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## Crossing Borders: Adventures in Transnational Legal Research

Anne E. Burnett

*University of Georgia School of Law Library*, [aburnett@uga.edu](mailto:aburnett@uga.edu)

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# **Crossing Borders: Adventures in Transnational Legal Research**

Anne E. Burnett, J.D., M.L.I.S.  
University of Georgia School of Law  
Athens, Georgia

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Anne E. Burnett, J.D., M.L.I.S.  
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## **I. Introduction**

American attorneys often find themselves at some point involved in a transaction or dispute crossing national borders:

- a probate case involves property in Georgia and Germany
- parents in the United States seek to adopt a child in Korea
- goods manufactured in Thailand are the subject of a contract formed in the United States
- a client in Atlanta seeks child support from a divorcing spouse in Bangkok

In these types of cases, the laws of the involved nations may vary significantly.

When conducting business between entities in more than one country, whose law governs the transaction? If a dispute arises, where and how will it be resolved? How is service of process completed outside of the United States? How is discovery of documents and other types of evidence accomplished? If judgment is entered in one country, can it be enforced in another? These are questions that many American attorneys face, regardless of whether they intended to practice “international law.”

A few preliminary definitions:

- transnational law - an evolving legal framework governing economic and monetary transactions and contracts involving two or more countries or parties from two or more countries. The purpose of transnational law is to regulate international commercial transactions by a uniform system of law.

- *lex mercatoria* - refers to a set of rules governing the transactions between merchants in medieval Europe. The term is often used currently to refer to the modern principles and rules of transnational law.
- private international law - not actually *international* law but rather the branch of municipal, or domestic, laws dealing with cases having a contact with some system of law other than the domestic system. Private international law is often referred to as “conflicts of law.” GERMAIN’S TRANSNATIONAL LAW RESEARCH asserts that private international law *always* includes choice of law questions, and in many legal systems it also includes questions concerning choice of jurisdiction, inheritance, marriage and divorce, injuries, accidents, gathering of evidence abroad, and the recognition of judgments.
- Public international law - usually refers to the laws governing the relations between nations, although the term also encompasses individuals in the context of international human rights.

This paper lists organizations and online resources designed to assist the domestic lawyer in global transactions or litigation. The focus is on free resources available in English, although a few resources available in other languages are included as well.

## II. Useful Sites

### a. Hague Conference on Private International Law

[http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)

Established in 1893, the Hague Conference is an intergovernmental organization working toward the unification of private international law through the negotiation and drafting of multilateral treaties or international conventions in the different fields of private international law, including:

- international judicial and administrative co-operation;
- conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; and
- jurisdiction and enforcement of foreign judgments.

Over 70 countries belong to the Hague Conference, and 130 countries are parties to Hague Conventions. From 1951 to 2008 the Conference adopted 38 Conventions. Some of these conventions deal with the determination of the applicable law, some with the conflict of jurisdictions, some with the recognition and enforcement of foreign judgments and some with administrative and judicial co-operation between authorities. According to the Hague Conference Secretariat, the most widely-ratified Hague conventions address:

- the abolition of legalization (apostille)
- service of process
- taking of evidence abroad
- access to justice

- international child abduction
- intercountry adoption
- conflicts of laws relating to the form of testamentary dispositions
- maintenance obligations
- recognition of divorces

The Hague Conference web site provides the texts of the Conventions from 1951 to 2009 at [http://www.hcch.net/index\\_en.php?act=publications.listing&sub=3](http://www.hcch.net/index_en.php?act=publications.listing&sub=3). The site also includes charts showing the status of the different Conventions, enabling the practitioner to determine if a specific country has signed on to a particular Convention. At [http://www.hcch.net/index\\_en.php?act=text.display&tid=10](http://www.hcch.net/index_en.php?act=text.display&tid=10), the site provides a listing of Conventions grouped by subject, such as “Protection of Children” or “International Judicial and Administrative Cooperation.”

**b. The United Nations Commission on International Trade Law (UNCITRAL)**

<http://www.uncitral.org/>

The United Nations General Assembly created UNCITRAL in 1966 as a response to perceived disparities in national trade laws which were viewed as providing obstacles to the free flow of trade. The General Assembly gave UNCITRAL a mandate to further the progressive harmonization and unification of international trade law. UNCITRAL’s work includes identifying areas where outdated or unpredictable laws hinder international commerce. The goal is to craft solutions which are acceptable to countries with different legal systems and levels of economic and social development. As part of its work, UNCITRAL produces conventions, model laws, legal guides, legislative guides,

rules, and practice notes. UNCITRAL differs from the World Trade Organization (WTO) which deals with trade policy issues (liberalization, abolition of trade barriers, unfair trade practices or other similar issues) usually related to *public* law, whereas UNCITRAL deals with the laws applicable to *private commercial parties* in international transactions.

The major areas of UNCITRAL's work are:

- International Commercial Arbitration and Conciliation
- International Sale of Goods (CISG) and Related Transactions
- Insolvency
- International Payments
- International Transport of Goods
- Electronic Commerce
- Procurement and Infrastructure Development
- Penalties and Liquidated Damages

UNCITRAL's web site provides access to its numerous international agreements, including the United Nations Convention on Contracts for the International Sale of Goods (CISG), which sets forth a uniform transnational sales law. The CISG has been ratified by over 70 countries, including the United States. The texts of all of UNCITRAL's conventions, model laws, legislative guides, arbitration rules, legal guides and other documents are linked from

[http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html).

Of particular use to the practitioner may be the database called Case Law on UNCITRAL Texts (CLOUT) [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html) , which

collects information on global court and arbitral decisions related to UNCITRAL's conventions and model laws. CLOUT provides abstracts in several languages, including English, of these decisions. In addition, the CLOUT record provides a citation if the decision is published and also includes known reproductions or summaries in additional languages. CLOUT also includes a digest arranged by CISG article number at [http://www.uncitral.org/uncitral/en/case\\_law/digests/cisg.html](http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html).

**c. International Institute for the Unification of Private Law (UNIDROIT)**  
<http://www.unidroit.org/>

UNIDROIT's purpose is to study needs and methods for modernizing, harmonizing and coordinating private and commercial law as between countries and groups of countries. UNIDROIT's work has resulted in the adoption over the years of numerous international conventions and model laws related to international commercial law, including the 1988 UNIDROIT Convention on International Financial Leasing, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and the 2002 Model Franchise Disclosure Law. In addition, UNIDROIT has published Principles of International Commercial Contracts, which serve as a "Restatement" for international commercial contracts, providing **black letter** rules reflecting current trade practices. The Principles were first prepared by legal experts from around the world in 1994 and updated in 2004 and again in 2010. They can be found on the UNIDROIT web site at <http://www.unidroit.org/english/principles/contracts/main.htm>. In addition to providing guidance to arbitrators and courts in matters relating to international

commercial contracts, the Principles have been influential in reforming national laws. For example, the Principles played an important role in the drafting of Russia's new Civil Code in 1995. Michael J. Bonnell, *UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law*, 2004 *UNIFORM LAW REVIEW* 5, also available at

<http://www.unidroit.org/english/publications/review/articles/2004-1-bonell.pdf>.

UNIDROIT's web site includes the UNILEX database which collects court decisions and arbitral awards concerning both the CISG and the UNIDROIT Principles. UNILEX provides abstracts and the full text of the cases in their original language. The cases are searchable by date, country, and instrument article. UNILEX also includes a bibliography of publications about the CISG and the UNIDROIT Principles. Access UNILEX at <http://www.unilex.info/>.

**d. TransLex Law Research**  
<http://trans-lex.org/index.php>

TransLex is a project of the Center for Transnational Law (CENTRAL) at the University of Cologne. The CENTRAL team uses the web as an online research and codification platform for posting its “creeping codification” of the “New Lex Mercatoria.” The site contains:

- TransLex Principles – more than 120 principles and rules of transnational law, set forth as **black letter** rules with references to domestic statutes, legal doctrine, uniform law instruments, court decisions and arbitral awards
- TransLex Bibliography – selected collection of bibliographic references on transnational law with hyperlinks to the full text of the referenced document if in TransLex
- TransLex Materials – domestic statutes, international conventions, model laws, restatements and other soft-law instruments relevant to the transnational legal researcher
- TransLex Links – selected links to sites related to transnational and international business law

**e. Pace Database on the CISG and International Commercial Law**

<http://cisgw3.law.pace.edu/>

This database (hereinafter referred to as the CISG Database) is produced by the Pace Institute of International Commercial Law and the Law Library at Pace University School of Law. The CISG database includes an annotated version of the text of the CISG. The annotations include legislative history, case law, and links to scholarly articles. The site also provides a searchable database of CISG cases at

<http://cisgw3.law.pace.edu/cisg/text/caseschedule.html>.

In addition to producing the CISG database, the Pace Institute of International Commercial Law participates in the Queen Mary Case Translation Programme, which

is a public service open to the academic and practicing legal communities and provides high quality professional translations into English of foreign case law (including arbitral awards) relating to the CISG and UNIDROIT Principles of International Commercial Contracts. Lawyers from all over the world provide the translations. More information about the Queen Mary Translation Programme is available at

<http://cisgw3.law.pace.edu/cisg/text/queenmary.html>.

**f. International Chamber of Commerce International Court of Arbitration**

<http://www.iccwbo.org/court/arbitration/>

The ICC International Court of Arbitration is a leading institution for resolving international commercial and business disputes. The court has handled more than 17,000 cases since its founding. In 2010, cases handled by the court involved parties from over 140 countries.

In addition to describing its services and posting the rules governing its proceedings and actions, the ICC Court provides access on its site to standard and suggested clauses for dispute resolution services. These model clauses are available in a number of languages and file formats.

**g. Department of State - Private International Law**

<http://www.state.gov/s/l/c3452.htm>

This site is helpful for determining whether the United States is a party or plans to be a party to a particular treaty. The site's stated purpose is to provide a convenient

location to find treaties in force for the United States, other international instruments, and information on current negotiations and projects covering the private international law in the following categories:

- commercial law
- judicial assistance
- arbitration and judgments
- family law
- wills, trusts and estates
- general resources

Within each category, the site groups private international law agreements according to whether the United States is a party, is considering ratification, or is not a party (and not considering ratification). In addition, the State Department site provides information about “Works in Progress,” including drafts, background reports, U.S. government position papers and proposals, and other working documents concerning conventions and other international instruments that are currently under negotiation.

#### **h. Uniform Law Review**

<http://www.unidroit.org/english/publications/review/main.htm>

Published by UNIDROIT, the *Uniform Law Review* is a bilingual (English/French) law periodical covering legal harmonization and uniform law instruments relating to private international commercial law. The web site includes an index from 1996 to present and the full text of selected articles.

**i. INCOTERMS**

<http://www.iccwbo.org/incoterms/>

Uniform Commercial Code definitions of commercial delivery terms such as F.O.B. (Free on Board) and F.A.S. (Free Alongside) are not always used in global commerce. More widely used are the Incoterms, a set of definitions published by the International Chamber of Commerce (I.C.C.). Incoterms sets forth the obligations of the seller and buyer based on the terms of the contract. The I.C.C. web site provides a FAQ about Incoterms, the preambles to the set, a PDF chart illustrating the buyers' and sellers' obligations under each of the Incoterms (including a list of critical points), and information about ordering the full set of Incoterms.

**j. Department of State - International Judicial Assistance, Notarial Services, and Authentication of Documents**

[http://travel.state.gov/law/judicial/judicial\\_702.html](http://travel.state.gov/law/judicial/judicial_702.html)

This State Department site provides information about authenticating and legalizing documents for use abroad, obtaining an apostille (a certificate issued by a designated authority in a country where the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents applies), notaries public abroad, obtaining evidence abroad, and preparing letters rogatory abroad. The site also provides country brochures detailing specific issues and procedures within selected countries. For example, the brochure at [http://travel.state.gov/law/judicial/judicial\\_672.html](http://travel.state.gov/law/judicial/judicial_672.html) contains State Department admonitions about the dicey proposition of an American attorney taking depositions in

Brazil (“such action potentially could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants”) and the brochure at [http://travel.state.gov/law/judicial/judicial\\_3831.html](http://travel.state.gov/law/judicial/judicial_3831.html) discusses the difficulties in obtaining judicial assistance from the Russian authorities despite both countries having signed relevant treaties designed to assist in these matters (“the Russian Federation also declines to give consideration to U.S. requests to obtain evidence”).

### **III. Additional Resources:**

The chapter on International Economic Law in the ASIL Guide to Electronic Resources in International Law at <http://www.asil.org/resource/iel1.htm> includes links and annotations for selected web sites covering private international law.

The Electronic Information System for International Law (EISIL), at <http://www.eisil.org/>, is an online database of online resources for international law. EISIL contains a category linking to numerous online resources related to private international law. The resources are divided into the following categories: Basic Resources, Trade & Commerce, Finance & Banking, Wills, Trusts & Estates, Family & Children, International Judicial Assistance, and Jurisdiction & Judgments. For each resource, EISIL provides not only a link to the most authoritative online source but also a record providing detailed information about the document, including citation information where relevant.

In most U.S. states the authority and responsibility for document authentication and apostilles rests with the secretary of state. Use a web search engine, such as Google or Bing, to locate the secretary of state sites. On each secretary of state’s home page, look

for a link to “Authentication of Documents” or “Apostille” to find the pages containing information about these services.