

## International Commercial Transactions: 1998

By Peter Winship\*

The year 1998 showed mixed progress in the field of international commercial law. On the one hand, enough states became parties to two conventions—the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit<sup>1</sup> and the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects<sup>2</sup>—that these conventions will enter into force. During this same period, on the other hand, the intergovernmental organizations usually reviewed in this Survey Article neither initiated nor completed a project.<sup>3</sup> This year's Article is therefore principally an update of the status of transnational commercial law projects mentioned in previous Survey articles.<sup>4</sup> The most important of these projects are the preliminary draft UNIDROIT Convention on Interests in Mobile Equipment (Mobile Equipment Conven-

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1. See *infra* notes 83-85 and accompanying text. The United States has signed, but not ratified, the Independent Guarantees Convention.

2. See *infra* notes 86-87 and accompanying text. The United States has taken no formal steps to become a party to the Cultural Property Convention.

3. These institutions include the United Nations Commission on International Trade Law (UNCITRAL or the Commission), the International Institute for the Unification of Private Law (UNIDROIT), the Organization of American States (OAS), and the Hague Conference on Private International Law. For further information about these international bodies, see Peter Winship, *International Harmonization of Private Law*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS 159 (Marylin J. Raisch & Roberta Shaffer eds., 1995).

4. For prior surveys, see Peter Winship, *International Commercial Transactions: 1995*, 51 BUS. LAW. 1493 (1996) [hereinafter *International Commercial Transactions: 1995*], Peter Winship, *International Commercial Transactions: 1996*, 52 BUS. LAW. 1643 (1997) [hereinafter *International Commercial Transactions: 1996*], and Peter Winship, *International Commercial Transactions: 1997*, 53 BUS. LAW. 1521 (1998) [hereinafter *International Commercial Transactions: 1997*].

tion),<sup>5</sup> the draft UNCITRAL Convention on Receivables Financing (Receivables Convention),<sup>6</sup> and work on electronic signatures.<sup>7</sup> Future work includes the topics to be taken by the sixth specialized conference on private international law to be convened in 2000 by the Organization of American States (OAS).

The focus of U.S. policy in this area of international private law is to work for economic goals rather than to harmonize existing national laws.<sup>8</sup> Thus, the United States delegation to the UNCITRAL Working Group charged with preparing uniform rules for receivables financing urges rules designed to increase credit by validating the bulk transfer of present and future receivables rather than by harmonizing divergent national rules. This policy is coordinated by an office on private international law (L/PIL) within the Office of the Legal Adviser of the U.S. Department of State.<sup>9</sup> The private sector participates in the formulation of U.S. policy through meetings of the U.S. Secretary of State's Advisory Committee on Private International Law and its study committees on particular projects. During 1998 there were no meetings of the Advisory Committee, but several of its study committees did meet. Notices of these meetings appear in the *Federal Register*<sup>10</sup> and the meetings themselves are open to the public. The charter of the Advisory Committee was renewed in December 1998 for an additional two years.<sup>11</sup>

## **WORK-IN-PROGRESS**

### *INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT*

UNIDROIT has had the subject of interests in mobile equipment on its work program for almost a decade.<sup>12</sup> As noted in last year's Survey article, in February 1998 UNIDROIT's Governing Council approved the final report of a study group.<sup>13</sup> This report proposed a structure of a base convention and a series of protocols negotiated separately for specific industries.<sup>14</sup> The combined text of the base convention and a protocol

5. See *infra* notes 12-35 and accompanying text.

6. See *infra* notes 36-51 and accompanying text.

7. See *infra* notes 52-58 and accompanying text.

8. Harold S. Burman, *Private International Law*, 33 INT'L LAW. (forthcoming 1999).

9. Jeffrey Kovar continues as assistant legal adviser for Private International Law, while Harold Burman remains Executive Director of the Secretary of State's Advisory Committee on Private International Law.

10. See, e.g., Public Notice No. 2669, 63 Fed. Reg. 3614 (1998) (providing notice of a meeting regarding a proposed UNIDROIT Convention and Protocol).

11. Public Notice No. 2946, 64 Fed. Reg. 201 (1999).

12. The progress of this project may be traced in the quarterly newsletter published by UNIDROIT. Recent issues of the newsletter are available through the Institute's webpage. See *Unidroit News* (visited July 11, 1999) <<http://www.unidroit.org/english/news/news-main.htm>>.

13. *International Commercial Transactions: 1997*, *supra* note 4, at 1524-25.

14. *Id.* at 1525.

would regulate the relevant industry. The report included drafts of both the base convention and a sample protocol proposed by the Aviation Working Group consisting of the principal participants in aircraft manufacture and financing.<sup>15</sup> Upon approving the report, the Governing Council submitted the text to the Steering and Revisions Committee, which reviewed the draft texts at a meeting in June 1998.<sup>16</sup>

The resulting preliminary draft Convention on International Interests in Mobile Equipment<sup>17</sup> and preliminary draft Protocol on Matters Specific to Aircraft Equipment (Aircraft Protocol)<sup>18</sup> were submitted to a first meeting of governmental experts in Rome in February 1999. The International Civil Aviation Organization co-sponsored this meeting with UNIDROIT. The formal procedures normally used by the international bodies left little or no room for direct private sector participation at the meeting. This led to some confusion and an unfortunate confrontation between the traditional public sector bodies and the private sector, represented by the Aviation Working Group and the International Air Transport Association (IATA). The meeting did, however, review the draft texts and propose modifications.<sup>19</sup> In addition, the working group on registration of interests in mobile equipment also met and reported to the full meeting.<sup>20</sup> The sponsors have scheduled a second meeting for late August 1999 in Montreal. Following review by governmental experts, it is expected that the draft Mobile Equipment Convention and the Aircraft Protocol will be submitted to a diplomatic conference in 2001.

15. *Unidroit Work Programme for the 1999-2001 Triennium* (last modified Mar. 3, 1999) <<http://www.unidroit.org/english/workprogramme/main.htm>>.

16. For a recent study of these preliminary drafts, see Roy Goode, *Transcending the Boundaries of Earth and Space: The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment*, 3 UNIF. L. REV. 52 (1998). An updated version of Prof. Goode's paper is found on the Internet at *Transcending the Boundaries of Earth and Space: The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment* (visited July 11, 1999) <<http://www.unidroit.org/english/publications/review/articles/19981a.htm>>. Prof. Goode chaired the UNIDROIT study group.

17. *Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment*, 3 UNIF. L. REV. 76 (1998) [hereinafter *Draft UNIDROIT Convention*]; see also *Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment* (visited July 11, 1999) <<http://www.unidroit.org/english/news/pdconv9806.htm>>.

18. *Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, UNIDROIT Doc. Study LXXIID-Doc.3 [hereinafter *Draft Aviation Protocol*]; see also *Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (visited July 11, 1999) <<http://www.unidroit.org/english/news/pdprot9806.htm>>.

19. *Report by the Drafting Committee, Joint Session (Rome, 1-12 February 1999)*, UNIDROIT Doc. CFE/Int.Int./WP/16 (1999) [hereinafter *Joint Session Drafting Committee*].

20. *Report by the Registration Working Group, Joint Session (Rome, 1-12 February 1999)*, UNIDROIT Doc. CFE/Int.Int./WP/15 (1999).

The private sector, as represented by the Aviation Working Group and IATA, chafes at the delay that this proposed timetable represents.<sup>21</sup> Pointing to a specially-commissioned economic impact study,<sup>22</sup> representatives of the private sector point to the significant savings in transactions costs which adoption of the Mobile Equipment Convention and Aircraft Protocol represents.

The draft Mobile Equipment Convention covers international interests in high-value mobile equipment created by security agreements, sales with the retention of title, and leases.<sup>23</sup> It also covers at least some assignments of these interests and the related obligations secured by them.<sup>24</sup> An international interest may be created in mobile equipment whether or not the equipment ever leaves a particular jurisdiction.<sup>25</sup> A creditor may obtain a consensual interest in the object under national law, but this interest will be subject to the interest of a creditor who complies with the publicity provisions provided by the Mobile Equipment Convention.<sup>26</sup>

Although the draft Convention does not provide for a unitary "security interest," its principles and rules will be familiar to readers who know Article 9 of the Uniform Commercial Code (U.C.C.). The draft provides rules for the creation of an enforceable interest, the enforcement of that interest following a debtor's default, publicity of the interest by registration, and priority rules vis-à-vis other creditors both in and outside insolvency proceedings. An interest is "constituted" by an agreement in writing identifying an object of which the party granting the interest has power to dispose and, in the case of a security agreement, determining the secured obligation.<sup>27</sup> Familiar default remedies are also provided, including self-help repossession and disposition without judicial intervention.<sup>28</sup> Although the creditor must act in a commercially reasonable

21. Lorne Clark, Keynote Address at a Roundtable Symposium at the University of Pennsylvania (Mar. 19, 1998). Mr. Clark is General Secretary and General Counsel, International Air Transport Association.

22. Anthony Saunders & Ingo Walter, *Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol: Economic Impact Assessment* (A Study Prepared Under the Auspices of INSEAD and the New York University Salomon Center) (Sept. 1998).

23. *Draft UNIDROIT Convention*, *supra* note 17, at 80 (art. 2(2)), as amended by *Joint Session Drafting Committee*, *supra* note 19.

24. *Draft UNIDROIT Convention*, *supra* note 17, at 96-100, as amended by *Joint Session Drafting Committee*, *supra* note 19; see also *Draft Aviation Protocol*, *supra* note 18, art. XV.

25. *Draft UNIDROIT Convention*, *supra* note 17, at 80, as amended by *Joint Session Drafting Committee*, *supra* note 19.

26. *Id.* at 100.

27. *Id.* at 82; see also *Draft Aviation Protocol*, *supra* note 18, arts. V, VII.

28. *Draft UNIDROIT Convention*, *supra* note 17, at 82, as amended by *Joint Session Drafting Committee*, *supra* note 19; see also *Draft Aviation Protocol*, *supra* note 18, art. IX(1), (2).

manner,<sup>29</sup> any action taken in accordance with its contract with the debtor will be deemed commercially reasonable unless that agreement is “manifestly unreasonable.”<sup>30</sup> Priority among competing claims, including those of an insolvency administrator, to the equipment is determined primarily by reference to the time that notice of an interest is filed in an international register.<sup>31</sup> A registered interest will have priority over later registered interests and over unregistered interests even if the person with the registered interest knew of an earlier unregistered interest.<sup>32</sup> The draft Mobile Equipment Convention sets out elaborate provisions on the registration system, the modalities of registration, and the liabilities and immunities of the international registry.<sup>33</sup>

Among the issues not yet resolved is the relation of the assignment provisions in UNIDROIT’s draft Mobile Equipment Convention with similar provisions in the draft UNCITRAL Receivables Convention, which is discussed below. Informal consultations between the two organizations, interested delegations, and representatives of the private sector will address the issue.<sup>34</sup> The related issue of the interaction of the draft Mobile Equipment Convention with the 1988 UNIDROIT Convention on International Financial Leasing is left to each protocol.<sup>35</sup>

### RECEIVABLES FINANCING

Work continues within UNCITRAL on uniform rules for the assignment of receivables—i.e., the sale or assignment by way of security of the contractual right to payment of money.<sup>36</sup> The objective of this project is

29. *Draft UNIDROIT Convention*, *supra* note 17, at 82, as amended by *Joint Session Drafting Committee*, *supra* note 19. The February 1999 meeting added, in brackets, the additional requirement that when exercising the remedy the creditor must act lawfully. *Joint Session Drafting Committee*, *supra* note 19, art. 9(2). The Aviation Protocol amplifies these requirements in a proposed new Article 14bis. *Draft Aviation Protocol*, *supra* note 18, art. IX(3)(b).

30. *Draft UNIDROIT Convention*, *supra* note 17, at 82, as amended by *Joint Session Drafting Committee*, *supra* note 19. The Aviation Protocol substitutes an amplified provision for this subsection of the draft Mobile Equipment Convention. *Draft Aviation Protocol*, *supra* note 18, art. IX(3).

31. *Draft UNIDROIT Convention*, *supra* note 17, at 94, as amended by *Joint Session Drafting Committee*, *supra* note 19.

32. *Id.*

33. *Id.* at 88-94; *see also Draft Aviation Protocol*, *supra* note 18, arts. XVI-XIX.

34. The Secretary-General of UNIDROIT and a representative of the Aviation Working Group attended the March 1999 meeting of the UNCITRAL Working Group preparing uniform rules for receivables financing. Further consultations are planned.

35. *Report, Joint First Session (Rome, 1-12 February 1999)*, paras. 20-23.

36. For a recent analysis of the UNCITRAL project, see Spiro V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL’s Contribution*, 8 DUKE J. COMP. & INT’L L. 315 (1998). Mr. Bazinas, a member of the UNCITRAL Secretariat, is the Secretary of the UNCITRAL Working Group charged with preparation of this project.

to facilitate cross-border finance and thereby expand the availability of lower-cost credit.<sup>37</sup> It would do so by validating the bulk transfer of present and future receivables and by providing some certainty with respect to issues of priority. Such diverse forms of financing as factoring, forfaiting, securitization, project financing, and refinancing fall within the scope of the rules. UNCITRAL took up the project in 1995. As of March 1999, the relevant UNCITRAL Working Group has met seven times and will meet for a final session in October 1999. The present plan is to submit a completed text to the Commission at its annual session in the spring of 2000.

The latest draft text<sup>38</sup> covers both the international assignment of domestic receivables and all assignments of international receivables.<sup>39</sup> In other words, it will cover all assignments other than domestic assignments of domestic receivables. Subject to special rules for the protection of an account debtor, the draft Receivables Convention will apply to an assignment if the assignor is located in a State that has become a party to the Convention.<sup>40</sup> In principle, the account debtor's rights and obligations are not affected by the Convention.<sup>41</sup> The draft rules cover the form and consequences of an assignment as between the assignor and the assignee, and also as to sub-assignees.<sup>42</sup> Priority among claimants to the same receivable is determined by the national law of the place where the assignor is located.<sup>43</sup> In principle, the same law governing priorities applies in insolvency proceedings, but the Convention expressly reserves issues other than priorities to the law governing the insolvency proceeding.<sup>44</sup> States that wish to adopt registration have the option under the present draft of doing so in a uniform manner, although the details set out in annex to the Convention are still sketchy. The draft also includes conflict of laws provisions that would supplement the uniform substantive rules unless a Contracting State chooses to opt out of these provisions at the time it becomes a party to the Convention.<sup>45</sup> As presently drafted, these provisions would

37. *Id.* at 316.

38. The text as it emerged from the Receivables Working Group session in February 1999 appears in the annex to its report on that session. *Report of the Working Group on International Contract Practices on the work of its thirtieth session*, 30th sess., Annex, U.N. Doc. A/CN.9/456 (1999) (arts. 1-26) [hereinafter *Working Group Report*]. This text does not, however, include previously-approved provisions on applicable law, registration, and final provisions. For these latter provisions, see *Report of the Working Group on International Contract Practices on the work of its twenty-ninth session*, 29th Sess., Annex, U.N. Doc. A/CN.9/455 (1998).

39. *Working Group Report*, *supra* note 38, arts. 1(1), 3.

40. *Id.* art. 1(1)(a).

41. *Id.* art. 18(1).

42. *Id.* arts. 8-23.

43. *Id.* arts. 24, 25(1).

44. *Id.* art. 25(2), (3).

45. *Id.* arts. 27-33.

also be applicable even when the uniform rules do not govern because the assignor is not located in a State that is party to the Convention.<sup>46</sup>

The principal issues that remain to be resolved are (i) how to determine the location of a legal person, (ii) what transactions should be excluded in whole or in part, and (iii) whether to include provisions on “proceeds.” Coming to agreement on the appropriate test for location of a legal person has been particularly difficult. Not only are there numerous tests in existing international instruments and conflict of laws rules, but the translation of concepts such as incorporation from one legal system to another has been challenging. As the text is presently drafted, the location of a party is important for determining whether a contract or assignment is international, whether the transaction has an appropriate relation to a Contracting State, and what law governs the priority of competing claimants to a given receivable. There has been general agreement within the Receivables Working Group on the need for a priority rule that provides as much certainty as possible (e.g., place of incorporation) for determining priorities at the time of planning a transaction.<sup>47</sup> There has also been general agreement that there should be a single rule for location throughout the Receivables Convention. At the same time, however, a number of delegations favor adopting a more flexible standard (i.e., the place of business most closely related to the contract) for determining whether a contract or assignment is international and whether the transaction has an appropriate relation to a Contracting State.<sup>48</sup> To further complicate matters, there is some uncertainty about the appropriate rule in insolvency proceedings.

Equally difficult to come to grips with is the question of what assignments and receivables should be excluded from coverage. On some issues there is agreement. Consumer receivables (i.e., where a consumer is the account debtor in the original contract from which the receivable arises) are covered on the assumption that the Convention’s account debtor protection rules adequately protect all account debtors. At the same time, assignment by a consumer of a receivable owed to that consumer are not covered.<sup>49</sup> For other receivables and assignments there has been much discussion, complicated by the possibility of excluding application of only some rules (e.g., the overriding of anti-assignment clauses) rather than excluding application of the Convention altogether. At present, for example, the draft text covers assignments of receivables where a government is the account debtor but makes an exception for government account debtors that have contracted for an anti-assignment clause.<sup>50</sup> The Receivables Working Group also continues to explore the possibility of

46. *Id.* art. 1(4).

47. *Id.* art. 5(j).

48. *Id.* art. 5(k).

49. *Id.* art. 4(1)(a).

50. *Id.* art. 13(3).

full or partial exclusions for complex financial transactions such as swaps and derivative trading.

While all delegations recognize the policies underlying a decision to include or exclude particular transactions, some delegations have found it difficult to agree to the concept of "proceeds" which is unknown in their domestic legal systems. The issue becomes important in insolvency proceedings where some jurisdictions, such as the United States, recognize an *in rem* right to proceeds while other jurisdictions recognize only an *in personam* right of a creditor against the debtor for the amount of payments made to the debtor. At the February 1999 Receivables Working Group session, a potential breakthrough on this issue was reached in the form of a proposal that would recognize what is effectively an *in rem* right when the assignor, pursuant to an agreement with the assignee, segregates payments in a separate fund that contains only such payments.<sup>51</sup> While this proposal does not provide for a general right to proceeds, let alone to proceeds of proceeds, it would address the particular needs of securitization transactions.

### *ELECTRONIC COMMERCE*

At its annual meeting in 1997, UNCITRAL charged one of its working groups (Electronic Signatures Working Group) with harmonizing the law on digital signatures and certification authorities in order to increase the use of electronic signatures in international commerce. The Working Group gave a first reading to draft uniform rules at a meeting in January 1998 and met again in July 1998 and February 1999 to consider further revisions.<sup>52</sup> The draft rules reflect the following principles:

the principle of media-neutrality; an approach under which functional equivalents of traditional paper-based concepts and practices should not be discriminated against; and extensive reliance on party autonomy. [The uniform rules] are intended for use both as minimum standards in an "open" environment (i.e., where parties communicate electronically without prior agreement) and as default rules in a "closed" environment (i.e., where parties are bound by pre-existing contractual rules and procedures to be followed in communicating by electronic means).<sup>53</sup>

51. *Id.* art. 26(2).

52. *Report of the Working Group on Electronic Commerce on the work of its thirty-fourth session*, 34th Sess., U.N. Doc. A/CN.9/457 (1999); *Report of the Working Group on Electronic Commerce on the work of its thirty-third session*, 33d Sess., U.N. Doc. A/CN.9/454 (1998); *Report of the Working Group on Electronic Commerce on the work of its thirty-second session (Vienna, 19-30 January 1998)*, U.N. Doc. A/CN.9/446 (1998).

53. *Note by the Secretariat: Draft Uniform Rules on Electronic Signatures*, 34th Sess., at 5, para. 14, U.N. Doc. A/CM.9/WG.IV/WP.79 (1998).



These principles are based on UNCITRAL's 1996 Model Law on Electronic Commerce.<sup>54</sup> They reflect a growing recognition that the uniform rules should not discourage other authentication techniques that may be developed, and should leave open the possibility of various levels of security when dealing with public-key cryptography. Concerning certification authorities, present thinking is that the rules should establish only minimum standards.<sup>55</sup>

The Electronic Signatures Working Group has not yet reached a common understanding of the legal problems and their solution. To assist the process, the UNCITRAL Secretariat took the relatively unusual step before the February 1999 meeting of preparing alternative articles to those that had already been discussed by the Working Group.<sup>56</sup>

On an entirely different electronic commerce issue, UNCITRAL adopted at its 1998 session a proposal with respect to "incorporation by reference" as a new article 5*bis* of the Model Law on Electronic Commerce.<sup>57</sup> Following the same approach as other provisions in the Model Law, the new article provides that "information shall not be denied legal effect solely on the grounds that it is incorporated by reference in a data message."<sup>58</sup>

### *PRIVATELY-FINANCED INFRASTRUCTURE PROJECTS*

UNCITRAL devoted a major portion of its 1998 annual session to an in-depth discussion of draft chapters of a legislative guide on privately-financed infrastructure projects.<sup>59</sup> At this session, the Commission directed the the UNCITRAL Secretariat to prepare draft legislative principles<sup>60</sup> and to discuss negotiating and contractual issues only to the extent necessary to explain proposed legislative principles,<sup>61</sup> and agreed to leave the drafting of future chapters and legislative principles to the Secretariat in

54. *UNCITRAL Model Law on Electronic Commerce*, 36 I.L.M. 202 (1997).

55. *Note by the Secretariat: Draft Uniform Rules on Electronic Signatures*, 34th Sess., at 3, para. 4, U.N. Doc. A/CN.9/WG.IV/WP.79 (1998).

56. *See generally, Note by the Secretariat: Electronic Signatures*, 34th Sess., U.N. Doc. A/CN.9/WG.IV/WP.80 (1998).

57. *Report of the Working Group on Electronic Commerce on the work of its thirty-second session*, 32d Sess. Para 24, U.N. Doc. A/CN. 9/446 (1998).

58. *Id.* para. 17.

59. *Report of the United Nations Commission on International Trade Law on the work of its thirty-first session*, 31st Sess., paras. 12-206, U.N. Doc. A/53/17 (1998).

60. *Id.* para. 204.

61. *Id.* para. 205.

consultation with outside experts.<sup>62</sup> At its 1999 session, the Commission will review the completed draft guide.<sup>63</sup>

### *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*

As reported in last year's Survey article, a UNIDROIT Working Group is preparing additional chapters of the very successful Principles of International Commercial Contracts.<sup>64</sup> At its first meeting, in March 1998, the Working Group decided to undertake work on agency, limitation of actions, assignment of rights and duties, third party beneficiaries, waivers, and set-off.<sup>65</sup> Responsibility for preparing drafts on these topics was allocated among the members at this initial meeting. At a second meeting, in February 1999, the Working Group reviewed the first drafts.<sup>66</sup> Professor E. Allan Farnsworth, who worked on the initial text of the Principles, is a member of the Working Group.

### *FUTURE WORK*

#### *Organization of American States: CIDIP-VI*

The OAS continues to plan the convening of a sixth specialized conference on private international law (CIDIP-VI). The OAS Permanent Council convened a meeting of experts in December 1998 to define the precise scope of the topics to be considered at the specialized conference.<sup>67</sup> Two of the three topics are of particular interest to the readers of this Survey:

1. International loan contracts of a private nature, in particular, the uniformity and harmonization of secured transactions law.
2. Standardized commercial documentation for international trade, with particular reference to the Inter-American Convention on

62. *Id.* para. 206.

63. *Note by the Secretariat: Provisional Agenda, Annotations Thereto and Scheduling of Meetings of the Thirty-Second Session*, 32nd Sess., Agenda Item 4, U.N. Doc. A/CN.9/453 (1999).

64. *UNIDROIT Principles of International Commercial Contracts* (1994), reprinted in 34 I.L.M. 1067 (1995). See generally MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (2d ed. 1997).

65. For a report of the March 1998 meeting, see *First Session of the Working Group for the Preparation of a Second Enlarged Edition of the UNIDROIT Principles of International Commercial Contracts* (visited June 28, 1999) <<http://www.unidroit.org/english/principles/wg1998.htm>>.

66. *UNIDROIT Principles of International Commercial Contracts*, UNIDROIT NEWS: 1999-1 (visited July 11, 1999) <<http://www.unidroit.org/english/news/news991.htm>>.

67. Resolution CP/RES. 732 (1173/98). The Permanent Council had been directed to convene a meeting of experts by a resolution of the General Assembly, Resolution AG/RES. 1558 (XXVIII-O/98).

Contracts for the International Carriage of Goods by Road, and the possible incorporation of an additional protocol on bills of lading.<sup>68</sup>

The December 1998 meeting also recommended the convening of two further meetings of experts for each of these two topics.<sup>69</sup> The first meeting would prepare preliminary drafts, which would then be circulated to member States and other organizations for comment. A second meeting would then prepare final drafts for submission to the specialized conference. The preliminary drafts would be prepared on the basis of documents compiled by the OAS Secretariat and documentation presented by States.<sup>70</sup> The specialized conference itself will probably meet no earlier than the end of 2000. Guatemala is expected to host the conference.

## **OTHER DEVELOPMENTS**

### *STANDBY LETTERS OF CREDIT*

The International Standby Practices 1998 (ISP98) became effective on January 1, 1999. The Institute of International Banking Law and Practice has published a commentary on ISP98 prepared by Professor James Byrne, one of the principal participants in the steering committee that prepared the text.<sup>71</sup> The text and Commentary together provide material comparable in format and style to the more familiar Uniform Customs and Practice for Commercial Credits (UCP) prepared and published by the International Chamber of Commerce.<sup>72</sup>

### *MARITIME BILLS OF LADING*

Although Article 7 of the U.C.C. purports to regulate bills of lading, federal preemption through the 1916 Pomerene Act leaves little for the U.C.C. provisions to regulate.<sup>73</sup> Before adoption of Article 7, differences between the Pomerene Act and state law were slight because the federal act followed closely the text of the 1909 Uniform Bills of Lading Act.<sup>74</sup>

68. *Report of the Meeting of Experts for the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)*, at 8, OAS Doc. No. OEA/Ser.K/XXI, RE/CIDIP-VI/doc.9/98 (1998).

69. *Id.* at 7.

70. At the meeting of December 1998 the experts had before them, *inter alia*, a study on the secured transactions topic prepared by the National Law Center for Inter-American Free Trade in Tucson. *Working Document for a Model Inter-American Law on Secured Transactions* (1998).

71. JAMES E. BYRNE, *THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES* (James G. Barnes ed. 1998).

72. ICC, *ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS* (1993).

73. *See* U.C.C. § 7-103 (1995).

74. *Compare* Federal Bills of Lading Act of 1916, 49 U.S.C. app. §§ 81-124 (1988), *with* Uniform Bills of Lading Act of 1909, 3A Unif. Laws Ann. 523 (Master ed. 1981).

Article 7 introduced substantive and textual differences between uniform state law and the federal act.<sup>75</sup> Recent recodification of the relevant portions of the U.S. Code has exacerbated differences in language.<sup>76</sup> Concerned about changes made to traditional language by the recent recodification of the federal act, the Carriage of Goods Committee of the Maritime Law Association of the United States (MLA) initially recommended incorporating most of the traditional language of the Pomerene Act in a proposed revision of the Carriage of Goods by Sea Act (COGSA).<sup>77</sup> The January 1999 draft bill, however, makes no change to the recodified language. It does, however, make those rules applicable to inbound goods.<sup>78</sup>

Previous Survey articles have reported on the MLA initiative. During the last year the MLA has actively lobbied other domestic and foreign interest groups. The chair of the MLA's Carriage of Goods Committee, for example, reports that the committee has consulted with the P&I Clubs of London and Scandinavia, American Waterways Operators, FIATA (International Federation of Freight Forwarders Associations), the Waterman Steamship Lines, and the Canadian Maritime Law Association.<sup>79</sup> The chair also reports that U.S. Senator Kay Bailey Hutchinson has indicated her willingness to introduce the revised COGSA to the Senate some time in early 1999. If she does so, the Senate Subcommittee on Surface Transportation and Merchant Marine of the Committee on Commerce, Sci-

75. One commentary identifies the following differences between Article 7 and the prior uniform law:

- (1) providing for destination bills of lading [§ 7-305];
- (2) giving the consignee of a nonnegotiable bill of lading more control over the goods [§ 7-303(1)(c)-(d)];
- (3) including provisions that deal specifically with through bills of lading [§ 7-302], with delivery orders [§ 7-502(1)(d)], and with bills of lading issued by freight forwarders [§ 7-503(3)];
- (4) spelling out, and perhaps increasing, the requisites necessary to become an Article 7 equivalent of the holder in due course [§ 7-501(4)]; and
- (5) covering all types of bills of lading, rather than only those issued by common carriers [§ 1-201(6)].

ROBERT A. RIEGERT & ROBERT BRAUCHER, DOCUMENTS OF TITLE § 1.3.1, at 13 & nn.24-29 (3d ed. 1978).

76. On July 5, 1994 Congress recodified the Federal Bills of Lading Act of 1916 (Pomerene Act) as part of a more general recodification of Title 49 of the United States Code. Revision of Title 49, Transportation (1994), Pub. L. No. 103-272, 108 Stat. 745 (1994). The new text is now found in 49 U.S.C. §§ 80101-80115 (1994) (replacing 49 U.S.C. app. §§ 81-124 (1988)). The redrafted text is not intended to make substantive changes to the 1916 Act, and Congress adopted the new text without controversy.

77. Formal Report of the Committee on Carriage of Goods, MLA Doc. No. 724 at 32-33 (May 3, 1996).

78. Draft Carriage of Goods by Sea Bill § 16(b) (Jan. 11, 1999) (text on file with author).

79. Letter from Vincent M. DeOrchis to members of the Committee on Carriage of Goods of the Maritime Law Association of the United States (Feb. 23, 1999) (on file with *The Business Lawyer*, University of Maryland School of Law).

ence, and Transportation will have jurisdiction. In the last Congress, this subcommittee conducted a hearing on April 21, 1998.<sup>80</sup>

## **INSTITUTIONAL DEVELOPMENTS**

### **PERSONNEL**

In 1998 UNIDROIT appointed Professor Herbert Kronke as secretary-general to replace the late Malcolm Evans.<sup>81</sup> Professor Kronke took up his position in September 1998. Prior to his appointment he served as Director of the Institute for Foreign and International Private and Economic Law at the University of Heidelberg, Germany. Elections to the UNIDROIT Governing Council were held at the end of 1998 and Professor E. Allan Farnsworth, who had served on the Council for many years, was not re-elected.<sup>82</sup>

### **IMPLEMENTATION**

Since the last Survey article, enough States have become parties to two conventions that they will enter into force. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit will enter into force on January 1, 2000, as a result of the accession by Tunisia in December 1998.<sup>83</sup> The initial five States that have become a party to the Independent Guarantees Convention are Ecuador, El Salvador, Kuwait, Panama and Tunisia.<sup>84</sup> The United States has signed, but not yet ratified this convention.<sup>85</sup> The Convention on the International Return of Stolen or Illegally Expropriated Cultural Objects<sup>86</sup> entered into force on July 1, 1998. The following countries are parties to the Cultural Property Con-

80. 144 CONG. REC. D377-378 (daily ed. Apr. 21, 1998).

81. For information about the appointment of Professor Kronke, see *Institutional Aspects: The New Secretary General Takes Office*, UNIDROIT NEWS: 1998-2/3 (visited July 11, 1999) <<http://www.unidroit.org/english/news/news982&3.htm>>.

82. For information about the 1998 elections to the Institute's Governing Council, see *Institutional Aspects: 52nd Session of the UNIDROIT General Assembly (Rome, 27 November 1998)*, UNIDROIT NEWS: 1998-4 (visited July 11, 1999) <<http://www.unidroit.org/english/news/news4.htm>>.

83. James E. Byrne & Harold Burman, Introductory Note, *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, 35 I.L.M. 735 (1996). For a brief introduction to the Independent Guarantees Convention, see *International Commercial Transactions: 1995*, *supra* note 4, at 1493-95.

84. UNCITRAL, Status of Conventions and Model Laws (last modified Apr. 20, 1999), <http://www.uncitral.org/en-index.htm> > [hereinafter Status of Conventions and Model Laws].

85. *Id.*

86. Convention on the International Return of Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1330 (1995). For a brief introduction to the Cultural Property Convention, see *International Commercial Transactions: 1995*, *supra* note 4, at 1495-97.

vention: China, Ecuador, Hungary, Lithuania, Paraguay, Peru and Romania.<sup>87</sup> The United States did not sign this convention and has taken no formal steps to accede to it.

Additional states have ratified or acceded to several other conventions to which the United States is a party. Burundi, Greece, Luxembourg, Mongolia and Uruguay have acceded to the United Nations Convention on Contracts for the International Sale of Goods.<sup>88</sup> As a result of these accessions, there are now 53 Contracting States, including the United States.<sup>89</sup> Burundi and Moldova have become parties to the related Convention on the Limitation Period in the International Sale of Goods (Limitations Convention).<sup>90</sup> There are now 24 States party to the unamended Limitations Convention and 17 party to the original 1974 Convention and its 1980 amending Protocol.<sup>91</sup> The United States has been party to the Limitations Convention and Protocol since December 1, 1994.<sup>92</sup>

Several states have also become party to conventions to which the United States is not a party. The Russian Federation and Belarus became parties to the 1988 UNIDROIT Convention on International Financial Leasing (Leasing Convention),<sup>93</sup> joining France, Hungary, Italy, Latvia, Nigeria and Panama.<sup>94</sup> During the same period Germany ratified the 1988 UNIDROIT Convention on International Factoring,<sup>95</sup> joining France,

87. For the current status of the Cultural Property Convention, see the UNIDROIT website at *Unidroit Convention on Stolen or Illegally Exported Cultural Objects* (last modified June 17, 1999) <<http://www.unidroit.org/english/implement/i95.htm>>.

88. For the current status of the Sales Convention, see *UNCITRAL Status of Conventions and Model Laws*, *supra* note 84; see also *United Nations Convention on Contracts for the International Sale of Goods*, 19 I.L.M. 668 (1980).

89. *UNCITRAL*, Status of Conventions and Model Laws, *supra* note 84.

90. For the current status of the Limitations Convention, see *id.*; see also *Convention on the Limitation Period in the International Sale of Goods*, 13 I.L.M. 952 (1974); *Protocol Amending the Convention on the Limitation Period in the International Sale of Goods*, 19 I.L.M. 696 (1980). Burundi has become a party to the 1974 Convention without the Protocol, while Moldova acceded to both the Convention and the Protocol. For the current status of the Limitations Convention, see Status of Conventions and Model Laws, *supra* note 84. For further information about the Limitations Convention, see Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's First-Born*, 28 INT'L LAW. 1071 (1994).

91. Winship, *supra* note 90, at 1073.

92. See Public Notice 2133, 60 Fed. Reg. 3484, 3484-3489 (1995) (setting out consolidated text of the convention as applicable in the United States).

93. *UNIDROIT Convention on International Financial Leasing*, 27 I.L.M. 931 (1988).

94. For the current status of the Leasing Convention, see *Unidroit Convention on International Financial Leasing* (visited July 11, 1999) <<http://www.unidroit.org/english/implement/i881.htm>>.

95. *UNIDROIT Convention on International Factoring*, 27 I.L.M. 943 (1988).

Hungary, Italy, Latvia and Nigeria.<sup>96</sup> The United States has signed both of these UNIDROIT conventions but has not yet requested the advice and consent of the Senate. Harold Burman, the executive director of the Secretary of State's Advisory Committee on Private International Law, has written that transmittal of the Leasing Convention to the Senate for its advice and consent is being considered.<sup>97</sup>

96. For the current status of the Factoring Convention, see *Unidroit Convention on International Factoring* (visited July 11, 1999) <<http://www.unidroit.org/english/implement/i88f.htm>>.

97. Harold S. Burman, *Private International Law*, 32 INT'L LAW. 591, 597 (1998).

