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## Private International Law

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# Private International Law\*

## I. Introduction

In contemporary practice, the field of private international law sweeps far beyond the traditional categories of jurisdiction, choice of law, and enforcement of judgments. Today, efforts are underway in several international fora to modernize and harmonize laws which affect individuals and entities in the fields of commercial, financial and family law, transnational litigation, and related areas. This report summarizes a number of recent developments in four of those venues: the Hague Conference on Private International Law (Hague Conference), the UN Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Organization of American States (OAS). For some topics, more detailed descriptions can be found in other committee reports in this volume.

## II. The Hague Conference on Private International Law

During 2007, the Hague Conference continued its work in the field of international family law, in particular efforts to foster wider and more effective implementation of its existing conventions on child abduction and inter-country adoption, and (most notably) the successful conclusion of work on a new multilateral convention on child support and family protection. It also pursued initiatives aimed at the more effective use and implementation of its widely ratified conventions on legalization, service of process, and obtaining evidence abroad.

### A. CHILD SUPPORT

On November 23, 2007, a Diplomatic Conference concluded a new multilateral Convention on the International Recovery of Child Support and Family Maintenance.<sup>1</sup> The new Convention establishes a comprehensive system of international cooperation between national child support authorities, which should allow more children to receive more support more quickly. The Convention aims to resolve the problems of unpaid or uncollectible support for children and other dependant family members when the person liable for support lives abroad but in a State Party to the treaty. Existing international procedures have typically been slow, complicated, costly, and under-utilized.

The major features of the new Convention are: (1) a broadly based system for the recognition and enforcement of maintenance decisions made in Contracting States, com-

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1. See Convention on the International Recovery of Child Support and Family Maintenance, Diplomatic Conference, Nov. 23, 2007, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131).

bined with expedited procedures; (2) a system of cooperation between Central Authorities in each country to facilitate the processing of international applications; (3) provision of virtually cost-free services for maintenance applicants, including free legal assistance when needed in all Contracting States; and (4) an obligation to provide prompt and effective measures to enforce support orders.

The United States joined sixty-seven other nations in signing the Final Act of the Conference and, in addition, became the first country to sign the new Convention itself.<sup>2</sup>

## B. INTERCOUNTRY ADOPTION

On November 16, 2007, the President signed the U.S. instrument of ratification of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The United States had signed the Convention in 1994, and in 2000 Congress passed the necessary implementing legislation in the form of the Intercountry Adoption Act.<sup>3</sup> That statute mandated the development of comprehensive procedures for the accreditation of adoption service providers, and the final rules relating to accreditation of domestic adoption agencies were only recently completed.<sup>4</sup> The United States joined the more than seventy other current states party when it deposited its instrument of ratification on December 12, 2007.<sup>5</sup>

## C. INTERNATIONAL CHILD ABDUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction sets forth procedures for the prompt return of children who have been abducted across international boundaries.<sup>6</sup> The Convention entered into force for the United States on July 1, 1988 and is implemented by the International Child Abductions Remedies Act.<sup>7</sup> During 2007, the U.S. Central Authority accepted the accession of twelve new treaty partners for the Convention; they included Estonia, Latvia, Lithuania, Peru, El Salvador, Do-

2. See Press Release, U.S. Embassy at The Hague, Netherlands, Signing of the Final Act of the New Convention on International Child Support (Nov. 23, 2007), available at [http://thehague.usembassy.gov/child\\_support.html](http://thehague.usembassy.gov/child_support.html) (providing, in Article 60(1), that the Convention will enter into force three months following deposit of the second instrument of instrument of ratification, acceptance or approval).

3. INTERCOUNTRY ADOPTION ACT OF 2000, PUB. L. 106-279, 114 STAT. 825 (codified at 42 U.S.C. §§ 148901 et seq.); see also Press Release, U.S. Dept. of State, Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background, [http://travel.state.gov/family/adoption/convention/convention\\_2290.html](http://travel.state.gov/family/adoption/convention/convention_2290.html).

4. 22 C.F.R. pts. 96-99 (2006), available at [http://travel.state.gov/family/adoption/convention/convention\\_2957.html](http://travel.state.gov/family/adoption/convention/convention_2957.html) (providing the implementing regulations for the Adoption Convention).

5. The event is declared in a press release by the U.S. Embassy to Hague and the Netherlands. Hans van Loon, Secretary General of the Hague Conference on Private International Law, Statement on the Occasion of the Deposit of the Instrument of Ratification of the Hague Convention by the United States of America (Dec. 12, 2007), [http://thehague.usembassy.gov/van\\_loon\\_speech\\_12/12.html](http://thehague.usembassy.gov/van_loon_speech_12/12.html) (the treaty will accordingly enter into force for the United States on April 1, 2008).

6. See Hague Conference on Private Int'l Law, Child Abduction Section, [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21) (last visited Feb. 18, 2008) (providing information about the Abduction Convention).

7. 42 U.S.C. § 11601 (1998); see 22 C.F.R. pt. 94 (containing the implementing regulations for the Abduction Convention); see generally U.S. Dept. of State, Int'l Child Abduction, [http://travel.state.gov/family/abduction/abduction\\_580.html](http://travel.state.gov/family/abduction/abduction_580.html) (last visited Feb. 18, 2008).

minican Republic, Ukraine, Costa Rica, Guatemala, Paraguay, San Marino, and Sri Lanka. The United States is now a partner with sixty-eight countries in this important Convention.<sup>8</sup> The Convention significantly increases the chances that left-behind parents will achieve the return of their children. According to the U.S. Central Authority, during fiscal year 2006, 65.8 percent of all returns of children who had been abducted from the United States were from U.S. Convention partners.<sup>9</sup>

#### D. PROTECTION OF CHILDREN

The United States has begun active consideration of joining the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. To date, only fourteen states have ratified or acceded to the Convention, and it has not been used extensively. All members of the European Union, however, have now signed and are expected to ratify it soon.<sup>10</sup>

The Convention provides the basic administrative and legal structure for the recognition and enforcement of foreign custody and access orders.<sup>11</sup> It also provides a mechanism for obtaining the assistance of foreign authorities in implementing rights of access for left-behind parents in abduction cases. It reinforces the child abduction convention by underscoring the principle that the authorities of the child's habitual residence have jurisdiction to decide custody and long-term protective measures. Under the Convention, custody and access jurisdiction remains with the court in the country of habitual residence so long as a return request remains pending. The Convention also fills in gaps by providing for child protection measures in other areas, such as runaway teenagers or placements that fall short of adoption, such as guardianship or foster care.

As the 1996 Convention covers matters that in the United States that are generally regulated under state law, the U.S. Department of State has been meeting with the National Conference of Commissioners on Uniform State Laws,<sup>12</sup> the American Bar Association, and other interested groups to consider how it might be implemented in this country.

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8. See U.S. Dept. of State, Hague Abduction Convention Country List, [http://travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html) (last visited Feb. 18, 2008) (providing the current list of U.S. treaty partner countries).

9. See U.S. Dept. of State, Annual Report on Compliance with the Hague Convention on Civil Aspects of Int'l Child Abduction (2007), available at [http://travel.state.gov/pdf/child\\_abduction\\_Compliance\\_Report.pdf](http://travel.state.gov/pdf/child_abduction_Compliance_Report.pdf).

10. See Adrian Croft, *Britain, Spain Settle a Dispute over Gibraltar*, REUTERS (Jan. 8, 2008), available at <http://www.reuters.com/article/worldNews/idUSL0845118820080108>.

11. See Hague Conference on Private Int'l Law, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, (Oct. 19, 1996), available at [http://hcch.net/index\\_en.php?act=conventions.text&cid=70](http://hcch.net/index_en.php?act=conventions.text&cid=70).

12. See, e.g., Press Release, National Conference of Commissioners on Uniform State Laws, New Drafting and Study Committees to be Appointed (Aug. 14, 2006), available at <http://www.nccsl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=168>.

## E. INVESTMENT SECURITIES

To date, the 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary has been signed only by Switzerland and the United States.<sup>13</sup> The Convention seeks to clarify the applicable law regarding securities transactions done through computer media, many of which cross country borders rapidly, essentially by adopting the basic rules already reflected in U.S. law (in particular, in the Uniform Commercial Code revised Article 8). Inasmuch as application of the Convention would produce transactional results consistent with uniform state law and federal regulation in the United States, it is anticipated that the Convention may be put forward for Senate advice and consent to ratification in the coming year. Within the E.U., however, there appears to be continuing discussion about whether the Convention might be read to restrict member states' capacity to regulate within their respective jurisdictions.

## F. CONVENTION ON CHOICE OF COURT AGREEMENTS

After many years of (ultimately unsuccessful) efforts to reach agreement on a broad treaty setting forth rules for exercising jurisdiction in civil and commercial cases and for recognizing and enforcing the resulting judgments, the Hague Conference adopted a new (and more limited) Convention on Choice of Court Agreements on June 30, 2005.<sup>14</sup> To promote the effectiveness of exclusive choice of court agreements in international business-to-business contracts,<sup>15</sup> the Convention establishes three basic rules: (i) with only limited exceptions, a court in a State Party to the Convention that has been chosen by the parties to the contract must exercise jurisdiction over the parties' dispute; (ii) subject to certain exceptions, courts not chosen by the parties must refuse to hear the case; and (iii) courts in other States Party must recognize and enforce the judgment of the chosen court, again subject to certain exceptions. Optionally, States Party to the Convention may accept an obligation to recognize and enforce judgments issued by courts of another member country pursuant to a nonexclusive choice of court agreement.

In May 2007, the Conference's Explanatory Report on the Convention was issued, providing a long-awaited description of the discussions that took place during the Diplomatic Conference at which the Convention was adopted.<sup>16</sup> Consideration is now being given to the manner in which the new Convention might be implemented if the United States becomes a party. In March 2007, the Mexican Senate approved signature and ratification

13. Hague Conference on Private Int'l Law, Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=72](http://www.hcch.net/index_en.php?act=conventions.text&cid=72).

14. Hague Conference on Private Int'l Law, Convention on Choice of Court Agreements (June 30, 2005), 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 Convention on Choice of Court Agreements]. For background, see Louise E. Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543 (2005); Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled*, 52 DEPAUL L. REV. 319 (2002).

15. Convention on Choice of Court Agreements, *supra* note 14, art. 3(b). Under Article 3(b), a choice of court agreement designating the courts of a Contracting State (or one or more specific courts of a Contracting State) is deemed to be "exclusive" unless the parties to that agreement expressly provided otherwise.

16. See Trevor Hartley & Masato Doguchi, Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3959](http://www.hcch.net/index_en.php?act=publications.details&pid=3959).

of the Convention, and the instrument of accession was deposited with the Hague Conference on September 26. Mexico thereby became the first State Party to the Convention.<sup>17</sup>

#### G. INTERNATIONAL LEGAL COOPERATION

Some of the most successful Hague Conventions concern international legal cooperation and litigation. One of these is the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. To facilitate the recognition and acceptance of public documents executed in one State Party by the authorities in another, this Convention replaces the cumbersome formalities of legalization by providing for issuance of an "apostille." The Convention is widely used in practice and, as of 2007, boasted ninety-two Contracting Parties. It is one of two Hague Conventions now in force in all twenty-seven Member States of the E.U.

To improve the Convention's usefulness even further, the Hague Conference launched an "electronic Apostille Pilot Program" (or "e-APP") in 2006, with the objective of replacing the paper-based system through the use of PDF technology and digital certificates.<sup>18</sup> Relying on generic, low cost and secure software for the issuance and use of electronic apostilles and supported by electronic registers, the new system is intended to facilitate communication and help to combat fraud in the use of such documents as birth certificates, corporate instruments, deeds, adoption papers, educational diplomas, and other similar documents. In February 2007, the state of Kansas successfully issued the first electronic apostille that was received in Colombia, and later in the year, the state of Rhode Island adopted the program's open-source software for an electronic register.

In late 2006, the Permanent Bureau of the Hague Conference issued the third edition of its Practical Handbook on the Operation of the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. That Convention now has fifty-six Contracting States.

#### H. ACCESSION OF THE EUROPEAN COMMUNITY

On April 3, 2007, the European Community formally acceded to the Statute of the Hague Conference, becoming the first "Member Organization" of the Conference.<sup>19</sup> The Statute had been amended in 2005 to permit "regional economic integration organizations" (REIOs) to join the Conference if they are "constituted solely by sovereign States" and if "Member States have transferred [to them] competence over a range of matters [within the purview of the Conference,] including the authority to make decisions binding on [their] Member States in respect of those matters."<sup>20</sup> The EU acquired legislative

17. See Diario Oficial de la Federación, <http://diariooficial.segob.gob.mx> (last visited Feb. 18, 2008).

18. See generally The Electronic Pilot Program: The e-APP (last updated Jan. 7, 2008), <http://www.e-APP.info> (last visited Feb. 18, 2008).

19. See Press Release, Hague Conference on Private Int'l Law, European Community Becomes a Member of the HCCH (Mar. 4, 2007), available at [http://hcch.net/index\\_en.php?act=events.details&year=2007&var=event=129&zoek=statute%20of%20the%20hague%20conference](http://hcch.net/index_en.php?act=events.details&year=2007&var=event=129&zoek=statute%20of%20the%20hague%20conference) (the revised statute (amended in 2005) entered into force on January 1, 2007).

20. Statute of the Hague Conference on Private Int'l Law, art. 3(9) (2005), available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=29](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=29).

competence in the field of private international law as a result of the Treaty of Amsterdam in 1999.

On specific issues, however, the question of the allocation of competences between a given REIO and its constituent members promises to pose some challenges for states that are members of the Conference (whether or not they are members of the REIO in question). To assist in determining when competence has been transferred to the REIO in question, the revised Statute requires the REIO to submit a “declaration of competence” at the time of its application and further provides that “Member States [of the REIO] shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified.”<sup>21</sup> The European Community’s initial declaration of competence is available on the Conference website. As the Community’s laws and structures continue to evolve, however, it may not always be clear where competence lies, and indeed in some instances competence is shared or mixed.

Similarly, the question of a REIO’s participation in meetings raises some questions. The general rule will be that the REIO will stand in the collective shoes of its members on matters falling within its competence. Thus, in any meeting in which it is entitled to participate, a REIO may exercise “a number of votes equal to the number of its Member States which have transferred competence to [it] in respect of the matter in question, and which are entitled to vote in and have registered for such meetings.”<sup>22</sup> Where competence is shared, the REIO is entitled to exercise membership rights “on an alternative basis” with its member states.<sup>23</sup> Thus, the REIO does not obtain voting rights separate from its members.

### III. UNCITRAL

The United Nations Commission on International Trade Law, headquartered in Vienna, focuses on the “progressive harmonization and unification of the law of international trade.”<sup>24</sup> The Commission itself (including its sixty elected member states as well as observers) meets annually in plenary session, but much of its substantive work is accomplished by topical working groups, which generally meet once or twice a year.<sup>25</sup>

#### A. SECURITY INTERESTS

The Working Group on Security Interests continued its efforts to prepare a draft Legislative Guide on secured transactions, the main purpose of which is to assist developing countries in revising their laws and developing an efficient legal regime for secured credit law by removing legal obstacles and impediments in their respective domestic systems.<sup>26</sup> The Guide, as it currently stands, incorporates many basic elements of modern secured

21. *Id.* arts. 3(3), (5).

22. *Id.* art. 3(8).

23. *Id.* art. 3(7).

24. U.N. Comm’n on Int’l Trade Law, Origin, Mandate and Composition of UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Feb. 18, 2008).

25. See generally U. N. Comm’n on Int’l Trade L., *Report on the Work of Its Fortieth Session*, U.N. Doc. A/62/17 (Part I) (Jul. 23, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V07/857/09/PDF/V0785709.pdf?OpenElement> (last visited Mar. 2, 2008) [hereinafter *Session Report*].

26. *Id.* at paras. 14-154.

finance law (as reflected, for example, in U.C.C. Article 9), including concepts of transparency and public filing, financing of non-possessory interests, bulk financing, financing of future interests, creditor enforcement, and other mechanisms. Completion of this project was anticipated in December 2007.<sup>27</sup>

Work will continue next year on annexes to the Legislative Guide, dealing in particular with issues concerning the treatment of security rights in intellectual property.<sup>28</sup> A significant part of corporate wealth is embodied in intellectual property assets, yet the coordination between secured transaction law and intellectual property law in many countries is not sufficiently developed to accommodate financing practices utilizing intellectual property as the security interest.<sup>29</sup> The Commission also decided that future work should be undertaken to prepare an annex on certain types of security, taking in account work by other organizations, in particular, UNIDROIT.<sup>30</sup>

## B. CROSS-BORDER INSOLVENCY

In 2007, the Working Group on Insolvency Law decided to begin drafting a Legislative Guide on Enterprise Groups and Post Commencement Finance. This Guide is intended to serve as a complement to the 1997 UNCITRAL Model Law on Cross Border Insolvency and the 2004 UNCITRAL Legislative Guide on Insolvency Law.<sup>31</sup> At its 2007 sessions, the Working Group determined, *inter alia*, that substantive consolidation only occurs in extremely limited circumstances; the rights and interest of a secured creditor, including any security interest which it has, should be recognized in the event of substantive consolidation, unless the secured creditor was a participant in the fraud which is a basis for the substantive consolidation; a single application can be filed per entity without the need for joint application; and post application finance prior to the commencement of the proceeding should be fully addressed in the Guide. The Working Group will continue to consider the issue of cooperation and coordination in cross-border insolvency proceedings through use of cross-border insolvency protocols.<sup>32</sup>

## C. PROCUREMENT

For the past several years, the Working Group on Procurement has been engaged in an effort to update its 1994 Model Law on Procurement of Goods, Construction and Ser-

27. U.N. Comm'n on Int'l Trade L., *Security interests—Draft Legislative Guide on Secured Transactions*, U.N. Doc. A/CN.9/637/Add.1-Add.8, available at <http://www.uncitral.org/uncitral/en/commission/sessions/40th.html#second>.

28. See Secretariat of U.N. Comm'n on Int'l Trade L., *Possible Future Work on Security Interests in Intellectual Property*, U.N. Doc. A/CN.9/632, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V07/82/7/54/PDF/V0782754.pdf?OpenElement>.

29. See Session Report, *supra* note 25, at ¶ 156.

30. *Id.* at ¶ 160. The Commission also decided to consider at a future session possible work on financial contracts. *Id.* at ¶ 161.

31. See *id.*; see generally G.A. Res 59/40, U.N. Doc. A/RES/59/40 (Dec. 16, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/66/PDF/N0447866.pdf?OpenElement>; G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N98/764/77/PDF/N9876477.pdf?OpenElement>.

32. For the UNCITRAL report on the work of the Insolvency Working Group, see Session Report, *supra* note 25 at ¶¶ 185-191.

vices and its accompanying Guide to Enactment<sup>33</sup> in order to reflect new practices and technological developments, particularly those resulting from the use of electronic communications in public procurement. At its two sessions in 2007, the Working Group focused on the elaboration of proposals for the revision of the Model Law on the following topics: (1) the use of electronic means of communication in the procurement process; (2) publication of procurement-related information; (3) the procurement technique known as the electronic reverse auction; (4) abnormally low tenders; and (5) the method of contracting known as framework agreements.

Although many of these techniques and practices are novel to public purchasing agencies worldwide, procurement authorities in the United States, those within the Member States of the E.U., and those in other developed countries typically have extensive experience with these concepts. For example, in the United States, the federal government utilizes framework agreements to purchase goods in amounts estimated to total between \$50-\$100 billion annually. The Working Group attempts to resolve how these novel practices might be used best in developing countries, in light of the developed countries' experience.

The Working Group also decided that the Model Law and the Guide should take into account the question of conflicts of interest and should consider whether any specific provisions addressing that question in the Model Law would be warranted. In this regard, the United Nations Convention Against Corruption, which entered into force in December 2005, specifically calls for anti-corruption measures in procurement to address conflicts of interest.<sup>34</sup> Article 9 of that Convention specifically calls for "measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements." The United States has recommended that the Model Law include conflict-of-interest provisions consistent with the provisions of the Corruption Convention.<sup>35</sup>

#### D. ARBITRATION

Among UNCITRAL's most well-known products are the 1976 UNCITRAL Arbitration Rules and the 1985 Model Law on Arbitration.<sup>36</sup> Several revisions to the Model Law (dealing most prominently with requests for interim measures and preliminary orders)

33. U.N. Comm'n on Int'l Trade L., *UNCITRAL Model Law on Procurement of Goods, Construction, and Services with Guide to Enactment*, (1994), available at <http://www.uncitral.org/pdf/english/texts/procurement/ml-procurement/ml-procure.pdf>.

34. United Nations Convention Against Corruption, G.A. Res. 58/4, (Oct. 31, 2003), available at <http://www.unicri.it/www/justice/docs/uncaac/uncaac.pdf>.

35. See U.N. Comm'n on Int'l Trade Law, *Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction, and Services*, U.N. Doc. A/CONF.9/WG.1/WP.56, ¶¶ 18-20 (Sept. 3-7, 2007), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V07/844/98/PDF/V0784498.pdf?OpenElement>. The United States also submitted proposals concerning framework agreements/dynamic purchasing systems. *Id.* at ¶¶ 2-17. For additional information, see the report submitted by the Procurement Committee of the International Law Section at pp. 479.

36. Although often considered to be an UNCITRAL text, strictly speaking the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") predates the establishment of UNCITRAL in 1966. See UNCITRAL Arbitration Rules, G.A. 31/98, 31st Sess., 99th plen. mtg., (Apr. 28, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>. U.N. Comm'm on Int'l L., *UNCITRAL Model Law on International Commercial Arbitration*, G.A. 40/72, 40th Sess.,

were agreed upon by the Commission and approved by the UN General Assembly in 2006.<sup>37</sup> Attention then turned to revision of the Rules, and the Working Group continued through 2007 to consider possible revisions.<sup>38</sup>

#### E. TRANSPORT LAW

The Working Group on Transport Law has been elaborating a new multilateral convention on the carriage of goods (wholly or partly) by sea.<sup>39</sup> The object is to craft a replacement for the multitude of inconsistent and out-of-date regimes that currently regulate this area of the law, including the Hague Rules (in force in the United States as the Carriage of Goods by Sea Act), the Hague-Visby Rules, and the Hamburg Rules.<sup>40</sup> There is a critical need for a modern legal regime to replace the current hodgepodge of laws dating back to the 1920s governing the international carriage of goods by sea. The current laws were developed before the era of globalization and containerization, two developments that have revolutionized the commercial carriage of goods by sea.

The draft Convention covers, among other topics, rights and obligations of the shipper and carrier, liability limits, defenses to liability, burden of proof, jurisdiction and arbitration, transport documents, delivery of the goods, transfer of rights, right of control, and electronic transport documents. Among the contentious issues are the extent to which the Convention will allow for party autonomy (i.e., whether and under what circumstances contracts covered by the Convention will be permitted to derogate from its terms), the liability limitation limit, and the extent to which exclusive choice of court clauses will be enforceable. The Working Group is expected to complete its work at a resumed session in January 2008, after which the draft convention will be presented to the Commission in June 2008 for its approval.

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112th plen. mtg., (Dec. 11, 1985), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

37. See G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 4, 2006); see also U.N. Com'm on Int'l Trade L., *Report on the Work of the Thirty-Ninth Session*, UN GAOR, 39th Sess., Supp.No. 17 U.N. Doc. A/61/17 (July 14, 2006), Annex I (Revised articles of the UNCITRAL Model Law on International Commercial Arbitration), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V06/558/15/PDF/V0655815.pdf?OpenElement>.

38. Working Gp. II (Arb. & Conciliation), *Report on the Work of the Forty-Sixth Session*, U.N. Doc. A/CN.9/619, (Oct. 5, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V06/575/26/PDF/V0657526.pdf?OpenElement>; Working Gp. II (Arb. & Conciliation), *Report on the Work of the Forty-Seventh Session*, U.N. Doc. A/CN.9/641, (Sept. 25, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V07/870/53/PDF/V0787053.pdf?OpenElement>.

39. See U.N. Comm'n on Int'l L., *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007), available at <http://daccessdds.un.org/doc/UNDOC/LTD/V07/807/35/PDF/V0780735.pdf?OpenElement>. For subsequent changes, see Working Gp. III, *Report on the Work of the Nineteenth Session*, U.N. Doc. A/CN.9/621 (May 17, 2007) available at <http://daccessdds.un.org/doc/UNDOC/GEN/V07/837/76/PDF/V0783776.pdf?OpenElement>.

40. See International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-1 (2004) [Hague Rules], codified in the United States at 46 U.S.C. app. §§ 1300-1315 (2000); Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmd. 6944), reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-2A (2004) [Hague-Visby Rules]; Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-3 [Hamburg Rules].

#### F. CROSS BORDER FRAUD

The Commission has considered the problem of cross-border commercial fraud since 2002, with the aim of elaborating indicative features to aid in fraud prevention. Commercial fraud deters legitimate trade and undermines confidence in established contract practices and instruments. In 2004, the Commission decided to prepare a list of common features present in typical fraudulent schemes, to assist potential targets to protect themselves and avoid becoming victims of fraudulent schemes. This year the Secretariat prepared a background note entitled "Indicators of Commercial Fraud."<sup>41</sup> The Commission has circulated the document to member and observer states and observer organizations for comment, and will consider it for adoption as a final text at its 2008 Plenary Session.<sup>42</sup>

### IV. UNIDROIT

UNIDROIT is an independent intergovernmental organization whose purpose is to study needs and methods for modernizing, harmonizing, and coordinating private and commercial law at the international level. Initially established as an "auxiliary organ of the League of Nations," today UNIDROIT functions on the basis of a multilateral agreement with sixty-one Member States.<sup>43</sup>

#### A. CAPETOWN CONVENTION AND PROTOCOLS

The 2001 Capetown Convention on International Interests in Mobile Equipment (currently in force for twenty States, including the United States) sets forth internationally agreed rules for the creation, perfection, and priority of security, title retention and leasing interests in major types of mobile equipment, underpinned by an international registry.<sup>44</sup> The Convention is the first multilateral instrument to establish new international financing rights, which (when notice is properly filed in the new treaty-based registry) prevail over otherwise valid national law rights. To be covered by the Convention, each category of equipment requires a separate protocol detailing the scope of application and accounting for specialized financing practices.

The first such protocol applied to larger commercial aircraft and engines.<sup>45</sup> By late 2007 the Aircraft Protocol already covered over 50 percent of the transactions involving larger commercial aircraft. A second protocol was adopted in 2007 (the "Luxembourg Protocol") covering financing of railroad rolling stock, including engines and freight, pas-

41. See Secretariat of U.N. Comm'n on Int'l Trade L., *Indicators of Commercial Fraud*, U.N. Doc. A/CN.9/624, Add. 1-2, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V07/835/51/PDF/V0783551.pdf?OpenElement>.

42. See Session Report, *supra* note 25, at ¶¶ 196-203.

43. Int'l Inst. for Unification of Private L. (UNIDROIT), *Statute Incorporating the Amendment to 6(1)* (Mar. 26, 1993), available at <http://www.unidroit.org/english/presentation/statute.pdf>.

44. UNIDROIT, Capetown Convention (2001), available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>. See generally SIR ROY GOODE, OFFICIAL COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (2002).

45. See UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (2001), available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2>.

senger and special use cars and related mobile equipment.<sup>46</sup> The Luxembourg Protocol will enhance financing and export of rail equipment, which can have especially important effects in developing countries and is expected to facilitate development of regional and sub-regional rail service. Work progressed in 2007 on a third protocol on financing of outer space equipment and commercial activities, expected to be concluded by the end of 2008 or early 2009. Some initial work has been undertaken on a further protocol dealing with agricultural, construction, and mining equipment.<sup>47</sup>

## B. INVESTMENT SECURITIES

UNIDROIT also continued work on a new convention on investment securities law, which is expected to be finalized at a diplomatic conference in September 2008.<sup>48</sup> Such a convention could facilitate the transfer of interests across borders by aligning national rules. A review of the draft convention will take place early in 2008 to assess its value to the U.S. market.

## C. MODEL LEASING LAW

UNIDROIT is currently drafting a Model Law on Leasing intended to assist developing countries and countries in transition to adopt effective legislation governing equipment financing as a means of helping to develop their economic infrastructure. In many emerging economies, the legal infrastructure for leasing is outdated, and the resulting legal uncertainty makes secured forms of leasing virtually impossible. Generally based on the 1998 UNIDROIT Convention on International Financial Leasing<sup>49</sup> but structured as a model law in order to enable national legislatures to adapt it to their specific needs, the proposed text would provide uniform rules governing the effect of the leasing agreement (e.g. enforceability, duties to the lessee, and priority in relation to liens). For U.S. exporters and investors looking to do business in those countries, the uniform adoption of the Model Law may provide clarity and certainty necessary to the establishment of new market opportunities. The Model Law is intended to cover both what are commonly referred to as financial leases and operating leases, in order to envisage likely trends in the development of such markets.<sup>50</sup>

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46. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (2007), *available at* <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR3>.

47. *See generally* UNIDROIT, International Interests in Mobile Equipment—Study LXXII (last updated Mar. 3, 2007), *available at* <http://www.unidroit.org/english/workprogramme/study072/main.htm>.

48. *See generally* UNIDROIT, Transactions on Transnational and Connected Capital Markets—Study LXXVII, *available at* <http://www.unidroit.org/english/workprogramme/study078/main.htm> (last visited Mar. 2, 2008).

49. UNIDROIT, Convention on International Financial Leasing (1998), *available at* <http://www.unidroit.org/english/conventions/1988leasing/main.htm> (last visited Feb. 18, 2008).

50. *See generally* UNIDROIT, Preparation of a Model Law on Leasing—Study LIX A (last updated Feb. 28, 2008), *available at* <http://www.unidroit.org/english/workprogramme/study059a/main.htm>.

## V. The Organization of American States<sup>51</sup>

Within the OAS, efforts to develop and harmonize private international law are undertaken through periodic diplomatic conferences. Work continued during 2007 on preparations for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII).<sup>52</sup> Of eight proposed topics,<sup>53</sup> two—consumer protection and electronic registries—have been selected for the development of new Inter-American instruments.<sup>54</sup>

### A. CONSUMER PROTECTION

On this topic, three proposals were received: (1) draft Convention on Consumer Protection to address choice of law, presented by Brazil; (2) a Legislative Guide (with model laws) on Consumer Dispute Settlement and Redress, proposed by the United States; and (3) draft Model Laws on Jurisdiction in Consumer Contracts and Choice of Law Rules for Consumer Contracts, put forward by Canada.

#### 1. *Convention on Choice of Law*

The heart of the Brazilian proposal is the idea that consumer contracts, especially those concluded by any form of electronic communication, should be governed by the law of the consumer's country of residence or by the law most favorable to the consumer.<sup>55</sup> The draft provides certain exceptions to its application for cases and issues covered by other international treaties and contains rules concerning contracts that present frequent problems (e.g. travel, tourism, and time-share or multi-property contracts).

To date, the proposal appears to have received broad support.<sup>56</sup> Negotiations continue, however, on several specific aspects, including how its choice of law rule might be applied

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51. This section was prepared by John M. Wilson, Legal Advisor, Office of International Law, Organization of American States.

52. CIDIP was initially created by the Organization of American States General Assembly through Organization of American States, Preparatory for the Seventh Inter-American Specialized Conference on Private International Laws, AG/RES. 1923 (XXXIII-O/03), 2033 (XXXIV-O/04), (June 8, 2004), available at [http://www.oas.org/dil/CIDIP-VII\\_res.1923.htm](http://www.oas.org/dil/CIDIP-VII_res.1923.htm), [http://www.oas.org/dil/CIDIP-VII\\_res.2033-04.htm](http://www.oas.org/dil/CIDIP-VII_res.2033-04.htm), respectively. For an overview of the CIDIP process and copies of the conventions and instruments adopted therein, see OAS, Office of Int'l L., *Private International Law* (2008), [http://www.oas.org/dil/privateintlaw\\_interamericancferences.htm](http://www.oas.org/dil/privateintlaw_interamericancferences.htm) (last visited Feb. 18, 2008).

53. For copies of the original country proposals, see OAS, Office of Inter-Am. L. & Prog., *Seventh Inter-American Specialized Conference on Private International Law* (2005), [http://www.oas.org/dil/CIDIP-VII\\_tableoftopicsproposed\\_bydate.htm](http://www.oas.org/dil/CIDIP-VII_tableoftopicsproposed_bydate.htm) (last visited Feb. 18, 2008).

54. OAS, Office of Inter-Am. L. & Prog, AG/RES 2065 (XXXV-O/05) (June 7, 2005), available at [http://www.oas.org/dil/CIDIP-VII\\_res.2065.htm](http://www.oas.org/dil/CIDIP-VII_res.2065.htm), formally approved the agenda for CIDIP-VII as follows: Consumer Protection (Including Applicable Law, Jurisdiction, and Monetary Redress Conventions and Model Laws); and Secured Transactions, Electronic Registry Implementation of the Model Inter-American Law on Secured Transactions.

55. Permanent Council of the OAS, Comm. on Judicial & Pol. Affairs CP/CAJP-2094/03 add. 3-a (Dec. 10, 2004) (providing the text of the proposed convention); OAS, Office of Int'l L., *Topics for CIDIPS* (2008), [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_applicablelaw.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_applicablelaw.htm).

56. OAS, *Explanatory Introduction to the Experts Meeting Carried out by the OAS—Puerto Alegre, Brazil* (Dec. 2, 2004), available at <http://www.oas.org/dil/INFORME%20FINAL%20Reuni%F3n%202006-%20ingl%20E%20.pdf>.

to a particular set of facts. Of particular concern is the lack of factors to determine the law most favorable to the consumer, which party (plaintiff, defendant, or court) is obligated to make this determination, and which party bears the responsibility for an erroneous determination.

## 2. *Legislative Guide (Model Laws) on Consumer Redress*

The U.S. proposal includes a Legislative Guide on Consumer Dispute Resolution and Redress, accompanied by three suggested Model Laws: one on Small Claims, a second on Government Assisted Redress, and a third on Cross-Border Arbitration.<sup>57</sup> The aim is for States to provide summary procedures for resolving disputes arising from consumer transactions of relatively small monetary value, which seldom merit resort to a full legal proceeding either under the proposed Convention or under existing rules for cross-border civil litigation.

Thus, the proposed Model Law on Small Claims would establish a procedure for resolving small claims in consumer contracts, based on functioning small claims procedures in OAS member states and other models. The draft Model Law on Government Redress would create rules for establishing competent consumer protection authorities in OAS member States and enabling them to cooperate with their foreign counterparts in cross-border disputes and enforcement of judgments. The suggested Rules for Electronic Arbitration of Cross-Border Consumer Claims contemplates a procedure for electronic arbitration of the most common cross-border consumer claims.

## 3. *Model Laws on Jurisdiction and Choice of Law*

The proposal by Canada provides the basis for drafting model laws on jurisdiction and choice of law rules for consumer transactions.<sup>58</sup> The primary purposes are to establish the grounds on which a court could hear a case involving parties in a cross-border consumer transaction and, much like the Brazilian proposal, to articulate rules concerning the law governing the resolution thereof. Under this proposal, courts of an enacting State would have jurisdiction over a consumer transaction when the consumer is habitually resident in the enacting State, there is a real or substantial connection between the enacting State and consumer contract, or there is a written agreement between the parties to that effect. The proposal also incorporates *forum non conveniens* rules by which courts may decline jurisdiction.

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57. U.S. Federal Trade Commission Proposal for OAS, *Model Law on Monetary Redress for Consumer Transactions*, available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_proposal\\_consumerprotection\\_monetaryrestitution\\_unitedstates.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumerprotection_monetaryrestitution_unitedstates.htm). The texts of the revised proposal, legislative guide, and annexed model laws will be available at this same webpage immediately upon becoming publicly available.

58. See Permanent Council of the OAS, CIDIP-VII: Preparatory Work for the Seventh Inter-American Specialized Conference on Private International Law, CP/CAJP-2094/03 add. 5-a, available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_jurisdiction.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm).

## B. ELECTRONIC REGISTRIES

To date, no specific proposals have been made for establishing electronic registries in implementation of the OAS Model Inter-American Law on Secured Transactions.<sup>59</sup> Preliminary discussions among experts have focused on creation of a uniform Inter-American registration form; drafting registry rules/guidelines for accepting, storing, and disseminating registry information; and creation of rules/guidelines for the electronic interconnectivity of registries from different jurisdictions.

While the Model Law provides basic rules each state can follow to create their own specific registration form, going forward, CIDIP-VII will consider the creation of a uniform set of electronic registration forms for use by all Member States. A system based on these uniform registration forms would harmonize filings for all states, permit easy access to registered information, create greater certainty, and facilitate filing (and searching) by parties in cross-border situations. Initial drafts prepared by the OAS General Secretariat are available online.<sup>60</sup> A parallel effort will be made to address uniform registration and registry operation.

A third aspect of CIDIP-VII's work in this area will involve drafting guidelines for the electronic interconnectivity of registries from different jurisdictions. Such interconnectivity would allow for draft rules concerning the proper place of registration for intangibles (including payment intangibles and intellectual property), as well as registry rules for cases in which goods are moved from one jurisdiction to another. In addition, CIDIP-VII work may cover rules and methods for registries in different states to make and receive electronic registrations from foreign jurisdictions.

Preliminary discussions have begun on convening a Diplomatic Conference at which the various proposals in the consumer protection area would be considered, possibly during 2008. However, CIDIP-VII work on Electronic Registries will not begin in earnest until early 2008, and negotiations on the proposed texts are likely to extend into 2009 and beyond.

## VI. Other Developments

### A. UNCITRAL GUARANTEES CONVENTION

Consideration is now being given to possible U.S. adherence to the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.<sup>61</sup> The Convention is designed to facilitate the use of instruments such as UCC-based standby letters of credit and European law-based demand bank guarantees in situations where only one or the other of those instruments is traditionally in use. Its focus is on the relationship between the guarantor or issuer and the beneficiary, rather than the relationship between the guarantor/issuer and its customer. It is intended to extend the reach of mod-

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59. OAS, *Model Inter-American Law on Secured Transactions* (2002), available at [http://www.oas.org/dil/CIDIP-VI-securedtransactions\\_Eng.htm](http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm).

60. OAS, *Uniform Registration Forms*, available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_securedtransactions\\_registrationforms.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_securedtransactions_registrationforms.htm).

61. See Convention on Independent Guarantees and Stand-by Letters of Credit, U.N. Doc. A/50/48 (Jan. 26, 1996), available at <http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf>.

ern financing law so that these instruments would have a higher probability of being honored, thus reducing the risk and cost of collateral to finance trade and commerce.

The Convention reflects principles of party autonomy to apply agreed rules of practice, and, in fact, was formulated at the same time as both the International Chamber of Commerce's (ICC) major revisions to the Uniform Customs and Practices for Documentary Credits (UCP 500) and the revised UCC Article 5 on letters of credit.<sup>62</sup> In addition, a new set of ICC banking standards was developed to work with the Convention on matters not fully covered by the UCP, called the International Stand-By Practice rules (ISP). In 2007, the UCP 500 and ISP have both been considered for revision, with an eye as to how the revisions would work with Convention.

## B. ICC UCP 600 RULES FOR LETTERS OF CREDIT

This year the ICC issued a new set of rules governing documentary credits called the Uniform Customs and Practice for Documentary Credits, Publication Number 600 (UCP 600).<sup>63</sup> The UCP 600 took effect on July 1, 2007, and will replace all previous rules on letters of credit, including the UCP 500.<sup>64</sup> The ICC regulations are not required as a matter of law, but parties that deal with letters of credit almost universally elect to follow these rules.<sup>65</sup>

This is the first time the ICC has revised the rules since 1993.<sup>66</sup> According to the ICC, the new UCP 600 addresses some of the most contentious issues of the previous rule set, including: replacing the term "reasonable time" for refusal of documents with the more concrete time period of five banking days; new articles on "Definitions" and "Interpretations;" and new provisions which "allow for the discounting of deferred payment credits."<sup>67</sup> The ICC was under pressure to review complications involved with the UCP 500 rules to keep up with a changing business environment that included replacing letters of credit with open account trading.<sup>68</sup> The new provisions of the UCP 600 aim to solve some of the uncertainty surrounding letters of credit by adopting more precise definitions and specific time periods.<sup>69</sup> A copy of the UCP 600 and commentary from the UCP drafting group on the new rules are both available from the ICC.<sup>70</sup>

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62. Since 1993, the International Chamber of Commerce (ICC) has issued rules related to letters of credit used in commercial transactions. See Janet K. Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 135 (2005). The ICC originally introduced the rules to reconcile the different documentary credit laws that each country used and replace them with a uniform set of rules that all parties could rely on. See Michael Imeson, *Getting Ready for the UCP 600 Roll-out*, BANKER, Feb. 1, 2007.

63. Int'l Chamber of Com., *Uniform Customs and Practice for Documentary Credits*, Pub. No. 600 (rev. 2006).

64. Int'l Chamber of Comm., Policy and Business Practices, available at <http://www.iccwbo.org/policy/banking/id15072/index.html>.

65. See Levit, *supra* note 62, at 141 (emphasizing that banks, exporters, and importers "proclaim their adherence to the UCP rules").

66. *Id.* at 135.

67. ICC Business Bookstore, *ICC Uniform Customs and Practice for Documentary Credits*, <http://www.iccbooks.com/Product/ProductInfo.aspx?id=456&cid=121> (last visited Feb. 18, 2008).

68. Imeson, *supra* note 62.

69. *Gearing up for UCP 600*, TRADE FIN., December 2006.

70. ICC Business Bookstore, *supra* note 67.

