition and enforcement of judgments in civil and commercial matters. Similar to the Canada-United Kingdom Convention, the proposed convention with France is also intended to encompass matters concerning recognition and enforcement of maintenance orders. The first round of negotiations, which took place in Paris in July, 1994, led to the production of a draft convention.

The provinces and territories are being consulted in preparation for the second round of negotiations which are scheduled to take place in the fall of 1995 in Ottawa. Discussions with France will focus on the enforcement of maintenance orders and on the question of whether the future Convention should be limited to monetary orders or should also extend to other matters, such as family-related orders, to supplement the provisions on maintenance.

### CONCLUSION

As many private international law conventions deal with matters within provincial legislative jurisdiction, Canadian participation in those conventions and in their drafting requires very close coordination between the provinces and the federal government.

The Advisory Group on Private International Law, which was established by the Department of Justice to advise the Department on private international matters, as

## UNIFORM LAW CONFERENCE OF CANADA

well as the Uniform Law Conference, play a key role in the coordination process. They both make it possible for Canada to participate fully in the development of private international law at the international level.

In particular, the Uniform Law Conference plays an important role in the harmonization of private law by drafting uniform acts that facilitate the implementation in Canada of private international law conventions. In that respect, it is worth noting the finalizing this year by the Uniform Law Conference of its work on the Unidroit Conventions on Leasing and Factoring.