Private International Law

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Private international law (PIL) spans a broad spectrum of private law topics, including commercial law, family law, consumer law, dispute resolution, judicial cooperation, arbitration, transportation of goods, and insolvency law. The focus of most PIL treaties and model laws is the creation or recognition of rights directly accessible by private parties and enforceable in courts or otherwise without governmental intervention or approval.

The focal point for this activity continues to be primarily intergovernmental bodies, including the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Organization of American States (OAS). International non-governmental bodies such as the International Chamber of Commerce (ICC) and the Comité Maritime Internationale are also actively involved. On the national level, the Section of International Law and other Sections of the American Bar Association (ABA), the National Conference of Commissioners on Uniform State Laws (now renamed the Uniform Law Commission), the American Law Institute (ALI), and a number of specialized associations participate in negotiations and consultations.

I. U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The new convention (Rotterdam Rules) was approved by UNCITRAL in July 2008 and adopted by the U.N. General Assembly on December 11, 2008.1 It will be open for signature following a formal signing ceremony in Rotterdam scheduled for September 2009. The convention has the backing of federal agencies as well as broad industry and bar association support within the United States. Signature of the convention is expected, and prompt transmission to the Senate for its advice and consent should follow.

This convention can bring about much-needed modernization and harmonization of the law in this field, which has remained fractured between different legal regimes for over

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eighty years. In the United States, the governing legal regime dates back to 1924. The United States was a major proponent of the convention, along with the Comité Maritime International, the Maritime Law Association, the National Industrial Transportation League, and other maritime and carriage of goods interest groups. Key features of the convention include a regime of uniform liability rules to govern contracts between cargo shippers and carriers for the international carriage of goods where the journey includes carriage by sea and may include carriage by other modes of transport. More limited coverage of related inland rail and road shipments is also included.

The Convention includes comprehensive rules regarding the entire contract of carriage, including: liability and obligations of the carrier; obligations of the shipper to the carrier; transport documents and electronic transport records; delivery of the goods; rights of the controlling party and transfer of rights; limits of liability; and provisions regarding the time for suit to be filed, jurisdiction, and arbitration.

Of particular importance to the United States, Article 80 provides that certain types of contracts, called “volume contracts,” may derogate from the terms of the convention and provide greater or lesser rights, obligations, and liabilities than those imposed by the convention. This was a difficult factor in the negotiations, opposed by some states as permitting more party autonomy than would be consistent with strict treaty regulation. Other difficult, but essential, provisions for the U.S. negotiating team were the jurisdictional provisions, including one which would have the effect of reversing the Sky Reefer decision, in which the U.S. Supreme Court held that an arbitration clause requiring arbitration in a foreign country is valid under the 1936 Carriage of Goods by Sea Act.

Many developing countries who are currently party to the 1978 UNCITRAL-prepared treaty known as the “Hamburg Rules” actively participated in the negotiations and may be more likely to choose the new Rotterdam Rules because of their involvement in the drafting process. Ratification by the United States is likely to be very important as to whether the new treaty becomes a new international harmonized standard. Consultations with all stakeholders will take place early in 2009 after the reorganization of Congress to consider whether implementing legislation is required or desirable.

3. Id. at chs. 4-5.
4. Id. at ch. 7.
5. Id. at ch. 8.
6. Id. at ch. 9.
8. Id. at ch. 12.
9. Id. at chs. 13-15.
10. Id. art. 80.
II. International Process and Dispute Resolution

A. THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Convention on Choice of Court Agreements may become the first such treaty instrument to be implemented by the United States. Consideration of the convention resulted in detailed consultations in 2008 between interested federal agencies, uniform state law representatives, and a variety of interested sectors and associations, including the ABA Section on International Law, as to the effect of the treaty and the options for implementation.

For a number of years, member states of the Hague Conference attempted to negotiate a much broader multilateral instrument on recognition and enforcement of judgments. That effort foundered on the differences between state practice and differing views as to the desirable extent of statutory regulation of such matters. E.U. states promoted standards drawn from its Brussels-Lugano treaty structure, which broadly regulates jurisdiction as well as enforceability, while the U.S. goals were more limited, given both constitutional limitations and practice differences. When those negotiations ultimately proved to be unsuccessful, efforts shifted to a more attainable but still important objective: an agreement regarding the recognition and enforcement of exclusive choice of court agreements and the resulting judicial judgments. Under the 2005 Hague Convention on Choice of Court Agreements, when parties to a wide range of civil or commercial contracts agree that disputes will be heard in a particular court, that provision will be enforced (depriving other courts of jurisdiction), and a judgment rendered by the chosen court will be recognized and enforced. Circular 175 authority (a federal inter-agency clearance process) has recently been granted for the U.S. Government to sign the Convention. Because the matters it addresses are generally a matter of state law in the United States, implementation is a key issue, and various groups, including the Consular Affairs Bureau, the Justice Department, various Sections of the ABA and other associations, and the Uniform Law Commissioners, are examining different options.

B. INTERNATIONAL PROCESS

The Hague Conference periodically holds special commission meetings to review the operation of its conventions and related matters on its work agenda. The next meeting, in February 2009, will cover the Apostille, Service, and Evidence Conventions. Work is also underway on mechanisms to adapt the Hague’s Apostille (legalization) Convention to modern electronic documentation processing and certification possibilities.

14. Id.
C. COMMERCIAL ARBITRATION

During its 2008 sessions, UNCITRAL's Working Group II on commercial arbitration law continued negotiating proposed changes to the UNCITRAL model arbitration law. The UNCITRAL Arbitration Rules are considered one of the most successful international arbitration texts, having been used in many ad hoc arbitrations and adapted by many arbitration centers as well as used for some investor-State disputes. One of the unresolved issues concerns the discretion of the appointing authority to appoint a substitute arbitrator or to establish a truncated tribunal. Some support was expressed for adopting a generic approach granting the appointing authority broad discretion in its decision whether to proceed itself with the replacement of the arbitrator or to order a truncated tribunal subject to clarification that such discretion would only exist in exceptional circumstances. The prevailing view, however, was that a provision allowing an appointing authority to proceed with the direct appointment of an arbitrator should not extend beyond the cases of improper conduct and should remain generic so as to cover all possible instances. It was further agreed that a provision allowing the appointing authority to opt for a truncated tribunal should include sufficient limitations to ensure that it could only happen in exceptional circumstances and take account of the stage of the proceedings. The Working Group decided to consider the matter further at a later time.

An issue that arose during the Working Group's 2008 sessions was whether to expand the role of the Permanent Court of Arbitration (PCA), headquartered in the Hague, in arbitrations conducted under the UNCITRAL Rules. Under Articles 6 and 7 of the existing Rules, when any party fails to appoint an arbitrator, or the parties cannot agree upon appointment of an arbitrator, this role is to be performed by an appointing authority, which may be a person or institution chosen for this role by the parties. If the parties cannot agree on an appointing authority, any party may ask the Secretary-General of the PCA to designate one. Some say that this two-step procedure of having the PCA designate an appointing authority that, in turn, appoints one or more arbitrators, is inefficient. For that reason, it has been proposed that the Rules should officially designate the Secretary-General of the PCA as the default appointing authority in any arbitration under the Rules in which the parties have not otherwise chosen an appointing authority. Some have objected to the proposal because the UNCITRAL Rules were meant to be international in scope and that the PCA did not have detailed knowledge of arbitrators in every region.

III. International Family Law

International family law continues to expand, most prominently in actions involving children's rights and protection Conventions. A series of Hague Conventions on various aspects of child protection involved implementation issues in 2008. The United States is a

party to the Convention on the Civil Aspects of International Child Abduction\textsuperscript{18} and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption\textsuperscript{19} (negotiation of the latter treaty was only the first step; negotiations in the United States to resolve the framework between federal law and interests of agencies, such as Health and Human Services and the State Department and state laws and state and private actors who are primary implementers, took several years and were concluded only recently).

Action was taken on a third family law treaty by signing the new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted in November 2007 and transmitted it to the Senate on September 8, 2008, along with proposed federal implementing legislation.\textsuperscript{20} It is not yet in force. There is strong support for the Child Support Convention from state child-support agencies and lawmakers, although action by the Senate and House in the closing days of this Congress is becoming less likely. Key elements of the treaty are:

- Each party shall designate a Central Authority to discharge the duties imposed on it by the Convention.\textsuperscript{21} The United States intends to designate HHS as the Central Authority. Articles 9-12 describe the types of applications that may be submitted under the convention and the process that Central Authorities must use in processing cases.

- A maintenance decision made in one contracting state shall be recognized and enforced in other contracting states if the first state’s jurisdiction was based on one of the enumerated grounds.\textsuperscript{22}

- Reciprocity, which will be a major benefit of ratification for the United States. U.S. courts already recognize and enforce foreign child support obligations in many cases, while many foreign countries will not process foreign child support requests in the absence of a treaty obligation. The Convention requires only two contracting states for entry into force. No state has yet ratified the convention.\textsuperscript{23}

- Federal and state implementing legislation will be required to give effect to the treaty: Proposed federal legislation was transmitted to Congress in July 2008, the same month that the Uniform Law Commission approved draft state implementing legislation.\textsuperscript{24}

The United States, with support from state family law interests, is also continuing to work toward expanding the number of bilateral child support agreements. There are currently twenty-four of them.


\textsuperscript{21} Id.

\textsuperscript{22} Id. art. 20.

\textsuperscript{23} Id.

The 1996 Hague Protection of Children Convention addresses child custody and rights of access.\textsuperscript{25} The State Department's Consular Affairs Bureau, taking into account the interests of many U.S. states, decided that it would be in the interests of the United States to sign the Convention. Implementation of the convention in the United States raises federalism issues, as well as complex practical questions, and work was begun in 2008 with stakeholders, including the National Conference of Commissioners on Uniform State Laws, to develop an implementation plan. The United States may sign the Convention within the next year. The 2000 Convention for the International Protection of Adults provides harmonized rules for courts issuing protective orders for incapacitated adults in international cases.\textsuperscript{26} It also raises federalism issues and practical questions much like those posed by the 1996 Convention, and a decision about proceeding with the 2000 Convention is likely to be made after procedures for implementing the earlier one have been worked out.

Some of the issues concerning implementation of the Protection of Children Convention include deciding on the means of implementation, which could include federal framework legislation with an opt-out if states adopted uniform state law or other state law that complied with Convention.\textsuperscript{27} The effect of a key jurisdictional rule in the convention, which differs from current law in U.S. states, needs to be worked out, and work needs to continue with the Uniform Law Commission regarding possible related amendments to Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and draft Uniform Guardianship Act.

IV. The Organization of American States—Preparations for CIDIP-VII

The OAS has approved convening the Seventh Inter-American Conference on Private International Law (CIDIP-VII), which will focus on two topics: consumer protection and electronic registries for secured transactions.\textsuperscript{28} Preliminary discussions have also begun on a Diplomatic Conference on consumer protection. The U.S. position has been to address all the CIDIP consumer law proposals at one conference; efforts by Brazil in November 2008 at the OAS to advance to a diplomatic conference only on its text were not supported. OAS member states will possibly also be able to adopt the OAS model registry regulations at that time, although with U.S. support it has been agreed that the two may proceed on separate tracks and on a separate time schedule.

A. CONSUMER PROTECTION

The United States and some other countries interpret consumer protection as amplifying legal rights in a way that facilitates cross-border expansion of goods and services while


\textsuperscript{27} Id.

\textsuperscript{28} Seventh Inter-American Specialized Conference on Private International Law, AG/RES. 2217 (XXXVI-O/06) (adopted by the Plenary at its fourth session, held on June 6, 2006), available at http://www.oas.org/dil/CIDIP-VIIAG-RES-2217_XXXVI-0-06_eng.htm.
lowering transaction costs for consumers. Three CIDIP proposals are being reviewed by OAS states: (i) a draft convention on consumer protection to address choice of law, presented by Brazil; (ii) draft model laws on jurisdiction and choice-of-law rules for consumer contracts, presented by Canada; and (iii) a draft Legislative Guide on Consumer Dispute Settlement and Redress, presented by the United States.\(^{29}\)

The United States, based on comments by a number of associations and interest groups, has not agreed to support either the current Brazilian or the Canadian proposals because they would prevent parties from choosing the applicable law in e-commerce transactions and because neither is seen as benefiting consumer interests. An approach similar to the Canadian draft model law, i.e. that the law applicable in most cases would be the law of the consumer's jurisdiction, regardless of other factors, was rejected by States during the Hague Conference Convention on Choice of Court Agreements negotiations in light of its likely negative impact on e-commerce transactions. Similar concerns recently led the European Union to reject a substantially identical proposal on the law applicable to consumer contracts in the Rome I regulations. The Brazilian draft treaty would permit party choice-of-law determinations only if it were the law "most favorable to the consumer."\(^{30}\)

In the absence of clear treaty rules permitting both the consumer and the business offering consumer goods to know in advance whether that would point to law with longer filing periods, law allowing less costly consumer proceedings, law with higher potential damage awards, etc., such a treaty would only produce (a) uncertainty and actually run up risk and costs and (b) create interesting conflict-of-laws issues well beyond the capacity of most consumers to pay for litigation to resolve them.

The United States recently has urged that states instead follow the approach taken in the earlier 1995 CIDIP V Mexico City Convention Law Applicable to International Contracts, which allows no-nexus choice of law and also covers consumer transactions.\(^{31}\) The Mexico City Convention could be amended to require a nexus to chosen law for consumer contracts. The Mexico City Convention, however, would require a number of English language corrections to conform to the Spanish text before the United States would be in a position to consider ratification of that treaty.

The U.S. proposal for CIDIP VII includes a draft Legislative Guide on consumer dispute resolution and redress and is accompanied by three suggested model laws. The U.S. draft model law on small claims establishes a procedure for resolving small claims in consumer contracts that is based on functioning small-claims procedures in some OAS member states (many OAS states lack comparable mechanisms for consumers).\(^{32}\) The U.S. draft model law on government redress for consumers (including cross-border consumer transactions) provides rules to establish competent consumer protection authorities in


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OAS member States, to vest them with authority to provide consumer redress, and to enable them to cooperate with their foreign counterparts in cross-border disputes and enforcement of judgments. Finally, the U.S. draft proposes model rules for electronic arbitration of cross-border consumer claims. These proposals have been reviewed by the Federal Trade Commission and others. The United States has expressed the view that resolving cross-border consumer claims through traditional court mechanisms is too expensive and not practical, given the small value of most consumer complaints, and U.S. proposals therefore focus on alternate effective redress.

Earlier in 2008, as part of the CIDIP VII process, the United States formed a group with Canada, Mexico, and Argentina to draft model registry regulations to implement the OAS Model Inter-American Law on Secured Transactions. The 2002 Model Law produced at CIDIP VI adopted modern concepts of secured finance that can boost economic performance in many states of the OAS, and broaden considerably the range of businesses that can effectively benefit. The current project would implement the Model Law by establishing a legal framework for modern notice-filing registries of such interests, providing low-cost predictability for financing interests. The current U.S. draft text focuses on three main features: (a) guidelines for interconnectivity of the various national registries; (b) guidelines for accepting, storing, and disseminating registry information, including search criteria and reliance rights; and (c) a uniform registration form for OAS countries to facilitate cross-border recognition of registered interests and amplify the economic effect of such reforms. While all-electronic registries are the goal and would boost commerce by providing low-cost and low liability exposure systems, not all OAS states may be in a position to implement such systems immediately and that some concurrent paper-based systems may be necessary.

V. Government Direct and Indirect Acquisition of Goods and Services

The field of government-associated procurement spans both public and private law and is a major, and sometimes the principal, sector in many developing countries. Promotion of responsible procurement laws, treaties, and other instruments, in addition to promoting cost savings, can boost modern contract and commercial practices and reduce corruption. For the past several years, UNCITRAL’s Working Group I on Procurement has been engaged in an effort to update the 1994 UNCITRAL Model Law on Procurement of Goods, Construction, and Services, and its accompanying Guide to Enactment, to reflect new practices and technological developments, in particular those resulting from the use of electronic communications.34

The UNCITRAL Model Law enjoys global influence as a source of norms and practices for good public procurement. It has been widely copied and followed around the world. UNCITRAL’s web site lists seventeen states that have utilized the model law as a


basis for enacting their own procurement laws. Other countries have also used the model law as a basis for updating their existing laws.

During 2008, the working group considered several novel topics, including (1) the procurement technique known as the “electronic reverse auction”; (2) abnormally low tenders; and (3) the method of contracting known as the “frameworks agreement” (known in the United States as “indefinite-delivery/indefinite-quantity” contracts or “catalogue” contracts). Although many of these techniques and practices are novel to public purchasing agencies worldwide, the United States, the European Union, and other developed countries have extensive experience with these concepts. Typically, the Working Group attempts to resolve how these novel practices might be used best in developing countries.

The Working Group also discussed strengthening remedies under the UNCITRAL Model Law. The United States has a long tradition of allowing vendor challenges to procurement decisions. That tradition has been extended to the U.N. Convention Against Corruption and the World Trade Organization’s Government Procurement Agreement (GPA). Both the Convention and the Agreement call for effective remedies systems in procurement, a position that received the strong support of the United States.

The Working Group also discussed potential reforms to deal with conflicts of interest in procurement. The U.N. Convention Against Corruption, which has been broadly adopted, calls in Article 9 for procurement rules to reduce conflicts of interest. Because standards for conflicts of interest can vary enormously between legal cultures, however, the Working Group has taken the position that the current reform initiative should identify and support ways to develop systems, such as regular reports, for mitigating conflicts of interest. The Working Group agreed that the Model Law should include provisions setting out the relevant principles and that the detailed explanations and considerations would be in the Guide to Enactment. The Working Group also agreed that a complete version of the revised model law would be presented at its February 2009 session in New York. Its aim is to submit the revised model law to the Commission at its 42nd session in June 2009 in Vienna.

VI. International Commercial Law

A. CAPITAL MARKETS TRANSACTIONS LAW

The advent of computer-based transfers of investment securities interests, both domestically and increasingly across borders, together with the rise of new regulated entities that manage the flow of these interests, has led to much higher volumes of transactions. These amplify the issues that arise as interests in securities rapidly cross over borders. Following conclusion of the 2006 Hague Convention on Law Applicable to Intermediated Securities, the negotiations advanced in 2008 on a second related draft convention under UNIDROIT auspices that seeks to harmonize core substantive laws involving transfers.

35. These nations are Afghanistan, Albania, Azerbaijan, Croatia, Estonia, Gambia, Kazakhstan, Kenya, Kyrgyzstan, Malawi, Mauritius, Moldova, Mongolia, Nigeria, Poland, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan.
37. Working Group, supra note 32.
1. The Draft Unidroit Convention on Substantive Law Related to Transfers of Intermediated Investment Securities

A diplomatic conference held in September 2008 at Geneva, Switzerland came much closer than expected to completing an acceptable treaty text that might be ratifiable by many states. A second and final diplomatic conference is expected to be held to adopt the treaty in the fall 2009. In the interim, participating states and the securities industry and regulators will review proposed official commentaries that detail the effects of the technical commercial law provisions more specifically than the black letter text. Although such official commentaries are usually prepared with participation of interested states and industry after the text is concluded, the need for greater certainty in the financial markets as to the effect of harmonized rules has reversed the order in this negotiation.

The dynamics of this negotiation have changed considerably after the economic downturns in the second half of 2008. Various national capital markets and financial systems produce different securities interests, different rules on what is transferable, different treatment of intermediaries, and different allocations of loss. The United States has harmonized these aspects of its securities transaction law through uniform state law (UCC Article 8 revised). The European Union is seeking concurrently with the UNIDROIT negotiation some measure of further harmonization amongst its member states. Uncertainties about the results of the internal EU process as well as the effects of economic changes make agreement sometimes difficult between the United States, the European Commission, the European Central Bank, and the various EU states, as well as countries from other regions. In addition, the treaty has been altered to try to accommodate non-intermediated system countries such as Brazil, China, Spain, and others. Thus, while not attempting to harmonize the overall differing market systems (an infeasible task for the foreseeable future), the draft UNIDROIT Convention would cover matters such as what types of rights and interests are transferred, rights and obligations of intermediaries, agreed standards for protection of acquirers of securities interests, plus additional provisions to support modern collateral transactions.

Overall, a substantial change, driven by increasing economic distress of financial sectors and decline in national economies, took place between consultations in early 2008 and the time of the September 2008 Geneva Conference. A recognition that some measure of harmonization had become much more important, both to facilitate markets and lower systemic risk, led to significant, though tentative, agreement on a number of issues on which the gaps between national positions had seemed problematic before. A final text will likely defer to national law on a number of matters on which consensus will not be reached, but by at least designating the applicable law the Convention will speed assessment of any issues of rights and obligations attached to the movement of securities, especially across borders, that can now take place multiple times in a single day. Thus, even where a number of declarations are to be available for states to modify specified provisions when their national law is applied (a common mechanism for private law treaties) it would nevertheless result in a much higher level of predictability in cross-border market transactions.

38. UNIDROIT, Substantive Rules regarding Intermediated Securities (Study 78), http://www.unidroit.org/english/workprogramme/study078/item1/overview.htm.
39. Id.

Signed by the United States in a joint signing ceremony with Switzerland in 2006, efforts were initiated in 2008 to boost support for ratification by states in the Americas, Asia, and others. This effort was deferred in 2007 to allow time for the European Union to consider whether it would permit member states to sign and ratify the Convention. While a larger number of EU states would be expected to adopt the convention, a "blocking minority" of four or more states prevents action in the European Council. Talks are expected between France, Germany, the European Central Bank, the United States, and others to assess whether necessary assurances can be made to resolve concerns. Future consideration might be given to reconvening a diplomatic conference to adopt a protocol if the results would be acceptable to states ready to accept the treaty as it is. One of the issues is whether the treaty language could be cited as a basis to preclude a state party from regulating certain matters involving securities transactions. The United States has stated that a private law convention, absent provisions to the contrary, would not preclude regulatory actions by government agencies, such as requiring parties within a state to adopt its national law in securities account agreements entered into in that state.

3. Possible future work on capital markets law

UNIDROIT has authorized two new projects in this area of law. The first, proposed by the London-based International Swaps and Derivatives Association (ISDA), would be a draft convention on bilateral and multilateral “netting” of obligations, including close-out of financial transactions, a modern development that facilitates financial markets; the second would be an elaboration of basic requirements for developing countries to initiate effective capital markets. A UNIDROIT Committee established at the September 2008 conference on the second proposal will be chaired by China and Brazil. The United Kingdom also recently proposed a project at UNIDROIT for agreement on classification of financial parties so that rules affecting cross-border cases can be tailored for each separate category.

B. UNIDROIT MODEL NATIONAL LEASING LAW

The UNIDROIT General Assembly and the UNIDROIT Committee of Government Experts (the equivalent of a working group of state representatives, industry, and private law focused non-governmental organizations (NGOs)) adopted a Model Law on Leasing at a special joint session in 2008.\(^{41}\) The Model Law will assist developing countries and countries in transition 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 insufficient, and as a result, modern forms of leasing finance are virtually unavailable or available only at high cost. The model law provides uniform rules governing the effect of the leasing agreement (e.g. enforceability, duties to the lessee, and priority in relation to liens) and covers both what are commonly referred


to as financial leases and operating leases. For exporters and investors, adoption will mean
the establishment of new or enhanced markets where none previously existed by creating
commercial law certainty and curtailing costs. It is expected that the World Bank’s Inter-
national Finance Corporation and others will promote its adoption.

C. CAPE TOWN CONVENTION ON MOBILE EQUIPMENT FINANCE

The first Protocol to the Convention, which covers aircraft finance, came into force in
2006. With over twenty states parties already, including the United States, it covers well
over fifty percent of the world’s transactions on larger commercial aircraft and aircraft
engines. Its adoption is seen as opening the door to countries’ amending their domestic
contract and finance laws to introduce concepts established in the Uniform Commercial
Code (ratifying states in 2008 include Saudi Arabia, the United Arab Emirates, India, and
Luxembourg). Considerable work is now undertaken annually by the aviation industry,
user airlines, export-import agencies of governments, and others to promote common
interpretations of, and practices under, the Convention and Protocol. This has worked
well despite the many options for declarations on a number of articles, since certainty of
commercial law as applied in any given country is itself a significant step forward.

A second Protocol to Cape Town was concluded in 2007 (the “Luxembourg Proto-
col”). It covers financing of rail rolling stock (engines, freight cars, passenger cars, etc.),
but efforts underway through 2008 to set up the necessary international registry have
encountered unexpected delays. Until the details for establishment of the new registry are
completed, so that costs, fees, and other factors as well as possible renumbering of large
volumes of freight cars can be assessed, states are unlikely to consider ratification.

A possible third protocol that involves efforts to move the Convention some 50,000
kilometers above commercial airspace (which is covered by the Chicago Convention on
international aviation) to outer space, so as to benefit financing of satellite manufacturers,
operators, service providers, and users, has proven to be a significant challenge and its
outcome not assured. A meeting of key states and industry in October 2008 was intended
to move toward a core set of agreed provisions or concepts but did not produce substantial
consensus. At issue at the October meeting was delineation of what assets would be regist-
trable for purposes of priority in financing, what effect secured interests in onboard com-
ponents such as transponders would have on interests in the satellite itself, the effect of
secured rights in one but not all of a satellite group that operates at least in part as a
unitary system, whether interests at the manufacturing stage would be covered, whether
enforcement of rights would be excluded at the launch phase, whether insurers (salvors)
rights would be registrable before or after payout of claims, and other factors. Other
previous unresolved issues include whether the Protocol should cover only physical assets
or should also extend to derivative rights such as secured financing rights and future re-
ceivables, and whether there should be a special constraint on enforcement that might
affect “public services” (an undefined and potentially very broad term in various coun-
tries). U.S. participants noted that unless the space asset protocol approaches the same

42. Convention on International Interests in Mobile Equipment and Protocol to Convention on
43. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters
credit value as the Aircraft Protocol (i.e. protects creditor's rights to attract capital), it will not draw financing to a sector already more risky than commercial airspace. Meetings are expected to resume in the spring 2009 after the next meeting in April of the U.N.'s Outer Space Committee, which has been monitoring developments at UNIDROIT.\textsuperscript{44}

Finally, the spring 2008 meeting of the UNIDROIT Governing Council gave support for initiation of a fourth protocol to Cape Town covering mobile agricultural, construction, and mining equipment. This protocol is expected to be supported by U.S. manufacturers and agencies such as USAID, Ex-Im Bank, Commerce, and others and would potentially involve the U.N.'s Food and Agriculture Organization.

D. Secured Finance and Intellectual Property Interests

UNCITRAL's Working Group VI (Secured Transactions) at its 2008 sessions continued its work on the preparation of an annex on secured rights in intellectual property (IP) that would supplement its 2007 Guide to secured finance law reforms.\textsuperscript{45} In 2007, UNCTAR had authorized the Working Group to undertake this work to assure coordination between secured transactions law and IP rights, since both fields were expanding considerably.

The Working Group was able to complete a first reading of the entire draft Annex. Several controversial issues remain to be resolved, however. For example, consistent with the Guide and U.S. law, the draft annex provided that non-exclusive licensees who obtain licenses in the ordinary course of business take free of a prior security interest created by the licensor. Some, however, argued that this concept of ordinary course does not generally exist in IP law in some countries and therefore has no place in the Annex. U.S. participants suggested that a result protecting mass market consumer licensees was more important than formulating a particular legal rule and that the Annex might simply urge that national laws should provide protection for consumer non-exclusive licensees. Even this limited formulation met with some opposition.

Another conceptual issue concerned the choice of law for security rights in intellectual property. Two alternate rules remain under consideration. Some participants argued that the \textit{lex protectionism} (following IP law of the state that created the IP right) would provide the best result. Others argued that the law of the grantor's location (the general rule for intangibles under the secured finance Guide) would provide the optimal result, since it would result in the application of a single law to the creation, third-party effectiveness, priority, and enforcement of a security right.

At the conclusion of the fall 2008 session, the Working Group was of the view that it should be able to complete its work on the draft Annex at its fall 2009 session or at its early spring 2010 session.\textsuperscript{46} The Working Group would then be in a position to submit the Annex to the Commission for final approval and adoption at its 2010 session.

\textsuperscript{44} U.N. Office of Outer Space Affairs, http://www.oosa.unvienna.org/.

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VII. Electronic Commerce

A. Electronic Means of Facilitating Import-Export Trade: The "Single Window"

At its July 2008 Commission meeting, UNCITRAL authorized new work on a trade related e-commerce project known as the "single window" that involves legal structures for channeling through a single electronic avenue the data, forms, approvals, and necessary information on various interrelated areas of trade practice needed to effect the export-import of goods. While conceptually able to expand the number of players in trade (it can enable smaller and medium size businesses to access trade routes, as well as potentially lower the cost and complexity for all business entities) and increase the efficiency of cross-border trade routes, it has not gone beyond pilot projects. The World Customs Organization (WCO) has now undertaken an effort to realize this concept, and UNCITRAL has agreed to participate. When described at the annual ABA meeting in August 2008, an equal number of commentators expressed concern as well as support. Some concerns focused on the potential for some developing countries to use the new mechanism not to expand trade participation and lower costs, but to further control and constrain such trade. Management and control of data will also be an issue (confidentiality of trade data will have to be assessed in light of newer legal avenues for access to such data for law enforcement, anti-terrorism initiatives, and other purposes). The WCO itself could become a manager of a system that allows countries to have access under prescribed conditions, which may be a means of resolving these concerns.

B. Electronic Commerce Convention

The 2005 UNCITRAL E-Commerce Convention was endorsed this year for U.S. ratification by the ABA House of Delegates. Two initiatives were launched in 2008 on methods to implement the Convention, one at the ABA Business Law Section's Cyberspace Law Committee, the other at the Uniform Law Commission. Both focus on implementing the Convention largely through uniform state law in order to track and maintain the present federalism balance between federal law and state law under the Federal Electronic Signature and Global E-Commerce Act [see "Treaty Implementation" below], which defers to uniform state law to the extent a state has adopted the 1999 version of the ULC's Uniform Electronic Transaction Act (UETA). It is expected that when the ULC process has evolved further, and more consideration is given to the options for implementation, a decision will be made whether to send the Convention forward to the Senate. A number of countries have signed the Convention, but most are expected to refrain from ratification unless the United States goes forward, since it is widely recognized that the final text largely parallels solutions in UETA. UETA reflects a minimalist approach, i.e. setting out the basic rules validating e-messages to conclude contracts but leaving much

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otherwise to party autonomy, in contrast to other more comprehensive regulatory models on the international table.

VIII. Cross-Border Business Insolvency Law

A. Treatment of Corporate Groups in Insolvency Proceedings

UNCITRAL's Working Group V on international insolvency law met twice in 2008 to seek agreement on the factors involved in handling corporate group cases. These issues are among the most important unresolved international bankruptcy law matters since the acceleration in 2008 of cases involving cross-border entities, in which parties seek to implicate other corporate entities in third countries that may have related assets or obligations, but that are separate corporate entities and that may or may not be insolvent. Limited recommendations dealing first with domestic corporate group cases was near completion in 2008 and expected to be submitted for approval by the full Commission in 2009. As a general matter, the Working Group rejected proposals to expand the circumstances under which “substantive consolidation” could occur, i.e. the joinder of corporate parties, assets, or liabilities, in part in recognition that credit and corporate finance markets today depend on separate legal entity risk assessment and credit ratings. The prospect of consolidating assets, absent very narrow circumstances, would force credit extenders to assess all related corporate entities stretched out often amongst a number of countries, significantly running up the time and cost of due diligence and constraining credit. The Working Group agreed to more flexibility for “procedural consolidation,” in which in various ways proceedings in multiple jurisdictions could be consolidated.

Work also began in November 2008 on the cross-border issues. Of particular concern is the application of the COMI (center of main interests) standard, which was adopted by the UNCITRAL Model Law of 1997 on cross-border cases and is reflected in both EU and U.S. statutes. What had been assumed would be a move toward international harmonization of the term COMI has not materialized. American bankruptcy courts have developed a substantive review standard of what qualifies as “center of main interests” [see the recent Bear Stearns bankruptcy decision] in contrast to the direction European courts have apparently gone, i.e. the first state to accept a bankruptcy filing is entitled to a presumption as the center of main interests. A second significant open issue on cross-border treatment is whether post-application financing, common in the United States and some countries, will be generally recognized and supported. U.S. experts have stated that if the option of possible reorganization and refinance is to be available, countries must accept both the legality of parties providing such finance as well as special priorities for such new creditors. The recently completed 2005 UNCITRAL Guide on insolvency law reform includes general recognition of both reorganization and post-application finance,


but the extent to which countries really accept laws that support such options will now be tested in the context of treatment of corporate groups.

B. CROSS-BORDER "PROTOCOLS" TO MANAGE MULTI-STATE PROCEEDINGS

A second UNCITRAL project prepared by experts groups largely consisting of bankruptcy judges and reviewed for the first time by the Working Group in November 2008 may be ready for final action by the Commission in 2009.52 The effort involves developing background materials and guidelines for a variety of "protocols" that could be employed between courts or bankruptcy or other authorities in different states and in appropriate cases between the parties involved. The purpose of such protocols in some cases is to manage multiple proceedings so that there is rationalized treatment of multiple parties and assets, and to move from "territorialist" bankruptcy law to "universalist" law approaches. The project is consistent with and is expected to boost support for, and more adoptions of, the 1997 UNCITRAL Model Law on cross-border cases (the United States already adopted the UNCITRAL Model law as the new Chapter 15 of the Bankruptcy Code).53

IX. Treaty Implementation, Uniform State Laws, and Federalism

Many private law treaties involve highly negotiated detailed provisions intended to be able to be self-executing, although many countries implement treaties only through legislative action. The Cape Town Convention and CISG, for example, have been considered to be self-executing treaties. At the same time, most PIL treaties deal with state law matters and often uniform state laws produced by Commission (and in the case of the UCC by the ALI as well), which raises federalism issues as to the appropriate way to resolve the effects of the treaty as well as state-law-based methods of implementation (exceptions include the new carriage of goods by sea convention, which largely involves federal law).

Several commercial law treaties of possible interest for U.S. ratification, which might be implemented at least in part through uniform state law, were examined in 2008 by the Commission. A domestic law precedent likely to be drawn on by the Commission is the federalism approach in electronic commerce law. Federal law (the Electronic Signature and Global Electronic Commerce Act) requires states to adhere to certain principles unless they adopt a specified uniform state law, which forty-five of fifty states and the District of Columbia have already done.54 Under consideration is whether to apply the same principle to at least two UNCITRAL Conventions, one on electronic commerce and one on banking (letter of credit) law. Both Conventions in almost all respects track the provisions of or the effects of uniform state law (the UCC) in the United States. Thus, it is argued that the treaties could be given effect by applying uniform state law as the means of U.S. implementation at the state level, except in the few cases where the rules are differ-

ent. In those cases, the treaties would be self-executing or apply as federal law through preemption to the extent any state did not adopt the specified uniform state law. In other words, the same result could be effected either directly through ratifying the treaties or indirectly by implementing federal legislation. A different set of factors and analyses of course might be obtained with regard to other areas of PIL treaty practice, such as family law, choice of court, and other non-commercial law conventions.

Whether alternative means of implementation are desirable has to be determined on a treaty-by-treaty basis, taking into account federal issues, as well as the concerns of each sector involved and the interests of regulating or other agencies that. By way of illustration, two other commercial law conventions on which implementation by the United States is expected to be requested and which also closely implicate (and were in part based on) the UCC are likely to be proposed as self-executing treaties: the 2001 UNCITRAL Convention on accounts receivable financing and the 2006 Hague Convention on Law Applicable to Intermediated Securities Transactions.55

The process undertaken by the Uniform Law Commissioners during 2008 has involved participation in most cases of counterpart organizations in Canada and Mexico. That has enabled advice and information to be available concerning law and practices in each of the three NAFTA states so that where feasible cross-border facilitation of commerce can be enhanced.

X. Organizational Developments

Private law bodies often operate somewhat differently than many public law bodies, in part because the subject matter is detailed law, private-sector driven, and industry or sector focused. Decisions are normally reached without vote, and matters are decided by the equivalent of the substantial prevailing majority rule, so that progress can be made on detailed provisions of law under consideration. NGOs have traditionally played a significant role in framing issues and assessing how proposed provisions work in the particular sector at issue. Recently these practices, and others, have been challenged by some countries at UNCITRAL on grounds that they are not appropriate in a General Assembly body (the Hague Conference and UNIDROIT are outside the United Nations and thus not affected). The United States and others have pointed out that while proposed constraining rules are appropriate in some General Assembly bodies, they are not necessary in a technical and non-political body such as UNCITRAL. Moreover, if implemented they would bring to a close the Commission’s effective work record of more than four decades. The proposals for changes to limit the Commission’s tradition of flexibility on the consensus rule and the participation of technical NGOs gained little traction at the 2008 UNCITAL Plenary Session in July, and most states were reluctant to agree with changes that would significantly undermine the Commission’s effectiveness. The 2009 Plenary session will resume discussion on these issues, but it appears that the work methods of the Commission are likely to continue.
