

**Joint Editorial Board on International Law
November 21, 2009, Meeting
Hotel Sax Chicago
333 N. Dearborn
Chicago, IL 60610
312-245-0333**

9:00 a.m. – Call to Order

AGENDA

Note: Those whose names are listed after a particular agenda item are asked to lead the discussion on that item.

1. Introductions

Committee Roster (attached)

2. Reports From Recent Prior Meetings (attached)

Report of Activities, December 12, 2008

ULC International Legal Developments Committee Report, June 29, 2009

3. Memorandum of Understanding Concerning the JEB, and ULC Processes for Consideration of Issues Relating to the Negotiation and Implementation of International Treaties (attached, for information)

4. Review of Current ULC International and Transnational Projects [**Information Items**]

a. List of ULC International and Transnational Projects (attached)

b. Committee for Implementation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit [**John Sebert**]

The Letters of Credit Convention is closely related to UCC Article 5 and substantially mirrors the terms of Article 5.

In January 2007 the Executive Committee approved the creation of an implementation committee that is a Joint Committee of ULC and the ALI, with participation by representatives from the Uniform Law Conference of Canada and the Mexican Center for Uniform Law. The Committee is chaired by Ed Smith and the reporter is James J. White, who also was the reporter for the most recent revision of UCC Article 5. That committee initially proposed that the Convention be implemented by a combination of “pre-implementation” [declaring that the US had already implemented

almost all of the provisions of the Convention through the adoption in all of the states of UCC Article 5], amendments to UCC Article 5 that accommodated two specific differences between provisions of the Convention and Article 5, and federal legislation that would pre-empt a state's version of Article 5 to the extent that a state had not adopted the implementing revisions of Article 5.

During the first half of 2009, however, the committee – after consultation with ALI members, ABA advisors, and industry observers – began to have doubts about the need for and feasibility of revising Article 5 to implement such relatively minor differences between the Convention and Article 5. Thus the committee instead proposed and drafted federal legislation that effectively is “choice-of-law” legislation, providing that:

- If an undertaking chose the Convention as applicable law, the undertaking would be governed by the Convention;
- If an undertaking chose the law of a particular US state as applicable law, this would be considered as opting out of the Convention, and version of UCC 5 in the chosen state would be governing law; and
- If an undertaking is silent concerning the applicable law, the Official Text of UCC Article 5 would be the governing law, except that the Convention would be controlling law with respect to the two matters on which there is divergence between the Convention and UCC Article 5.

When this recommendation was considered at the ULC Annual Meeting in July 2009, a number of commissioners expressed concern that providing through federal legislation that the Official Text of UCC Article 5 is controlling would unduly “federalize” UCC Article 5. They instead asked that the Committee consider providing that, when an undertaking is silent concerning the applicable law, that the version of UCC Article 5 that is in force in the state whose law is controlling under Article 5 choice of law rules would be the applicable law. The Committee agreed to consider this request, with the additional agreement that the Committee's decision on this matter would be subject to review by the ILDC and the Executive Committee.

The drafting committee met twice by conference call this fall. By a divided vote, it decided to renew its recommendation that, when an undertaking did not specify applicable law, the uniform version of UCC Article 5, and not the version in force in a particular state, would be controlling law. The majority of the committee believed that implementing the Convention through the version of UCC Article 5 enacted in a particular state would too frequently require a time-consuming, costly and occasionally complex examination of an

unnecessary preliminary question – whether a specific state’s version of UCC Article 5 was sufficiently similar to the uniform text to provide an adequate implementation of the Convention. As with the recommendation of the E-Commerce Committee, this recommendation will be considered by the ILDC in December and the ULC Executive Committee in early January.

c. Drafting Committee on the Hague Convention on Choice of Court Agreements [**Louise Ellen Teitz, Keith Loken, King Burnett and John Sebert**]

This Convention provides a means to recognize the designation in an agreement between business parties of a court that the parties have chosen to decide disputes that arise under the agreement, provides standards by which the validity of that designation will be determined, establishes mechanisms and standards by which courts that have not been chosen as the deciding court will decline jurisdiction if asked to intervene, and provides mechanisms and standards for enforcing decisions of the chosen court. This convention has no analogue in existing ULC acts.

The Executive Committee approved a Study Committee in July 2007. The committee was chaired by Rex Blackburn, and Kathy Patchel and Louise Ellen Teitz served as co-reporters. The committee recommended that the Convention be implemented by (1) drafting a state law with provisions necessary to implement the convention; and, if necessary, (2) by enactment of a federal law that will adopt provisions necessary to implement the convention from a federal law perspective and pre-empt state law unless a state adopts the Uniform Act.

The Executive Committee approved a drafting committee in January 2008, also chaired by Rex Blackburn. Kathy Patchel and Louise Ellen Teitz are co-reporters. The drafting committee confirmed the judgment of the Study Committee that the Convention should be implemented by a combination of state and federal legislation because the vast majority of litigation under the Convention will be in state courts and uniform state legislation will be more readily accessible by the state and will fit more satisfactorily with established state court procedures. This approach will also enable states to exercise choice on a few key provisions, such as whether to assume jurisdiction if the parties’ agreement selects the courts of the state as the forum for adjudication of disputes but the parties have no relationship to the chosen state.

The Conference considered a draft of the uniform act at its meeting in July 2009. The drafting committee met to further consider and revise the act in October 2009. Keith Loken, the Assistant Legal Advisor for Private International Law, and representatives of the Department of Justice

prepared a draft of proposed federal implementing legislation, and the Drafting Committee considered that draft as well. The Drafting Committee is seeking to have its draft be as consistent as possible with both the Convention language and the proposed federal legislation, and the ULC draft has significantly influenced the drafting of the federal legislation.

Representatives of the State Department have not decided whether they will implement the Convention taking the approach proposed by the ULC. The State Department led a discussion of the Convention and the ULC approach at a recent meeting of the Advisory Committee on Private International Law. Some participants at that meeting voiced preferences that the Convention be self-executing or implemented by federal legislation. They and others who argue for those methods of implementation are concerned that it will be too complex and confusing (particularly for lawyers outside the United States) if both federal and state legislation must be consulted, and that there may be a perception on the part of potential treaty partners that the United States is not fully implementing the treaty in good faith if a combination of state and federal law is employed. Concerns have also been expressed about the difficulty of ascertaining whether a particular state's enactment of implementing state legislation is sufficiently consistent with the Uniform Act to be a good faith implementation of the Convention, and whether it will be possible to ensure that state court interpretations of state legislation are sufficiently consistent with the Convention. The State Department indicated that it will make a decision on the mode of implementation relatively soon.

**d. Committee to Implement the UN Convention on E-Commerce
[Henry Gabriel]**

This Convention affects both the Uniform Electronic Transactions Act and the federal E-Sign legislation. It contains one or two provisions that are different from or are not contained in those acts.

In July 2008 the Executive committee established an implementation committee, which is chaired by Henry Gabriel. Ben Beard, who also was reporter for UETA, is the reporter. The committee initially recommended that this Convention be implemented by revisions to UETA and E-Sign to make them consistent with the Convention.

Prior to the annual meeting in July, 2009, many members of the drafting committee, and particularly its ABA advisors, became concerned over potential "collateral damage" if either UETA or E-Sign were reopened. UETA has been widely adopted (48 jurisdictions), and there was concern both that state legislatures would not be interested in revising UETA to

make very modest changes, and that if they did a number of non-uniform amendments might be proposed and adopted in some states. Similar concerns were raised about any attempt to revise E-Sign. Thus the implementation committee presented a report to the ULC Annual Meeting this summer recommending that the E-Commerce Convention be implemented as a self-executing treaty, with no implementing state or federal legislation.

The Conference asked the Committee to reconsider its recommendation, and to look again at possible implementation by revisions to UETA and E-Sign. There was concern that, even though the Convention applied only to cross-border business-to-business transactions, many of those affected by the Convention, and their attorneys, may not be aware of the Convention unless there was some legislation related to the Convention.

The committee met again at the end of September. It continued to have concerns about potential collateral damage and non-uniformity if revisions to E-Sign or UETA were attempted, and new concerns developed that there were sufficient variations in state enactments of UETA that, if the Convention were implemented by reference to the version of UETA enacted in a state, undue time might have to be spent determining whether the state's version of UETA was sufficiently similar to the uniform version to provide an adequate basis for implementing the Convention. The Committee did, however, recognize the value of providing some notice concerning the Convention in legislation, and thus it has recommended developing free-standing federal legislation (not a revision of E-Sign) that provides that the terms of the Convention apply to transactions to which the Convention applies. There was a divided vote in the Committee on this recommendation, however, and the recommendation will be considered by the ILDC in December and the Executive Committee in early January.

e. Study Committee on Mareva Injunctions [**John Sebert and Glenn Hendrix**]

This committee will consider and make recommendations concerning the need for and feasibility of drafting a uniform act that provides authority for Mareva Injunctions – freezing orders – entered in one jurisdiction that would prevent a defendant in litigation pending in another jurisdiction from dissipating assets located in the first jurisdiction during the pendency of the litigation. The project was recommended by the ABA Section of International Law and by the JEB, and the ULC Scope and Program Committee and Executive Committee approved establishing the Study Committee in July 2009. Commissioner Michael Getty is chair of the study committee and Dean John Carroll of Cumberland School of Law, Samford University, is reporter. Steve Richman, who chaired the ABASIL task force that recommended this project, is ABA Section Advisor from ABASIL. Steve organized a panel on this

project that was presented at the ABASIL fall meeting in October 2009, and John Sebert spoke on the panel.

5. Discussion of Current Projects of International Organizations that Have Been Identified as Likely of Interest **[Discussion Items – Are there specific steps that the JEB should take or recommend concerning any of these items?]**

See the attached document: Report on Projects of International Organizations that May be of Interest to ULC **[JEB members who are knowledgeable about any of the projects listed should be prepared to offer comments on them]**

Future Work of UNCITRAL Working Group VI (attached document) **[Hal Burman should assist the JEB in identifying projects possibly deserving of ABA or ULC participation or monitoring]**

6. Discussion of Possible Future Projects Identified for Further Discussion **[Discussion items -- Are there specific steps that the JEB should take or recommend concerning any of these items?]**

Uniform or Model Statute for Implementation of the Consular Convention in Light of *Medellin* **[Glenn Hendrix]**

The Council of the ABASIL recently voted to co-sponsor a resolution sponsored by the Litigation Section that urges widespread enforcement of the provisions of the Consular Convention in the United States. A draft of the Report and Resolution, which apparently will be considered by the ABA House of Delegates in February 2010, is attached. *The JEB may wish to consider whether to recommend that ULC consider the feasibility of undertaking a drafting project on this topic.*

Possible Expansion of Scope of the ULC Drafting Committee on Notarial Acts to Authorize US Licensed Attorneys Who Are Resident in a Foreign Country to Perform Notarial Acts for US Citizens in that Foreign Country **[Glenn Hendrix; John Sebert]**

An ABASIL committee has been working on this recommendation for some time, and the chair of the committee asked for advice as to whether this recommendation has enough chances of success to justify further effort on the committee's part. Documents concerning this proposal are attached, which include previous e-mails to and from Pat Fry, the chair of the Notarial Acts Committee. That committee also meets November 20 – 21, and Pat Fry is putting these materials before her committee.

7. Reports from the State Department on Plans for Obtaining Senate Advice and Consent [**Hal Burman and Keith Loken**]

Hague Family Maintenance Convention

The Senate Foreign Relations Committee held a hearing on this Convention October 6, 2009, at which Keith Loken and Battle Robinson, UIFSA Drafting Committee chair, testified. SFRC staff report that the Committee intends to report favorably on the Convention, and that Senate advice and consent is expected before the end of 2009. The implementing federal legislation has been transmitted to the Senate and House, but plans for consideration of that legislation are indeterminate at this time.

UN Convention on Receivables in International Trade

This Convention addresses the assignment of receivables, both the creation of a security interest in and the sale of receivables, when the assignor and assignee, or the assignor and the account debtor, are located in different countries, and when the assignor is located in a country that has adopted the Convention. Most of the subject matter of the Convention is governed in the United States by UCC Article 9, and the provisions of the Convention and UCC Article 9 are largely consistent; the differences relate largely to matters of scope of application and choice of law.

In 2006 the Executive Committee created a Drafting Committee to Harmonize North American Law with Regard to the Assignment of Receivables in International Trade Convention. The Committee is a Joint Committee of ULC and the ALI, with participation by representatives from the Uniform Law Conference of Canada and the Mexican Center for Uniform Law. The Committee was chaired by Ed Smith and Steven Weise was the reporter. After initially considering drafting amendments to UCC Article 9 to implement the Convention in the United States, the Committee ultimately decided to recommend against that approach because it believed that any revision of the choice of law rules of Article 9 could be disruptive to transactions not covered by the Convention, and that the process of seeking 50-state adoption of the revisions to UCC Article 9 would be time-consuming and inefficient.

The Committee then recommended that the Convention be self-executing. The Executive Committee approved the committee's request that it be permitted to work with the State Department to draft the necessary materials, including declarations and understandings, for submission of the Convention to the Senate for advice and consent. The Committee did so and reported on its work at the July 2007 Annual Meeting. The report was accepted, but only after debate in which concerns were expressed about this approach to implementation. The State Department has not yet

presented the Convention to the Senate for advice and consent but we have been informed that the Department plans to forward this Convention, together with other commercial law treaties, to the Senate in 2010.

During the July 2009 Annual Meeting, some commissioners asked that this approach to implementation be reconsidered in light of the existence of the current project to make limited amendments to UCC Article 9. The Executive Committee asked the UCC 9 Joint Review Committee, chaired by Ed Smith, to consider drafting appropriate amendments to UCC Article 9 to implement the Convention. At its September 2009 meeting, the UCC 9 Committee unanimously recommended against drafting any amendments to UCC Article 9 to implement the Convention. The Committee believed that those who would be involved in transactions that are subject to the Convention are likely to be highly knowledgeable and sophisticated, and thus fully aware of the Convention and its terms. Thus the Committee concluded that it would not be useful to prepare revisions to UCC Article 9 to implement the Convention, although it does plan to revise the Comments to provide notice of the Convention. The PEB has also decided to have commentaries drafted that will discuss and explain the effect of international conventions on articles of the UCC. Such commentaries are planned for the Intermediated Securities, Letters of Credit, and Assignment of Receivables Conventions.

Hague Securities Convention

This is essentially a choice-of-law convention, determining which law applies to cross-border transactions in investment securities. The provisions of the Convention are essentially consistent with UCC Article 8.

With the approval of ULC leadership, Commissioners Carl Bjerre and Curtis Reitz initially worked informally with the State Department and other federal officials to develop a recommended implementation plan. They recommended that the treaty be self-executing, relying on the significant consistency between the Convention and Article 8 and the fact that those involved in such transactions are highly likely to be sophisticated parties fully knowledgeable about the Convention and its impact on US law. The Executive Committee approved their recommendation and they were appointed to serve as a drafting committee to work with Hal Burman, of the State Department, representatives of other federal agencies, and the industry to develop documentation intended to obtain Senate advice and consent to this treaty as a self-executing treaty, without any implementing federal or uniform state legislation. We have been informed that the State Department intends to present this treaty to the Senate for advice and consent in 2010.

UN Letters of Credit Convention

UN E-Commerce Convention

8. Report on the ABASIL/Society of International Law Task Force on the Implications of *Medellin v. Texas* [**Glenn Hendrix**]

The final report of the Task Force is attached, together with a draft resolution for action by the ABA House of Delegates concerning implementation of current and future treaties.

9. Possible Regional or International Harmonization of Law Projects that Might be Undertaken

- a. Program on Harmonization Projects at the ABASIL Spring Meeting, April 13 – 17, 2010 [**John Sebert**]

This proposal has been approved, and the program proposal is attached. The date and time for the program have not yet been set.

- b. Discussion of possible harmonization projects

The JEB should brain-storm about possible harmonization projects. For example, last fall John Sebert met with Professor Boris Kozolchuk of the National Law Center for Inter-American Free Trade (at the University of Arizona), and they had a very preliminary discussion about possible Latin American harmonization projects, including one possibly involving the law governing small and medium sized business entities.

When Bob Stein and Martha Walters attended the Uniform Law Conference of Canada annual meeting in August 2009, our Canadian colleagues expressed interest in participating in one or more new harmonization projects. The ones that were mentioned were:

Mareva Injunctions, since Canada uses these

Expanding the Uniform Emergency Health Practitioners Act (2006) to cover fire and police personnel

The ULC Study Committee on Mental Health Advance Directives

ULCC has indicated that it will provide additional information concerning its view of these or other harmonization projects for

consideration by the ULC Scope and Program Committee when it meets January 8, 2009.

10. ABASIL/ULC Collaboration and Collaboration with Other Organizations

Participation of ABASIL Members as Advisors on NCCUSL Drafting Projects **[John Sebert]**

Identification of ULC Commissioners who Can Serve as Advisors or Observers to ABASIL Committees that are Considering Matters Related to ULC Areas of Interest *[John Sebert mentioned this again when Bob Stein, Mike Houghton and he met with ABASIL leadership at the ABA Annual Meeting. ABASIL leadership expressed interest, but primarily in having them contact John Sebert if there is a particular project about which they would like advice.]*

12. Other Business

Adjournment No Later than 5:30 p.m.

Set out below are links to some of the Conventions and Treaties that we may be discussing:

1. All the Hague Conventions are readily available at <http://www.hcch.net>. The family law conventions (there are quite a few) can all be found at http://www.hcch.net/index_en.php?act=text.display&tid=10#family. The 2006 Intermediated Securities Convention is at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72. The 2005 Choice of Court Agreements Convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.
2. UNIDROIT's conventions are available at <http://www.unidroit.org/english/conventions/c-main.htm>. You'll see that the last three entries cover the Capetown Convention itself, the first protocol on aircraft equipment, and the second protocol on railway rolling stock.
3. UNCITRAL's conventions can be found at http://www.uncitral.org/uncitral/en/uncitral_texts.html. Specific links to the ones you mentioned are as follows:

UNCITRAL Assignments (Receivables):
www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf.

UNCITRAL convention on E-commerce:
http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf or
http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

UNCITRAL Convention on Independent Guarantees (letters of credit):
<http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf>