

# Private International Law

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## I. Three Completed Efforts to Unify Private Law

The unification of private law at the international level moved ahead on several fronts, including completion of three international legal works—the United Nations model national law on electronic commerce, the Hague Conference's Convention on the protection of minors, and the UNCITRAL notes on organizing international commercial arbitrations.

### A. OAS SPONSORED INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW CIDIP-VI

In June 1996, the Organization of American States (OAS) General Assembly approved a resolution in principle convoking the Sixth CIDIP, although no consensus has emerged yet on the priority topics for the Conference. The Section has provided input on which two of eight topics should be supported. These include (a) uniform trade and transportation documents required for seamless commercial transportation of goods in the Americas, such as bills of lading, insurance, letters of credit, border customs clearance, etc., (b) transborder environmental damage, including applicable law, standards to determine which national regulatory standards apply, etc., (c) protection and custody of minors, (d) nonpossessory secured interests for commercial finance, (e) cross-border insolvency, (f) uniform standards for authorization and powers of attorney, and (g) selected international tort issues, including applicable law, measure of damages, criteria to determine which standards of due care would be applicable, etc. Of these, international secured interests received support from almost all representatives at a joint OAS-UNIDROIT meeting in November 1996 in Valencia, Venezuela. The U.S. views were put forward by the National Law Center for Inter-American Free Trade (CIFT) of Tucson, Arizona. As an indicia of change in 1996, the new OAS Secretary General circulated a document (not yet approved by member states as policy for the Organization) calling for, *inter alia*, more emphasis on development of the private law infrastructure as a means to promote economic integration in the Americas.

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Documents mentioned in this article may be obtained from the ABA International Law and Practice Section's Private International Law Coordinating Committee through Don Wallace, Jr., Chair, or Hal Burman, Vice-Chair.

B. ELECTRONIC COMMERCE—UN GENERAL ASSEMBLY APPROVAL OF UNCITRAL'S  
GENERAL RULES ON COMPUTER COMMUNICATIONS IN COMMERCIAL RELATIONSHIPS

UNCITRAL completed its ground-breaking basic rules on electronic commerce at its 1996 Plenary session, in the form of a model national law endorsed by the General Assembly. The rules cover functional equivalents of "signature," "original," "writing," etc., and provide default rules on who is bound, where and when messages are deemed to have been made or received (to avoid actions in an Internet age being construed to have taken place in remote jurisdictions where computer systems may be located), allocations of risk, and other matters. The rules favor validation of commitments made by computer messaging, but do not go as far as the proposed new U.C.C. Article 2B, which incorporates the concept of an "electronic agent."

Conceived as an international work in progress, the model national law has a second part, reserved for additional articles on sector-specific concerns, which has two articles on electronic bills of lading. Focused primarily on maritime and admiralty usages, the articles seek to validate electronic documents by resolving some uncertainties that arise from presentment of nonpaper instruments.

Several topics were advanced at the 1996 Plenary for new international work on electronic commerce. Those topics include legal standards for "digital signatures," and work on new legal standards for contract conclusion and performance in a computer environment, which would raise questions such as what "offer" and "acceptance" really mean on the Internet, purchase and use of software, and use, regulation, and control of electronic data. Digital signatures will be discussed first, including whether UN rules should also cover basic standards for certifying authorities, *i.e.*, third-party service providers who guarantee the "signatures" within agreed limits.

C. INTERNATIONAL COMMERCIAL ARBITRATION

Following two years of input from the commercial arbitration community, including members of the Section as well as the American Arbitration Association and others, the UNCITRAL "Notes on Organizing Arbitral Proceedings" (Notes) were completed and released in the fall of 1996. The Notes, and their checklist of matters to be considered, draw attention to a number of matters that may need to be addressed, such as arbitration rules, language of the proceedings, procedures and evidence, and defining points at issue. The publication has already been used to bring a mid-size American company, *i.e.*, one unlikely to be able to have on retainer a large law firm with specialized arbitration counsel, into arbitration in a neutral country and a Near Eastern country, which felt more comfortable assessing the process of arbitration on the basis of a UN document.

Regionally, the Inter-American Commercial Arbitration Commission (IACAC), a quasi-official body established pursuant to OAS resolution which can administer arbitrations under the 1975 Panama Convention, modified its Rules, which are based on the UNCITRAL Arbitration rules of 1976. The Rules, as amended, are effective in all fourteen states party to the Convention *except* the United States. Based in part on recommendations of the Section, the Senate, in granting advice and consent to U.S. ratification, entered several reservations, including a requirement that no change to the Rules could be effective as to the United States until the Secretary of State accepted the changes, following a rule-making process under Title 5, U.S.C. Thus, the 1996 IACAC Rules changes are not yet applicable in so far as enforcement actions come to U.S. courts.

## II. The New "Front"

### A. PROMOTING INTERNATIONAL SECURED INTERESTS LAW

Concurrent efforts progressed in two international bodies, UNIDROIT and UNCITRAL, to draft conventions on secured interests, only recently thought to be one of the "impossible" topics, because of wide and difficult-to-bridge differences in legal systems. UNCITRAL seeks to draft a convention for general commercial and inventory financing, based on accounts receivable. While some progress was made along the lines of U.C.C. Article 9, the meetings at UNCITRAL also highlighted the lack of consensus on what purpose private law harmonization should serve. The U.S. view is that it should consciously facilitate economic development. Moreover, the United States maintained that the purpose should be to create new pools of commercial credit for underserved markets (developing countries, emerging states, etc.), and not merely harmonize legal standards between already established markets, such as the U.S. and Western Europe.

In order to achieve the U.S. goal, which is shared by both the World Bank and the private international finance community, UN standards need to support credit on a more modern paradigm than the traditional three-party arrangement. New sources of credit can be based, for example, on the bundling of large volume, low-value credit cards and other types of accounts receivable. The United States has also urged that interests perfected under the convention must prevail over those perfected under national laws of ratifying states, in order to attract foreign credit for new markets, which is a large leap for many countries. In addition, it became clear that computer-based registration systems would be needed to achieve economic savings sufficient to lower the cost of credit to such markets. The latter would require the hundreds of state and local paper-based filing offices in the United States to shift to electronic filing, which may also be a hurdle.

The second closely related project is the UNIDROIT effort to draft rules for mobile equipment, including aircraft, vessels, containers, agricultural and construction equipment, large trucks, etc. The ability to identify particular equipment, which could be the basis of financing interests, and the particular industry finance practices made this project quite different from receivables financing. One industry so far, aircraft manufacturers and carrier associations, has proposed that special protocols be prepared for its particular financing practices. Consensus has not yet been reached on whether the convention would cover equipment that, in the normal course of business moves across borders, or apply only when such equipment actually so moves. Preliminary work is underway on possible models for internationally sanctioned registries that could interface with national systems, whether private or governmental.

All in all, 1996 made private international law a front-line test of unification. Expectations are that the UNCITRAL convention may be ready for finalization by mid-1998, and the UNIDROIT draft circulated to governments for comment by the end of 1997, with formal negotiations to follow beginning in 1998.

### B. 1995 UN CONVENTION ON INDEPENDENT GUARANTEES AND STANDBY LETTERS OF CREDIT

The Convention, approved by the UN General Assembly late in 1995 after five years of work, bridged a number of differences between American-based letter of credit law and European-based law on independent bank guarantees. It was endorsed for signature at the 1996 annual meeting of the Secretary of State's Advisory Committee on Private International Law

(ACPIL). It was agreed, however, that the Advisory Committee would again review the Convention before it took a position on U.S. ratification. Some issues remain as to the effect of the Convention vis-à-vis applicable domestic law, although this is not expected to present significant problems in view of the fact that the Convention was largely harmonized with the recently revised U.C.C. Article 5, as well as the revised UCP.

#### C. DEVELOPING COUNTRY PROJECT FINANCING

Focused on the rapidly growing market for "Build, Operate and Transfer" (BOT) contract methods of combining private and public financing of infrastructure projects, proposed projects at UNCITRAL and elsewhere gained momentum in 1996. Approved in 1996 as a topic for future work, the UNCITRAL Secretariat, with the assistance of the Section, the International Law Institute in Washington, D.C., the World Bank, and others, prepared a UN survey of legal issues involved in this innovative practice. This effort will lead to preparation of legislative guidelines, model contract provisions, or other legal texts as well. Considerable support from developing countries is expected to expand this effort in the coming years.

#### D. CROSS-BORDER INSOLVENCY

The year 1996 saw considerable progress on another law unification topic long consigned, along with secured interests, to the impossible list. A draft UN model national law on procedural aspects of cross-border insolvency advanced to a point where it is possible that it may be completed in 1997. Support for this work has grown due to the increasing problems confronted by insolvencies in an era of globalization of economic undertakings, which often leave issues to be resolved between labor rights in one country, assets in several others, and commercial lenders' rights in still more jurisdictions. The uncertainties that abound because of widespread disharmony in legal standards is reflected in the costs and availability of credit across territorial boundaries. With the support of NGOs such as INSOL and the International Bar Association, as well as conferences of bankruptcy judges co-hosted by INSOL and UNCITRAL, a UNCITRAL Working Group has prepared draft provisions on: (1) recognition of a foreign main proceeding and its relation to local proceedings, (2) access and rights to participate for foreign administrators and creditors, (3) a mandatory (though not automatic) temporary stay to prevent dissipation, and (4) authority for judicial cooperation across borders, a provision equalizing payout between certain classes of creditors, and other matters. Substantive issues, such as priority and preferences, and the power to set aside transactions, and other arguably more difficult matters from the vantage point of unification, were left to be taken up in a later project. If progress on the procedural front can be achieved now, it may build confidence that may one day permit further harmonization.

### III. Family Law Matters

#### A. CONVENTION ON THE PROTECTION OF CHILDREN

At the 18th Session of the Hague Conference on Private International Law in October 1996, the final text of a convention on the protection of children was adopted by the thirty-five participating countries. This brought to a conclusion almost four years of work on this project by the Hague Conference and its member states.

The Convention (text and introductory notes in 35 ILM 1391-1405, 1996) addresses questions of jurisdiction, applicable law, and recognition and cooperation with regard to measures for the protection (custody) of children. The extent to which the Convention may be applicable

to needs in our country, and the manner in which it would relate to differences in state laws will be examined in the coming year.

#### B. INTERNATIONAL CHILD SUPPORT ENFORCEMENT

Recently enacted federal welfare reform legislation contains provisions authorizing the government to enter into arrangements with other countries for the reciprocal enforcement of support obligations (42 U.S.C. §§ 659a and 654(32)). In the absence of such authority in the past, many U.S. States, with State Department support, have, since 1980, made arrangements directly with twenty countries, and have been negotiating with another eighteen, for the reciprocal enforcement of support obligations through parallel policy declarations.

The new legislation provides that the Secretary of State, with the concurrence of the Department of Health and Human Services (HHS), may declare that certain countries are reciprocating nations if they are able to meet specified requirements, with the effect that support obligations originating in such countries would be enforced throughout the United States. A corresponding declaration by the other country would provide for the enforcement there of support obligations originating in the United States. The HHS Office of Child Support Enforcement (OCSE) is to be the U.S. Central Authority to oversee implementation of such arrangements. The State Department and OCSE expect to negotiate agreements with many of the countries referred to above.

#### C. INTERCOUNTRY ADOPTION CONVENTION

The State Department is working with HHS and the Immigration and Naturalization Service (INS) to prepare federal implementing legislation for the 1993 Hague Convention on intercountry adoption. That Convention establishes internationally agreed norms and procedures to safeguard children moving in adoption from one party country to another and to protect the interests of their birth and adoptive parents. The legislation is required to ensure the full and uniform implementation of the Convention throughout the United States.

The United States, which in 1996 received over half of all children made available worldwide that year for intercountry adoption, actively participated in negotiation of the Convention and signed it in 1994. Twenty-eight countries have signed the Convention and twelve have ratified it. The State Department (Consular Affairs Bureau) may become the U.S. Central Authority under the Convention.

The Convention may be ready for submission to the president for transmission to the Senate early in 1997, and inter-agency efforts may make the legislation ready for introduction in Congress by summer 1997.

### IV. Other Future Projects

#### A. FUTURE DRAFT CONVENTION ON JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The Hague Conference agreed at its 18th session in 1996 to undertake the preparation of a convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters during 1996-2000. The convention may provide different rules for enforcement depending on the bases of jurisdiction and other considerations.

#### B. FUTURE DRAFT CONVENTION ON THE PROTECTION OF [INCAPACITATED] Adults

The Hague Conference also decided in 1996 to seek to prepare by 1999 a convention that would address questions of jurisdiction, applicable law, recognition and enforcement, and international cooperation with regard to the protection of [incapacitated] adults.

