

MEMORANDUM

To: Joint Editorial Board on International Law

From: Peter Winship

Re: On-Going Private International Law Projects

Date: November 30, 2007

I have been asked to report at our November 30 meeting on on-going projects sponsored by international organizations. This memorandum reports briefly on present and contemplated projects at the four principal institutions of interest to the United States: the U.N. Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law (Hague Conference), and the Organization of American States (OAS). The memorandum updates Henry Gabriel's 2005 report to the National Conference but makes no effort to supplement his sketches of the goals, organization and working methods of these international institutions.

The focus of the following discussion is on projects that have not yet reached the point where the National Conference has appointed a drafting committee or a study committee.

1. UNCITRAL

The Commission last met in June-July 2007. At the meeting, which will continue for a week in December, the principal item for discussion was the review of the draft Legislative Guide on Secured Transactions. The meeting also had reports from the five other Working Groups and considered a Secretariat report on possible future work in the area of commercial fraud.

1.1. Secured Transactions

By the end of its December meeting the Commission hopes to approve the final text of the Legislative Guide. In July, however, the Commission agreed to continue work to prepare annexes to the Guide to address (1) security rights in intellectual property, and (2) security rights in investment securities.

1.2. Procurement

The Working Group on Procurement has prepared revisions of the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The issues most recently addressed are: "(i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including

revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (iii) the procurement technique known as the electronic reverse auction; (iv) abnormally low tenders; and (v) the method of contracting known as the framework agreement.” The Commission has added the issue of conflict of interest.

1.3 Electronic commerce

The Secretariat has been charged with preparing a comprehensive “reference document” discussing “various elements required to establish a favourable legal framework for electronic commerce.”

1.4. Transport law

The Working Group on Transport Law is nearing completion of a draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]. Among its provisions are articles on bills of lading and the use of electronic communications.

1.5. Arbitration

The Working Group on Arbitration has been revising the 1976 UNCITRAL Arbitration Rules. As to future work, the Commission’s report from July 2007 states (para. 177): “With respect to future work in the field of settlement of commercial disputes, the Commission recalled that, at its thirty-ninth session, it had agreed that the issue of arbitrability was a topic that the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should maintain the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.”

1.6. Insolvency

The Working Group on Insolvency is studying the treatment of corporate groups in insolvency, including post-commencement finance.

1.7. Commercial Fraud

The project is designed to identify various types of commercial fraud and to educate merchants and others on the prevention or avoidance of frauds. The Commission does not presently contemplate draft legal rules having noted, in particular, that many of these rules would fall in the ambit of institutions dealing with criminal law matters.

2. UNIDROIT

2.1. Cape Town Convention on International Interests in Mobile Equipment

Protocols on aircraft and railway rolling stock have been adopted. Work continues on space assets and preparatory work has been undertaken within the UNIDROIT Secretariat on agricultural, construction and mining equipment.

2.2. Transactions on Transnational and Connected Capital Markets

Within the framework of capital market transactions, UNIDROIT has worked on Substantive Rules regarding Intermediated Securities. These rules would supplement the 2006 Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary.

2.3. Model Law on Leasing

UNIDROIT has undertaken preparation of a draft Model Law on Leasing intended, as the 2006 report says, "specially for use by developing countries and countries engaged in the transition to a market economy."

2.4. Principles of International Commercial Contracts

UNIDROIT has undertaken preparation on a third edition of the Principles. The third edition would add chapters on new chapters on unwinding of failed contracts, plurality of debtors and creditors, illegality, conditions and termination of long-term contracts for cause.

3. HAGUE CONFERENCE

3.1. Maintenance Obligations

On 23 November 2007 a conference adopted the Convention (and Protocol) on the international recovery of child support and other forms of family maintenance.

3.2. Work program

At its April 2007 the Council of General Affairs and Policy of the Hague Conference adopted a work program.

Its report states:

2. The Council decided to retain the following matters on the Conference's Agenda:

a) questions of private international law raised by the information society, including electronic commerce,

b) the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage,

c) jurisdiction, and recognition and enforcement of decisions in matters of succession upon death,

d) jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples,

e) assessment and analysis of transnational legal issues relating to indirectly held securities and security interests, taking into account in particular the work undertaken by other international organisations.

3. The Council decided to invite Members to provide comments, before the end of 2007, on the feasibility study on cross-border mediation in family matters (Prel. Doc. No 20) with a view to further discussion of the topic at the spring 2008 meeting of the Council.

4. The Council invited Members who have not already done so to respond to the Questionnaire concerning choice of law in international contracts and to provide comments on the existing feasibility study (Prel. Doc. No 22) by the autumn of 2007 with a view to further discussion of the topic at the spring 2008 meeting of the Council.

5. The Council invited the Permanent Bureau to develop a questionnaire as suggested in the feasibility study on the treatment of foreign law (Prel. Doc. No 21) with a view to identifying practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which information is required. This questionnaire will also invite Members to comment on the models suggested in the feasibility study and their possible implementation. Responses should be returned before the end of 2007 with a view to further discussion of the topic at the spring 2008 meeting of the Council.

6. The Council reserved its position on the ultimate priority to be attached to each of the possible subjects for future work referred to above, in particular those mentioned in paragraphs 3-5, as well as on the possibility of adding other subjects and otherwise revisiting the list at a later meeting. In this respect, the Council invited the Permanent Bureau to continue its exploration of the application of certain private international law techniques to aspects of international migration.

3.3. Electronic Apostilles

The 1967 Legalisation (Apostille) Convention, to which the United States is a party, provides for agreed procedures for the verification of the authenticity of documents issued by public authorities. The Hague Conference has an electronic apostille (e-APP) project composed of two components, the issuance of electronic apostilles and an e-Register of apostilles. Colombia and Belgium have implemented or are in the process of implementing the e-APP project. Kansas and Rhode Island have also undertaken to do so. The U.S. National Notary Association has provided the software for the project.

4. OAS

Periodic diplomatic conferences on private international law (CIDIP) are held under the auspices of the OAS. Planning for CIDIP-VII is underway with two principal projects.

4.1. Electronic register for security interests

At CIDIP-VI in 2002, the conference adopted the text of a Model Law on Secured Financing of Moveables. At CIDIP-VII the Model Law would be supplemented with rules for an electronic registry to record the security interests.

4.2. Consumer protection

Brazil, Canada, and the United States have submitted proposals related to the general topic of consumer protection. The Brazilian focuses on traditional private international law concerns (jurisdiction, applicable law, enforcement of judgments); the Canadian considers these issues in the context of transactions concluded by consumers by means of electronic communications. The U.S. proposal is to consider procedural issues, such as class actions and small claims courts.