

# Developments in Private International Law: Facilitating Cross-border Transactions and Dispute Resolution

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The year 2005 was a banner year for the three major intergovernmental organizations involved in harmonization of private international law.<sup>1</sup> The Hague Conference on Private International Law completed its long-awaited Convention on Choice of Court Agreements. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Convention on the Use of Electronic Communications in International Contracts which was endorsed by the U.N. General Assembly. While the International Institute for the Unification of Private Law (UNIDROIT) did not complete work on any project in 2005, the deposit of the eighth instrument of ratification in November 2005 brought its Convention on International Interests in Mobile Equipment and an Aircraft Protocol into force.

## I. The Hague Conference

### A. BACKGROUND OF THE CHOICE OF COURT CONVENTION

On June 30, 2005, the Hague Conference on Private International Law concluded the Convention on Choice of Court Agreements<sup>2</sup> in a formal signing in the Peace Palace, after

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1. For an introduction to these intergovernmental institutions and their working methods, see Peter Winship, *International Harmonization of Private Law*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS 157-186 (Marylin J. Raisch & Roberta I. Shaffer eds., 1995).

2. Hague Convention on Choice of Court Agreements art. 21, June 30, 2005, 44 I.L.M. 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) [hereinafter Choice of Court Convention].

almost thirteen years of negotiations on jurisdiction and judgments.<sup>3</sup> The Hague Conference on Private International Law, beginning in 1992-93, labored to create a multilateral convention on jurisdiction and the enforcement of judgments.<sup>4</sup> The Hague Conference's undertaking to work on a general convention on the recognition and enforcement for foreign judgments was generated largely by the suggestion of the United States. The United States, not a party to any bilateral or multilateral convention on the enforcement of foreign judgments, sought to find a means for private parties to enforce foreign judgments outside of the United States without relitigation and to "level the playing field" for litigants in the United States.<sup>5</sup> The convention was designed to help the "middle class litigant,"<sup>6</sup> not just the large multinational corporations who already could afford to resolve their transnational disputes with arbitration.

Much has been written about the history of the negotiations and the problems that plagued it, from an initial 1999 draft that was a copy of the Brussels Convention<sup>7</sup> to the 2001 Interim Draft that was a consensus version with multiple options and 201 footnotes.<sup>8</sup> Many of the obstacles to the conclusion of a comprehensive jurisdiction and judgments convention to which the United States would be a party were not apparent at the beginning of the decade when negotiations began but arose much later, including the rise of the internet and electronic commerce, the role of the consumer, and the increased integration of the European Community.<sup>9</sup> The documents of the Hague Conference itself point out many of the problems.<sup>10</sup> The negotiations on a comprehensive convention ultimately stalled

3. For a more detailed discussion of the June 30, 2005 Convention, see Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 901 (2006). Portions of this article appeared in the earlier work. See also Peter Trooboff, *Foreign Judgments: International Law*, NAT'L L.J., Oct. 17, 2005, at P13 (discussing the new Hague Convention on Choice of Court Agreements).

4. There is extensive literature on the Hague jurisdiction and judgments negotiations and drafts. See generally SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003); LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 151 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) [hereinafter LAW AND JUSTICE]; Ronald A. Brand, *Jurisdictional Common Ground: In Search of a Global Convention*, in LAW AND JUSTICE, at 11; Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002); Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections of the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17 (1998).

5. See generally Peter Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263 (John J. Barcelo & Kevin M. Clermont eds., 2002).

6. Peter Trooboff, a member of the U.S. delegation, frequently used this expression when advocating for a comprehensive judgments convention. See *id.* at 263.

7. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2. The Brussels Convention was replaced by EU Regulation 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Mar. 1, 2002, 2001 O.J. (L 12) 1, amended by, 2002 O.J. (L 225) 1.

8. The 2001 draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, which was held from June 6-22, 2001. The draft text can be found at the Hague Conference's website, see Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, available at [http://www.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf) (last visited Feb. 27, 2006).

9. See Fausto Pocar, *The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in The Hague?*, in LAW AND JUSTICE, *supra* note 4, at 191.

10. Following the June 2001 diplomatic session, there were informal meetings among different member

and a decision was made after 2001 to put the comprehensive convention on hold. The Hague Conference instead began work on a smaller, scaled-back convention that would address choice of court clauses in the commercial context and provide an analogue for litigation to the Convention on Recognition and Enforcement of Foreign Arbitral Awards—the New York Convention. Following three meetings of an informal Working Group, two Special Commissions, one in December 2003 and one in April 2004, a final text was completed and signed at the end of a three-week diplomatic session in June 2005.<sup>11</sup>

## B. THE STRUCTURE OF THE CONVENTION

The Choice of Court Convention is first and foremost a tool for transaction planning and for subsequent dispute resolution, validating party autonomy through upholding choice of court agreements and enforcing judgments resulting from exclusive choice of court agreements, not all judgments. The Convention enforces exclusive choice of court clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. At bottom, the Convention from a U.S. perspective is focused directly on the exporting of U.S. judgments, making them more enforceable cross-border. One simply cannot view the enforcement of judgments as a domestic issue, divorced from the flipside, that of the exporting of judgments. Currently, we enforce incoming judgments much more readily than our judgments are enforced elsewhere. Ultimately the success of enforcing our judgments abroad must be balanced against our willingness to enforce foreign incoming judgments. That balance is currently far off.

From the U.S. perspective, the need for the convention is clear. A significant number of lawyers and businesses have indicated to the State Department the need to be able to draft for choice of court and then be able to enforce these.<sup>12</sup>

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nations, exploring ways to continue the work on the Judgments Convention. For a discussion of the state of negotiations, see Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Conference), *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, Prel. Doc. No. 16 (Feb. 2002), available at [http://www.hcch.net/upload/wop/gen\\_pd17e.pdf](http://www.hcch.net/upload/wop/gen_pd17e.pdf).

Two other documents on the Hague Conference website, both produced by Avril D. Haines, provide insight into the problems that the Conference has faced, especially in connection with the internet and also the problems related to choice of court agreements. See Hague Conference, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, Prel. Doc. No. 17 (Feb. 2002) (prepared by Avril D. Haines), available at [http://www.hcch.net/upload/wop/gen\\_pd18e.pdf](http://www.hcch.net/upload/wop/gen_pd18e.pdf); Hague Conference, *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text*, Prel. Doc. No. 18 (Feb. 2002) (prepared by Avril D. Haines), available at [http://www.hcch.net/upload/wop/gen\\_pd18e.pdf](http://www.hcch.net/upload/wop/gen_pd18e.pdf).

11. For further discussion of this process and the changes to the text made along the way, see Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 62-68 (2004) [hereinafter Teitz, *Both Sides of the Coin*]. For a discussion of some of the issues facing the Member States, see Hague Conference, *Report on the Work of The Informal Working Group on The Judgments Project, In Particular on The Preliminary Text Achieved at Its Third Meeting—25-28 MARCH 2003*, Prel. Doc. No. 22 (June 2003) (prepared by Andrea Schulz), available at [http://www.hcch.net/upload/wop/jdgm\\_pd22e.pdf](http://www.hcch.net/upload/wop/jdgm_pd22e.pdf); Hague Conference, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 19 (August 2002) (prepared by Andrea Schulz), available at [http://www.hcch.net/upload/wop/jdgm\\_pd19e.pdf](http://www.hcch.net/upload/wop/jdgm_pd19e.pdf).

12. In a survey of practitioners conducted by the ABA Section of International Litigation and Practice in

The basic structure of the Convention reflects the realities of negotiations, both of attempting to harmonize civil and common law traditions and of dealing with political agendas of multiple countries. The Convention is broken into four chapters: (1) scope, exclusions, definitions; (2) jurisdiction; (3) recognition and enforcement; and (4) general/relationship with other instruments. The Convention applies to exclusive choice of court agreements<sup>13</sup> in civil or commercial matters not excluded from scope under article 2 or under article 21 Declarations.

The final text is built around three basic rules. First, the court chosen by the parties in an exclusive choice of court agreement has jurisdiction (article 5). Article 5 provides that the chosen court shall decide a dispute, thus denying the forum the right to dismiss for *forum non conveniens*, “unless the agreement is null and void” under its “law,” including its choice of law rules.<sup>14</sup> Second, if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case (article 6), with certain exceptions: primarily if the agreement is null and void under the law of the chosen court; if capacity is lacking; or if the agreement would lead to “manifest injustice” or be “manifestly contrary to the public policy” of the seised court.<sup>15</sup> Third, a

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October–November 2003, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice. Over 70% indicated that a convention would make them “more willing to designate litigation instead of arbitration” in their contracts. The survey is a product of the ABA Working Group on the Hague Convention on Choice of Court Agreements, which was co-chaired by Louise Ellen Teitz and Janis H. Brennan, a partner at Foley, Hoag LLP in Washington D.C., Douglas Earl McLaren at Bechtel SAIC Company LLC also helped to develop the survey. Help was also provided by the D.C. Bar Association and the Association of the Bar of the City of New York.

13. More precisely, subsection (a) of article 3 of the Choice of Court Convention, entitled, “Exclusive choice of court agreements,” states in relevant part:

For the purposes of this Convention—  
 “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts . . . .

Choice of Court Convention, *supra* note 2, at art. 3. However, the Convention may apply to nonexclusive agreements.

14. Specifically, article 5, entitled, “Jurisdiction of the chosen court,” states:

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State . . . .

*Id.* at art. 5.

15. In its entirety, article 6, entitled, “Obligations of a court not chosen,” states:

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless—

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States (article 8). Article 8 provides for recognition and enforcement of a judgment given by the chosen court, with article 9 providing exceptions similar to article 6 and a choice of law rule as well. Recognition and enforcement of a judgment that results from an exclusive choice of court clause designating a member state may be refused generally only if the agreement is null and void according to the chosen court's whole law, the party lacked capacity, under the law of the requested state, the defendant didn't have sufficient notice, the judgment was obtained by fraud, or the recognition would be "manifestly incompatible" with public policy.<sup>16</sup>

Article 22 potentially broadens the reach of the Convention by providing for the enforcement of a judgment that was given from a court named in a nonexclusive choice of court agreement if the parties actually obtained a judgment in that forum. This option, promoted by the United States,<sup>17</sup> extends the benefits of the Convention for enforcement when parties have litigated where they had agreed to do so, but without providing protection for enforcing nonexclusive clauses for purposes of jurisdiction. The decision not to cover nonexclusive choice of court agreements for purposes of jurisdiction reflects the inability for the civil law tradition to accept the common law possibility of parallel litigation, rather than a rigid *lis pendens* rule such as that in the Brussels Regulation.<sup>18</sup> Article 22

- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.

*Id.* at art. 6.

16. Article 9, entitled, "Refusal of recognition or enforcement," states:

Recognition or enforcement may be refused if—

- a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to conclude the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
  - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
  - ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
- f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

*Id.* at art. 9.

17. Article 22 was drafted by Professor Brand and was added near the final day of negotiations. The 2003 draft included nonexclusive choice of court clauses for both jurisdiction and enforcement.

18. See Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, 2003 E.C.R. I-14693 at ¶¶ 68-72. For a discussion of *Gasser*, see also Teitz, *Both Sides of the Coin*, *supra* note 11, at 47-55.

allows for countries to opt-in to the possibility of reciprocal enforcement of judgments from nonexclusive clauses (or clauses that fail to meet the definitional aspect of article 3 and the temporal aspect of article 16).<sup>19</sup> Thus, it is actually possible in countries that do make the declaration under article 22 to get enforcement of what might appear to be an “exclusive” clause but which was concluded before a country had acceded to the Convention and therefore becomes a “nonexclusive clause” for definitional purposes.<sup>20</sup> What this means is that one should start drafting exclusive choice of court agreements now for potential enforcement later of the resulting judgments from these clauses.

States may declare that they will not apply the Convention to specific matters (such as asbestos for Canada), which will result not only in non-enforcement of a judgment in the declaring State, but also non-enforcement of choice of court agreements that designate the courts of the declaring State (article 21). The Choice of Court Convention will trump the Brussels Regulation when one party is resident outside of the European Union under article 26 of the Convention even if the court selected is within the European Union. In this case, the Brussels Regulation “disconnects” and the Choice of Court Convention controls, providing a result that differs from the interpretation under the Brussels Regulation which is applicable even when one party is domiciled outside the member State.

### C. THE ROLE OF THE EUROPEAN UNION AT THE HAGUE CONFERENCE

In addition to completing the Choice of Court Convention, the Final Act of the June 2005 Diplomatic Session (the Twentieth Session) is significant in clearing the way for the European Union to become a member of The Hague Conference as a Regional Economic Integration Organisation (REIO), emphasizing the European Union’s crucial role in the negotiations, through the European Commission, in creating this major new convention in private international law. In fact, on June 30, 2006, when the Choice of Court convention was signed in the Peace Palace, it was incorporated into another significant document changing the membership requirements of The Hague Conference, allowing the Community to become a member of the Conference,<sup>21</sup> independent of its member states, anticipating the decision of the European Court of Justice in the Lugano decision of 7 February 2006.<sup>22</sup> Thus, the Choice of Court Convention is a shining example of the increasing role of the European Union as a partner in developing private international law.<sup>23</sup>

19. Choice of Court Convention, *supra* note 2, at art. 22.

20. Minutes from the Hague Conference on Private International Law session on Jurisdiction, Recognition and Enforcement in Civil and Commercial Matters, 25 June 2005 (discussing temporal issues in relation to judgments from non-exclusive choice of court agreements under article 22) (on file with author); *see also* Troob-off, *supra* note 3.

21. This is reflected in articles 29-30 of the Choice of Court Convention and in article 2A of the Statute of the Hague Conference on Private International Law, as amended on June 30, 2005 and attached as an Annex to the Final Act of the Twentieth Session.

22. The European Court of Justice’s Ruling in February 2006 determines that the sole competence to conclude the new Lugano Convention resides with the Community. *See* European Court of Justice Opinion 1/03 of 7 Feb. 2006, *available at* <http://www.curia.eu.int/en/actu/communiqués/cp06/aff/cp060010en.pdf>.

23. *See generally* 2 CILE STUDIES, PRIVATE LAW, PRIVATE INTERNATIONAL LAW & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP (Ronald A. Brand ed. 2005); *see also* INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 285-309 (Arnaud Nuyts & Nadine Watté eds., 2005).

## II. The U.N. Commission on International Trade Law

The United Nations Commission on International Trade Law completed four projects in 2005. Its Working Groups continued its work in the areas of procurement, arbitration, security interests, and transport law.

### A. CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS<sup>24</sup>

The U.N. General Assembly resolved on November 23, 2005 to adopt the United Nations Convention on the Use of Electronic Communications in International Contracts and to call upon governments to consider becoming a party to the Convention.<sup>25</sup> The text of the draft Convention<sup>26</sup> is the product of the U.N. Commission on International Trade Law, which had approved the text at its annual meeting in July 2005. The draft Convention builds upon the UNCITRAL Model Law on Electronic Commerce<sup>27</sup> that has inspired domestic legislation in a number of countries, including the United States.<sup>28</sup> The Convention will enter into force “on the first day of the month following the expiration of six months from the date of deposit of the third instrument of ratification, acceptance, approval or accession.”<sup>29</sup>

The Convention applies to the use of electronic communications in connection with the formation or performance of an international contract (i.e., a contract between two parties in different States).<sup>30</sup> The Convention itself expressly excludes certain transactions. It states that it does not apply to electronic communications in consumer transactions<sup>31</sup> or in specified financial transactions.<sup>32</sup> Nor does it apply to negotiable instruments or documents of title.<sup>33</sup> The Convention does, however, expressly cover the exchange of communications under specified existing treaties.<sup>34</sup> Thus, the provisions of the 2005 Convention will apply to arbitration agreements covered by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1980 United Nations Convention on Contracts for the International Sale of Goods.

Even if the Convention applies by its own terms, the parties to an international contract may agree to exclude application of the Convention or to vary the effect of any of its

24. For a brief introduction to the Convention, see Zubaida Qazi & Mark E. Wojcik, *A New UN Convention on E-Contracts*, INT'L L. NEWS, Spring 2006, at 1.

25. G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (9 Dec. 2005).

26. The text of the Convention appears in the Annex to the General Assembly's resolution. *Id.* For an electronic version, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html) (last visited April 10, 2006) [hereinafter *Electronic Communications Convention*].

27. UNCITRAL Model Law on Electronic Commerce, 1996, 36 I.L.M. 197 (1997).

28. For a list of jurisdictions that have adopted or inspired by some or all of the substance of the Model Law, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html) (last visited on April 10, 2006).

29. *Electronic Communications Convention*, supra note 26, at art. 22, ¶ 1.

30. *Id.* at art. 1, ¶ 1.

31. *Id.* at art. 2, ¶ 1(a).

32. *Id.* at art. 2, ¶ 1(b) (“(b) (i) [t]ransactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan, or holding of agreement to repurchase securities or other financial assets or instruments held by an intermediary”).

33. *Id.* at art. 2, ¶ 2.

34. *Id.* at art. 20.

provisions.<sup>35</sup> In the absence of consent, a party is not required to use or accept electronic communications but consent may be inferred from the party's conduct.<sup>36</sup>

Seven substantive provisions set out rules on electronic communications generally and more specific rules on contract formation. As a general proposition a communication must not be denied validity or enforceability solely because it is in electronic form (article 8, paragraph 1). The more general rules on electronic communications address form requirements (article 9), the time and place of dispatch and receipt of electronic communications (article 10), and the allocation of the risk of an error in electronic communications (article 14). These rules will apply not only to communications of offers and acceptances, but also notices sent during the performance of a contract. Three more specific rules cover particular issues that arise in the context of contract formation: invitations to make offers (article 11), use of automated message systems (article 12), and incorporation of contract terms by reference (article 13).

These substantive rules regulate electronic communications with a light hand. In addition to recognizing party autonomy, the rules negate any suggestion that a communication will be deemed ineffective merely because it is not in a more traditional medium. They also clarify ambiguities in existing legal rules when a party uses an electronic medium of communication. Thus the Convention does not change existing rules that require "receipt" of a notice; instead it clarifies when an electronic communication is deemed sent.<sup>37</sup>

## B. MODEL LAW ON CROSS-BORDER INSOLVENCY

The U.N. General Assembly approved the UNCITRAL Model Law on Cross-Border Insolvency in December 1997.<sup>38</sup> Since that time several jurisdictions, including Japan, have enacted legislation based on the Model Law. For a number of years proposed revisions to the U.S. Bankruptcy Code incorporated the Model Law in draft chapter 15. On April 20, 2005, Congress finally enacted the proposed revisions and chapter 15 came into force 180 days later.<sup>39</sup> Prior to enactment of the revisions, section 304 of the Bankruptcy Code<sup>40</sup> governed some aspects of cross-border bankruptcies and an extensive case law construing that section had accumulated. Both the Model Law and draft chapter 15 have been subject to extensive analysis.<sup>41</sup>

## C. CASE LAW DIGEST

In 2005 the UNCITRAL Secretariat published a digest of the cumulative case law on the U.N. Convention on Contracts for the International Sale of Goods.<sup>42</sup> It also completed

35. *Id.* at art. 3.

36. *Id.* at art. 8, ¶ 2.

37. *Id.* at art. 10, ¶ 2.

38. G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (30 Jan. 1998).

39. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

40. Bankruptcy Code, 11 U.S.C. § 304 (2005).

41. See the references cited in Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 713 n.1 (2005).

42. UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, [http://www.uncitral.org/uncitral/en/case\\_law/digests/cisg.html](http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html) (last visited on April 10, 2006).

a draft of a similar digest of case law construing the 1985 Model Law on International Commercial Arbitration.

### III. International Institute for the Unification of Private Law (UNIDROIT)

A diplomatic conference convened in Cape Town in 2001 adopted a Convention on International Interests in Mobile Equipment and a Protocol on Matters Specific to Aircraft Equipment.<sup>43</sup> The texts provide international rules for the secured financing of aircraft and engines by creating for the creation, registration and enforcement of international interests in equipment of significant value. The Convention text provides a framework that can be amended by a protocol to address particular issues specific to a particular type of equipment. After negotiating the protocol, a consolidated text enters into force after a specified number of states ratify or otherwise accede. In the case of aircraft equipment eight states had to become a party before the consolidated text entered into force.

On November 2, 2005, Malaysia deposited its instrument of ratification of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment.<sup>44</sup> As a result, the Aircraft Protocol enters into force on March 1, 2006. As the United States deposited its instrument of ratification in October 2004, the Protocol becomes the law of the United States as of that date. A growing number of publications analyze the text of the Aircraft Protocol and the effect it will have on U.S. law.<sup>45</sup>

UNIDROIT continues to work on protocols for other types of mobile equipment as well as additions to the UNIDROIT Principles of International Commercial Contracts, transactions on capital markets (harmonized rules regarding intermediated securities), and a model law on leasing.<sup>46</sup>

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43. The official text of the Convention and Protocol may be found at [www.unidroit.org/english/conventions/c-main.htm](http://www.unidroit.org/english/conventions/c-main.htm).

44. For the status of the Convention and protocols, see <http://www.unidroit.org/english/implement/i-2001-aircraftprotocol.pdf> (last visited on April 10, 2006).

45. See, e.g., Frank L. Polk, *Cape Town and Aircraft Transactions in the United States*, 20 AIR & SPACE LAW. 4 (2006); Mark J. Sundahl, *The Cape Town Approach: A New Method of Making International Law?*, 44 COLUM. J. TRANSNAT'L L. 339 (2006).

46. For information on the UNIDROIT work program see the periodic reports in its news bulletin, available at <http://www.unidroit.org/english/news/main.htm> (last visited on April 10, 2006).

