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Memorandum

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Selected update on international private law developments – 2005

The following update covers briefly those topics likely to have interest for Section members and committees. Supplementary reports will be available in the near future on two additional areas, the recent conclusion in June 2005 of the *Hague convention on party choice of forum*, and developments in *international family law*. The topics below are grouped by subject matter rather than by organization. As always, members of the Section are welcome to participate in any of these activities through the appropriate Committees. For those interested, we will provide web sites for documentation or hard copies for any material not readily available in e-form.

Electronic Commerce:

New convention -- two weeks after conclusion of the Hague Convention referred to above, a second PIL convention was concluded at Uncitral in mid-July on basic enabling laws on computer and other *electronic communications in formation of contract* and related matters. In many respects drawn from the first 1996 Uncitral Model Law on E-commerce, and compatible with uniform state law in the US (Uniform Electronic Transactions Act) and the related Federal E-Signatures and Global E-Commerce Act, the new convention is expected to have its largest impact in two areas: (a) developing and emerging states who will benefit from greater predictability as they seek to enter e-commerce trade routes, and (b) all states, including the US, who may wish to upgrade their existing treaties and other international agreements so as to make their terms compatible with e-commerce and e-documents.

Transportation law (maritime and other carriage of goods):

Notwithstanding over eighty years of disharmony in international carriage of goods laws, punctuated by various international texts, Uncitral and the Brussels-based Comité Maritime Internationale (CMI) are closing in on what *may be the first multilateral treaty to harmonize this area* at least as to a considerable portion of its trade. Compromises continue to be worked out between shippers, carriers, cargo insurers, freight forwarders, etc. on modern maritime practices, although a considerable distance is left to go. The draft treaty would cover some aspects of claims arising from inland carriage and some jurisdictional and arbitration issues as well. A possible conclusion at the 2007 Plenary session is the target, involving four to five weeks negotiation annually, along with a substantial amount of intercessional work between each formal session.

Commercial finance:

Cape Town Convention on equipment finance – the US ratified both the Unidroit Convention and the first Protocol on aircraft finance in October 2004 (a political cliff-hanger), one of the few such treaty actions by the Administration, and implementation efforts have been underway since. Six of the eight required ratifications are now in for the Protocol to come into force, and at least four more states are at various stages of completing their ratification processes. The Convention promotes more than equipment finance, and entails adoption of modern UCC-style asset-based finance which is expected to spin off a number of other changes in ratifying states. The convention calls for creation of the world's first international computer-based filing system to establish priorities, accessible from any part of the globe. A recent decision by ICAO (International Civil Aviation Organization) to accept the role of supervisory authority over the registry paves the way for the new system to come on line.

Additional Unidroit protocols to the Cape Town Convention are underway. The draft *railway equipment* protocol may be finalized early 2006, and is expected to be of major importance to a number of regions and developing countries. Another, moving more slowly, is the draft protocol on *space equipment*, including manufacturing and operation of satellites. A fourth protocol has been proposed by the US with support of equipment producing states on *agricultural, construction and mining equipment*.

Commercial arbitration:

Uncitral has continued to seek to work out rules on several areas of commercial arbitration practice, including revisions to the widely used UN Model law on arbitration relating both to the form of agreement and the controversial areas of *issuance and enforcement of orders for interim relief, including ex parte orders*. The advantages of resolving these often encountered problems, and the limitations currently applied to them in many areas of commercial arbitration, are seen by some as risking introduction of the litigation field and its precedents into arbitration. Progress has been slow, although completion of this work is targeted for mid-2006. A review of country practices in arbitration under the New York Convention and the Panama Convention continues, but no agreement has not been reached on what to do with the results, and whether to entertain any proposals for amendments to either convention. Future work in this field will be considered at a conference in Vienna in April 2006 commemorating the Uncitral model arbitration rules.

Investment securities:

Unidroit draft convention on transactional law on cross-border securities transactions – the first intergovernmental negotiation took place in Rome in May 2005, a second was deferred until March 2006 to allow informal negotiations to proceed, the first of which will take place in Bern in September. This also will permit bilateral US-EU talks to proceed, as well as discussions between central banks and other agencies with regulatory responsibilities. The US supported the initial draft approach focused on modern intermediated stock holding systems, allowing rights and interests to move by computer as contemplated by revisions to UCC Article 8. Countries with other types of systems, not geared for high volume, intermediated systems or netting, have sought however to also be covered by the rules, which poses a very difficult challenge. The US has stated

that it would support the new effort as long as it remains consistent with the 2002 Hague Convention on law applicable to intermediaries, which seeks to provide predictability in a world of data moving rapidly across borders. A possible joint signing of the Hague Convention by the US, Switzerland and Japan is under informal discussion.

Procurement:

Uncitral continued its work on updating its previous *model laws on procurement of goods, services and construction* which have been used by a number of developing countries to reform their public and publicly-assisted areas of acquisition, a large overall sector in many countries. Adoption of these instruments is intended to facilitate better commercial and other practices as well as streamline economic activities in developing countries while reducing corruption and fraud. The current project has emphasized new rules to *facilitate electronic procurement*, and may be completed in 2007 or possibly earlier.

Cross-Border Insolvency law:

Major developments continue to move forward in this field, which has become an integral part of trade finance as well as the means by which developing countries can provide for management of economic downturns and avoidance of meltdown risk. The US enacted this year the *1997 Uncitral Model law on cross-border insolvency procedure* as the *new Chapter 15 of the US Bankruptcy Code*. In a move not often likely to be repeated, the Judiciary Committees agreed to recast that portion of the bill so it resembled the UN Model law, so that the US, the IMF, the World Bank and others could promote its adoption by other countries.

Prior to that, Uncitral completed its *new legislative guide to insolvency law reform*, which is expected to become a major component of the new international standards by which the World Bank and IMF assess performance of recipient states. Future work in this field will be considered at a colloquium in Vienna in November 2005, which is likely to focus on upgrading the concept of “protocols” between courts or other authorities of states wishing to rationalize the handling of cross-border bankruptcy cases; rules to handle the increasing phenomena of groups of companies subject to insolvency risk; and post-commencement financing to facilitate workouts.

General principles of international commercial law:

Unidroit completed its 2004 edition of its widely-used “International Principles” by adding new chapters on a number of areas of commercial and contract practice. Recommendations are being sought by Unidroit as to appropriate topics which would be important in transactions or other international applications to be added in the next phase to this document.