



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Study Paper 5

INTERNATIONAL TRADE CONVENTIONS

November 2000
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

The Honourable Justice Baragwanath – President
Judge Margaret Lee
DF Dugdale
Timothy Brewer ED
Paul Heath QC

The Executive Manager of the Law Commission is Bala Benjamin
The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

Use of submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request, and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Study Paper/Law Commission, Wellington, 2000
ISSN 1174–9776 ISBN 1–877187–61–5
This study paper may be cited as: NZLC SP5

This study paper is also available from the Internet at the Commission's website:
<http://www.lawcom.govt.nz>

Contents

	<i>Para</i>	<i>Page</i>
Preface		vii
1 INTRODUCTION		1
Structure of this study paper	6	2
Membership of international organisations	8	2
2 CONVENTIONS IN INTERNATIONAL LAW		5
Conventions or model laws?	14	5
Negotiation of conventions	16	5
How conventions become law	18	6
3 UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT		8
Nature and scope of the Convention	23	8
Other relevant international instruments	28	9
Independence	32	9
Non-documentary conditions	33	10
Fraudulent or unfair callings	34	10
Current situation at New Zealand law	37	10
Impact of adoption on New Zealand parties	40	11
Recommendation	41	12
4 UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS		13
Nature and scope of the Model Law	42	13
Choice of law	48	14
Key provisions of the Model Law	50	15
Current situation at New Zealand law	54	15
Impact of adoption on New Zealand parties	59	16
Recommendation	60	17
5 UNITED NATIONS CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES		18
Nature and scope of the Convention	61	18
Current situation at New Zealand law	66	19
Impact of adoption on New Zealand parties	71	19
Recommendation	72	19
6 CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS		21
Nature and scope of the Convention	74	21
Current situation at New Zealand law	81	23
Recommendation	86	24

	<i>Para</i>	<i>Page</i>
7	HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS	26
	Nature and scope of the Convention	88 26
	Procedures	94 27
	Other modes of service	95 27
	Costs	96 27
	Safeguards	97 28
	Extrajudicial documents	98 28
	Current situation at New Zealand law	99 28
	Serving notice of New Zealand proceedings overseas	100 28
	Serving notice of foreign process in New Zealand	101 29
	Impact of adoption on New Zealand parties	105 29
	Recommendation	106 30
8	UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA 1978	31
	Nature and scope of the Convention	108 31
	Application	110 31
	Liability	113 32
	Documentation	116 32
	Limitation	117 33
	Current situation at New Zealand law	118 33
	Documentation	119 33
	Liability	120 33
	Impact of adoption on New Zealand parties	123 34
	Recommendation	124 34
9	UNITED NATIONS CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS	36
	Nature and scope of the Convention	128 36
	Current situation at New Zealand law	133 37
	Effect of the Convention on Himalaya clauses	134 37
	United Kingdom legislation	137 39
	Impact of adoption on New Zealand parties	138 39
	Recommendation	140 39
10	UNCITRAL MODEL LAW ON THE PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES	40
	Nature and scope of the Model Law	141 40
	Current situation at New Zealand law	145 41
	Impact of adoption on New Zealand parties	146 41
	Recommendation	147 42
11	UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING	43
	Nature and scope of the Convention	148 43
	Current situation at New Zealand law	155 44
	Impact of adoption on New Zealand parties	156 44
	Recommendation	157 45
12	INSOLVENCY	46

	Para	Page
13 WORK IN PROGRESS		47
Hague Convention on Jurisdiction and Foreign Judgments	162	47
<i>Electronic commerce issues</i>	165	48
Nature and scope of the draft Convention	167	48
<i>Jurisdiction</i>	167	48
<i>Recognition and enforcement</i>	170	49
<i>General</i>	172	49
<i>Observations</i>	173	49
Draft UNCITRAL Convention on Assignment in Receivables		
Financing	175	50
Nature and scope of the Convention	175	50
Current situation at New Zealand law	180	51
UNIDROIT Convention on International Factoring	181	51
Recommendation	184	52
APPENDICES		
A Major trading partners of New Zealand		53
B Convention on the Taking of Evidence Abroad in Civil or Commercial Matters		54
C Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters		64
Bibliography		75

Preface

IN OCTOBER 1997, the Law Commission commenced an international trade project designed to consider various ways in which New Zealand's laws could be improved to maximise export returns for our country. This Study Paper is the Commission's penultimate offering on the subject; the final report will be *Electronic Commerce Part Three*, which is scheduled for publication in December 2000.

The purpose of this Study Paper is to identify international instruments that impact on various areas of international trade and to ask whether New Zealand should accede to those instruments. We also offer our analysis as a starting point for those working in this area to assist with the crafting of appropriate contractual provisions.

The Commissioner in charge of this Study Paper was Paul Heath QC. Research was undertaken by Lucy McGrath, to whom the Commission expresses its appreciation. The Commission is responsible for the contents of this paper, however, we gratefully acknowledge the assistance we obtained from discussions with David Goddard, Barrister of Wellington, Lloyd Kavanagh of the New Zealand Dairy Board, and Mark Russell of Buddle Findlay, Christchurch.

1

Introduction

- 1 THE LAW COMMISSION commenced a new project on international trade in October 1997. The principal purpose of this project was to identify legal barriers to international trade, which might adversely affect New Zealand's export-driven economy. By initiating reform of New Zealand's domestic law, the Commission hopes to contribute to the removal of impediments to international trade.
- 2 However, ensuring our domestic law is in order is only half the battle. As New Zealand becomes more integrated into the global market for goods and services, international rules and practices assume more importance. To be effective, our domestic laws should where appropriate be consistent with those of our major trading partners. Consistency does not mean slavishly adopting those laws. Rather, we should critically examine those rules and consider the advantages and disadvantages of applying them in New Zealand. While having different laws can sometimes result in trading advantages,¹ care must be taken in assessing whether a different law will achieve that outcome.
- 3 The harmonisation of rules governing cross-border transactions can facilitate trade, and international conventions have a part to play in achieving uniformity. The harmonisation of laws can be pursued in different ways:
- by unifying domestic laws;
 - by unifying laws relating to cross-border dealings; or
 - by recognising regulatory outcomes (for example, agreeing that goods which can be sold lawfully in country A can also be sold in country B without needing to comply with the corresponding regulatory requirements of country B).
- All of these solutions require a degree of international co-operation – they cannot be achieved unilaterally.²
- 4 In addition, harmonisation can be achieved by parties to a contract reaching agreement on applicable laws.³ Usually New Zealand trading entities will prefer to specify New Zealand law as the applicable law in their international contracts,

¹ This point is made by J Hodder in "Trans-Tasman Business Law: Co-ordinating, Not Harmonising" 23 TCL 33 1.

² This point is made by D Goddard in "Does the Internet Require New Norms?", International Law Forum 2 (2000) 183, 186.

³ The applicable law is the law of a particular country which the parties to a contract intended to govern the contract or, where no such intention can be established, the law with which the contract is most closely connected. This is also known as the "proper law of the contract", see C Schmitthoff *The Law & Practice of International Trade* (Stevens & Sons, London, 1990) 209.

because New Zealand law is familiar and our court system is relatively efficient and inexpensive compared to many other jurisdictions. One of the country's leading exporters informed us that when persuading a trading partner to apply New Zealand law, the Privy Council's status as the final appellate court of New Zealand may be influential, because international parties are more familiar with English law and judges (from which, by and large, the Privy Council is drawn) than those of New Zealand.

- 5 In considering whether to adopt the conventions discussed in this paper, the Law Commission has paid particular attention to whether adoption would result in a greater degree of commonality between our legislation and that of our major trading partners. In making this assessment, we have taken into account statistics on the countries with which New Zealand conducts most trade, in terms of the value of both exports and imports. These statistics are reproduced in appendix A.⁴ While these statistics indicate New Zealand's most significant trading partners by value across all sectors, it should be noted that other perhaps less apparent markets may be of great significance to particular industries.⁵

STRUCTURE OF THIS STUDY PAPER

- 6 This Study Paper introduces a number of international conventions. For each convention, it summarises the current situation in New Zealand in respect of the law to which the convention relates, and outlines the benefits or otherwise of adopting it. In some cases, it is recommended that New Zealand should adopt a convention; in others the recommendation is against adoption. This Study Paper is primarily intended to be educative; even if conventions are not adopted as part of New Zealand's domestic law, they can be useful drafting tools for those engaged in documenting the terms of contracts which have international elements.
- 7 To ensure that those conducting international transactions are aware of the provisions of these instruments, we have included relevant extracts from the relevant conventions as a resource.⁶

MEMBERSHIP OF INTERNATIONAL ORGANISATIONS

- 8 Since commencing the international trade project, Law Commissioners and others representing the Commission have attended meetings of organisations such as the United Nations Commission on International Trade Law (UNCITRAL), and the Hague Conference on Private International Law.⁷ As

⁴ The three most significant countries in terms of both exports and imports are Australia, the United States and Japan.

⁵ For example, Venezuela is the New Zealand Dairy Board's largest consumer market for milk powder (New Zealand Dairy Board Annual Report 2000, page 2), although it does not appear in the list of the top 10 importing countries. Other significant markets for the dairy industry are the Russian Federation, Morocco, Algeria and Saudi Arabia.

⁶ The Hague Conventions on the Taking of Evidence Abroad, and the Service Abroad of Judicial and Extrajudicial Documents are reproduced in appendices B and C respectively. Other Hague Conference Conventions can be accessed at <http://www.hcch.net> (last accessed 1 November 2000). UNCITRAL conventions and model laws are available from the UNCITRAL website <http://www.uncitral.org>.

New Zealand is not a full member of these organisations, these representatives attended in the capacity of observer.⁸

- 9 The membership of UNCITRAL is limited to a certain number of countries, and determined by the United Nations, so there is little that New Zealand can do to advance its own membership. There are however arguments in favour of New Zealand becoming a formal member of the Hague Conference, with full voting and speaking rights. If New Zealand as a member of the Conference ratified a convention, that convention would apply automatically between New Zealand and other member States, with no need for each other contracting State to accept specifically New Zealand's accession. Most of New Zealand's major trading partners are member States, including Australia, Japan, the United States, the United Kingdom, China and Korea.⁹
- 10 In addition to the procedural conventions discussed in this paper, the focus of the Hague Conference has been in the area of family law; New Zealand has become party to two of its more successful conventions in relation to intercountry adoption, and child abduction.¹⁰ The Hague Conference plans to undertake further work in the family law area, in particular regarding maintenance obligations, over the next 12 months. The Hague Conference is also beginning work on private international law issues that arise where securities are used as collateral, an issue of some importance to the banking and finance sectors.
- 11 Not only is it important for New Zealand to be involved in the formulation of rules that will apply to and facilitate our own international relations, but we also have an obligation as an international citizen to contribute to the development of international law. The Commission notes the desirability of New Zealand becoming a full member of the Hague Conference, while also recognising the need to balance its advantages against the cost of membership. Originally the Hague Conference had hoped to approve a final text of the Convention on Jurisdiction and Foreign Judgments¹¹ during 2000. However disagreement over the draft may make completion impossible this year. The Commission expects to be able to make a more firm recommendation regarding membership of the Hague Conference in its third report on electronic commerce.

⁷ Private International Law, also known as Conflict of Laws, is the body of law concerned with issues arising where transactions, relationships, and disputes span the boundaries of different countries with different legal systems. See further *Laws NZ Conflict of Laws: Jurisdiction and Foreign Judgments* (Butterworths, Wellington, 1996) paras 1–4.

⁸ Law Commissioners have also made presentations on the topic of international trade at meetings of the Organisation for Economic Co-operation and Development, and the Asia-Pacific Economic Co-operation (APEC). See Hon Justice Baragwanath “Changes in International and Domestic Law which are Critical to a Borderless World of Electronic Commerce” (presented at APEC Conference, Auckland, 6 September 1999) available at <http://www.lawcom.govt.nz/speeches/apec060999.htm> (last accessed 1 November 2000).

⁹ Refer to appendix A for details of the top 10 countries in terms of import value, and the top 10 in terms of export value, in trade with New Zealand.

¹⁰ The full titles are the Convention on the Civil Aspects of International Child Abduction (concluded on 25 October 1980) and the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (concluded on 29 May 1993 and discussed in NZLC PP38 *Adoption: Options for Reform* (Wellington, 1999) at paras 137–143).

¹¹ This draft Convention is discussed in chapter 13.

- 12 Before going to press, the Commission became aware of New Zealand's forthcoming accession to the Hague Conference Convention Abolishing the Requirement of Legalisation of Public Documents, concluded in 1961. Accession requires some amendments to the Evidence Act 1908, which are contained in the Statutes Amendment Bill (No 7) 1999. The Convention aims to simplify the series of formalities entailed in using public documents outside the country from which they emanate, by reducing the formalities of legalisation to the simple delivery of a certificate (in a prescribed form) by the authorities of the State from which the document originates. Approximately 70 other States are party to this Convention, including Australia, the United States, the United Kingdom and Japan.
-

2

Conventions in international law

- 13 **T**HIS STUDY PAPER considers a number of international texts which are referred to collectively as “conventions”. Convention is the word most commonly used for a multilateral treaty which is open to acceptance by a large number of States.¹² This usage is especially common in the United Nations and its agencies.

CONVENTIONS OR MODEL LAWS?

- 14 Many of the conventions discussed in this Study Paper were produced by the United Nations Commission on International Trade Law. UNCITRAL uses a variety of techniques to promote the harmonisation of international trade law;¹³ the two legislative techniques it uses are *conventions* and *model laws*. When maximum uniformity is important, the desirable form is a convention; it establishes an international obligation to adopt legislation in line with the convention’s provisions. A convention is negotiated, and so must be adopted in full or not at all. It can lack flexibility in that States wanting to adhere to most but not all provisions may not be able to adopt the Convention formally.
- 15 A model law can provide greater flexibility than a convention, as a country’s legislature, when incorporating a model law into domestic law, is free to modify or dispense with some of its provisions. However, the more idiosyncrasies that a State introduces when adopting model laws, the less the degree of harmonisation between its domestic law and that of other States. A model law is finalised and adopted by UNCITRAL whereas a convention requires, in addition to the work in UNCITRAL, the convening of a universal Diplomatic Conference.¹⁴

NEGOTIATION OF CONVENTIONS

- 16 International law and practice have established that representatives of a State have authority to negotiate and adopt the text of a convention. This is a

¹² For a description of the different types of international agreements, see NZLC R34 *A New Zealand Guide to International Law and its Sources* (Wellington, 1996) paras 18–23.

¹³ Other techniques are *contractual* (by producing uniform rules which contract drafters are free to incorporate) and *explanatory* (by issuing legal guides on contract practices and laws). See G Shapira “UNCITRAL and its Work – Harmonisation and Unification of International Trade Law” [1992] NZLJ 309, 310–311. Currently a legal guide is being drafted by an UNCITRAL Working Group in respect of privately funded infrastructure projects.

¹⁴ Above n 13, 310.

function of the executive branch of government;¹⁵ however, it is a principle of constitutional law that the executive cannot change the national law by entering into an international agreement. The performance of obligations under a convention often involves action by the Parliament, to amend the existing domestic law.

- 17 The Law Commission recommended in 1997 that the value of consultation with Parliament and interested or affected groups at the negotiating stage of a convention be recognised.¹⁶ Parliament's role in the consultation process is likely to be extended following Select Committee recommendations that time be set aside on the parliamentary timetable for international treaties to be debated.¹⁷

HOW CONVENTIONS BECOME LAW

- 18 Conventions come into force and take effect according to their own terms. Once concluded, conventions are usually signed by the negotiating parties. However signature does not generally amount to full acceptance of the convention: rather it is an indication of the State's intention to ratify in the future. Final acceptance may involve substantial changes in government policy or domestic law, so that a State is not bound by a convention until it is formally ratified or approved.
- 19 States that were not involved in negotiating and concluding a convention but wish to become a party to it at some later stage may have the right under the convention to accede to it and therefore become bound. Most of the conventions considered in this Study Paper have already been concluded, so the issue is whether New Zealand will become a party to them by accession. A party to a multilateral convention may also file reservations, indicating that it will not be bound by one or more of the provisions of the convention.
- 20 Conventions can be incorporated into domestic law in four ways:¹⁸
- an Act gives direct effect to the text of the convention, by providing that it "has the force of law" in New Zealand;
 - an Act uses some of the wording of the convention, or indicates in some other way its origins;
 - the substance of the convention is incorporated into legislation, without any obvious indication of the fact; or
 - an Act authorises the making of subordinate legislation (regulations or rules) which is to give effect to a particular convention. That subordinate legislation might take any of the three forms outlined above.
- 21 In addition, a very few treaties operating at the international level which raise no issues of domestic law may take effect with no need for domestic legislation.

¹⁵ See the Privy Council decision in *Attorney General for Canada v Attorney-General for Ontario* [1937] AC 326, 347–348 and NZLC R34 para 28.

¹⁶ See NZLC R45 *The Treaty Making Process* (Wellington, 1997) para 144.

¹⁷ Foreign Affairs, Defence and Trade Committee "Review of the International Treaty Examination Process" [1999] AJHR I 4E. The Government has agreed to the recommendations (23 TCL 7 11).

¹⁸ These methods of implementation are discussed in detail in NZLC R34, above n 12, chapter 2, and NZLC R45, above n 16, chapter 6.

Examples include the Convention on International Liability for Damage caused by Space Objects, the Vienna Convention on the Law of Treaties, and the Hague Convention on the Pacific Settlement of Disputes 1899.

- 22 Private law conventions, which are the subject of this Study Paper, can often be directly implemented by scheduling their text and stating they have the force of law. Current examples include the Hague Rules on the Carriage of Goods by Sea, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. These Conventions have force of law under the Maritime Transport Act 1994 and the Arbitration Act 1996 respectively.¹⁹
-

¹⁹ See section 209 and the Fifth Schedule of the Maritime Transport Act 1994, and section 5 and the Third Schedule of the Arbitration Act 1996.

3

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

NATURE AND SCOPE OF THE CONVENTION

- 23 THE UNITED NATIONS CONVENTION on Independent Guarantees and Stand-by Letters of Credit was adopted and opened for signature by the General Assembly of the United Nations by Resolution 50/48 of December 1995. It has been ratified or acceded to by five countries: Ecuador, El Salvador, Kuwait, Panama and Tunisia. In addition, both the United States and Belarus have signed the Convention. While signing indicates an intention to ratify the Convention in the future, these countries will not be bound by the Convention until they take this additional step.²⁰
- 24 As a matter of international law, treaties come into force and take effect according to their own terms (NZLC R45 para 19). Article 28 of the Convention provides that it enters into force on the first day of the month following one year from the date the fifth State ratified the Convention, that is, on 1 January 2000.
- 25 The Convention applies to those undertakings “known in international practice as an independent guarantee or as a stand-by letter of credit”, which are defined in article 2(1) as an independent commitment to pay a sum of money to a beneficiary on demand, or on presentation of specified documents. Instruments falling outside this definition will not be subject to the Convention, although article 1(2) provides an international letter of credit will be covered if it expressly states that the Convention applies. Even if the Convention applies *prima facie* to the undertaking, parties are free to exclude it (article 1(1)).
- 26 Independent guarantees and stand-by letters of credit are usually called upon when a party defaults in the performance of another obligation. However they are independent of such underlying obligations in that payment is conditional only on demand or presentation of documents, and not on establishing any default by another.
- 27 The main advantage to be gained from using these undertakings is the assurance of payment upon simple demand or presentation of correct documents. They provide an efficient and simple mechanism for recovering money in the event of a default. The main risk associated with the undertakings is that there may be an unfair or fraudulent demand for payment.²¹

²⁰ See discussion in chapter 2 para 18.

²¹ M Sneddon “The UNCITRAL Draft Convention on Independent Guarantees and Standby Letters of Credit” (1995) 23 Aust Business LR 145.

Other relevant international instruments

- 28 The Uniform Rules for Demand Guarantees (URDG), completed by the International Chamber of Commerce (ICC) in 1992, apply to independent guarantees when expressly incorporated. Similarly, stand-by letters of credit can be made subject to the ICC's Uniform Customs and Practice for Documentary Credits (UCP) when expressly incorporated.
- 29 UCP purport to apply to all documentary credits, including stand-by letters of credit where applicable (article 1, UCP 500). The term "stand-by" letters of credit originated in the United States and refers to credits which are called on in the event of non-performance of the underlying contract. The beneficiary (or nominee) need only produce a certificate of non-performance when calling on a stand-by letter of credit.²²
- 30 The need for an UNCITRAL Convention following so quickly on the heels of the URDG has been queried,²³ as arguably the URDG had not been operating for a sufficient period to gauge their effectiveness. However, in a policy statement the ICC recognised that its rules could not be fully effective until incorporated into a State's domestic law, and that the UNCITRAL Convention "provides an important impetus to obtain this objective".²⁴ The Convention is intended to work in tandem with rules of practice such as the UCP and URDG.²⁵
- 31 The influence of the URDG is evident in both the structure and content of the UNCITRAL Convention. An additional feature of the Convention is the provisional court measures in article 20, which allow a court to block payment to a beneficiary where there is a high probability of fraud or where the demand has no basis. Such measures were not provided for in the URDG, a consequence of the difference between a formal Convention involving the national legislature, and uniform rules for contracting.²⁶ Nor did the URDG deal with the transfer of a beneficiary's right to payment or the assignment of proceeds (covered in articles 9 and 10 of the Convention respectively).

Independence

- 32 It is implicit from the article 2(1) definition that an undertaking incorporating the terms of the underlying transaction will not be covered by the Convention, which only applies to "independent" undertakings. Article 3 expands on this quality of independence, providing that the obligation to pay must not depend on the existence or validity of any other undertaking, nor must it be subject to any condition not appearing in the undertaking.

²² See *Laws NZ Banking* (Butterworths, Wellington, 1999) paras 141–144, and *Sale of Goods* (Butterworths, Wellington, 1995) paras 349–351.

²³ L Gorton "Draft UNCITRAL Convention on Independent Guarantees" [1997] JBL 240, 242.

²⁴ Commission on Banking Technique and Practice policy statement, 21 June 1999, http://www.iccwbo.org/home/statements_rules/statements/1999/un_letters_of_credit_and_independant_guarantees_endorsement.asp (last accessed 1 November 2000).

²⁵ Explanatory Note to the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit para 5.

²⁶ Gorton, above n 23, 243.

Non-documentary conditions

- 33 Conditions on payment which require more than simple production of documentation may negate the independence principle and prejudice the efficient settlement of an undertaking. Article 3(b) implicitly excludes from its operation any such “conditional” undertakings except for terms requiring presentation of documents or another such act or event within the “sphere of operations” of a guarantor/issuer. An example of such an act or event is a determination by the guarantor/issuer as to whether a required sum had been deposited in a designated account held with that guarantor/issuer.²⁷

Fraudulent or unfair callings

- 34 Generally, the only exception to paying on demand is in the event of fraud on the part of the beneficiary of the guarantee or letter of credit.²⁸ Such fraud, or a “lack of honest belief” on behalf of the beneficiary that he or she is entitled to claim payment, can be very difficult for the account party to prove.
- 35 Article 19 of the Convention broadens the grounds on which a demand on an undertaking might be considered fraudulent at common law.²⁹ It provides that a guarantor may withhold payment if it is clear that documents have been falsified, or that no payment is due on the basis asserted in the demand, or that the demand has no conceivable basis. This latter ground is expanded upon in article 19(2) as being where, for example:
- the contingency or risk against which the undertaking was designed to secure has not materialised;
 - the underlying obligation has been declared invalid by a court or arbitral tribunal (unless this risk falls within the undertaking);
 - the underlying obligation has been fulfilled;
 - fulfilment has been prevented by the beneficiary’s wilful misconduct; or
 - in the case of demand on a counter-guarantee, the beneficiary has made payment in bad faith.
- 36 The Convention claims to balance competing interests by permitting but not requiring the guarantor to refuse payment when confronted with fraud.³⁰ However the assertion that “[t]he Convention is sensitive to the concern of guarantors/issuers over preserving the commercial reliability of undertakings” seems unrealistic. If a bank were presented with a fraudulent demand, it is debatable how willing it would be to pay on that demand in order to preserve the integrity of a payment mechanism which is subject to abuse.

CURRENT SITUATION AT NEW ZEALAND LAW

- 37 An example of the application of the independence principle in New Zealand law lies in *Cruickshank v Westpac Banking Corporation*,³¹ in which Sinclair J would

²⁷ Explanatory Note, above n 25, para 19.

²⁸ See *Laws NZ Banking*, above n 22, 159–160.

²⁹ Sneddon, above n 21, 147–148.

³⁰ Explanatory Note, above n 25, para 48.

³¹ [1989] 1 NZLR 114.

not allow a defendant to plead an alleged breach of the underlying contract as a defence to paying out on a letter of credit. He referred to authorities in both the United Kingdom and United States in concluding that the bank was neither obliged nor allowed to enter into controversies between the contracting parties regarding the primary contract.³² In this case the parties accepted that the letter of credit was governed by the UCP (1983 version). Sinclair J had cause to refer to articles of the UCP when interpreting the provisions of the letter of credit, in order to determine whether (as the defendant claimed) there was any restriction on the bank through which the letter of credit could be negotiated.³³

- 38 As the independence principle is generally invoked to prevent an injunction being granted against a bank paying out on an undertaking, account parties have attempted instead to seek injunctions against a beneficiary claiming payment.³⁴ However the argument that the independence principle and strict fraud exception could be modified as between the contracting parties was rejected in *Fortex Group Ltd (in rec & liq) v New Zealand Meat Producers Board*.³⁵ Doogue J concluded that, in the absence of reason to the contrary, he should follow cited decisions not to grant injunctive relief unless the plaintiff established a seriously arguable case that the defendant had acted fraudulently. It was not sufficient that the plaintiff had established a seriously arguable case that the defendant did not have a good claim under the underlying contract.³⁶
- 39 When determining whether to allow payment, a court must balance two competing policy arguments: maintaining business confidence in the guarantee or letter of credit as an effective payment mechanism, and upholding the interests of the business community in detecting fraud. Zohrab observes that the English courts have leant in favour of the former, and that New Zealand courts are now likely to follow a similar approach in light of the decision in *Fortex*.³⁷

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 40 If adopted by New Zealand, this Convention would automatically apply where the place of business of the guarantor/issuer at which the undertaking was issued was in a Contracting State, or if the rules of private international law led to the application of the law of a Contracting State.³⁸ As already noted, however, parties could avoid the Convention by expressly excluding it in the undertaking.

³² Above n 31, 121.

³³ Above n 31, 123.

³⁴ P Zohrab [1996] NZLJ 392.

³⁵ HC Wellington, CP 118–95, 16 June 1995.

³⁶ Above n 35, 15–16. Compare *Themehelp v West* [1996] QB 84 in which a majority of the United Kingdom Court of Appeal held that the plaintiffs had satisfied the onus of showing that there was an arguable case that the defendants had been fraudulent. It was held therefore that there was jurisdiction to grant interim relief to restrain the defendant from enforcing the guarantee (100–101).

³⁷ Above n 34, 396. See also *Group Josi Re v Walbrook Insurance Co* [1996] 1 WLR 1152 in which the United Kingdom Court of Appeal dismissed an appeal from a decision (approved in *Fortex*) that a letter of credit could not be declared void simply because the underlying insurance contracts were illegal (1166–1167).

³⁸ Article 1(1).

As the Convention only applies to international undertakings, domestic transactions involving these guarantees and letters of credit would not be affected.

RECOMMENDATION

- 41 The Commission's view is that there is no reason to accede to this Convention on Independent Guarantees and Stand-by Letters of Credit at this time. The first consideration in support of this view is that the United States is the only one of New Zealand's major trading partners to have signed the text, and has yet to bind itself by ratification. Secondly, parties are free to subject their undertakings to the Convention's provisions, simply by expressly incorporating the Convention into the text of the guarantee or letter of credit. This has been the practice with the other international guidelines such as the UCP which have been expressly incorporated, and indeed have been applied by the courts, without any recognition in New Zealand's domestic law. Thirdly, because the Convention largely codifies the basic legal principles recognised internationally as applicable to guarantees and letters of credit, New Zealand parties need not formally adopt the Convention to benefit from its provisions. The decisions of the High Court in both *Cruickshank v Westpac Banking Corporation* and *Fortex Group Ltd (in rec & liq) v New Zealand Meat Producers Board* support this final reason against the adoption of the Convention as part of New Zealand domestic law.
-

4

UNCITRAL Model Law on International Credit Transfers

NATURE AND SCOPE OF THE MODEL LAW

- 42 **T**HE MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS was adopted by UNCITRAL in 1992. A Directive based on the principles of the Model Law was issued on 27 January 1997 by the European Parliament and Council of the European Union (the EU Directive). However, there have been no further enactments of this Model Law.
- 43 The Model Law arose out of the development of electronic credit transfer systems.³⁹ Prior to the development of these systems, international funds transfers tended to be made by debit transfer, through the collection of cheques and other similar instruments.⁴⁰ New high-speed systems have significantly increased the number of international transfers, and highlighted concerns about the differences in the legal rules governing these transactions. The Model Law attempts to overcome these differences. In the United States, article 4A of the Uniform Commercial Code (UCC) has a similar function. The underlying purpose of these instruments, and the EU Directive, is to improve payments systems and thereby facilitate trade between States.
- 44 A “credit transfer” is defined in article 2(a) as the series of operations, beginning with the originator’s payment order, made for the purpose of placing funds at the disposal of a beneficiary. It includes any payment order issued by the originator’s bank or an intermediary’s bank intended to carry out the originator’s payment order. If the originator’s bank and the beneficiary’s bank are not members of the same clearing system, then the transfer must be made through an intermediary bank.⁴¹
- 45 The Model Law applies to those entities that execute payment orders as an ordinary part of their business (article 1(2)), and therefore is not limited to banks. This wider scope exists because in many countries non-banks, such as the postal service, operate a credit transfer service that is directly competitive with the services offered by banks. Furthermore, it was practically impossible to formulate a definition of “bank” in a manner acceptable to all countries.⁴² However article 1(2) does not include other participants in the transfer process,

³⁹ Explanatory Note to the UNCITRAL Model Law on International Credit Transfers para 1.

⁴⁰ E Bergsten “UNCITRAL Model Law on International Credit Transfers” [1991] 7 JIBL 276, 277.

⁴¹ Bergsten, above n 40, 277.

⁴² Bergsten, above n 40, 278.

such as telecommunications carriers, who do not enter into the actual banking process. The EU Directive refers to “credit institutions” rather than banks.⁴³

- 46 The Model Law applies to all credit transfers, including those where a consumer is a party (in practice a very small proportion of all international transfers). A footnote to article 1 states that the Model Law does not “deal with issues related to the protection of consumers”.⁴⁴ Consumer protection is a primary aim of the EU Directive and is stressed by certain information requirements (for example, regarding charges and avenues for redress) which are not included in the Model Law.⁴⁵
- 47 A payment order must be unconditional to fall within the scope of the Model Law (article 2(b)). However, if a bank receives an instruction that is conditional and executes it issuing an unconditional payment order, then the sender of the instruction has the same rights and obligations as the sender of a payment order (article 3(1)). This provision covers the situation where a condition is to be fulfilled at the originator’s bank.⁴⁶ The definition of “cross-border credit transfer order” in the EU Directive also requires an order to be unconditional (article 2(g)).

Choice of law

- 48 A single international credit transfer involves at least two banks (and sometimes more, if intermediary banks are involved) located in different jurisdictions. There is therefore potential for conflict between the various legal rules governing these transactions. For this reason, article 4A of the UCC provides that a funds transfer system may select the law to govern an entire credit transfer if any part of that transfer is carried out through that system (4A–507(c)). For example, any transfer made using the Clearing House Interbank Payments System (CHIPS) or Fedwire⁴⁷ will be subject to the law of the State of New York.⁴⁸
- 49 Under the Model Law, parties to a credit transfer are free to vary their rights and obligations by agreement (article 4). In the absence of any express agreement regarding choice of law, optional article Y suggests that the law of the State of the receiving bank should apply. The position is unclear if parties have neither specified an applicable law nor adopted article Y. Article Y was deleted from the main text of the Model Law at the 1992 UNCITRAL session but is included in a footnote “for States that might wish to adopt it”.⁴⁹

⁴³ Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, article 2(a).

⁴⁴ This means that the Model Law is subject to domestic rules for consumer protection. This footnote is included in many UNCITRAL texts and reflects that, when created in 1966, UNCITRAL’s mandate was considered not to include issues of consumer protection, as international trade was generally conducted between businesses rather than consumers. See further NZLC R58 *Electronic Commerce Part Two* (Wellington, 1999) para 103.

⁴⁵ L Bøjer “International Credit Transfers: The Proposed EC Directive compared with the UNCITRAL Model Law” [1995] 6 JIBL 223, 224–225.

⁴⁶ Bøjer, above n 45, 225.

⁴⁷ CHIPS and Fedwire are electronic funds transfer systems.

⁴⁸ Bergsten, above n 40, 279.

⁴⁹ Explanatory Note, above n 39, para 18.

Key provisions of the Model Law

- 50 No obligation to execute a payment order arises until the bank receiving the order has accepted it. If the sender and the receiving bank have a prior agreement that the bank will execute orders on receipt, the bank will be deemed to have accepted the order on receipt (articles 7(2)(a) and 9(1)(a)). This provision contrasts with article 4A of the UCC which states that a payment order cannot be accepted by prior agreement.⁵⁰
- 51 The receiving bank has a full discretion to reject an order. If the sender has sufficient funds with the bank, then any notice of rejection must be given no later than the banking day following the end of the execution period (articles 7(3) and 9(2)). If the bank fails to give a required notice of rejection, then it is deemed to have accepted the order (articles 7(2)(e) and 9(1)(h)). However if the bank does not hold sufficient funds for the sender and fails to give notice, then the order ceases to have effect at the end of the fifth banking day following the end of the execution period (articles 7(4) and 9(3)).
- 52 Under article 19(1) a credit transfer is complete when the beneficiary's bank accepts the payment order. The bank is then obliged to credit the beneficiary in accordance with the payment order and the law governing the relationship between the bank and the beneficiary (article 10(1)). Under article 19(2) the transfer is deemed complete notwithstanding the deduction of any charges by a receiving bank from the amount transferred. The EU Directive takes a stricter approach to the deduction of charges; the originating bank is liable to pay the originator any amount that has been deducted without authorisation.⁵¹
- 53 Article 17 provides that a receiving bank that has not fulfilled its obligations (for example, by delaying a transfer) is liable only for interest on the funds that it held beyond the time for which it should have held them. This provision was made because usually an originator does not suffer loss if a transfer is made late, unless there are consequential damages, which are not provided for in the Model Law.⁵² Article 18 states that remedies are exclusive, precluding any resort to other legal doctrines. However a party may rely on any remedy that may exist when a bank has improperly executed, or failed to execute, a payment order with intent to cause loss, or recklessly and with actual knowledge that loss might result.

CURRENT SITUATION AT NEW ZEALAND LAW

- 54 The body of New Zealand case law on the subject of international credit transfers is not large. However, some of the issues were considered recently by the Court of Appeal.⁵³
- 55 Regarding the completion of a credit transfer, there are distinctions drawn at common law based on whether or not the transfer is made "in-house" (that is, whether the amount credited to the beneficiary's account is debited from an

⁵⁰ 4A-209, Bergsten, above n 40, 281.

⁵¹ Bøjer, above n 45, 226.

⁵² Bergsten, above n 40, 283.

⁵³ *Dovey v Bank of New Zealand* (2000) 6 NZBLC 102,953. Also reported at (2000) 9 TCLR 263.

account within the same institution). An in-house credit transfer is complete when the bank makes the decision to credit the beneficiary's account.⁵⁴

- 56 However, as a matter of course, international credit transfers will not be “in-house” as they involve banks located in different States (even if those banks are branches of the same parent institution). In these cases, payment is complete at the time when the funds are freely available to the beneficiary.⁵⁵ This situation contrasts with the position under the Model Law article 19(1) when the transfer is complete once the beneficiary's bank has accepted the payment order. There is authority for the proposition that the transfer is complete when the beneficiary's bank receives an instrument which it treats as the equivalent of cash.⁵⁶
- 57 In *Dovey v Bank of New Zealand*, the plaintiff Mr Dovey claimed that the Bank of New Zealand (BNZ) had failed to carry out his instructions in effecting a transfer from his BNZ account to his account with a branch of the Bank of Credit and Commerce International (BCCI), which was placed into liquidation shortly after Mr Dovey's funds were received. In a discussion of the legal aspects of transfers of money, Tipping J (for the Court) considered the concept of “transfer” to be a misnomer in that no actual assignment of funds takes place. Rather, a chose in action is discharged in respect of one party, and created in respect of another.⁵⁷
- 58 Mr Dovey contended *inter alia* that at the critical time (when the BCCI was placed into liquidation) his money was held by a clearing bank acting as the BNZ's agent. However, Tipping J considered “[t]hat proposition has only to be stated to demonstrate its apparent lack of merit” and that the clearing bank was the agent of the receiving bank, not of the BNZ.⁵⁸ The Court of Appeal had no hesitation in upholding the High Court decision that the BNZ had done everything that was required of it to effect the transfer, and that the material and substantial cause of Mr Dovey's loss was his decision to use BCCI as his bank, followed by the bank's collapse.⁵⁹ The Court cited with approval the decision in *Royal Products Ltd v Midland Bank Ltd*⁶⁰ that if the customer could draw on the receiving bank for the remitted funds, then the paying bank had fully carried out its customer's mandate. This statement of when a transfer is deemed complete is consistent with the decision in *The Brimnes*.

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 59 If adopted, this Model Law would automatically apply to all international credit transfers entered into by New Zealand parties with institutions located in other Contracting States. It would not apply to debit transfers. If a State wished to adopt the Model Law to govern domestic credit transfers as well, to ensure unity

⁵⁴ See *Laws NZ Banking*, above n 22, para 14.

⁵⁵ *The Brimnes* [1975] QB 929, 963.

⁵⁶ *Mardorf Peach v Attica Sea Carriers* [1977] AC 850, 880.

⁵⁷ Above n 56, 102, 960.

⁵⁸ Above n 56, 102, 961.

⁵⁹ Above n 56, 102, 963.

⁶⁰ [1981] 2 Lloyd's LR 194.

of the law, then it would only be necessary to change the scope of application in article 1.⁶¹

RECOMMENDATION

- 60 The Model Law on International Credit Transfers was concluded eight years ago. Given that no State other than the European Union (through the EU Directive) has incorporated this Model Law into domestic legislation, we question the usefulness of adopting it. The relative lack of litigation regarding these transactions, indicating that credit transfers generally run smoothly according to international banking practice, together with the recent confirmation in *Dovey* of when a paying bank has fulfilled its obligations, lead the Commission to conclude there is no need to enact this Model Law in New Zealand.
-

⁶¹ Explanatory Note, above n 39, para 14.

5

United Nations Convention on International Bills of Exchange and International Promissory Notes

NATURE AND SCOPE OF THE CONVENTION

- 61 **T**HE UNITED NATIONS CONVENTION on International Bills of Exchange and International Promissory Notes, adopted by the General Assembly on 9 December 1988, has not yet entered into force. It will do so only after 10 States have deposited instruments of acceptance. To date, only Guinea and Mexico have acceded to the Convention, while Canada, the Russian Federation and the United States have signed it (indicating an intention to ratify).
- 62 The Convention applies only to *international* bills of exchange and promissory notes, which are defined in article 3, and is intended to provide a comprehensive set of rules governing these instruments.⁶² Articles 7–11 of the Convention deal with the interpretation of formal requirements.
- 63 If a bill or note is dishonoured by non-acceptance or non-payment, the holder has recourse only after the instrument has been protested in accordance with articles 60–62.⁶³ The Convention relaxes the precise common law rules on protest, allowing for a short form and extending the period usually allowed to make protest.⁶⁴
- 64 Generally a bill or note must be paid in the currency in which the sum payable is expressed. If there is an express provision that payment should be made in some other currency, and no exchange rate is specified, the amount is to be calculated according to the rate of exchange for sight drafts on the date of maturity.⁶⁵ Article 9 of the Convention specifies when an instrument is payable; it also allows for payment in instalments, which is a new feature in relation to these instruments.⁶⁶
- 65 Rules concerning the procedure to be followed when an instrument is lost (whether by destruction, theft or otherwise) are detailed in articles 78–83.

⁶² Explanatory Note to the United Nations Convention on International Bills of Exchange and International Promissory Notes para 2.

⁶³ Article 59.

⁶⁴ Explanatory Note, above n 62, para 42.

⁶⁵ Article 75.

⁶⁶ Explanatory Note, above n 62, para 36.

CURRENT SITUATION AT NEW ZEALAND LAW

- 66 In New Zealand, the Bills of Exchange Act 1908 (BOEA) regulates both bills of exchange and promissory notes. Unlike the Convention, the BOEA also applies to cheques.
- 67 The BOEA applies to both inland and foreign bills (section 4) and notes (section 84). A bill is “inland” if it is both drawn and payable in, or upon a resident of, what are quaintly described in section 4(1)(a) as the “Australasian colonies”. The Acts Interpretation Act 1924 defined “Australasian colonies” as “the Commonwealth of Australia as now or hereafter constituted, together with New Zealand and Fiji”. However the 1924 Act was repealed by the Interpretation Act 1999, which contains no definition for “Australasian colonies”. Any bill of exchange that is not an inland bill is a foreign bill (section 4(1)(b)). A promissory note is an “inland” note if it is made and payable in New Zealand. All other notes are “foreign” notes (section 84(4)).
- 68 Under the BOEA, the duties of the holder with respect to presentment for acceptance or payment, or a protest or notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured (section 72(c)). Section 51(2) provides further that where a foreign bill has been dishonoured by non-acceptance or non-payment, it must be protested; otherwise the drawer and indorsers may be discharged. This rule is consistent with article 59 of the Convention.
- 69 A foreign bill payable in New Zealand, but not expressed in New Zealand currency, should (in the absence of any express provision) be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (section 72(d)). This rule is consistent with article 75 of the Convention. The due date of a foreign bill is determined according to the law of the place where it is payable (section 72(e)).
- 70 Sections 69 and 70 of the BOEA establish the parties’ respective rights regarding lost instruments.

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 71 Parties in Contracting States are bound only if the Convention is expressly incorporated into the bill of exchange or promissory note (article 1(1) and (2)). The provisions of the Convention are optional even where a State adopts it, and New Zealand parties are already free to incorporate its terms into these instruments, so adoption would make very little practical difference to whether parties incorporated the terms.

RECOMMENDATION

- 72 The Commission believes it would not be useful for New Zealand to adopt this Convention, for the following reasons. First, none of our major trading partners is party to the Convention at present; the United States is yet to ratify its signature. Secondly, the Convention aims to resolve tension between the civil and common law traditions regarding these instruments. New Zealand’s law derives from the Bills of Exchange Act 1882 (UK) which also formed the basis for the legislation of most other Commonwealth countries in relation of

these instruments, so there is already a degree of harmonisation between New Zealand's domestic law and that of many of our trading partners.

- 73 Regarding the current Bills of Exchange Act 1908, the Commission recommends that the lack of definition for the term "Australasian colonies" should be addressed. As the BOEA is the only statute still in force which uses the term, we recommend that the section 4 definition of "inland" bill be amended to state in modern terms exactly which countries it encompasses. The Commission has made this recommendation to the Ministry of Justice; together with the Reserve Bank of New Zealand which is responsible for administering the BOEA, the Ministry is considering the proposed amendment.
-

6

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

NATURE AND SCOPE OF THE CONVENTION

- 74 **T**HE HAGUE CONVENTION on the Taking of Evidence Abroad in Civil or Commercial Matters was concluded on 18 March 1970. The following countries have ratified or acceded to the Convention:

Member States: Argentina, Australia, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Italy, Latvia, Luxembourg, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela

Non-member States: Barbados, Singapore, South Africa

- 75 The purpose of the Convention was to establish a structure for obtaining evidence which would be acceptable to both common law and civil law systems, despite their inherent differences regarding the taking of evidence. Within the adversarial system of common law countries, the parties to a dispute have the duty to obtain the evidence they need to support their contentions. However, under the inquisitorial system adopted in civil law countries, it is the court that decides what evidence is necessary and orders its production.⁶⁷ A direct request for evidence from a party in a civil law country may risk offending that country's concept of judicial sovereignty.⁶⁸
- 76 The Convention establishes two different methods for obtaining evidence abroad:
- letters of request, which ask the court in the State where the evidence or witness is located (the court addressed) to make the necessary orders (covered in articles 1–14); and
 - taking of evidence by diplomatic officers, consular agents or commissioners, who are appointed by the court to take a deposition in the State where proceedings have been issued (the State of origin) (covered in articles 15–22).
- 77 The Convention applies to “civil and commercial matters”. This phrase was considered by the House of Lords in *Re State of Norway*⁶⁹ which involved a request that an English resident be examined in relation to litigation in Norway

⁶⁷ W Kennett “The Production of Evidence within the European Community” (1993) 56 MLR 342, 345.

⁶⁸ D McClean *International Judicial Assistance* (Oxford University Press, 1992) 101.

⁶⁹ [1989] 1 All ER 745.

over a deceased person's tax assessment. While a general principle of international law is that the penal or revenue law of one State will not be enforced in another,⁷⁰ the majority of the House of Lords concluded that to provide evidence for use in foreign proceedings is not to "enforce" the foreign law in England.⁷¹ Whether proceedings were a "civil or commercial matter" depended on the classification of those proceedings according to the law of the requesting court and the court to which the request was made.⁷²

- 78 The decision in *Re State of Norway* was referred to in *Re [A] Films Ltd*,⁷³ in which Judge Barber considered whether an inquiry under section 18 of the Inland Revenue Department Act 1974 was a "proceeding" for the purposes of section 55 of the District Courts Act 1947. Section 55(1) provides:

The District Court may, on application made in accordance with the rules, issue a commission, request, or order to examine witnesses abroad for the purpose of any proceedings.

The Judge concluded that this section did apply to a section 18 inquiry. The District Courts Act 1947 contemplated a wide range of District Court civil proceedings other than the basic jurisdiction specified in the Act, and a section 18 enquiry fell within that extended civil jurisdiction.⁷⁴

- 79 The Convention enables parties to request that particular procedures for taking evidence be adopted in order to ensure that the resulting evidence is admissible in the State of origin (articles 9 and 21). Nevertheless, as Kennett notes, the Convention is used infrequently, for two main reasons.⁷⁵ The first is the long delays involved when making requests for international judicial assistance.⁷⁶ The second reason is misunderstanding about the function and timing of pre-trial discovery of documents. In contrast to common law procedures for pre-trial discovery, the basic pattern in civil law countries is that the parties' lawyers are required to attend a hearing at an early stage (perhaps a month after proceedings are commenced) so the court can determine whether the evidence

⁷⁰ Dicey and Morris *The Conflict of Laws* (Sweet & Maxwell, London, 1993) 101–103 and Government of *India v Taylor* [1955] AC 491. See also discussion in NZLC R50 *Electronic Commerce Part One* (Wellington, 1998) para 301. An exception to this principle lies in sections 3 and 3A of the Reciprocal Enforcement of Judgments Act 1934, which allows for judgments from Australian courts to be enforced under the Act, in situations where Australian tax is payable. The corresponding Australian provision is contained in section 3 of the Foreign Judgments Act 1991. See also *Ayres v Evans* (1981) 39 ALR 129 (discussed in NZLC R52 *Cross-border Insolvency* (Wellington, 1999) para 149) in which the Federal Court allowed a claim by the New Zealand Official Assignee on the grounds that the Official Assignee was not acting as agent for a foreign revenue, but in the interests of all creditors (131 and 140).

⁷¹ Above n 69, 761–762.

⁷² Above n 69, 757.

⁷³ [1993] DCR 970.

⁷⁴ Above n 73, 977.

⁷⁵ Kennett, above n 67, 356; compare McClean, above n 68, 86 who describes it as one of the most successful Hague Conventions.

⁷⁶ Article 14 of the UNCITRAL Model Law on Cross-border Insolvency expressly provides that letters rogatory are not required when giving notification of proceedings. This article was intended to expedite proceedings by not requiring that the "cumbersome and time-consuming" procedures for serving notice of proceedings be followed (Guide to Enactment para 108).

is sufficient for a final hearing to take place. If not, the judge will decide what evidence is desirable to enable the case to be determined.⁷⁷

- 80 Kennett concludes that neither the Brussels Convention nor the Hague Evidence Convention is adapted to modern litigation techniques which rely heavily on provisional and protective measures.⁷⁸ She also observes that technology has developed since the Evidence Convention was negotiated and that cross-examination of witnesses via a television link is now permissible under *Garcin v Amerindo Investment Advisors Ltd.*⁷⁹ In *Plumley v Ellis*⁸⁰ Barker J noted that sections 19–23 of the Evidence Amendment Act 1994 permit a witness located in Australia to be compelled to give evidence by video-link or telephone conference.

CURRENT SITUATION AT NEW ZEALAND LAW

- 81 Existing New Zealand law governing the circumstances in which evidence can be taken abroad in support of New Zealand proceedings is complicated and cumbersome. It is therefore costly for litigants to use, particularly in the context of increasing cross-border litigation.
- 82 What law is appropriate to apply depends upon the following considerations:
- the particular court in which the New Zealand proceedings are being taken. For example, the rules for proceedings brought in the High Court differ from those applied in District Court proceedings;
 - the country in which it is proposed to take evidence in support of the New Zealand proceedings. For example, there are some common procedures involving Commonwealth countries and there are other rules which govern relations between New Zealand and other countries at a bilateral level. In other cases, no formal instruments apply at all; and
 - the nature of the particular litigation. For example, different rules may apply to criminal proceedings or to taxation proceedings which do not apply, more generally, to civil proceedings.
- 83 In regard to High Court proceedings, the taking of evidence abroad is governed by the Evidence Act 1908 (sections 48–48J), Evidence Amendment Act (No 2) 1980, Evidence Amendment Act 1994 and High Court Rules (HCR) 1985. In the District Court, the issues are governed by the various Evidence Acts and by the District Courts Act 1947 (section 55). The Evidence Amendment Act 1994 makes particular provision for evidence to be given by video-link or telephone conference from Australia.⁸¹
- 84 The Law Commission has recently reported on an extensive review of the law of evidence.⁸² In that report, the Commission observed that scattered through

⁷⁷ Above n 67, 346.

⁷⁸ Above n 67, 357.

⁷⁹ [1991] 1 WLR 1140; Kennett, above n 67, 358.

⁸⁰ [1997] 2 NZLR 105. See also *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 96, in which it was held that expert evidence could be given via video-link from Dallas, Texas, provided that guidelines were followed to ensure compliance with the rules of natural justice (109).

⁸¹ Evidence Amendment Act 1994, sections 19–23; see also *Plumley v Ellis* [1997] 2 NZLR 105.

⁸² NZLC R55 *Evidence* (Wellington, 1999).

a number of statutes were various provisions setting out the circumstances in which evidence may be obtained overseas for use in New Zealand, and obtained in New Zealand for use overseas. Specific reference was made to particular provisions in the Evidence Act 1908 and its amendments. The Commission recommended that these provisions be gathered together in a single statute but mentioned that another method of dealing with the problem would be to accede to this Convention on the Taking of Evidence Abroad. The Commission expressed the view that a separate review of these provisions was required as issues arose that were distinct from those addressed in the Commission's proposed Evidence Code.⁸³

85 We do not propose to examine in detail the provisions governing the taking of evidence abroad in support of New Zealand proceedings. Rather, we set out the relevant provisions in appendix B and summarise below some of the practical difficulties that arise from the use of the provisions.

- While section 44 of the Evidence Amendment Act (No 2) 1980 confers on a New Zealand court the power to request a corresponding court in “a prescribed country” to make an order for the examination of a witness or the production of any specified document, no countries have, in fact, been prescribed under section 38 of that Act.
- Because the term “proceeding” is defined in section 2 of the District Courts Act 1947 as excluding interlocutory applications, there is a question of whether evidence for use in interlocutory applications can be sought in the District Court notwithstanding the wider definition of the term “proceeding” in, for example, the Evidence Amendment Act (No 2) 1980.⁸⁴
- While section 46(3) of the Evidence Amendment Act (No 2) 1980 provides that “Letters of Request shall be transmitted to and from an overseas Court through such channels as may be prescribed by rules of Court”, it appears that no procedure has been prescribed by either the HCR or the District Court Rules (DCR). Traditional methods of communication through diplomatic channels can be cumbersome. It should also be noted that HCR 371 and 372 provide a procedure for examination of a witness before an examiner.

RECOMMENDATION

86 The Commission recommends that the Ministry of Justice give serious consideration to adopting this Convention to supplement New Zealand's law of evidence. A number of our significant trading partners are party to this Convention. Moreover, it is questionable whether New Zealand's existing mechanisms for taking evidence abroad are workable and cost efficient.

87 In addition to the problems noted above, there are countries where a New Zealand judge or court officer cannot lawfully take evidence or administer an oath, and where the local courts will not provide assistance in the absence of a convention providing for this action. Even where it is possible for a New Zealand representative to take evidence in a foreign country, usually it will not be

⁸³ Above n 82, Vol 1 at paras 504–506; the Commission's recommended Evidence Code is in Vol 2 of the report.

⁸⁴ But see also *Re [A] Films Limited* [1993] DCR 970.

possible to compel witnesses to attend before that representative if they will not do so voluntarily, and there are no practical sanctions for perjury where an oath has been administered by a New Zealand representative. While it has been criticised for its lengthy procedures,⁸⁵ the Convention would go some way towards addressing these problems. Even if the Convention were not adopted, it would be desirable to consolidate the provisions relating to foreign evidence contained in the various statutes and the HCR.

⁸⁵ See para 79.

7

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

NATURE AND SCOPE OF THE CONVENTION

- 88 **T**HE HAGUE CONVENTION on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was concluded on 15 November 1965. It has been adopted by the following countries:
- Member States: Belgium, Canada, China, Hong Kong (Special Administrative Region only), Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela
- Non-member States: Antigua and Barbuda, Bahamas, Barbados, Belarus, Botswana, Malawi, Pakistan
- 89 Australia has not yet acceded to this Convention, although in 1996 the Australian Law Reform Commission recommended that it do so.⁸⁶
- 90 The Convention applies “in all cases, in civil and commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad” (article 1). The phrase “civil and commercial” appears in many Hague Conventions and is open to differing interpretations.⁸⁷ Common law countries generally interpret it as meaning any non-criminal matter, whereas civil law countries may take a narrower approach. McClean observes that a generous interpretation aids both plaintiffs (who may need to effect service before a judgment can be given) and defendants (who can benefit from knowledge of pending proceedings); and that a State does not commit itself to recognising any judgment the plaintiff may ultimately obtain, because service facilitates proceedings rather than authenticates them.⁸⁸
- 91 The Convention does not apply where the address of the person to be served is not known (article 1). This exclusion leaves States free to use whatever other methods are considered appropriate, such as substituted service under English law.⁸⁹

⁸⁶ ALRC R80 *Legal Risk in International Transactions* (Canberra, 1996) 86–87. While the Standing Committee of Attorneys-General have agreed in principle that Australia should accede to the Convention, that decision has not been implemented as some state and territory courts have not made the necessary changes to their governing rules.

⁸⁷ See discussion of *Re State of Norway* and other authorities in chapter 6 paras 77–78.

⁸⁸ McClean, above n 68, 19.

⁸⁹ McClean, above n 68, 20; see also HCR 211.

- 92 The Convention creates a system of Central Authorities to receive requests for service coming from other States (article 2(1)). Most States have designated their Ministries of Justice as the Central Authority. Others have placed the Central Authority within the courts service, and a small number (including the United Kingdom) have designated the Foreign Ministry.⁹⁰
- 93 Article 3(1) provides that requests for service should be forwarded by an authority or judicial officer competent under the law of the State in which the documents originate. Some countries (including the United Kingdom) use their Central Authorities to forward requests as well as to receive them, although this additional responsibility is not required by the Convention. However, other (mainly civil law) countries adhere to a principle that outgoing requests must emanate directly from a court.⁹¹

Procedures

- 94 An Annex to the Convention prescribes the form of a request for service. If a particular method of service is requested, then the Central Authority should comply, unless doing so would be incompatible with the law of the country receiving the request.⁹² In all other cases, service can be made *either* by the method prescribed by domestic law for serving defendants in that country, or “by delivery to an addressee who accepts it voluntarily” (article 5). If a Central Authority considers that a request does not comply with the Convention, it must inform the applicant of the reasons why (article 4). If the request does comply, then the only grounds for rejecting it are that actioning the request would infringe the sovereignty or security of the receiving State (article 13).

Other modes of service

- 95 The Convention permits modes of service other than through Central Authorities, subject to any objection by the State of destination (article 21(2)(a)). These modes are:
- service directly on the addressee by a diplomatic or consular agent of the originating State (article 8);
 - using consular channels to forward service documents to designated authorities in the State of destination (article 9); and
 - service by post (article 10(a)).

In addition, the Convention does not affect the ability of overseas parties to serve documents within a State’s territory, by any other means permitted by that State’s internal law (article 21).

Costs

- 96 Article 12 states the general principle that the authorities of the State of destination seek no reimbursement of any costs incurred in the service of judicial documents. However, the applicant must pay or reimburse costs occasioned by the use of the services of a judicial officer or person competent under the law of the State of destination, or by the use of a particular method of service.

⁹⁰ McClean, above n 68, 20.

⁹¹ McClean, above n 68, 21.

⁹² McClean, above n 68, 23.

Safeguards

- 97 Articles 15 and 16 contain guarantees that balance the interests of the addressee against those of the plaintiff wishing to serve notice. Under article 15, no judgment should be entered against an absent defendant until it is established that service was effected in sufficient time for the defendant to prepare a case. Where a judgment has been entered against an absent defendant, article 16 empowers a judge to extend the appeal period if the defendant did not have knowledge of service in sufficient time, *and* has a *prima facie* defence to the action. Judgments concerning the status or capacity of persons are expressly excluded from the ambit of article 16.

Extrajudicial documents

- 98 Article 17 extends the Convention to extrajudicial documents “emanating from authorities and judicial officers of a Contracting State”. Examples of documents served under this provision are demands for payment, notices to quit, protests in connection with bills of exchange, and consents to adoption or marriage. Such documents often emanate from an official source in civil jurisdictions, but in common law countries tend to be issued by private parties. Central Authorities are encouraged to serve documents not emanating from an authority or judicial officer, if they were of a type which would normally call for the intervention of an authority in their country.⁹³

CURRENT SITUATION AT NEW ZEALAND LAW

- 99 At common law, service of process is the foundation of the court’s right to try an action. The court has jurisdiction only if service has taken place. Responsibility for service lies with the parties to an action, and traditionally common law countries have not impeded service of foreign process, even where the defendant is one of their own nationals. This approach contrasts with that in civil law countries, where the uncontrolled service of foreign process within their territory may raise objections on sovereignty grounds.⁹⁴

Serving notice of New Zealand proceedings overseas

- 100 The circumstances in which notice can be served on a defendant located outside New Zealand were outlined in the Law Commission’s first report on electronic commerce.⁹⁵ The relevant statutory provisions are contained within the High Court Rules 219–220 and District Court Rules 242–243 (which are identical to the HCR). Under HCR 222, the mode for serving notice of proceedings on a defendant outside New Zealand is the same as that for service inside New Zealand,⁹⁶ subject to HCR 224 which specifies the procedure to be followed if a convention for service of notice is in place with a particular country. If a

⁹³ McClean, above n 68, 32.

⁹⁴ Commonwealth Secretariat “Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth” A Report of a Working Meeting held at Basseterre, St Kitts, 24–28 April 1978, paras 8.11 and 8.58.

⁹⁵ NZLC R50, above n 70, paras 264–266.

⁹⁶ Also subject to HCR 223 concerning proceedings under the Carriage by Air Act 1967 and certain provisions of the Civil Aviation Act 1990.

convention is in place, then the Registrar should forward the request and accompanying documents to the Chief Executive of the Department for Courts, who will transmit them to the appropriate authority in the relevant country (HCR 224(3)).

Serving notice of foreign process in New Zealand

- 101 The first inquiry is to establish whether a convention exists which governs service with the country from which the request for service has been made. If a service convention exists, then that will govern the situation under HCR 218. New Zealand is party to bilateral conventions on service and the taking of evidence abroad with a number of mainly European States.⁹⁷ Most of these conventions were entered into by these States and the United Kingdom in the period between the First and Second World Wars, and were subsequently adhered to by other Commonwealth countries, including New Zealand.⁹⁸ However, these conventions are somewhat inaccessible and out of date, and do not facilitate service as between Commonwealth countries.
- 102 There is no general Commonwealth convention governing service of foreign process. Conventions with these countries are a concession to the civil law tradition, but have not been considered necessary as between countries with the common, more informal approach to service of process. However, as more countries accede to the Hague Convention, a new set of expectations regarding procedures for foreign service may develop.⁹⁹
- 103 HCR 213 specifies procedures for dealing with letters of request from courts or tribunals of non-Commonwealth countries. Earlier versions of HCR 213 refer to courts or tribunals “outside His Majesty’s Dominions”.¹⁰⁰ These Rules were based on the English Rules of the Supreme Court 1883, as were the Rules of Court for most Commonwealth jurisdictions.
- 104 There are no equivalents to HCR 213 and 218 in the DCR (that is, none of the DCR cross-refers to HCR 213 and 218). There are provisions regarding the service abroad of New Zealand proceedings, but not vice versa, perhaps again because it was expected that service could be effected by the parties without having to go through the courts.¹⁰¹

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 105 Currently there are several countries where service of originating documents is permitted only through official channels. In some of these countries, foreign documents will be served through those official channels only if there is a

⁹⁷ Austria, Belgium, Czechoslovakia, Denmark and Iceland, Estonia, Finland, France, Germany, Greece, Hungary, Iraq, Italy, Lithuania, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, and the States of the former Yugoslavia (from D Campbell (ed) *The Comparative Law Yearbook of International Business* (Kluwer, London, 1998) appendix B).

⁹⁸ Commonwealth Secretariat Working Paper, above n 94, paras 8.15–8.19.

⁹⁹ Commonwealth Secretariat Working Paper, above n 94, para 8.77.

¹⁰⁰ R 51J of the Code of Civil Procedure as amended by SR 1939/9.

¹⁰¹ Note that at one stage it was proposed to omit the rules dealing with service of foreign process from the then Code of Civil Procedure on the grounds that they were irrelevant to the actual procedure of the New Zealand courts (Commonwealth Secretariat Working Paper, above n 94, para 8.06).

convention with the country requesting service.¹⁰² Accession to the Convention on the Service Abroad of Judicial and Extrajudicial Documents would enable New Zealand proceedings to be served in these countries. In other common law countries and those countries where there is already a convention, the issue becomes one of cost, speed and convenience of the contemplated procedure. The alternative methods of service contemplated by the Hague Convention are likely to be quicker and less expensive than the use of official channels in the destination country. In practice, requests for service through official channels are not received or sent often, although this may be a reflection of the unwieldy procedure rather than a low demand for such assistance. Accession would require some amendments to the HCR (and corresponding DCR) relating to foreign service, although there do not appear to be any major inconsistencies between the provisions of the Convention and the existing limited procedures in New Zealand. The main effect of accession therefore would be to increase the number of countries to which the procedures in HCR 218 and 224 would apply (being service in or from countries with which a convention is in place). Any consequential amendments to the HCR as a result of a decision to adopt this Convention should be made by the Rules Committee.

RECOMMENDATION

- 106 The Commission agrees that accession to this Convention on the Service Abroad of Judicial and Extrajudicial Documents would be a useful reform.¹⁰³ In 1978 the Commonwealth Secretariat observed that the growth of international trade and easier communications meant there was a need to rationalise and simplify these procedures.¹⁰⁴ Over 20 years later, considering the increase in cross-border transactions associated with electronic commerce, that need is even greater. The Commission therefore recommends that the Ministry of Justice consider these issues with a view to ratifying this Convention.
-

¹⁰² Above n 94.

¹⁰³ D Goddard "Global Disputes – Jurisdiction, Interim Relief and Enforcement of Judgments" paper delivered to the NZLS Conference (Rotorua, April 1999) 13.

¹⁰⁴ Commonwealth Secretariat Working Paper, above n 94, para 8.13.

United Nations Convention on the Carriage of Goods by Sea 1978

- 107 **I**N NZLC R50, the Law Commission indicated its intention to consider the possibility of New Zealand adopting the United Nations Convention on the Carriage of Goods by Sea 1978 (otherwise known as the Hamburg Rules).¹⁰⁵ In particular, the Commission intended to consider whether the Hamburg Rules were more suited to electronic commerce than the Hague-Visby Rules currently enshrined in Schedule 5 of the Maritime Transport Act 1994.

NATURE AND SCOPE OF THE CONVENTION

- 108 As at 2 September 1999, 26 countries¹⁰⁶ had ratified or acceded to the Hamburg Rules; however, few of them are of great significance to New Zealand as trading partners. Interestingly, 11 of these 26 countries are landlocked. While the United States, France, Germany and the Philippines all signed the Convention, their action merely indicates an intention to ratify in the future and does not bind these countries. Given the time that has elapsed since these countries signed the Convention (1979 for the United States and France, 1978 for Germany and the Philippines), it seems unlikely that ratification will be forthcoming. Commentators agree that it would be necessary for a major trading nation to adopt the Hamburg Rules before the current regime could be displaced.¹⁰⁷
- 109 The Hamburg Rules are underpinned by the principle that the cargo carrier is presumed to be liable in the event of damage or loss, subject to certain exceptions outlined in the Rules. The carrier generally bears the burden of proof.

Application

- 110 The Hamburg Rules cover “any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another” (article 1(6)).

¹⁰⁵ See NZLC R50, above n 70, para 8.

¹⁰⁶ Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Slovakia, Tunisia, Tanzania and Zambia.

¹⁰⁷ AJ Waldron “The Hamburg Rules – a Boondoggle for Lawyers?” (1991) JBL 305, 319. See also S Thompson “The Hamburg Rules: Should they be implemented in Australia and New Zealand?” (1992) 4 Bond LR 168, 184.

This wide application extends to the paperless exchange of electronic data and agreements, to meet the modern demands of electronic commerce.¹⁰⁸

- 111 Under article 10(1), the initial carrier of a consignment is responsible for its entire carriage to the port of destination, even where it is performed by subsequent carriers. This provision has the advantage of clearly establishing the defendant in legal proceedings, and the initial carrier can always recover damages from the culpable carrier if necessary (article 10(6)). An exception is contained in article 11(1), where a subsequent carrier named in the contract of carriage may also become a defendant.
- 112 The Hamburg Rules apply to both inbound and outbound cargo (article 2(1)). They do not apply to domestic carriage unless expressly incorporated into the contract of carriage.

Liability

- 113 The Hamburg Rules introduce a single test of liability: no distinction is drawn between the duty to ensure the ship is seaworthy, and the continuing obligation to care for the goods. Under article 5(1) a carrier will be liable unless it proves that it took all measures that could reasonably be required to avoid loss, damage and/or delay of the goods.
- 114 There is, however, a different rule regarding liability for delay or damage caused by fire, where the fire arose from the “fault or neglect” of the carrier (article 5(4)). The burden of proof falls on the claimant. Another reform favouring carriers relates to the amount recoverable in respect of goods that have been delayed. Article 6(1) limits this amount to an “equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total weight payable under the contract of carriage of goods by sea”. Waldron sees no logical reason why a limit should be imposed on liability for delay, but not for other damage, as delay is likely to be just as detrimental as physical loss.¹⁰⁹ Different treatment may lead to attempts to benefit from the cap on liability by drawing fine distinctions between whether perishable goods have been delayed or damaged.
- 115 The Hamburg Rules continue to use the Special Drawing Rights of the International Monetary Fund (IMF) as the basic unit of account. Although the limits are higher than those in 1968, when inflation is taken into account, as Waldron observes, the new units of account actually represent a reduction in limits of liability in real terms.¹¹⁰

Documentation

- 116 While the Hamburg Rules apply to any contract for the carriage of goods by sea, rather than being limited to bills of lading or similar documents, they do require a document to contain prescribed and detailed particulars. Waldron notes that it remains to be seen what a shipper is entitled to demand as a

¹⁰⁸ Thompson, above n 107, 181.

¹⁰⁹ Waldron, above n 107, 311.

¹¹⁰ Above n 107, 313–314.

document when loading,¹¹¹ although he does not mention the possibility of electronic documentation.

Limitation

- 117 The Hamburg Rules would double the current limitation period for bringing proceedings to two years (article 20(1)). Actions for indemnity may be entertained after the expiry of the limitation period, subject to the conditions specified in article 20(5).

CURRENT SITUATION AT NEW ZEALAND LAW

- 118 The Hamburg Rules and issues of civil liability were considered in 1992 by the Department then known as Maritime Transport, as part of a review of the Shipping and Seamen Act 1952. The outcome of that review was the Maritime Transport Act 1994. Contracts for the international shipment of goods by sea are currently regulated in New Zealand by what are known as the Hague-Visby Rules,¹¹² which have force of law by virtue of section 209 of the Maritime Transport Act 1994.

Documentation

- 119 The Hague-Visby Rules apply to contracts of carriage “covered by a bill of lading or any similar document of title” (article 1(b)), and are therefore more restrictive than the Hamburg Rules in that a particular document is specified. The Hague-Visby Rules can be interpreted as requiring the existence of a physical document,¹¹³ and therefore imposing restrictions on those wanting to use electronic systems for trade documentation. Section 13(5) of the Mercantile Law Act 1908 currently provides that regulations may be made for the application of the Act to cases where a network or other information technology is used for effecting transactions corresponding to the issue, endorsement, delivery or other transfer of a document to which the Act applies. While section 13(5) could facilitate the use of electronic trade documents, it is currently inactive as no such regulations have been passed. Even if regulations were passed providing that certain technology could be used, the issue arises as to whether an electronic document would be considered a “bill of lading” for the purposes of the Hague-Visby Rules.

Liability

- 120 The introduction of a single test of liability is perhaps the most significant way in which the Hamburg Rules differ from the Hague-Visby Rules, which impose a dual duty on the carrier to ensure the seaworthiness of the transporting vessel, and to take proper care of the goods (article 3(1) and (2)).

¹¹¹ Above n 107, 315.

¹¹² The full title is the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 24 August 1924 (Hague Rules) as amended by the Protocol of 23 February 1968 (Visby Rules). Discussed in NZLC R50, above n 70, para 118.

¹¹³ As noted in NZLC R58, above n 44, para 77.

- 121 However the Hamburg Rules do not perpetuate the provision in the Hague-Visby Rules permitting a carrier to contract out of the standard of care prescribed in the latter Rules. Unlike the Hague-Visby Rules, the Hamburg Rules make no specific provision relating to deviation, which is instead subsumed into the general liability.
- 122 Under the Hague-Visby Rules, any suit for loss or damage must be brought within one year either of the delivery of the goods, or of the date when the goods should have been delivered, unless the parties agree on an extension to the period after the cause of action has arisen (article 3(6)). If no agreement has been reached, the claim will be entirely extinguished after a year if no proceedings have been brought. An action for indemnity against a third person may, however, be brought even after the expiration of the year, if brought within the time allowed by the law of the court seised of the case.¹¹⁴

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 123 If adopted, the Hamburg Rules would apply automatically should one of the following five situations outlined in article 2 be present:
- (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
 - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
 - (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
 - (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
 - (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

Article 2 also provides that the Convention applies only where carriage is between two different States, so domestic carriage within New Zealand would not be affected.

RECOMMENDATION

- 124 The Commission does not recommend adoption of the Hamburg Rules. Among industry groups there appears to be no demand for the Rules to become part of New Zealand law, and none of the submissions received in response to the Commission's reports on electronic commerce¹¹⁵ favoured adoption. Furthermore, few of New Zealand's major trading partners have adopted the Rules.
- 125 One advantage of the Hamburg Rules is their provision for electronic documentation. To take advantage of this provision, rather than adopting the Hamburg Rules wholesale, another possibility would be to pass regulations

¹¹⁴ *Laws NZ Limitation of Civil Proceedings* (Butterworths, Wellington, 1993) para 44.

¹¹⁵ The Hamburg Rules are mentioned in NZLC R50, above n 70, paras 8 and 121, and NZLC R58, above n 44, para 77.

under section 13(5) of the Mercantile Law Act 1908 to give effect to electronic transportation documents. However, as noted above, the issue does arise as to whether an electronic document would be considered a “bill of lading” for the purposes of the Hague-Visby Rules. The Commission intends to comment further on these issues in its forthcoming third report on electronic commerce.

- 126 The Commission notes that market participants are forming non-regulatory solutions to the issue of acceptability of electronic trade documentation. The most significant example is the Bolero project.¹¹⁶ This project, which went live in September 1999, provides a common, open system by which businesses can exchange electronic trade data and documentation electronically.¹¹⁷

¹¹⁶ Discussed in NZLC R50, above n 70, paras 124–125 and NZLC R58, above n 44, para 71.

¹¹⁷ For further information see <http://www.bolero.net>.

9

United Nations Convention on the Liability of Operators of Transport Terminals

- 127 **W**HILE THE HAMBURG RULES establish liability for loss, damage or delay of goods during carriage, the United Nations Convention on the Liability of Operators of Transport Terminals applies immediately before and after carriage, when the goods are being loaded, unloaded or stored. This Convention was adopted by the General Assembly on 17 April 1991, prior to which the issue of transport terminal operator liability had received little attention from the international community.

NATURE AND SCOPE OF THE CONVENTION

- 128 This Convention has not yet entered into force. As at 2 September 1999, only Egypt and Georgia had acceded to the Convention. While France, Mexico, the Philippines, Spain and the United States have all signed the Convention, signing only represents an intention to ratify and is not binding. The Convention must be ratified by three further States before it enters into force; the issue we address is whether New Zealand should be one of these States.
- 129 A transport terminal “operator” is defined as:
a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport related services with respect to the goods in an area under his control or in respect of which he has a right of access or use.¹¹⁸

Operators are responsible for the goods from the time they take charge of them, to the time they make them over to the party entitled to take delivery of them (article 3). The Convention applies where transport-related services¹¹⁹ are performed in a State which is party to the Convention (a “Party State”), or by an operator whose place of business is located in a Party State. It also applies where the services are governed by the law of a Party State (article 2(1)(c)).

- 130 Article 5 details the basis of the operator’s liability. An operator will be liable for loss resulting from loss, damage or delay during the time the operator is responsible for the goods, unless he or she (or his or her servants or agents) took all measures that could reasonably be required to avoid the loss and its

¹¹⁸ Article 1(a). A person is not an operator wherever he or she is also a carrier under the applicable conventions.

¹¹⁹ Transport-related services are defined in article 1(d) as including storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing.

consequences. The burden of proof is on the operator. Liability for delayed goods is limited by article 6(2) to two and a half times the charges payable to the operator for services in respect of the delayed goods, and not exceeding the total charges payable in respect of the whole consignment. This cap on liability for delayed goods could lead to the same artificial distinctions being drawn between delayed and damaged perishable goods as those identified in respect of the Hamburg Rules.¹²⁰ Where loss is caused by the intentional or reckless act or omission of the operator or his or her agents, then the limitations on liability contained in the Convention will not apply (article 8(1)).

- 131 Article 11(1) provides that unless notice of loss or damage is given within three days of an operator handing over goods to the person entitled to receive them, the handing over is prima facie evidence that the goods were as described or in good condition. However, if the operator participated in an inspection of the goods at the point of handing over, then no such notice need be served.
- 132 In the event that “dangerous goods” (not defined in the Convention) are handed over to an operator and he or she is not informed of their dangerous character, under article 9 the operator may “take all precautions the circumstance may require”, including destroying the goods. Furthermore, an operator is entitled to be reimbursed for all costs incurred in taking such measures, and a failure to reimburse will activate the rights of security in goods outlined in article 10. That article provides that the operator has a right of retention over goods for costs due in connection with the services performed by him or her. However, this right may not be exercised if a sufficient guarantee is provided, or if an equivalent sum is deposited with a mutually acceptable third party or official institution (article 11(2)).

CURRENT SITUATION AT NEW ZEALAND LAW

- 133 The Contracts (Privity) Act 1982 applies where one person contracts for the benefit of a sufficiently designated third party and there is no intention that this person should be a contracting party. A third party operator can therefore benefit from a contractual term excluding liability, provided that the contract is governed by New Zealand law. However, if the contract is governed by the law of another country, it is unlikely that either a New Zealand court or a foreign court will permit a third party to sue in reliance on the Contracts (Privity) Act.¹²¹

Effect of the Convention on Himalaya clauses

- 134 Himalaya clauses limit the liability of stevedores and others, including operators, when such persons are mentioned in the relevant bill of lading. The name for the clauses derives from the ship *Himalaya* in the case *Adler v Dickson*,¹²² in which a ship’s master was sued in respect of injuries sustained by a passenger. Himalaya clauses provide an exception to the privity principle that only parties

¹²⁰ See chapter 8 paras 113–114.

¹²¹ See D Goddard “New Zealand’s Contract Statutes: International Transactions” in NZLC R25 *Contract Statutes Review* (Wellington, 1993) paras 7.45–7.48.

¹²² [1955] 1 QB 158, 185. The Court of Appeal held that a clause excluding liability did not prevent the complainant from suing in tort.

to a contract can benefit from its terms, such as a term excluding liability. The contract is between the carrier and the shipper; however, the operator (and his or her agents) benefit from the exclusion.¹²³ In *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)*,¹²⁴ the rationale for the stevedores avoiding liability was that the clause in the bill of lading could be treated as an offer of a unilateral contract; therefore, if those performing the main contract played their part (unloading the cargo), the consignor would hold them free from liability.¹²⁵

- 135 The validity of Himalaya clauses has been the subject of much judicial debate. Where they have been upheld, there are usually dissenting judgments.¹²⁶ However, recently in *The Mahkutai*,¹²⁷ the Privy Council acknowledged that there was a commercial need for such a principle, and considered that there would come a time when these clauses would be recognised as a fully fledged exception to the privity doctrine. Burrows, Finn and Todd agree that giving effect to these clauses reflects commercial realities.¹²⁸ The Hague Rules¹²⁹ on the Carriage of Goods by Sea incorporate this principle in article 4 bis (2) by providing:

If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

- 136 Article 7 provides that the defences to and limits of liability provided for in the Convention apply in any action against the operator, whether it is founded in contract, tort or otherwise. Chatterjee contends that article 13 of the Convention “sounds the death knell” of the Himalaya clause.¹³⁰ Article 13 provides:

Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4, is null and void to the extent that it derogates directly or indirectly from the provisions of this Convention.

¹²³ See sections 4 and 8; and J Burrows, J Finn and S Todd “Law of Contract in New Zealand” (Butterworths, Wellington, 1997) 479.

¹²⁴ [1974] 1 NZLR 505.

¹²⁵ See Burrows, Finn and Todd, above n 123, 472. *The Eurymedon* was decided 3–2 by the Privy Council, which overturned a unanimous decision of the New Zealand Court of Appeal.

¹²⁶ See *Elder Dempster and Co Ltd v Paterson Zochonis and Co Ltd* [1924] AC 522, 548; and *The Eurymedon*, above n 124, 516 and 525. See also the High Court of Australia decision in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231 (*The New York Star*) which was overturned on appeal to the Privy Council. Since becoming the final court in Australia, the High Court has not reconsidered the validity of Himalaya clauses.

¹²⁷ [1996] AC 650, 664–665. Their Lordships stopped short of recognising the exception in this case as they had not heard argument directed specifically at this fundamental question (665 per Lord Goff (for the Board)). Note that as the case was on appeal from the Court of Appeal of Hong Kong, *The Mahkutai* is not binding on New Zealand courts, although it is highly persuasive.

¹²⁸ Above n 123, 474.

¹²⁹ These are contained in the Fifth Schedule to the Maritime Transport Act 1994. See chapter 8 for a discussion of the Hague Rules and their possible successor the Hamburg Rules.

¹³⁰ S Chatterjee “The UN Convention on the Liability of Operators of Transport Terminals in International Trade: The End of the Himalaya Clause?” [1994] JBL 109, 118 and 120.

United Kingdom legislation

- 137 Many international contracts for the carriage of goods by sea specify that the law of the United Kingdom is the applicable law. The doctrine of privity in the United Kingdom has recently been the subject of reform. The Contracts (Rights of Third Parties) Act 1999 (UK) confers on third parties the right to sue under a contract made for their benefit, doing away with the need for judges to engage in “jurisprudential gymnastics” such as relying on an implied contract to avoid the doctrine of privity (as in *The Eurymedon*).¹³¹

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 138 The Convention applies only to “international carriage”, which is defined in article 1(c) as carriage in which the place of departure and the destination are identified as being located in two different States. Therefore, domestic carriage within New Zealand would not be affected if this Convention were adopted.
- 139 While it may be preferable for New Zealand parties to specify New Zealand law as the applicable law in their shipping contracts, where this is not possible then the law of England and Wales may be a preferred option, given its similarities to New Zealand law. A prime consideration in enacting the Contracts (Rights of Third Parties) Act 1999 (UK) was to bring English law into line with the law of Scotland and the majority of European Union States, as well as with that of the United States, New Zealand and some Australian states.¹³²

RECOMMENDATION

- 140 Given that none of New Zealand’s major trading partners is party to the United Nations Convention on the Liability of Operators of Transport Terminals, the Commission sees no benefit in adopting it and thereby introducing further uncertainty into what is already a complicated area of the law. The Contracts (Privity) Act ensures that under New Zealand law a third party operator can rely on exclusion clauses. Moreover, the introduction of similar legislation in the United Kingdom means there is already a degree of commonality with the law governing the majority of shipping contracts.

¹³¹ M Dean “Removing a Blot on the Landscape” [2000] JBL 143, 146.

¹³² Above n 131, 145.

10

UNCITRAL Model Law
on the Procurement of Goods,
Construction and Services

NATURE AND SCOPE OF THE MODEL LAW

- 141 **T**HE MODEL LAW on the Procurement of Goods, Construction and Services was adopted by UNCITRAL at its 27th session in 1994. Without superseding the earlier Model Law on Procurement of Goods and Construction, it extended the scope of the earlier text to include services. As at September 1999, legislation based on the Model Law has been enacted in Albania, Kyrgyzstan, Poland and Slovakia. While sound laws and practices for public sector procurement are desirable in all States, this need is felt particularly in developing countries and countries whose economies are in transition.¹³³ This tendency may explain why the above countries, none of which is a significant trading partner for New Zealand, have adopted the Model Law.
- 142 Traditionally, governments have tended to place procurement contracts with domestic industry, potentially distorting the natural flow of international trade and creating inefficiencies in the global economy.¹³⁴ International agreements can remove discrimination in government supplies contracts and achieve transparency in contract award procedures. The most significant international agreement currently in operation is the Agreement on Government Procurement (GPA), administered by the World Trade Organisation (WTO), which has been signed by 26 out of the 130 WTO member States, most notably Japan, Korea, the United States and the member States of the European Union. Australia is an observer to the GPA.
- 143 Like the Model Law, the GPA applies to goods and services, including construction services. The cornerstone of the Agreement is non-discrimination; parties are required to give the products, services and suppliers of any other party treatment “no less favourable” than that they give to their domestic products, services and suppliers (article III:1). To ensure that access to procurement is available to foreign products, services and suppliers, the GPA heavily emphasises procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement. Disputes between parties to the GPA are subject to the WTO disputes resolution procedure.

¹³³ Explanatory Note to the Model Law on the Procurement of Goods, Construction and Services para 3. This greater need exists because procurement is often connected with projects that are part of the essential process of economic and social development, and these countries in particular suffer from a shortage of public funds to use for procurement.

¹³⁴ S Arrowsmith “Towards a Multilateral Agreement on Transparency in Government Procurement” (1998) 47 ICLQ 793.

- 144 The Model Law and the GPA do not actually differ greatly; to adopt either, or indeed both, would ensure an acceptable international tendering procedure.¹³⁵ However, adoption does carry risks by departing from existing procurement arrangements. Rosenberg identifies four risks:
- Any preference for domestic suppliers may be abandoned.
 - There is limited flexibility in the tendering process.
 - Review mechanisms may result in the cancellation of procurement, which in turn may harm the domestic economy.
 - Opening the procurement process to scrutiny means greater involvement of lawyers and consultants, leading to higher tendering costs (and tender prices).¹³⁶

CURRENT SITUATION AT NEW ZEALAND LAW

- 145 The Model Law in its draft form was considered by the then Department of Justice in 1993, which concluded that there would be difficulty with the prescriptive nature of the Model Law. While the Department supported the Model Law's aims of economic and efficient procurement processes free from artificial barriers, it felt that these aims could be achieved without rigid prescriptive legislation, and that the New Zealand state sector already provided incentives to achieve them without such legislation.¹³⁷ The Law Commission was also consulted, and agreed that legislation in this area was probably not necessary; uniformity could be achieved through guidelines or a handbook. The Law Commission queried whether any one agency in New Zealand would be in a position to give the approvals required by the Model Law, and whether movement towards deregulation, giving greater autonomy to state owned enterprises and Crown entities, may be inconsistent with the imposition of standard procedures in relation to procurement.¹³⁸ To take advantage of foreign governments' preferences for their own local businesses, New Zealand parties can and do operate out of local subsidiaries.

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 146 If a procurement convention were adopted, the main advantage to New Zealand would be an enhanced access to foreign markets. However, this benefit needs to be balanced against the greater rigidity and cost that may be involved in adhering to prescribed tendering procedures. If adoption did proceed, New Zealand might accede to the GPA rather than the Model Law, for the obvious reason that a number of significant trading partners belong to the former agreement, which would mean a greater degree of harmonisation of law governing procurement procedures. The Ministry of Foreign Affairs and Trade (MFAT) considers that the degree of prescription in the GPA would be an issue

¹³⁵ For a comparison of the Model Law and the Agreement on Government Procurement see G Rosenberg "International Construction Procurement – the Developing Regulatory Framework" (1997) 14(2) International Construction Law Review 168.

¹³⁶ Above n 135, 187.

¹³⁷ Correspondence from Department of Justice to the then Ministry of External Relations and Trade dated 21 April 1993.

¹³⁸ Correspondence from the Law Commission to the then Ministry of External Relations and Trade dated 30 April 1993.

for New Zealand's decentralised and deregulated public sector.¹³⁹ However, these qualities are common to the public sectors of other WTO member States. Furthermore, while compliance with the procedures might be problematic for government entities of New Zealand who are procuring goods and services, New Zealand businesses wishing to offer goods and services to other governments would be wise to adhere to the GPA procedures. On the other hand, harmonisation may be achieved without the need for prescriptive legislation. For example, government procurement is the subject of action plans developed at Asia-Pacific Economic Co-operation (APEC), with the objective of achieving free and open procedures among member economies.¹⁴⁰

RECOMMENDATION

- 147 As a small trading nation, New Zealand has much to gain from initiatives such as the GPA which discourage protectionism and open up opportunities for the cross-border provision of goods and services. As responsibility for New Zealand's representation at the WTO lies with the Ministry of Foreign Affairs and Trade, we recommend that MFAT consider whether New Zealand should acquire the status of observer to the GPA, with a view to negotiating accession.
-

¹³⁹ "New Zealand and the WTO" <http://www.mfat.govt.nz/foreign/wto.html> (Ministry of Foreign Affairs and Trade, Wellington, accessed 28 March 2000).

¹⁴⁰ "New Zealand and the International Community" <http://www.mfat.govt.nz/foreign/inter.html> (Ministry of Foreign Affairs and Trade, Wellington, accessed 28 March 2000).

11

UNIDROIT Convention on International Financial Leasing

NATURE AND SCOPE OF THE CONVENTION

- 148 **T**HE CONVENTION ON International Financial Leasing was prepared by the International Institute for the Unification of Private Law (UNIDROIT) and was concluded in 1988. UNIDROIT is an independent intergovernmental organisation based in Rome, whose purpose is to examine ways of harmonising and co-ordinating the private law of States, and to prepare uniform rules of private law. Currently New Zealand is not a member of UNIDROIT, although several of our major trading partners are (including Australia, Japan, the United States, the United Kingdom and Korea).
- 149 This Convention has been signed by 13 countries (including the Philippines, Belgium, the United States and the United Kingdom) and has been ratified or acceded to by France, Italy, Nigeria, Panama, Hungary, Latvia, the Russian Federation and Belarus. As noted above, signature does no more than indicate an intention to ratify in the future and does not bind those countries in any way. Of the parties to the Convention, only France and Italy have any significant trade with New Zealand, and even these countries could not be termed major trading partners.
- 150 One purpose of this Convention is to remove impediments to the cross-border leasing of equipment which are created by differences in the legal systems of States. The second purpose is to provide rules which accommodate the specific characteristics and business needs of financial leasing.
- 151 For the Convention to apply, three conditions must exist:
- a transaction must be a financial leasing transaction (as opposed to an operating lease; article 1);
 - the transaction must be international (whereby the lessor and lessee have their place of business in different States; article 3); and
 - *either* all the parties (lessor, lessee and supplier) have their places of business in Contracting States, *or* the supply and leasing agreements are governed by the law of a Contracting State.
- 152 The Convention is based on the premise that a financial lease is essentially a financial transaction, that in general the lessor ought not be liable to the lessee or third parties in respect of the equipment, and that the lessee should have rights and remedies against the supplier as if the lessee had been a party to the supply agreement. Although there are certain qualifications to this immunity, the broad effect of articles 8 and 10 is to place liability for defective or non-conforming equipment on the person responsible (the supplier), thus

overcoming any legal difficulties created by the doctrine of privity of contract, and to remove it from the lessor who is not normally responsible for the selection of the equipment or the supplier.¹⁴¹ The Convention restricts the lessor's liability to third parties by providing that the lessor shall not, in its capacity as lessor, be liable for death, injury or damage caused by the equipment. The lessor's liability in any other capacity, as owner for example, is unaffected.¹⁴²

- 153 Article 9 requires the lessee to take proper care of the equipment and article 13 prescribes a range of default remedies for the lessor, designed to maintain a fair balance between the parties to the leasing agreement. Article 7 provides a safeguard for the lessor by preserving the lessor's real rights in the equipment against the trustee in bankruptcy and creditors, including those who have obtained an attachment or execution. "Trustee in bankruptcy" includes a liquidator, administrator or anyone appointed to administer the lessee's estate for the benefit of creditors.
- 154 One of the major problems confronting a financial lessor in common law jurisdictions is to make a provision for liquidated damages on default by the lessee which will withstand attack under the rule against penalties.¹⁴³ Article 13 enjoins a court to uphold such provisions unless they would result in damages substantially in excess of the amount that would place the lessor in the position in which it would have been, had the lessee performed the leasing agreement in accordance with its terms.

CURRENT SITUATION AT NEW ZEALAND LAW

- 155 There is no specific body of New Zealand law dealing with the cross-border leasing of equipment. Such transactions would be governed by the terms of the lease, and the proper law of the contract.¹⁴⁴ Instances of bankruptcy among lessees would also be governed by existing mechanisms for cross-border insolvency discussed in NZLC R52 *Cross-Border Insolvency*.

IMPACT OF ADOPTION ON NEW ZEALAND PARTIES

- 156 New Zealand parties to an international financial leasing transaction would be bound by the Convention if all other parties had their places of business in Contracting States, or the supply and leasing agreements specified the law of New Zealand or that of another Contracting State as the applicable law. However, the Convention may be excluded by the agreement of all the parties (article 5).

¹⁴¹ R Goode "The UNIDROIT Convention on International Financial Leasing" Summary No 19 made to United Nations Congress on Uniform Commercial Law in the 21st Century, 18–22 May 1992.

¹⁴² R Goode "Conclusions of the Leasing and Factoring Conventions I" [1988] JBL 347, 348–349.

¹⁴³ Above n 142, 349.

¹⁴⁴ See above n 3 and para 4 regarding applicable law.

RECOMMENDATION

- 157 The Commission considers that, given New Zealand's geographical isolation, international financial leasing transactions are not common and that there is no pressing need to adopt a Convention concerning them. Moreover, given that few of New Zealand's trading partners have adopted this Convention, the Commission concludes that there appears to be no particular advantage to this country in adopting it.
-

12

Insolvency

- 158 **I**N NZLC R50 *Electronic Commerce Part One* para 8 the Law Commission mentioned that this Study Paper would consider the European Convention on Insolvency Proceedings. This Convention was concluded on 23 November 1995, but one member State¹⁴⁵ failed to sign the Convention within the time limit, with the result that it could not enter into force. The Convention was intended to provide a system of mutual recognition and enforcement of judgments in insolvency proceedings.
- 159 Since then, the Law Commission published a further report in February 1999, NZLC R52 *Cross-border Insolvency*, which recommends that New Zealand adopt the UNCITRAL Model Law on Cross-border Insolvency. The Model Law provides a framework to address instances where the insolvent debtor has assets in more than one State. Not being a member State, New Zealand could not have acceded to the European Convention, although the option of passing legislation consistent with the European Convention's provisions would always have been open. However, the Commission has concluded that enacting the Model Law as recommended in NZLC R52 will provide the desired uniformity of approach to the initiation of cross-border proceedings.
- 160 Unlike the European Regulation, which provides a fully harmonised insolvency regime, the Model Law is essentially procedural in nature. It enables local assets to be governed by local law, and does not attempt to unify the substantive insolvency law of individual States.¹⁴⁶ The UNCITRAL Working Group on Insolvency Law is currently considering producing a further text on insolvency proceedings (including liquidations and rehabilitation proceedings). However, this work is still at the preparatory stages.¹⁴⁷

¹⁴⁵ Discussed by O Borch in "The EU Convention on Insolvency Proceedings and Mad Cow Disease" *Insolvency and Restructuring* (Law Business Research, 1998) 9. The provisions of the Convention have now been modified and passed as the European Bankruptcy Regulation which will come into effect in June 2002.

¹⁴⁶ NZLC R52, above n 70, para 8.

¹⁴⁷ See Note of UNCITRAL Secretariat A/CN.9/WG.V/WP.50 paras 1–7. At the 33rd UNCITRAL Session held in June 2000, UNCITRAL approved the recommendations of the Working Group and mandated the preparation of a set of principles with a legislative guide. A colloquium on insolvency is to be held before the next session of the Working Group, in co-operation with the International Federation of Insolvency Practitioners (INSOL International) and the International Bar Association.

Work in progress

- 161 **T**HE CONVENTIONS discussed in this chapter are not yet finalised, so any recommendation as to whether New Zealand should adopt them would be premature. However, because these Conventions are potentially useful additions to New Zealand's international trade law, we discuss their subject matter and recommend that their progress be monitored with a view to considering their adoption at some time in the future.

HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS

- 162 In NZLC R50 para 8, the Commission expressed its intention to consider in a subsequent report whether New Zealand should adopt various conventions on the recognition of foreign judgments. Specifically, the Commission sought submissions on the possibility of New Zealand adapting and adopting the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.¹⁴⁸ The Lugano Convention extended to the whole of Western Europe the regime of the Brussels Convention regarding the mutual recognition of civil judgments. We did not consider the provisions of the Brussels Convention any further, as its membership is limited to the European Union.
- 163 While considering submissions made on this topic, with a view to making a recommendation in the subsequent report NZLC R58, it became apparent to the Commission that the Brussels and Lugano Conventions were being overtaken by developments at the Hague Conference on Private International Law. Since 1992 the Hague Conference has been working towards a draft Convention on jurisdiction and foreign judgments in civil and commercial matters. At the time of writing NZLC R58, October 1999, the Hague Conference was finalising the first complete draft of its Convention. The Commission therefore deferred making any recommendations regarding issues of jurisdiction and judgments.¹⁴⁹
- 164 The Law Commission intends to discuss these issues in its third report on electronic commerce, to be published towards the end of 2000. Accordingly, the proposed Hague Conference Convention is discussed only briefly in this Study Paper. Some background information on the work of the Hague Conference is also provided. While it was originally hoped that the Hague

¹⁴⁸ NZLC R50, above n 70, para 307.

¹⁴⁹ See NZLC R58, above n 44, chapter 6, in particular para 282.

Conference Convention would be concluded at a Diplomatic Conference to be held towards the end of 2000, disagreement among the negotiating States as to both the contents of the Convention and the general working methods of the Conference has stalled proceedings somewhat.

Electronic commerce issues

- 165 The draft Hague Conference Convention is intended to apply to international litigation in civil and commercial matters generally, rather than just in the area of electronic commerce. However, as noted in NZLC R58, it is important that electronic commerce issues are considered when formulating the draft Convention, as a significant and increasing proportion of cross-border transactions will take place electronically.¹⁵⁰ Where a dispute arises in relation to a transaction, and one party wants to obtain and enforce a court order against a party in another State, an international convention establishing which court has jurisdiction and how a judgment can be enforced will be very relevant.
- 166 The New Zealand representative at the October 1999 meeting of the Hague Conference, Mr David Goddard, Barrister, has subsequently attended a roundtable discussion¹⁵¹ with other Hague Conference delegates to consider the extent to which the provisions of the draft Convention might require modification to meet the needs of electronic commerce.

Nature and scope of the draft Convention

Jurisdiction

- 167 Chapter two of the draft Convention outlines the bases for determining the State in which courts will have jurisdiction to hear disputes arising under the Convention. As a general rule, a defendant may be sued in the State where he or she is habitually resident. Article 3 outlines the criteria for determining whether an entity or person other than a natural person will be considered to be habitually resident.
- 168 The Convention provides rules for determining jurisdiction where there is an action for breach of a general supply contract,¹⁵² consumer contract¹⁵³ or employment contract,¹⁵⁴ actions in tort¹⁵⁵ or regarding a trust,¹⁵⁶ and proceedings concerning immovable property, legal persons, public registers, and patents, trademarks and similar rights (but not copyright).¹⁵⁷
- 169 When the same parties are engaged in proceedings based on the same causes of action in courts of two or more States, the court second seised must suspend proceedings if the court first seised has jurisdiction, unless the court second seised has exclusive jurisdiction under articles 4 or 13. The court second seised

¹⁵⁰ Above n 44, paras 279–281.

¹⁵¹ Held in March 2000 in Ottawa, Canada.

¹⁵² Article 6.

¹⁵³ Article 7.

¹⁵⁴ Article 8.

¹⁵⁵ Article 10.

¹⁵⁶ Article 12.

¹⁵⁷ Article 13.

shall decline jurisdiction as soon as it is presented with a judgment from the court first seised which complies with the Convention. Article 22(3)–(7) outlines circumstances under which the court second seised may proceed to hear the case. Under article 24, a court may decline jurisdiction in exceptional circumstances if it is clearly inappropriate for that court to hear proceedings, and a court in another State is clearly more appropriate to resolve the dispute. However article 24 cannot be invoked where jurisdiction is based on an agreement between the parties under article 4, or articles 7, 8 or 13.

Recognition and enforcement

- 170 Article 25 defines “judgment” for the purposes of the recognition and enforcement provisions of the Convention. The current definition includes provisional orders in accordance with article 14(1).
- 171 Article 27 bis lists grounds on which recognition or enforcement may be refused, which include defective notice to the defendant, and fraud. However the court addressed should not enter into a consideration of the merits of the judgment given by the court of origin.

General

- 172 The remaining provisions give guidelines to interpretation and provide for regular reviews of the Convention. Regarding the relationship between this Convention and other international instruments for the same issues of jurisdiction and enforcement of judgments, three proposals are outlined in an annex to the draft. The Conference is yet to agree on how this Convention will relate to the Brussels and Lugano Conventions, and other uniform laws based on special ties of a regional or other nature (which could include existing and future reciprocal arrangements between Australia and New Zealand).

Observations

- 173 It is possible that disputes over the working methods of the Conference might preclude the Convention from being finalised. Its progress will be discussed in the Commission’s third report on electronic commerce, to be published towards the end of this year.
- 174 However, the Commission does note that the New Zealand representative’s significant contribution to the Hague Conference to date means that a final document is likely to be relevant to and compatible with New Zealand law and procedure. This Convention has the potential to facilitate the granting and enforcement of judgments against a party in another State, which should in turn increase confidence and certainty of New Zealand parties in international dealings. The presence of an effective regime for the reciprocal enforcement of judgments can work to New Zealand’s advantage when negotiating contracts with overseas parties. The current provisions of the Reciprocal Enforcement of Judgments Act 1934¹⁵⁸ cannot be invoked in respect of several of New Zealand’s

¹⁵⁸ For a discussion of this Act and its limitations, see D Goddard “Global Disputes – Jurisdiction, Interim Relief and Enforcement of Judgments” paper delivered to the NZLS Conference, Rotorua, April 1999.

important trading partners, including the United States, Japan and Canada. It is somewhat ironic that while United States Federal Courts can enforce New Zealand arbitral awards under the 1958 New York Convention, the process for enforcing judgments is much more complicated. We therefore recommend that the progress of this Convention be followed closely and that, if completed, consideration be given to its adoption by New Zealand.

DRAFT UNCITRAL CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

Nature and scope of the Convention

- 175 Work is in progress at UNCITRAL on a draft Convention governing international accounts receivable financing. Determining which legal regime governs the many issues that may arise from an assignment of a receivable in the international context can be a daunting task that makes some transactions more expensive or uncertain and discourages others altogether.¹⁵⁹ The UNCITRAL Working Group on Contractual Practices hopes to produce a Convention that will minimise these difficulties.
- 176 One issue the Working Group has encountered is which transactions will be covered by the draft Convention. It is not intended that it should apply to wholly domestic transactions. The prevailing view is that both “international receivables” (arising from contracts between parties in different countries) and domestic receivables assigned to a party in another country should be covered. The Convention should apply to both outright transfers of receivables, and transfers as security for an obligation.¹⁶⁰
- 177 A further issue is to what extent the Convention should apply where some parties to an international assignment are not Contracting States. An assignor that assigns the same receivable to two different assignees in different countries may create a situation in which the Convention governs one assignment but not the other. This outcome would create difficulties in determining the priority rules that govern the rights of assignees against third parties. It is likely, therefore, that the finalised Convention will provide that for most issues only the assignor need be based in a Contracting State.¹⁶¹
- 178 The Working Group has also been debating whether there should be a requirement for transfers of interests in accounts receivable to be in writing and signed, as is the case under United States law. Such a requirement would be inconsistent with business practices in some nations and might cause some disruption in otherwise well-functioning markets. It is likely that the Convention will contain one or more alternatives to a writing requirement.¹⁶²

¹⁵⁹ G McLaughlin and N Cohen “Efforts to Harmonize International Receivables Financing” *New York Law Journal* 19 November 1997 <http://www.ljx.com/practice/intrade/1119itreceive.html> (last accessed 2 November 2000).

¹⁶⁰ A similar provision is contained in article 9 of the United States Uniform Commercial Code.

¹⁶¹ Above n 139. See also articles 1(a) and 3 of the draft Convention version A/CN.9/466 of 2 November 1999.

¹⁶² Above n 139. See also article 6(d) of the draft Convention version A/CN.9/466 of 2 November 1999, which defines “writing” as any form of information that is accessible so as to be usable for subsequent reference. This technologically neutral provision is consistent with the meaning ascribed to “writing” in other UNCITRAL texts on electronic commerce and electronic signatures.

- 179 The core of secured credit law is its perfection and priority rules. In the United States, perfection of a security interest can be effected by filing a financing statement and, in general, priority follows a simple first-to-file rule. New Zealand is moving towards adopting a similar system with the introduction of the Personal Properties and Securities Act 1999. However, in many countries there is no filing system; in these instances, priority may be determined by which claimant's interest was created first, or by which claimant first notified the debtor of the assignment of the interest.¹⁶³ The Convention is likely to accommodate different systems by providing that assignments governed by the Convention are to be governed by the law of the assignor's State.¹⁶⁴ While this approach does not achieve uniformity of law for determining priority, it should remove uncertainty as to which legal rules apply, which in turn should reduce the cost of many international transactions.¹⁶⁵

Current situation at New Zealand law

- 180 Part 2 of the Personal Property and Securities Act 1999 provides some guidance as to when New Zealand law applies to the validity, perfection, and the effect of perfection or non-perfection of a security interest. In particular, section 30 provides that the law of the jurisdiction where the debtor is located applies when the security interest is in an intangible.

UNIDROIT Convention on International Factoring

- 181 The UNIDROIT Convention on International Factoring was concluded at the same time as the Convention on International Financial Leasing in 1988. Its purpose is to encourage international factoring by facilitating the assignment of receivables.
- 182 The Convention is notable for its article 6 which endorses the principle that assignment clauses are valid regardless of any ban on them stipulated in the contract of sale. This provision has increased access to sources of finance for small and medium-sized suppliers, and strengthened their position with regard to the debtor protection argument championed by larger businesses.¹⁶⁶ However this rule does not apply where a debtor has its place of business in a Contracting State which has made a declaration to that effect in the Convention.¹⁶⁷
- 183 This Convention has been signed by 14 countries (including the Philippines, Belgium, the United States and the United Kingdom) and has been ratified or acceded to by France, Italy, Nigeria, Germany, Hungary and Latvia. As noted above, signature does no more than indicate an intention to ratify in the future and does not bind those countries in any way. Of the parties to the Convention, only France, Germany and Italy have any significant trade with New Zealand, and even these countries could not be termed major trading partners.

¹⁶³ The right to notify the debtor is preserved in article 15 of the draft Convention version A/CN.9/466 of 2 November 1999.

¹⁶⁴ See article 24 of the draft Convention version A/CN.9/466 of 2 November 1999.

¹⁶⁵ Above n 139.

¹⁶⁶ U Brink "New German Legislation Opens Door to Ratification of UNIDROIT Factoring Convention" (1998) 4 Uniform Law Review, 770–772.

¹⁶⁷ R Goode "Conclusion of the Leasing and Factoring Conventions II" [1988] JBL 510, 511. France made such a declaration under article 6(1) when ratifying the Convention.

Furthermore, the subject of the Convention appears to have been superseded by the UNCITRAL work on the Convention on Assignment in Receivables Financing. The Commission therefore makes no further recommendation with regard to the UNIDROIT Convention.

RECOMMENDATION

- 184 Given that New Zealand has so recently enacted a statute dealing with the perfection of security interests including conflict of laws provisions, consideration of the draft UNCITRAL Convention on Assignment in Receivables Financing should perhaps be deferred until such time as the effect of the Personal Properties and Securities Act can be assessed. However, it may be of benefit to New Zealand to adopt the Convention once it is completed. It is recommended that the Ministry of Economic Development monitor the progress of both the UNCITRAL and the UNIDROIT Conventions and determine whether any changes to the Personal Properties and Securities Act are required as a result.
-

APPENDIX A

Major trading partners of New Zealand

TABLE 1: Exports by destination for years ending July 1999–2000

<i>Top 10 countries</i>	1999	2000*
	M\$	M\$
1 Australia	4908	5553
2 United States	3025	3797
3 Japan	2909	3440
4 United Kingdom	1465	1559
5 Republic of Korea	902	756
6 People's Republic of China	618	756
7 Hong Kong (Special Administrative Region)	544	721
8 Germany	608	654
9 Taiwan, Province of China	555	630
10 Malaysia	418	499

* Provisional figures

Source: Statistics New Zealand

TABLE 2: Imports by country of origin for years ending July 1999–2000

<i>Top 10 countries</i>	1999	2000*
	M\$	M\$
1 Australia	5453	6943
2 United States	4269	5241
3 Japan	3149	3441
4 People's Republic of China	1262	1658
5 Germany	1078	1200
6 United Kingdom	1049	1166
7 Malaysia	548	703
8 France	477	686
9 Republic of Korea	536	676
10 Taiwan, Province of China	544	652

* Provisional figures

Source: Statistics New Zealand

APPENDIX B

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

(Concluded March 18, 1970)

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression “other judicial act” does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify –

- a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- b) the names and addresses of the parties to the proceedings and their representatives, if any;
- c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* –

- e) the names and addresses of the persons to be examined;
- f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- g) the documents or other property, real or personal, to be inspected;
- h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

- a) under the law of the State of execution; or
- b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

- a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
- b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II – TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

- a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In civil or commercial matters, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State, if –

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence –

- a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
- b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
- c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
- d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
- e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

- a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
- b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
- c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

- a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- b) the provisions of Article 4 with respect to the languages which may be used;
- c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- f) the provisions of Article 14 with respect to fees and costs;
- g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8–16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

- a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
- d) any withdrawal or modification of the above designations and declarations;
- e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

- a) the signatures and ratifications referred to in Article 37;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- c) the accessions referred to in Article 39 and the dates on which they take effect;
- d) the extensions referred to in Article 40 and the dates on which they take effect;
- e) the designations, reservations and declarations referred to in Articles 33 and 35;
- f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

APPENDIX C

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

(Concluded November 15, 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

- a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –

- a) the employment of a judicial officer or of a person competent under the law of the State of destination,
- b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

- a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
- b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

- a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
- b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

- a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
- b) the language requirements of the third paragraph of Article 5 and Article 7,
- c) the provisions of the fourth paragraph of Article 5,
- d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

- a) the designation of authorities, pursuant to Articles 2 and 18,
- b) the designation of the authority competent to complete the certificate pursuant to Article 6,
- c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

- a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
- b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
- c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has

entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

- a) the signatures and ratifications referred to in Article 26;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
- c) the accessions referred to in Article 28 and the dates on which they take effect;
- d) the extensions referred to in Article 29 and the dates on which they take effect;

- e) the designations, oppositions and declarations referred to in Article 21;
- f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

FORMS (REQUEST AND CERTIFICATE)
SUMMARY OF THE DOCUMENT TO BE SERVED
(annexes provided for Articles 3, 5, 6 and 7)

ANNEX TO THE CONVENTION

Forms

REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or
Commercial Matters,
signed at The Hague, the 15th of November 1965.

Identity and address of the applicant	Address of receiving authority
--	-----------------------------------

The undersigned applicant has the honour to transmit – in duplicate – the documents listed
below and, in conformity with Article 5 of the above-mentioned Convention, requests
prompt service of one copy thereof on the addressee, *i.e.*,
(identity and address)

.....
.....

- a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of Article 5
of the Convention.*
b) in accordance with the following particular method (sub-paragraph (b) of the first
paragraph of Article 5)*:

.....
.....

- c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of
Article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the
documents - and of the annexes* - with a certificate as provided on the reverse side.

List of documents

.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

Done at , the
Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with Article 6 of the Convention,

1) that the document has been served*

- the (date)

- at (place, street, number)

– in one of the following methods authorised by Article 5:

a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of Article 5 of the Convention*.

b) in accordance with the following particular method*:

c) by delivery to the addressee, who accepted it voluntarily.*

The documents referred to in the request have been delivered to:

- (identity and description of person)

-

- relationship to the addressee (family, business or other):

-

2) that the document has not been served, by reason of the following facts*:

In conformity with the second paragraph of Article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Annexes

Documents returned:

In appropriate cases, documents establishing the service:

Done at , the

Signature and/or stamp.

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or
Commercial Matters,
signed at The Hague, the 15th of November 1965.
(Article 5, fourth paragraph)

Name and address of the requesting authority:

.....
.....
.....

Particulars of the parties*:

.....
.....
.....

JUDICIAL DOCUMENT**

Nature and purpose of the document:

.....
.....
.....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:

.....
.....
.....

Date and place for entering appearance**:

.....
.....

Court which has given judgment**:

.....
.....

Date of judgment**:

.....

Time-limits stated in the document**:

.....
.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:

.....
.....
.....

Time-limits stated in the document**:

.....
.....
.....

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

Bibliography

REPORTS

Australian Law Reform Commission *Legal Risk in International Transactions* (ALRC R80, Canberra, 1996)

Commonwealth Secretariat *Recognition and Enforcement of Judgments and Orders and the Service of Process in the Commonwealth* (Report of a Working Meeting held at Basseterre, St Kitts, 24–28 April 1978)

Foreign Affairs, Defence and Trade Committee “Review of the International Treaty Examination Process” [1999] AJHR I 4E

New Zealand Law Commission *Adoption: Options for Reform* (NZLC PP38, Wellington, 1999)

New Zealand Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, Wellington, 1996)

New Zealand Law Commission *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, Wellington, 1997)

New Zealand Law Commission *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50, Wellington, 1998)

New Zealand Law Commission *Electronic Commerce Part Two: A Basic Legal Framework* (NZLC R58, Wellington, 1999)

New Zealand Law Commission *Evidence* (NZLC R55, Wellington, 1999)

TEXTS

J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997)

D Campbell (ed) *The Comparative Law Yearbook of International Business* (Kluwer, London, 1998)

A Dicey and J Morris *The Conflict of Laws* (Sweet & Maxwell, London, 1993)

D McClean *International Judicial Assistance* (Clarendon Press, Oxford, 1992)

C Schmitthoff *The Law & Practice of International Trade* (Stevens & Sons, London, 1990)

Laws NZ Banking (Butterworths, Wellington, 1999)

Laws NZ Sale of Goods (Butterworths, Wellington, 1995)

Laws NZ Conflict of Laws: Jurisdiction and Foreign Judgments (Butterworths, Wellington, 1996)

Laws NZ Limitation of Civil Proceedings (Butterworths, Wellington, 1993)

ARTICLES AND PAPERS

S Arrowsmith “Towards a Multilateral Agreement on Transparency in Government Procurement” (1998) 47 ICLQ 793

E Bergsten “UNCITRAL Model Law on International Credit Transfers” [1991] 7 JIBL 276

L Bøjer “International Credit Transfers: The Proposed EC Directive compared with the UNCITRAL Model Law” [1995] 6 JIBL 223

O Borch “The EU Convention on Insolvency Proceedings and Mad Cow Disease” *Insolvency and Restructuring* (Law Business Research, 1998)

U Brink "New German Legislation Opens Door to Ratification of UNIDROIT Factoring Convention" (1998) 4 Uniform Law Review 770

S Chatterjee "The UN Convention on the Liability of Operators of Transport Terminals in International Trade: The End of the Himalaya Clause?" (1994) JBL 109

D Goddard "Does the Internet Require New Norms?", International Law Forum 2 (2000) 183

R Goode "Conclusions of the Leasing and Factoring Conventions I" [1988] JBL 347

R Goode "Conclusion of the Leasing and Factoring Conventions II" [1988] JBL 510

L Gorton "Draft UNCITRAL Convention on Independent Guarantees" [1997] JBL 240

J Hodder "Trans-Tasman Business Law: Coordinating, Not Harmonising" 23 TCL 33 1

W Kennett "The Production of Evidence within the European Community" (1993) 56 MLR 342

G Rosenberg "International Construction Procurement – the Developing Regulatory Framework" (1997) 14(2) International Construction Law Review 168

G Shapira "UNCITRAL and its Work – Harmonisation and Unification of International Trade Law" [1992] NZLJ 309

M Sneddon "The UNCITRAL Draft Convention on Independent Guarantees and Standby Letters of Credit" (1995) 23 Australian Business LR 145

S Thompson "The Hamburg Rules: Should they be implemented in Australia and New Zealand?" (1992) 4 Bond LR 168

AJ Waldron "The Hamburg Rules – a Boondoggle for Lawyers?" (1991) JBL 305

P Zohrab "Stand-by Letters of Credit: Fortex" [1996] NZLJ 392

CASES

Adler v Dickson [1955] 1 QB 158

Attorney General for Canada v Attorney-General for Ontario [1937] AC 326

Cruickshank v Westpac Banking Corporation [1989] 1 NZLR 114

Dovey v Bank of New Zealand (2000) 6 NZBLC 102, 953; (2000) 9 TCLR 263

Elder Dempster and Co Ltd v Paterson Zochonis and Co Ltd [1924] AC 522

Fortex Group Ltd (in rec & liq) v New Zealand Meat Producers Board HC Wellington, CP 118/95, 16 June 1995

Garcin v Amerindo Investment Advisors Ltd [1992] ILPr 496

Government of India v Taylor [1955] AC 491

Mardorf Peach v Attica Sea Carriers [1977] AC 850, 880

New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon) [1974] 1 NZLR 505

Plumley v Ellis [1997] 2 NZLR 105

Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star) (1978) 139 CLR 231

Re [A] Films Limited [1993] DCR 970

Re State of Norway [1989] 1 All ER 745

Royal Products Ltd v Midland Bank Ltd [1981] 2 Lloyd's LR 194

Texas Steamship Co Ltd v The Brimnes (Owners) [1975] QB 929

The Mahkutai [1996] AC 650

UNPUBLISHED

Hon Justice Baragwanath "Changes in International and Domestic Law which are Critical to a Borderless World of Electronic Commerce" (presented at APEC Conference, Auckland, 6 September 1999) available at <http://www.lawcom.govt.nz/speeches/apec060999.htm>

Commission on Banking Technique and Practice policy statement, 21 June 1999, http://www.iccwbo.org/home/statements_rules/statements/1999/un_letters_of_credit_and_independant_guarentees_endorsement.asp (accessed 1 November 2000)

D Goddard "Global Disputes – Jurisdiction, Interim Relief and Enforcement of Judgments" paper delivered to the NZLS Conference (Rotorua, April 1999)

R Goode "The UNIDROIT Convention on International Financial Leasing" Summary No 19 made to United Nations Congress on Uniform Commercial Law in the 21st Century, 18–22 May 1992

G McLaughlin and N Cohen "Efforts to Harmonize International Receivables Financing" New York Law Journal 19 November 1997 <http://www.ljx.com/practice/intrade/1119itreceive.html> (accessed 2 November 2000)

"New Zealand and the International Community" <http://www.mfat.govt.nz/foreign/inter.html> (Ministry of Foreign Affairs and Trade, Wellington, accessed 28 March 2000)

"New Zealand and the WTO" <http://www.mfat.govt.nz/foreign/wto.html> (Ministry of Foreign Affairs and Trade, Wellington, accessed 28 March 2000)

OTHER LAW COMMISSION PUBLICATIONS

Report series

NZLC R1	Imperial Legislation in Force in New Zealand (1987)
NZLC R2	Annual Reports for the years ended 31 March 1986 and 31 March 1987 (1987)
NZLC R3	The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987)
NZLC R4	Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
NZLC R5	Annual Report 1988 (1988)
NZLC R6	Limitation Defences in Civil Proceedings (1988)
NZLC R7	The Structure of the Courts (1989)
NZLC R8	A Personal Property Securities Act for New Zealand (1989)
NZLC R9	Company Law: Reform and Restatement (1989)
NZLC R10	Annual Report 1989 (1989)
NZLC R11	Legislation and its Interpretation: Statutory Publications Bill (1989)
NZLC R12	First Report on Emergencies: Use of the Armed Forces (1990)
NZLC R13	Intellectual Property: The Context for Reform (1990)
NZLC R14	Criminal Procedure: Part One: Disclosure and Committal (1990)
NZLC R15	Annual Report 1990 (1990)
NZLC R16	Company Law Reform: Transition and Revision (1990)
NZLC R17(S)	A New Interpretation Act: To Avoid "Prolixity and Tautology" (1990) (and Summary Version)
NZLC R18	Aspects of Damages: Employment Contracts and the Rule in <i>Addis v Gramophone Co</i> (1991)
NZLC R19	Aspects of Damages: The Rules in <i>Bain v Fothergill</i> and <i>Joyner v Weeks</i> (1991)
NZLC R20	Arbitration (1991)
NZLC R21	Annual Report 1991 (1991)
NZLC R22	Final Report on Emergencies (1991)
NZLC R23	The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance (1992)
NZLC R24	Report for the period 1 April 1991 to 30 June 1992 (1992)
NZLC R25	Contract Statutes Review (1993)
NZLC R26	Report for the year ended 30 June 1993 (1993)
NZLC R27	The Format of Legislation (1993)
NZLC R28	Aspects of Damages: The Award of Interest on Money Claims (1994)
NZLC R29	A New Property Law Act (1994)
NZLC R30	Community Safety: Mental Health and Criminal Justice Issues (1994)
NZLC R31	Police Questioning (1994)
NZLC R32	Annual Report 1994 (1994)
NZLC R33	Annual Report 1995 (1995)
NZLC R34	A New Zealand Guide to International Law and its Sources (1996)
NZLC R35	Legislation Manual: Structure and Style (1996)
NZLC R36	Annual Report 1996 (1996)
NZLC R37	Crown Liability and Judicial Immunity: A response to <i>Baigent's</i> case and <i>Harvey v Derrick</i> (1997)
NZLC R38	Succession Law: Homicidal Heirs (1997)

NZLC R39	Succession Law: A Succession (Adjustment) Act (1997)
NZLC R40	Review of the Official Information Act 1982 (1997)
NZLC R41	Succession Law: A Succession (Wills) Act (1997)
NZLC R42	Evidence Law: Witness Anonymity (1997)
NZLC R43	Annual Report 1997 (1997)
NZLC R44	Habeas Corpus: Procedure (1997)
NZLC R45	The Treaty Making Process: Reform and the Role of Parliament (1997)
NZLC R46	Some Insurance Law Problems (1998)
NZLC R47	Apportionment of Civil Liability (1998)
NZLC R48	Annual Report (1998)
NZLC R49	Compensating the Wrongly Convicted (1998)
NZLC R50	Electronic Commerce Part One: A Guide for the Legal and Business Community (1998)
NZLC R51	Dishonestly Procuring Valuable Benefits (1998)
NZLC R52	Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency? (1999)
NZLC R53	Justice: The Experiences of Māori Women : Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei (1999)
NZLC R54	Computer Misuse (1999)
NZLC R55	Evidence (1999)
NZLC R56	Annual Report (1999)
NZLC R57	Retirement Villages (1999)
NZLC R58	Electronic Commerce Part Two: A Basic Legal Framework (1999)
NZLC R59	Shared Ownership of Land (1999)
NZLC R60	Costs in Criminal Cases (2000)
NZLC R61	Tidying the Limitation Act (2000)
NZLC R62	Coroners (2000)
NZLC R63	Annual Report 2000 (2000)
NZLC R64	Defaming Politicians: A Response to <i>Lange v Atkinson</i>
NZLC R65	Adoption and Its Alternatives: A Different Approach and a New Framework (2000)
NZLC R66	Criminal Prosecution (2000)
NZLC R67	Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information (2000)

Study Paper series

NZLC SP1	Women's Access to Legal Services (1999)
NZLC SP2	Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce (1999)
NZLC SP3	Protecting Construction Contractors (1999)
NZLC SP4	Recognising Same-Sex Relationships (1999)

Preliminary Paper series

NZLC PP1	Legislation and its Interpretation: The Acts Interpretation Act 1924 and Related Legislation (discussion paper and questionnaire) (1987)
NZLC PP2	The Accident Compensation Scheme (discussion paper) (1987)
NZLC PP3	The Limitation Act 1950 (discussion paper) (1987)

NZLC PP4	The Structure of the Courts (discussion paper) (1987)
NZLC PP5	Company Law (discussion paper) (1987)
NZLC PP6	Reform of Personal Property Security Law (report by Prof JH Farrar and MA O'Regan) (1988)
NZLC PP7	Arbitration (discussion paper) (1988)
NZLC PP8	Legislation and its Interpretation (discussion and seminar papers) (1988)
NZLC PP9	The Treaty of Waitangi and Māori Fisheries – Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi (background paper) (1989)
NZLC PP10	Hearsay Evidence (options paper) (1989)
NZLC PP11	“Unfair” Contracts (discussion paper) (1990)
NZLC PP12	The Prosecution of Offences (issues paper) (1990)
NZLC PP13	Evidence Law: Principles for Reform (discussion paper) (1991)
NZLC PP14	Evidence Law: Codification (discussion paper) (1991)
NZLC PP15	Evidence Law: Hearsay (discussion paper) (1991)
NZLC PP16	The Property Law Act 1952 (discussion paper) (1991)
NZLC PP17	Aspects of Damages: Interest on Debt and Damages (discussion paper) (1991)
NZLC PP18	Evidence Law: Expert Evidence and Opinion Evidence (discussion paper) (1991)
NZLC PP19	Apportionment of Civil Liability (discussion paper) (1992)
NZLC PP20	Tenure and Estates in Land (discussion paper) (1992)
NZLC PP21	Criminal Evidence: Police Questioning (discussion paper) (1992)
NZLC PP22	Evidence Law: Documentary Evidence and Judicial Notice (discussion paper) (1994)
NZLC PP23	Evidence Law: Privilege (discussion paper) (1994)
NZLC PP24	Succession Law: Testamentary Claims (discussion paper) (1996)
NZLC PP25	The Privilege Against Self-Incrimination (discussion paper) (1996)
NZLC PP26	The Evidence of Children and Other Vulnerable Witnesses (discussion paper) (1996)
NZLC PP27	Evidence Law: Character and Credibility (discussion paper) (1997)
NZLC PP28	Criminal Prosecution (discussion paper) (1997)
NZLC PP29	Witness Anonymity (discussion paper) (1997)
NZLC PP30	Repeal of the Contracts Enforcement Act 1956 (discussion paper) (1998)
NZLC PP31	Compensation for Wrongful Conviction or Prosecution (discussion paper) (1998)
NZLC PP32	Juries in Criminal Trials: Part One (discussion paper) (1998)
NZLC PP33	Defaming Politicians: A response to <i>Lange v Atkinson</i> (discussion paper) (1998)
NZLC PP34	Retirement Villages (discussion paper) (1998)
NZLC PP35	Shared Ownership of Land (discussion paper) (1999)
NZLC PP36	Coroners: A Review (discussion paper) (1999)
NZLC PP37	Juries in Criminal Trials: Part Two (discussion paper) (1999)
NZLC PP38	Adoption: Options for Reform (discussion paper) (1999)
NZLC PP39	Limitation of Civil Actions (discussion paper) (2000)
NZLC PP40	Misuse of Enduring Powers of Attorney (discussion paper) (2000)
NZLC PP41	Battered Defendants: Victims of Domestic Violence Who Offend (discussion paper) (2000)
NZLC PP42	Acquittal Following Perversion of the Course of Justice: A Response to <i>R v Moore</i> (discussion paper) (2000)