

**UNIFORM LAW CONFERENCE OF CANADA**

**CIVIL LAW SECTION**

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

**REPORT OF THE DEPARTMENT OF JUSTICE CANADA**

**Regina, Saskatchewan  
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ACTIVITIES AND PRIORITIES OF THE DEPARTMENT OF JUSTICE  
IN PRIVATE INTERNATIONAL LAW

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**Report of the Department of Justice Canada**

**August 2004**

**INTRODUCTION**

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

[2] There have been some notable events on the private international law scene in the past year. Of particular note is the signature by Canada of the Unidroit *Convention on International Interests in Mobile Equipment* and related *Aircraft Protocol*. Negotiations continued at UNCITRAL and at Unidroit on projects which will culminate in new private international law instruments. At the Hague Conference on Private International Law, negotiations on maintenance obligations and a future convention on judgments continued.

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

[4] The first part of the report deals with the different **Canadian actors in private international law**. In the course of its activities, the Department of Justice consults regularly with the provinces and territories, as well as with other interested federal departments, the private sector and the members of its Advisory Group on Private International Law. Contacts in the International Private Law Section are set out in Annex A.

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

[6] Finally, the third part of the report presents the **activities of the Department of Justice in private international law** by theme. These activities are ranked with respect to their **level of priority**. In order to evaluate the priority of each project, the PIL Team

considers the following: the interest of the international community, Canada's interest and the interest of national actors; its costs and benefits; and the challenges and difficulties related to implementation.

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

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

[8] These projects are displayed in the same order in the **Chart of Private International Law Priorities** (Annex B). We hope that this presentation is clear and useful and encourage you to provide us with your views.

[9] We also have attached a **Status Chart of Canadian Participation in Private International Law Instruments** (Annex C) which gives updated information on conventions in private international law to which Canada is a party or is considering becoming a party, as well as a provisional list of international meetings for the coming year (Annex D) to inform you of activities in which the Department may be involved.

## **I. NATIONAL ACTORS**

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

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

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



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projects in which Canada is involved. The Group held a meeting in Ottawa in November 2003, and a conference call in June 2004.

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

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

#### **1. Uniform Law Conference of Canada**

[13] Instituted in 1919 with a view to ensuring uniformity in provincial legislation, the ULCC now participates actively in the implementation of international conventions in the realm of private international law. This year, the Department of Justice of Canada continued to participate in the ULCC's activities. From the perspective of the Department of Justice, the ULCC constitutes the key mechanism for facilitating implementation of PIL instruments via the development of uniform implementing legislation.

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

[14] This committee was first established as an ad hoc committee of government officials in the late 1980s to assist in the preparation for and follow-up to the meetings of federal, provincial and territorial Deputy Ministers responsible for Justice matters. Its efforts in the adoption of implementing legislation recommended by the ULCC are greatly appreciated.

### **C. PRIVATE SECTOR**

[15] In addition to consultation with the Canadian Bar Association (CBA), the Department of Justice contacts with private sector groups, such as the Canadian Exporters' Association and the Arbitrators' Institute. From 1983 to 1993, the Department organised an annual seminar on international trade law. From 1993 to 1995, the seminar was organised in collaboration with the CBA. Since the spring of 2000, an annual International Law Seminar has been organised by the CBA in collaboration with the Department of Justice and other interested federal departments. Over the last year, members of the Justice International Private Law Section have participated in conferences, lectured in law faculties, drafted discussion papers and met with interested

parties, all in order to strengthen ties with the business and academic community and the Bar.

## II. INTERNATIONAL ORGANIZATIONS

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

[16] The Hague Conference on Private International Law, which held its first session in 1893, has 64 Member States, including Canada since 1968. Its objective is to work toward the progressive unification of rules of private international law. The Permanent Bureau, the small secretariat of the Conference, is responsible for the administration and supporting research. Its working cycle is approximately four years, at the end of which the Sessions of the Conference are convened, attended by all member States. The member States also meet during the intersessional period in “Special Commissions”, which develop draft conventions to be adopted at the next Session. The Hague Conference has adopted 36 conventions, 27 of which are in force. Further information on The Hague Conference on Private International Law may be found at <<http://www.hcch.net>>.

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

[18] Over the last year, Canada participated in the following activities of the Conference: experts and drafting group meetings, Special Commissions, including the Special Commission on the International Recovery of Child Support and Other Form of Family Maintenance in June 2004 and the Special Commission to review the practical operation of the Hague Conventions on Judicial Cooperation in Autumn 2004, and the Special Commission of April 2004 on General Affairs and Policy of the Conference.

[19] Canada is party to four Hague Conference Conventions in private international law: the *Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters* (adoption 1965, in force in Canada 88/05/01); the *Convention on the Civil Aspects of International Child Abduction* (1980, Canada 88/04/01); the *Convention on the Law Applicable to Trusts and on their Recognition* (1985, Canada 93/01/01); and the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993, Canada 97/04/01). Not all jurisdictions in Canada have implemented all four.

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**B. UNCITRAL**

[20] The United Nations Commission on International Trade Law, the core legal body within the UN system in the field of international trade law, aims to further the progressive harmonisation and unification of the law of international trade. To reach this goal, the Commission uses various instruments: it has prepared 9 conventions, 7 model laws, uniform rules and a number of legal or legislative guides. Further information on UNCITRAL may be found at <<http://www.uncitral.org>>.

[21] UNCITRAL comprises 60 member States representing various geographic regions and the principal economic systems and legal traditions of the world. Members are elected for a six-year term by the General Assembly. Other States and governmental and non-governmental organisations may participate as observers in meetings of the Commission and its working groups, which both operate by consensus. Canada was a member of UNCITRAL from 1989 to 1995, participated actively as an observer from 1995 to the fall of 2000, and was elected to the Commission again in the fall of 2000 for a term commencing in June 2001.

[22] At the 37<sup>th</sup> session of the Commission in June/July 2004, in which Canada actively participated, UNCITRAL finalized and adopted the UNCITRAL Legislative Guide on Insolvency Law.

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

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

the provinces and territories regarding accession to and implementation of the *Conventions on the Limitation Period in the International Sale of Goods*.

### **C. UNIDROIT**

[25] Although the International Institute for the Unification of Private Law, known as Unidroit, was created in 1926 as an organ of the League of Nations, since 1940 it has been an independent inter-governmental organisation based in Rome. There are 59 member States, including Canada since 1968, the United States, China, Australia, and many States from Latin America, Africa, and Eastern and Western Europe. Unidroit's mandate differs from that of the Hague Conference, as it aims to harmonize and co-ordinate the private law of the member States, rather than their private international law rules. Further information on Unidroit may be found at <<http://www.unidroit.org>>.

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

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

### **D. WORLD BANK**

[28] The World Bank's role on the private international law scene stems in part from the creation of the International Centre for Settlement of Investment Disputes (ICSID) under the *Convention for the Settlement of Investment Disputes between States and Nationals of Other States* (1965). Canada is still not a party to this Convention. Foreseeing a future ratification, the ULCC has prepared a uniform act to implement the Convention. Further information on the World Bank and the ICSID Convention can be found at <<http://www.worldbank.org>>.

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

[29] The Organisation of American States, with 35 member States, provides an important forum for political, economic, social and cultural cooperation in the region of

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

[30] Canada is not yet party to any of the 23 OAS conventions in private international law, and had only observer status for the first four CIDIP meetings. Since becoming a member of the OAS in 1990, however, Canada's interest in exploring ways of enhancing legal cooperation with other OAS countries has increased. Canada did participate officially in the 1994 Fifth Inter-American Conference on Private International Law (CIDIP-V) and in CIDIP-VI which was convened in February 2002, particularly regarding the drafting of a Model Law on Secured Transactions. The OAS is currently in process of deciding eventual subjects for CIDIP-VII.

### F. BILATERAL ACTIVITIES

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

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

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

#### A. INTERNATIONAL COMMERCIAL LAW

##### 1. HIGH PRIORITIES

###### a. Convention on the Settlement of Investment Disputes (ICSID) (World Bank)

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

[34] Although 140 States are party to the Convention, Canada has not yet ratified it. This may be explained in part by the fact that the Convention does not contain a federal state clause. The federal government has been working to obtain the agreement of all provinces and territories to implement the Convention. Uniform adoption of implementing legislation would allow Canada to ratify it. The project has received the support of eight provinces and two territories. The Department of Justice will continue to consult with the two remaining provinces (Quebec and Alberta). Nunavut will also be consulted. A uniform act for the implementation of the *Convention for the Settlement of International Investment Disputes Act*, was adopted unanimously by the ULCC on November 30, 1997.

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

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

[36] These Conventions, which entered into force August 1, 1988, grew out of the work of UNCITRAL to unify international sales law. There are 24 States party to the *Limitation Convention* of 1974, and 17 States party to the *Amended Limitation Convention*, including, in both cases, our North-American trade partners, the United States and Mexico.

[37] The Conventions dovetail with the United Nations *Convention on Contracts for the International Sale of Goods* (Vienna, 1980), which is in force for all of Canada. There is

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substantial similarity between the three Conventions, in particular the articles setting out the sphere of application, declarations and reservations, the federal State clause, and the final clauses.

[38] The purpose of the *Limitation Conventions* is to eliminate all disparities in the national laws governing limitations on the initiation of legal proceedings arising from contracts for the international sale of goods, as these disparities can create hardship both in cases where meritorious claims are statute-barred by a very short limitation period, and where parties are left open to liability for an inordinately long time in jurisdictions with very long limitation periods. The Conventions establish a uniform prescription period of four years for commercial litigation.

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

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

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

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

[42] A 2001 Diplomatic Conference in Cape Town, South Africa, resulted in the adoption of the *Convention on International Interest in Mobile Equipment* and its related Aircraft Protocol. The texts of the Convention, Protocol and a consolidated version can be found on the Unidroit website. The Convention provides a framework for the creation and effects of an international interest in mobile equipment (i.e., aircraft equipment, registered ships, oil rigs, containers, railway rolling stock, space property, and other

objects that could be identified in the future). Each type of mobile equipment would be the subject of a specific Protocol under the Convention. The Convention entered into force internationally on April 1, 2004, after its third ratification. However, the Convention will only enter into force as regards a specific category of objects to which a Protocol applies as from the date of the entry into force of that Protocol. For example, it will only enter into force as regards aircraft equipment as of the date of the entry into force of the Aircraft Protocol. Canada signed the Convention and Aircraft Protocol in March 2004.

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

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

[44] In summary, the Convention:

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

[45] The Aircraft Protocol, not yet in force, adapts to aircraft equipment the mechanisms set out in the Convention. Among other things, it will set an international central registry to register interests in aircraft equipment an essential element of the Protocol. It will enable registration of convention-based international security interests in aircraft equipment, and will facilitate searches. Canada, given its role in international civil aviation and its expertise in electronic registries, had hoped to host and operate the registry. A Canadian candidate had been put forward, along with candidatures from Ireland, Singapore and Spain. Ireland was the successful candidate.

[46] The ULCC adopted a uniform implementing act in May 2002. Canadian jurisdictions have been asked to consider adopting legislation to implement the Convention and Aircraft Protocol. Ontario and Nova Scotia have adopted implementing legislation.



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[47] When sufficient support for ratification will have been demonstrated by the adoption of implementing legislation in provinces and territories, the federal government will seek authority to ratify the Convention and Protocol, with the relevant declarations in order for the instruments to apply in the jurisdictions that so wish, along with as other important declarations related to preserving the status quo of existing rights. The ULCC Working Group on International Interests will continue its work to facilitate the process of drafting declarations.

[48] *Action required in Canada:* Reaffirm the support of the provinces and territories and invite them to consider adopting legislation to implement the instruments; continue work to facilitate the drafting of declarations.

### **d. Model Legislative Provisions on the Recognition and Enforcement of Interim Measures of Protection in the Arbitral Context (UNCITRAL)**

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

[50] To date, the Working Group has only examined the first 3 subjects. The Model Law on International Commercial Conciliation was adopted in June 2002. Once work on interim awards is completed, the Working Group will resume its work on the written form of the arbitration agreement. During the November 2003 and February 2004 session, the Working Group continued its discussions on harmonized texts on the enforcement of interim measures. The Canadian delegation comprises Manon Dostie (federal Department of Justice), Professor Guy Lefebvre (civil law expert) and Robert Cosman (common law expert).

[51] *Action required in Canada:* Consult with federal provincial and territorial governments, private sector, academics, dispute resolution organisations and other interested parties in preparation for the next Working Group session scheduled for September 13-17, 2004. The Reports of the Working Group and background documents are available on the UNCITRAL website.

### **e. Draft Electronic Contracting Convention (UNCITRAL)**

[52] The Working Group on Electronic Commerce continued its work on a draft instrument on electronic contracting as a means of increasing legal certainty or commercial predictability in electronic business transactions. Canada, represented by the

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Department of Justice Canada, as well as civil and common law representatives, participated at the 42nd Session of the Working Group, November 17-21, 2003, in Vienna, and the 43<sup>rd</sup> Session, March 15-19, 2004 in New York.

[53] The focus of discussions was on new drafts prepared by the Secretariat, with debate centering on a range of issues including scope, exclusions (specific and general), relation to other conventions, as well as technical discussions on issues of dispatch, reception and recognition of data messages, location of the parties, mistake/error and more.

[54] Prior to the November and March sessions, consultations (ULCC Ecom distribution list) were launched in order to obtain comments on the Secretariat's drafts. Comments were relatively few.

[55] The 44<sup>th</sup> Session will take place over two weeks, October 11-22, in Vienna. A consultation with the Ecom distribution list will be launched, as well as with OGDs and within DOJ. It is possible that this will be the last working session. However, another session in early 2005 may be necessary to tie up loose ends in the draft. Depending on the progress of the Working Group, it is anticipated that the Commission would approve the Group's final draft in June 2005.

[56] One of the issues that the Working Group will be discussing in October in Vienna is the relationship or applicability of the draft electronic contracting convention to other conventions.

[57] *Action required in Canada:* Comments and input from provinces, territories, stakeholders and experts for consideration in determining Canadian positions on various key issues.

### **f. Draft Legislative Guide on Security Interests (UNCITRAL)**

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

[59] The UNCITRAL work on security interests was initiated because it was felt that modern secured credit laws could alleviate inequalities in access to lower-cost credit between parties in developed countries and parties in developing countries, which would

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overall contribute to foster international trade. It was also widely recognised that an appropriate balance needed to be struck in the treatment of privileged, secured and unsecured creditors. States agreed that a flexible approach aimed at the preparation of a set of principles in a guide, rather than a model law, would be advisable. Furthermore, given the close link between security interests and the work on insolvency, countries recognised that any effort on security interests would need to be co-ordinated with efforts on insolvency law.

[60] Canadian experts Me Michel Deschamps of McCarthy Tétrault in Montreal and Professors Catherine Walsh and Roderick Macdonald of McGill University have been leading contributors to the project, participating in both Working Group sessions and in the drafting of the Guide. Joint sessions have been held with the Working Group on Insolvency Law to ensure consistency with the Insolvency Guide. A joint experts meeting with the Hague Conference will take place in early September to review conflicts of law issues in the Security Interests Guide. It is now expected that the work will conclude at the Commission session in 2006, with possible adoption in principle at the 2005 session.

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

[62] Although transfer of title arrangements are now generally to be treated as security interests, the Working Group still needs to resolve the treatment of reservation of title arrangements. Some delegations, including Canada, prefer to treat these mechanisms within the security interests regime to the extent possible. Others would prefer to exclude them. This issue will be discussed again at a later Working Group session. The Secretariat is preparing a document on retention of title for the Working Group to facilitate discussion.

[63] From a Canadian perspective, the government monitors the trends the global model is taking with the view of ensuring that it does not take a direction that is inconsistent with our security interests regimes here in Canada. Although the draft Guide would not

be particularly useful for Canadian jurisdictions given that our legal framework for secured interest is already relatively modern, our aim is to ensure that countries where Canadians do business have similar regimes.

[64] Working Group documents can be found on the UNCITRAL website. The next meeting of the Working Group will take place in Vienna from September 27 to October 1, 2004. The following session is set for January 24-28 in New York. Canada continues to chair the sessions of the Working Group.

[65] *Action required in Canada:* Distribute working papers for comments. Ensure links are made with the work on security interests in the Commercial Law Strategy.

**g. Project on Harmonised Substantive Rules Regarding Indirectly Held Securities (Unidroit)**

[66] Unidroit continued its project on Transactions on transnational and connected capital markets. This project comprises 5 items: (1) the creation of clear and consistent rules for the taking of securities, especially securities held indirectly through intermediaries in multi-tiered holding patterns and evidenced by book entries in the investor's account, as collateral; (2) the creation of harmonized "global shares", permitting trade of such shares on more than one (national) stock exchange so as to make foreign capital markets accessible to a wider range of companies with limited means; (3) the development of rules capable of enhancing trading on emerging markets; (4) the development of harmonized or uniform substantive rules applicable to so-called "delocalised" transactions; and (5) the examination of the desirability and feasibility of rules for world-wide takeover bids. This Unidroit project is complementary to the *Convention on the law applicable to certain rights in respect of securities held with an intermediary*, adopted under the auspices of The Hague Conference of Private International Law in December 2002.

[67] A Unidroit Study Group, which includes Michel Deschamps, was set up to analyse the existing legal framework for indirect holding of securities and, on this basis, develop a preliminary proposal on how to tackle existing difficulties and legal uncertainty. The description of the project and a copy of the preliminary draft text is available on the Unidroit website. An intergovernmental session will be held when the Study Group completes its work.

[68] *Action required in Canada:* Consultation on the preliminary draft convention in preparation for the first intergovernmental session in winter 2005.

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**h. Convention on Securities Held by Intermediaries (Hague Conference)**

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

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

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

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

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

**2. MEDIUM PRIORITIES**

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

[74] In July 2001, UNCITRAL adopted the *Convention on the Assignment of Receivables in International Trade* after six years of development. The Convention was opened for signature in December 2001. The rules are intended to facilitate financing by removing uncertainty encountered in various legal systems as to recognition and effects of assignments in which the assignor, the assignee and the debtor are not in the same country. Canada was an active participant in the development of this Convention.

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

**b. Model Law on International Commercial Conciliation (UNCITRAL)**

[76] Since 1999, the Working Group on Arbitration has examined many issues related to arbitration, notably international commercial conciliation. The Working Group drafted a *Model Law on International Commercial Conciliation* which was adopted in June 2002. The Canadian delegation comprises Manon Dostie (federal Department of Justice), Professor Guy Lefebvre (civil law expert) and Robert Cosman (common law expert).

[77] The Reports of the Working Group and background documents are available on the UNCITRAL website.

[78] *Action required in Canada:* In collaboration with the ULCC, establish a working group to draft uniform legislation to enact the model law.

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

[79] Following the first session of the Committee of governmental experts in December 2003 to discuss the development of a draft Protocol to the Cape Town *Convention on International Interests in Mobile Equipment on Matters specific to Space Assets*, a new draft of the Space Protocol adapts to space equipment the mechanisms set out in the Convention. This draft further takes into account the practicalities and particularities of the space industry. The revised version of the draft Space Protocol may be found on Unidroit's website.

[80] The Canadian delegation, led by the Department of Justice, included representatives from the Canadian Space Agency, a civil law expert and a common law expert. Canada was elected to the drafting committee, and Me Michel Deschamps, representing Canada, co-chaired the Committee with the UK. The next session of the Committee of governmental experts will take place in Rome, 25-29 October 2004.

[81] A Subcommittee of the United Nations Committee for the Peaceful Utilisation of Outer Space (UNCOPUOS) met in Vienna in March/April 2004. The Subcommittee

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discussed the role of the UN as a possible supervisory authority. Discussions also dealt with UN jurisdiction this respect and with the role of other treaties involving space law.

[82] *Action required in Canada:* Ongoing consultations on the Convention and the draft Space Protocol to develop the Canadian position in order to prepare for the Unidroit session of governmental experts in fall 2004.

**3. LOW PRIORITIES**

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

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

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

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

[85] The Sales Convention to which 63 States are party establishes uniform rules for the international sale of goods, which apply in the absence of any expression to the contrary by the parties to the sales contract. While the Convention applies to contracts for the sale of goods, it excludes the sale of goods for personal use, sale by auction, judicial sales, and the sale of stocks, ships, aircraft or electricity. The provisions of the Convention deal with the formation of the contract and the rights and obligations of the seller and buyer. The Convention does not govern the validity of the contract or its terms, nor does it deal with the seller's liability outside the contract.

[86] The Convention came into force for Canada on May 1, 1992, and applies uniformly across all of Canada since February 1, 1993. A declaration was made with regard to Nunavut, and the Convention entered into force there on January 1, 2004.

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

[88] *Action required in Canada:* Pursue the consultations on the appropriateness of adopting the *Uniform International Sales Convention Act* at federal, provincial and territorial level.

**c. Inter-American Convention on the Law Applicable to International Contracts (OAS)**

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

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

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

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

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

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

[94] Trans- or cross-border insolvency exists where the insolvent debtor has assets in more than one jurisdiction. In many cases, administrators are not able to deal effectively with the



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assets because of the great differences in insolvency legislation from one State to another and because of a lack of procedures to allow cross-border co-ordination of insolvency proceedings.

[95] In 1995, UNCITRAL decided to address the issue and attempt to propose solutions to the practical problems caused by the lack of harmony among national laws on cross-border insolvency, notwithstanding the failure of other international organisations to achieve results. In collaboration with INSOL, an international association of insolvency practitioners, the Working Group on Insolvency Law prepared a legislative framework for judicial co-operation and for access and recognition in cross-border insolvency. The Model Law on Cross-Border Insolvency was finished at the 30th Session of the Commission in May 1997. Since then, Eritrea, Japan, Mexico, the United Kingdom and South Africa have enacted the Model Law. Other States, including Australia, New Zealand and the United States are considering its adoption.

[96] Industry Canada is including consideration of the Model Law in its reform consultations and the Senate Standing Committee on Banking, Trade and Commerce has heard presentations on the Model Law.

**e. Case Law on UNCITRAL Texts (CLOUT)**

[97] UNCITRAL has established a system for collecting and distributing judicial and arbitral decisions on the *New York Convention*, the *Model Law on International Commercial Arbitration*, the *Sales Convention* and other UNCITRAL instruments in force. Designated national correspondents contribute summaries of the decisions. Cases which interpret, for example, the *Sale of Goods Convention*, can be found at the UNCITRAL website. Professor Geneviève Saumier from the Faculty of Law of McGill University, Canadian National Correspondent for CLOUT for both civil and common law cases, submits Canadian decisions to UNCITRAL.

[98] UNCITRAL is also preparing a caselaw digest for *Sales Convention* cases and arbitration cases.

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

**f. Legislative Guide on Insolvency Law (UNCITRAL)**

[100] UNCITRAL undertook the preparation of a legislative guide on insolvency law in 2000. The Guide aims to set out policy considerations and legislative recommendations for a domestic insolvency regime, excluding consumer insolvency. At its session last year, the Commission adopted the Guide in principle, focussing on the recommendations it set out. The Commission adopted the Guide in its final form during its 37<sup>th</sup> session from June 14-25, 2004. The final text will soon be available on the UNCITRAL website.

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

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

**g. Model Franchise Disclosure Law (Unidroit)**

[103] In 2002, the Governing Council of Unidroit adopted the Model Franchise Disclosure Law. The purpose of the Model Law is to establish obligations on the part of franchisors regarding disclosure of information and in particular, to determine the information to be disclosed in the “disclosure document”. Some exceptions from the obligation to disclose are also mentioned. Finally, the Model Law creates remedies for the franchisee.

**h. Convention on International Leasing and Convention on International Factoring (Unidroit)**

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

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[105] Canada is not yet party to either of the Conventions. In 1991, however, the Department of Justice consulted with the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions. The responses received indicated that there was some support for Canada becoming party to both Conventions. Because of changes in the leasing industry and in light of the recent coming into force of the Conventions, however, consultations will be renewed with a view to making a recommendation as to whether Canada should become a party to the Conventions.

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

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

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

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

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

[110] In October 2002 and March 2003, meetings were held in Ottawa and Washington with several national delegations, including the Canadian delegation, and representatives of the Association of American Railroads.

[111] A Second Joint Session of governmental experts was held in May 2003 to continue the study of the draft Rail Protocol. Several Canadian federal experts took part.

[112] The latest version of the draft Rail Protocol may be found on the Unidroit website.

[113] *Action required in Canada:* Follow developments on this project.

**j. Review of Model Law on Procurement of Goods, Construction and Services (UNCITRAL)**

[114] In 2003, UNCITRAL debated a proposal to continue work in the area of procurement on the basis of a note prepared by the Secretariat. The purpose is mainly to review the UNCITRAL Model Law on Procurement of Goods, Construction and Services from two perspectives: one concerns the use of electronic commerce in public procurement and the other consists of exploring new practices in order to enhance transparency and efficiency in public procurement.

[115] In June 2004, UNCITRAL mandated the Working Group on Procurement to hold its first session from August 30 to September 3, 2004. The Department of Justice's Advisory Group on Private International Law has not yet determined the level of priority of this new project. However, federal and provincial authorities have expressed interest in this project.

[116] *Action required in Canada:* Continue consultations and constitute Canadian delegation.

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

**1. HIGH PRIORITIES**

**a. Draft Text on Choice of Court Agreements (Hague Conference)**

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

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

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[119] In 2002, the Permanent Bureau of the Hague Conference established an Informal Working Group to attempt to prepare a new draft convention, in accordance with the mandate given to it at the April 2002 meeting of Member States. The Working Group submitted a draft text that recognized exclusive choice of forum clauses in business-to-business contracts and provided for recognition and enforcement of judgments based on choice of court clauses.

[120] The Secretary General convened a Special Commission in December 2003 to review the draft. Canada took the position that the text was generally satisfactory but that some important issues needed to be resolved. Canada's main issues were:

- 1) satisfactory treatment of federal subject matters in Article 1 – maritime law, competition law and intellectual property;
- 2) the need to return to the 1999 provision on damages, including the power of the recognizing court to reduce the damage award in certain circumstances;
- 3) the addition of an exclusion to cover the exclusive jurisdiction reserved by British Columbia and Quebec in asbestos matters.

[121] At the December Special Commission, substantial progress was made on the first set of issues. The Canadian delegation was successful on both the second and third points. Other changes were made to the Working Group's draft. In particular, recognition and enforcement was restricted to judgments based on exclusive choice of court agreements, in contrast to the more liberal position the Working Group had proposed.

[122] The Hague Conference convened a second Special Commission from April 21-27, 2004 with the goal of completing work on the draft. The resulting text which will go to a diplomatic conference, is an improved text, but the process was a difficult one and the "consensus" on the document is tenuous.

[123] Canada successfully resisted attempts to go back on agreement achieved in December 2003 with regard to the damages clause and the exception for asbestos-related matters. There remain contentious issues. Intellectual property issues are not completely resolved, nor is the treatment of incidental questions to the extent this is related to the list of matters excluded from the scope of the Convention. The issue of a State's power to transfer cases from one court to another also remains contentious, with European-tradition civil law jurisdictions opposed to what most common law States see as a usual and fundamental power.

[124] Key issues for Canada at the Diplomatic Conference will be:

- 1) retaining an exclusion for asbestos-related matters, either specifically, or via a provision retaining the application of mandatory rules of the forum;
- 2) retaining the broad provision on damages;
- 3) ensuring appropriate treatment of maritime law, competition law and intellectual property so that there is no federal obstacle to Canadian acceptance of the Convention;
- 4) ensuring that our courts retain the power to transfer cases.

[125] The Diplomatic Conference is provisionally set for January 31 – February 16, 2005. It is possible, however, that these dates will be moved to allow States and Regional Economic Integration Organizations more time to prepare.

[126] *Action required in Canada:* Consult with governments and stakeholders to develop Canada's position.

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

[127] This Convention, which does not yet apply to Canada, is in force in 83 States. It is aimed at replacing the process of legalisation of documents by diplomatic officials with the simpler method of the "apostille", i.e., a certificate issued in the originating country by a competent authority. At the request of the Secretary General of the Hague Conference, the Advisory Group recommended that consultation on the suitability of Canada becoming a party to this Convention, which was suspended in 1993, be reinitiated given the anticipated benefits for private parties particularly under the *Intercountry Adoption Convention*.

[128] In October 2003, the Hague Conference convened a Special Commission on the operation of the Hague Conventions on Service Abroad, Taking of Evidence Abroad and Legalisation. Canada participated in the Special Commission and the Canadian delegation included Manon Dostie, from the IPL Section at the federal Department of Justice; John Gregory, Government of Ontario; John Horn, private practitioner, British Columbia; Frédérique Sabourin and Patrick Gingras, both from the Ministère des relations internationales du Québec. The Conclusions and Recommendations adopted by the Special Commission are available on the Hague Conference website.

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[129] Canada sought agreement to include a federal state clause by way of protocol to the Legalisation and the Taking of Evidence Conventions. The Special Commission was of the opinion that there was insufficient priority for this to be the subject of a protocol on its own and that, if there were to be a Protocol on other issues, then such a clause might be considered.

[130] Following the Special Commission, a Sub-group of the Advisory Group on Private International Law composed of John Gregory and Frédérique Sabourin, as well as officials from Foreign Affairs Canada and the IPL Section, worked out a proposal for implementation and identified some difficulties that would arise and possible solutions. The following points have been identified as needing particular consideration and would be stressed in a future consultation:

- Determination of the public documents that may be legalised;
- Determination of the relevant Authorities under the Convention;
- Registry of Apostilles (cost/new system to put in place);
- Double system of legalisation, one for States that are party to the Convention and another one for States that are not/one sole Canadian system based on the Apostille for all the States;
- If uniform system of Apostille for all States, need for DFAIT to consult the embassies and consulates;
- Uniform fee in Canada for the Apostille;
- Determine if modification to legislation is needed.

[131] Foreign Affairs Canada has undertaken a broad consultation with certain States party to the Legalisation Convention in order to assess the different methods of implementation of this Convention.

[132] *Action required in Canada:* Prepare a consultation document for the provinces and territories on the appropriateness of applying the Convention on Legalisation in their respective jurisdictions.

## 2. MEDIUM PRIORITIES

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

[133] This Convention, which does not yet apply in Canada, is in force in 40 States. Its purpose is to facilitate the transmission and enforcement of letters rogatory by which foreign authorities are requested to obtain evidence for use in ongoing proceedings. This

Convention is a complement to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, which is already in force in Canada.

[134] In October 2003, the Hague Conference convened a Special Commission on the operation of the Hague Conventions on Service Abroad, Taking of Evidence Abroad and Legalisation. Canada participated in the Special Commission and the Canadian delegation included Manon Dostie, from the IPL Section at the federal Department of Justice; John Gregory, Government of Ontario; John Horn, private practitioner, British Columbia; Frédérique Sabourin and Patrick Gingras, both from the Ministère des relations internationales du Québec. The Conclusions and Recommendations adopted by the Special Commission are available on the Hague Conference website.

[135] Canada sought agreement to include a federal state clause by way of protocol to the Legalisation and the Taking of Evidence Conventions. The Special Commission was of the opinion that there was insufficient priority for this to be the subject of a protocol on its own and that if there were to be a Protocol on other issues, then such a clause might be considered.

[136] *Action required in Canada:* When appropriate, consult on Canada's accession.

### **3. LOW PRIORITIES**

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

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



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[138] The 1984 Convention is used from time to time by parties in order to obtain from the courts of one of the State-parties the recognition of the judgments obtained from the courts of another. However, the Convention does not apply to a certain number of areas of the law, like judgments in family matters.

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

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

[140] The *Canada-France Convention*, the first treaty relating to enforcement of judgments negotiated between Canada and a country with a civil law tradition, was signed on June 10, 1996. Ratification by both countries is required before it can come into force. Its main advantage, similar to that under the *Canada-United Kingdom Convention*, is protecting Canadian interests against the enforcement of judgments rendered in European States parties to the *Brussels* and the *Lugano Conventions* on exorbitant bases of jurisdiction. In addition, the *Canada-France Convention* would allow for the simplified enforcement of Canadian judgments in France, not only in general civil and commercial matters, but also in family matters, including maintenance orders.

[141] Since 1996, France has transferred to the European Union an important part of its jurisdiction over the administration of justice, especially concerning the recognition and enforcement of foreign judgments. This transfer of jurisdiction could constitute an obstacle to the ratification of the Convention by France.

[142] The ULCC adopted a uniform law to implement the Convention in August 1997. Relevant documents were sent to the provinces and territories. In June 1998, Saskatchewan became the first jurisdiction to enact legislation based on the Uniform Act. In December 1999 and August 2000 respectively, Ontario and Manitoba enacted legislation to implement the Convention also based on the Uniform Act.

[143] *Action required in Canada:* Once a response is received from France concerning its capacity to ratify the Convention, take appropriate measures.

**c. Convention on Service Abroad (Hague Conference)**

[144] This Convention is in force across Canada. It also applies in 49 other States. It is aimed at facilitating the service of documents through Central Authorities established in

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each State party. Other means of service, such as postal service, are also available provided no objection to their use has been made.

[145] In Canada, Central Authorities have been designated in each province and territory. At the federal level, the Legal Advisory Division of Foreign Affairs Canada serves as the Central Authority and is monitoring the application of the Convention with the input of provincial and territorial Central Authorities. The rules of practice in all provinces and in three territories, as well as at the federal level, have been amended to comply with the Convention.

[146] The Permanent Bureau of the Hague Conference on Private International Law published a new preliminary edition of the Practical Handbook on the operation of the Convention. All Canadian jurisdictions were contacted to update the practical information provided in the Handbook. This information has been provided to the Permanent Bureau of the Hague Conference. The new edition will be available soon.

[147] In October 2003, the Hague Conference convened a Special Commission on the operation of the Hague Conventions on Service Abroad, Taking of Evidence Abroad and Legalisation. Canada participated in the Special Commission and the Canadian delegation included Manon Dostie, from the IPL Section at the federal Department of Justice; John Gregory, Government of Ontario; John Horn, private practitioner, British Columbia; Frédérique Sabourin and Patrick Gingras, both from the Ministère des relations internationales du Québec. Pursuant to the discussions at the Special Commission on electronic communications and other subjects, further work will be undertaken by the Hague Permanent Bureau with the help of some national experts in order to assess the necessity of amending the forms under the Service Convention and developing guidelines to complete those forms. The Conclusions and Recommendations adopted by the Special Commission are available on the Hague Conference website.

[148] *Action required in Canada:* Monitor its application; provide information; follow up in Canada with matters raised by the 2003 Special Commission.

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**C. FAMILY LAW**

**1. HIGH PRIORITIES**

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

**and**

**b. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Hague Conference)**

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

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

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

**Uniform Implementing Acts**

[152] The Department of Justice in collaboration with the ULCC prepared Uniform Acts for the implementation of both the 2000 *Convention on the Protection of Adults* and the 1996 *Convention on the Protection of Children*. These Acts were adopted by the ULCC in November 2001.

**CCSO Working Group on Parenting and Contact Enforcement and Jurisdiction**

[153] The CCSO Working Group on Parenting and Contact Enforcement and Jurisdiction is examining the 1996 Convention's conflict of law rules and their possible application to interprovincial situations. At the same time, this work is extremely useful for provinces and territories wishing to implement the Convention.

[154] The final explanatory reports of the Conventions are available on the Hague Conference website .

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

**c. Draft Convention on Maintenance Obligations (Hague Conference)**

[156] As part of its 2000-2004 work program, the Hague Conference on Private International Law is preparing a new international instrument in relation to maintenance obligations.

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

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

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[159] In June 2001, the Hague Conference decided to include the project as a priority. A first Special Commission was held from May 5 – 16, 2003 and a Second Special Commission was held from June 7-18, 2004. All existing documents relevant to those Special Commissions are available on the Hague Conference website. The report of the second Special Commission will be available soon.

[160] The Canadian delegation to the second Special Commission comprised Mounia Allouch and Manon Dostie, Counsels with the International Private Law Section of the Department of Justice of Canada; Danièle Ménard, Counsel with the Family, Children and Youth Section of the Department of Justice of Canada and federal co-chair of the Interjurisdictional Support Sub-Committee; Denise Gervais, civil law expert from Quebec, and Tracy Morrow, common law expert from Manitoba and the provincial co-chair of the Interjurisdictional Support Sub-Committee.

[161] Some major questions discussed at the Second Special Commission included (1) the cost of legal aid and assistance and other services provided by the Central Authorities and/or their intermediaries, whether free of charge and whether on a bilateral basis, (2) the designation of central authorities and their specific and general functions, (3) the types of applications available under the Convention, (4) the use of information technologies, (5) the possibility of rules on applicable law and on direct jurisdiction in the Convention, (6) the recognition and enforcement of decisions, and (7) the scope and objectives of the Convention and, in particular, whether the Convention would be primarily or only applicable to children. The latest version of the draft Convention is available on the Hague Conference website.

[162] *Action required in Canada:* Consultations in preparation for the next Special Commission in 2005.

### **2. MEDIUM PRIORITIES**

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

[163] The Convention provides rules for an orderly and harmonised process for international adoption encouraging cooperation between countries of origin and receiving countries. It aims to assure a rapid and flexible process, in the best interests of the children concerned. The implementation of the Convention will have real impact on Canadian international adoption practices. The Permanent Bureau may convene a Special Commission in Winter 2005 to review the operation of the Convention.

[164] The Convention entered into force in Canada on April 1, 1997 in the five provinces which were the first to enact implementing legislation, i.e. British Columbia, Prince Edward Island, Manitoba, New Brunswick and Saskatchewan. On November 1, 1997, the Convention entered into force for Alberta; on August 1, 1998 for the Yukon; on October 1, 1999 for Nova Scotia; on December 1, 1999 for Ontario; the Northwest Territories on April 1<sup>st</sup> 2000, Nunavut on September 1, 2001 and Newfoundland on December 1, 2003. In April 2004, Quebec adopted implementing legislation. The Act will enter into force at a date to be determined by the Quebec Government.

[165] *Action required in Canada:* Follow up with date of entry into force for Quebec. Begin preparation for possible Special Commission in Winter 2005.

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

[166] This Convention, which is the first Hague Convention to be ratified by Canada is in force across Canada.

[167] The Convention provides for an expeditious remedy in order to obtain the return to the State of habitual residence of a child who has been unlawfully removed to or who is unlawfully retained in another country in breach of custody rights. Each State party is required to establish a Central Authority to deal with requests for the return of abducted children or for assistance in the exercise of access rights.

[168] In Canada, there is a Central Authority in every province and territory within the Ministry of the Attorney General or the Department of Justice. The federal Central Authority is located in the federal Department of Justice Legal Services Unit at Foreign Affairs Canada. A transportation programme facilitates the repatriation of children who have been abducted by a parent; the programme operates domestically and as well as internationally. The programme is co-ordinated by the Royal Canadian Mounted Police (RCMP) Missing Children's Registry, (tel.: 1-877-318-3576) in cooperation with the national airlines and Via Rail.

[169] A database of judicial decisions taken under the *Hague Convention on the Civil Aspects of Child Abduction* is available at <http://www.incadat.com>. It is hoped that this will facilitate a uniform interpretation of the Convention across all Contracting States. Relevant decisions from Central Authorities will be collected and forwarded to the Permanent Bureau of the Hague Conference.

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[170] A new round of consultations has been initiated on Canada's acceptance of the accessions by Latvia, Guatemala, Lithuania, Thailand, Bulgaria and Nicaragua to the Convention.

[171] The Permanent Bureau may convene a Special Commission in Fall 2005 to review the operation of the Convention.

[172] ] *Action required in Canada:* Follow-up on the accession process and prepare for possible Special Commission in 2005.

**D. PROTECTION OF PROPERTY**

**1. MEDIUM PRIORITIES**

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

[173] This Convention, which has been signed by Argentina, Luxembourg, Switzerland and the Netherlands and which has only been ratified by the Netherlands, is not in force, as three ratifications are necessary. The Convention determines the law applicable to the estates of deceased persons where more than one State is concerned. The Convention's main feature is the principle of unity whereby the entire succession of an estate is governed by one law unless a choice of law has been made.

[174] Canada actively participated in the negotiation of this Convention. Since 1994, consultation regarding possible support in Canada for the implementation of this Convention has been suspended in order to allow further study of the Convention to answer questions raised as to its interpretation.

[175] At the request of the Secretary General of the Hague Conference, the Advisory Group on Private International Law considered the suggestion that Canada ratify the Convention soon, after a new round of consultation. It was felt that consultations should not be undertaken at this point given that the Convention is not in force.

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

## 2. LOW PRIORITIES

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

[177] This Convention applies to 12 States, including Canada, where it has been extended to 8 provinces and territories. To facilitate implementation of the Convention, the ULCC has prepared a Uniform Act.

[178] The purpose of the Convention is to establish an international form of will, additional to the forms in use in Contracting States, which is to be recognised as valid in all Contracting States. Article 1 of the Convention stipulates that each Party undertakes to introduce into its law the rules regarding an international will set out in the Annex to the Convention. In choosing the form of an international will, testators know that their will is to be recognised in all Contracting States without reference to the conflict of law rules concerning the validity of wills.

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

### b. Convention on the Return of Stolen or Illegally Exported Cultural Objects (Unidroit)

[180] This Convention, to which 23 States are party, was finalised under the auspices of Unidroit in June 1995. It sets out rules for the restitution or return of stolen or illegally exported cultural objects, subject to certain limitation periods. The Convention also provides for compensation of *bona fide* purchasers and addresses the issue of the proper jurisdiction in which to bring a claim. An explanatory report on the Convention and its implementation is available on the Unidroit website.

[181] *Action required in Canada:* When requested, assist Canadian Heritage in the consultations.

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

[182] This Convention is now in force in 11 States, including five exclusively civil law jurisdictions. It entered into force in Canada on January 1, 1993 and now applies to seven jurisdictions: Alberta, British Columbia, Prince Edward Island, New Brunswick, Newfoundland, Manitoba and Saskatchewan.



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

[184] *Action required in Canada:* Consultation with the jurisdictions that have yet to implement the Convention.

**CONCLUSION**

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

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

[187] We would like to reiterate our invitation to members of the ULCC to provide us with comments or questions arising from this report. We would be particularly interested in knowing whether the ordering of our priorities corresponds to the priorities of the provincial and territorial governments. Your comments or questions may be directed to Kathryn Sabo of the International Private Law Section at the Department of Justice.

## **ANNEX A: INTERNATIONAL PRIVATE LAW SECTION CONTACTS**

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