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International Harmonization of Private Law

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Introduction to Transnational Legal Transactions

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Edited by

Marylin J. Raisch
Roberta I. Shaffer

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INTERNATIONAL HARMONIZATION OF PRIVATE LAW

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I. Introduction To The Problems Of Trading Across National Boundaries

[What follows is an excerpt from Peter Winship & John A. Spanogle, *Transnational Sales, Contracts: Course Materials* 1, 3-6 and 11 (Spring 1994)]

After that magic day when you have graduated, a second magic day when you have found an employer or "just the perfect spot" to hang out your shingle, and the third magic day when the bar examiners notify you that (of course!) you passed the bar with flying colors -- after all that, a potential client walks into your office, says that she is about to sell 500 electronic notepads to a buyer in France, and announces that she wants you to "set up" the transaction for her. What do you do? Read on. . . .

If your potential client had negotiated to sell 500 electronic notepads to a buyer in Missouri, she and the buyer are unlikely to have bargained hard, if at all, over what law governs the sales contract. Drawing on your knowledge of Article 2 of the Uniform Commercial Code you will realize that the risk of surprise or disadvantage is slight. Article 2 will almost always govern and, with limited exceptions, the parties' agreement will displace the Code's provisions, as will the usages of the electronic notepad trade. If you are asked to memorialize the transaction, you will discover that your study of contract law, the Uniform Commercial Code, and all those legal writing exercises in Law School now pay dividends.

When, however, your potential client wishes to sell the same notepads to a buyer in France, the risks of surprise and disadvantage are higher. U.C.C. Article 2, after all, is not the law outside the United States, no matter what your sales law instructor thought. Consider what happens when a dispute arises between the parties and the contract does not designate the law applicable to the contract. Because the parties did not choose the applicable law,

the judge or arbitrator will have to do so. If the claim is brought before a French judge, he or she will use French choice-of-law rules -- and these rules may be quite different from the choice-of-law rules that a U.S. judge would apply if the claim were brought before a U.S. court.

When you analyze your client's claim you will therefore have to go through three steps. First, you will have to determine what forum will hear the claim. Only *after* the forum has been selected can you analyze the second step: whether U.S. law, French law, or some other country's law governs the parties' rights and obligations. You must then construe the applicable law to predict how the dispute will be resolved by the judge or arbitrator. All three steps of the analysis are costly to carry out and subject to a greater possibility of error than if the transaction were a domestic sale governed by the Uniform Commercial Code.

Are these problems resolved if you have the parties designate U.S. law as the applicable law? A moment's reflection suggests that the answer is a qualified "no". Although the risk of non-enforcement is slight, you still must consider whether all possible fora will enforce the choice-of-law clause. Even if a French court would enforce the clause, would you feel comfortable having to prove the content (translated into French) of U.S. law to that court? Finally, consider your own professional responsibility. If French law gives greater protection to the seller than U.S. law does, have you necessarily advised a client properly if you have the parties designate U.S. law as applicable? Aren't you obliged, in other words, to know enough about the possible alternatives (*e.g.*, U.S. law, French law) to advise a client on the best possible alternative? Given these considerations, of course, the practical problem is that the initial question assumes that you or the seller can persuade the French buyer to accept U.S. law as the applicable law. Remember that to the French buyer U.S. law and the Uniform Commercial Code will be unfamiliar and he will therefore probably prefer French law.

Your life, in other words, would be much simpler if U.C.C. Article 2 -- or some other uniform sales law -- were the law in both the United States and France. Put another way, the non-uniformity of national sales laws creates "transaction costs" for international trade.

There are several possible ways to reduce, if not eliminate, these transaction costs.

First, as just suggested, all the world's States might adopt a uniform sales law for transnational sales, or, more ambitiously, for both domestic and transnational sales.

Second, but more modestly, these same States might unify choice-of-law rules, thereby assuring parties that the same national sales law will govern no matter what forum considers the dispute.

Third, courts and arbitral tribunals might recognize and enforce a supranational "law merchant" (sometimes referred to as *lex mercatoria*) incorporating principles and rules of contract law tailored for international trade.

Finally, international traders themselves might develop standard form contracts or general conditions incorporated into their agreements.

These techniques, of course, are not incompatible with each other. International organizations concerned with elimination of these transaction costs, however, have tended to specialize in one or more of these techniques.

A growing body of draft conventions, uniform laws, model laws, and less formal international instruments draws upon one or more of these techniques to address transnational sales, payments, and financing. If you are familiar with articles 2, 3, 4, 4A, 5 and 9 of the Uniform Commercial Code you will find analogues to these articles in this body of "transnational" law. Although their comments are premature, some commentators already speak about "codification" of private international trade law.[218]

II. The Principal International Organizations Devoted To Harmonization Or Unification Of Private Law

For the past 150 years there have been numerous international attempts to unify or harmonize private law in different

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[218] *See, e.g.*, Clive M. Schmitthoff, *The Codification of the Law of International Trade*, 1985 J. Bus. L. 34; *Symposium: The Codification of International Commercial Law: Toward a New Law Merchant*, 15 Brooklyn J. Int'l L. 1 (1989).

countries.[219] Projects for harmonization of business law are the most widely-known today, but there have also been numerous efforts in the fields of personal status, property, and judicial procedure and cooperation.

The closest we have to a survey of contemporary projects is the "Digest of Legal Activities of International Organizations and Other Institutions" published in loose-leaf form by the International Institute for the Unification of Private Law.[220] A quick perusal of that text reveals the wide variety of on-going projects and sponsors.

A similar impression comes from reading the 1966 U.N. Secretary-General on harmonization and unification of international trade law, *Progressive Development of the Law of International Trade*.[221] The report identifies the following public and private organizations as engaged in relevant projects:

A. Inter-governmental Organizations
   1. The International Institute for the Unification of Private Law (UNIDROIT)
   2. The Hague Conference on Private International Law
   3. The League of Nations
   4. The United Nations
      (a) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
      (b) Industrial property legislation
      (c) United Nations regional economic commissions
      (d) United Nations Conference on Trade and Development (UNCTAD)

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[219] For a general survey of the history of the unification of law (and much more), see René David, *The International Unification of Private Law*, in 2 Int'l Encyc. Comp. L. ch. 5 (1971). *See also* Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 Am. J. Comp. L. 683 (1992).

[220] International Institute for the Unification of Private Law (UNIDROIT), *Digest of Legal Activities of International Organizations and Other Institutions* (Dobbs Ferry, N.Y.: Oceana Publications, 10th ed. 1994).

[221] *Progressive Development of the Law of International Trade: Report of the Secretary-General*, U.N. GAOR, 21st Sess., Annex, Agenda Item 88, U.N. Doc. A/6396 and addenda (1966), *reprinted in* [1968-1970] 1 UNCITRAL Y.B. 18, U.N. Doc. A/CN.9/SER.A/1970.

(e) Centre for Industrial Development
5. The United Nations Specialized Agencies
(a) International Bank for Reconstruction and Development (IBRD)
(b) Inter-governmental Maritime Consultative Organization (IMCO)
(c) The International Civil Aviation Organization (ICAO)
6. United International Bureaux for the Protection of Intellectual Property (BIRPI)

B. Regional Inter-governmental Organizations and Groupings
1. The Council for Mutual Economic Assistance (CMEA)
2. The European Economic Community (EEC)
3. The European Free Trade Association (EFTA)
4. The Latin American Countries (OAS)
5. The Council of Europe
6. The Benelux Countries
7. The Nordic Council
8. The Organization of African Unity (OAU)
9. The Asian-African Legal Consultative Committee

C. Non-governmental Organizations
1. The International Chamber of Commerce (ICC)
2. The International Maritime Committee (IMC)
3. The International Association of Legal Science
4. The International Law Association (ILA)
5. The Institute of International Law

As a result of this 1966 report, the United States General Assembly created a Commission on International Trade Law (UNCITRAL) charged with, *inter alia* "[c]o-ordinating the work of orginizations active in this field and encouraging the work of co-operation amang them.[222]

Four inter-governmental institutions are of particular interest to the United States. One body -- the Hague Conference on Private

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[222] G.A. Res. 2205, U.N.G.A.O.R., 21st Sess., Supp. No. 16 at 100; U.N. Doc. A16594 (1966).

International Law ("Hague Conference") -- celebrated its centenary in 1993. A second, the International Institute for the Unification of Private Law ("UNIDROIT") in Rome, was a gift by Mussolini to the League of Nations in 1926. More recently, in 1966 the U.N. General Assembly created the Commission on International Trade Law ("UNCITRAL"). While these three bodies are dedicated to global unification efforts, the fourth body -- the Organization of American States ("OAS") -- is a regional political grouping that convenes Specialized Conferences on Private International Law.

The United States participates actively in all four bodies. After considerable debate, the United States became a member of the Hague Conference and UNIDROIT in 1963 after receiving congressional approval. The United States has been elected a member of UNCITRAL since its inception. Because the United States has always been a member of the United Nations, Congress has not had specifically to approve participation in UNCITRAL. Likewise, as a member of the OAS, the United States has participated in the Specialized Conferences on Private International Law without the need for congressional action. Participation in the work of these bodies, of course, does not commit the United States to any particular text developed by these bodies.

Individuals from the United States also participate in the harmonization efforts of non-governmental organizations. The most influential of these bodies are the International Chamber of Commerce ("ICC") and the International Maritime Committee ("IMC" or "CMI", the latter being the initials of its French name, Comité maritime international).

While one should not overlook the activities of the non-governmental organizations, the following materials focus on the four inter-governmental bodies of particular interest to the United States.[223]

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[223] *See generally* Rudolf Dolzer, *International Agencies for the Formulation of Transnational Economic Law*, in *The Transnational Law of International Commercial Transactions* 61-80 (Norbert Horn & Clive M. Schmitthoff eds. 1982).

A. The Hague Conference On Private International Law

The Hague Conference on Private International Law is -- despite its name a permanent inter-governmental body with its headquarters at The Hague in the Netherlands.[224] Its present status is determined by a "Statute" set out in an international treaty that came into force on July 15, 1955.[225]

The Hague Conference's purpose, as stated in Article 1 of its Statute, is "to work for the progressive unification of the rules of private international law." The phrase "private international law" approximates "conflict of laws" in Anglo-American usage. Thus, the Hague Conference concentrates on preparing uniform rules for determining which national law governs a particular transaction or issue. By tradition, these uniform rules are incorporated in multilateral treaties or conventions rather than model laws, although as from 1980 the Conference is willing to prepare model laws and adopt recommendations.

The Conference has been most successful in the areas of personal status, family obligations, and judicial procedure or cooperation. Although it has adopted several commercial law conventions, few of these have come into force.

The United States is a party to the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters,[226] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,[227] Convention Abolishing the Requirement of Legalization for Foreign Public

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[224] Hague Conference on Private International Law, 6 Scheveningseweg, 2517 KT The Hague, The Netherlands. (tel. 31-70-363-3303; fax 31-70-360-4867).

[225] Statute of The Hague Conference on Private International Law, October 31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121 (1955). The Statute entered into force for the United States on October 15, 1964.

[226] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. The service convention entered into force for the United States on February 10, 1969.

[227] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. The evidence convention entered into force for the United States on October 7, 1972 and is codified at 28 U.S.C.A. § 1781 (West Supp. 1989).

Documents;[228] and Convention on the Civil Aspects of International Child Abduction.[229] In addition, the United States has signed but not yet ratified the Convention on the Law Applicable to Trusts and on their Recognition.[230]

As of March 1994 the Conference had 41 members.[231] When the United States became a member in 1964 there were 23 members, most from western Europe. In the last 30 years, membership has become more diverse. Australia and Canada are now members, as are six countries from Latin America (Argentina, Chile, Mexico, Suriname, Uruguay, and Venezuela). In more recent years, China and East European countries have also become members.

Financial support for the Conference comes from subventions provided by the government of the Netherlands and by agreed contributions from member States. This support finances the Conference's permanent bureau at The Hague. The secretariat at the permanent bureau consists of a Secretary-General, two Deputy Secretary-Generals, and supporting staff. The three principal officers must be nationals of different States. As of 1994, one of the Deputy Secretary-Generals is from the United States.

The history of the Hague Conference falls into two distinct periods. Prior to World War II, the Conference met six times in 1893, 1894,

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[228] Convention Abolishing the Requirement of Legalization for Foreign Public Documents, October 5, 1961, 33 U.S.T. 883, T.I.A.S. No. 10072, 527 U.N.T.S. 189. The legalization convention entered into force for the United States on October 15, 1981. 28 U.S.C.A. App., Rules of Civil Procedure No. 44 (Supp.).

[229] Convention on the Civil Aspects of International Child Abduction, October 25, 1980. T.I.A.S. No. 11670, Hague Conference on Private International Law, *Recueil des Conventions* (hereinafter R.C.H.) 264, 1951-1988. The abduction convention entered into force for the United States on July 1, 1988.

[230] Convention on the Law Applicable to Trusts and on their Recognition, July 1, 1985, Hague Conference on Private International Law, *Recueil des conventions* 1951-1988.

[231] Members as of March 1, 1994 include: Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, Czech Republic, Denmark, Egypt, Finland, Former Yugoslav Republic of Macedonia, France, Germany (F.R.G.), Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, United Kingdom, U.S.A., Uruguay, and Venezuela. 83 Rev. crit. dr. internat. privé 195, 195 (1994).

1900, 1904, 1925, and 1928. The Netherlands government convened a seventh session in 1951 at which the delegates adopted the present Statute. Starting in 1956, the Conference has usually met every four years with several additional extraordinary sessions. The most recent meeting was rescheduled from October 1992 to May 1993 in honor of the Conference's centenary. The next meeting of the Conference is scheduled for October 1996.

At the time of the Conference's centenary in 1993, law reviews published a number of articles examining the work and influence of the Conference. In the United States, *Law and Contemporary Problems* will publish papers presented at a symposium that reviewed the Conference's work.

The Conference's working methods have been relatively consistent since 1951.[232] In the year before the quadrennial session, a Special Commission on General Affairs and Policy of the Conference meets to consider the future work of the Conference. The secretariat then prepares feasibility studies which are circulated to the member states. The Conference then adopts an agenda for future work as part of the Conference's Final Act of its regular session. For each topic on the agenda, the secretariat prepares a research paper and a questionnaire which it then circulates to member States for comments. A Special Commission, consisting of representatives of member states, will then meet to review this material and draft a text for submission to the next session of the Conference. At this session, one of the Commissions will review this draft and recommend a proposed text for adoption at a plenary meeting. If approved, the Conference incorporates the draft Convention in the Final Act of the session. The Conference publishes the acts and documents of its sessions, with a volume usually devoted to each draft convention adopted at a session.

At the May 1993 session, the Conference adopted[233] the following agenda of future work:

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[232] For a more detailed description of the Hague Conference's working methods, see *United Nations Legislative Series: Review of the Multilateral Treaty-Making Process* at 513-521, U.N. Doc. ST/LEG/SER.B/21, U.N. Sales No. E/F.83.V.8 (1985).

[233] Hague Conference on Private International Law, *Final Act of the Seventeenth*

1. Decides to include in the Agenda of the Eighteenth Session the revision of the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and a possible extension of the new convention's scope to the protection of incapacitated adults.

2a. Decides to include in the Agenda for the work of the Conference the question of the recognition and enforcement of foreign judgments in civil and commercial matters;

b. Requests the Secretary General to convene as soon as is feasible a Special Commission charged with the following matters:

- studying further the problems involved in drafting a new convention, on the basis of a document prepared by the Permanent Bureau, taking into account the discussions of the Seventeenth Session,
- making proposals with respect to the work which might be undertaken,
- suggesting the timing of such work;

c. Leaves it to the Special Commission on General Affairs and Policy of the Conference to make recommendations to the Eighteenth Session on the further steps to be taken.

3. Decides to include also in the Agenda for the work programme of the Conference the question of the determination of the law applicable, and possibly questions arising from conflicts of jurisdiction, in respect of civil liability for environmental damage.

4. Decides to include or retain in the Agenda of the Conference, but without priority -

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Session at Part B (1993), *reprinted in* 40 Neth. Int'l L. Rev. 292, 306-307 (1993).

a. jurisdiction, and recognition and enforcement of decisions in matters of succession upon death,

b. protection of privacy in connection with transfrontier data flows,

c. the law applicable to unmarried couples,

d. the law applicable to negotiable instruments,

e. the international legal problems raised by electronic data interchange,

f. the law applicable to bank guarantees,

g. the law applicable to unfair competition.

5. Requests the Secretary General to convene at appropriate times Special Commissions to study the operations of the following Conventions -

a. Hague Conventions on the law applicable to or on the recognition and enforcement of decisions relating to maintenance obligations, as well as the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance,*

b. Hague Conventions on civil procedure and on international judicial and administrative co-operation.

The Conference's Permanent Bureau edits a bibliography relating to the work of the Conference which it publishes as part of the volume of miscellaneous matters for each session.[234] An annual report on the Conference appears in the second issue each year of The *Netherlands International Law Review.*[235] This issue lists the member

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[234] For the most recent edition, see *Bibliography Relating to the Work of the Conference (1945-1991),* in 1 Hague Conference on Private International Law, *Proceedings of the Sixteenth Session (3 to 20 October 1988): Miscellaneous Matters* 284-347 (1991).

[235] *See, e.g., Information concerning the Hague Conventions on Private International Law,* 40 Neth. Int'l L. Rev. 257 (1993).

states and reports on the present status of each of its conventions.[236]

B. International Institute For The Unification Of Private Law

The International Institute for the Unification of Private Law (UNIDROIT) is an inter-governmental body with its headquarters in Rome, Italy.[237] Originally established in 1926 and affiliated with the League of Nations, the Institute was reestablished after World War II as an independent organization. Its present status is determined by a "Charter."[238]

As of October 1993, the Institute had 56 members.[239] When the United States became a member in 1964 there were 40 members. Many of the same countries that have joined the Hague Conference in recent years have also joined the Institute. These members and the Italian government provide the financing for the Institute's operations.

The Institute's purpose, as stated in Article 1 of the Charter, is "to examine ways of harmonizing and co-ordinating the private law of States and groups of States, and to prepare gradually for the

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[236] Similar reports appear periodically in the *Revue critique de droit international privé. See, e.g.*, 83 Rev. crit. dr. internat. privé 195 (1994) (state of signatures and ratifications as of 1 March 1994).

[237] International Institute for the Unification of Private Law, Palazzo Aldobrandini, Via Panisperna, 28, 1-00184 Rome, Italy (tel. 39-6-684-1372; fax 39-6-684-1394).

[238] Statute of the International Institute for the Unification of Private Law, March 15, 1940, 15 U.S.T. 2494, The Statute has been amended several times. (See UKTS 78 (1977), Cmnd. 6946 (consolidated text with all amendments to 1977) and UKTS 93 (1991), Cmnd.1728 (1984 amendment)). It entered into force for the United States on March 13, 1964.

[239] Members as of October 1, 1993 include: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Holy See, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Senegal, Slovakia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, USA, Uruguay, Venezuela, and Yugoslavia. UNIDROIT, *News Bulletin* No. 93/94 at 1 (January/April 1993), No. 95/96 at 1 (July/October 1993).

adoption by the various States of uniform legislation in the field of private law." To carry out this objective, the Institute has prepared uniform texts of substantive law, many of which are set out in international instruments. Thus, unlike the Hague Conference, the Institute promotes unification or harmonization of law by seeking to have states adopt uniform substantive law.

Since 1926 the Institute has worked principally in the areas of sales law, credit law, transportation law, procedural law, and law relating to civil liability. The 1964 uniform sales laws were prepared under the auspices of the Institute, as were the 1973 uniform law on the form of an international will and the 1988 factoring and leasing conventions.

As important as these legal texts are the Institute's scholarly activities and publications. It has sponsored three "Congresses on Private Law" and five "Meetings of the Organisations concerned with the Unification of Law." Proceedings of these meetings have been published.[240]

Proceedings of the five meetings of organizations involved in unification or harmonization efforts appear in 1956 UNIDROIT Y.B., vol. 2 (1957) (Unification of Law); 1959 UNIDROIT Y.B. 48-509 (1960) (The Methods in the Unification of Law; The Differences in the Interpretation of Uniform Law); 1963 UNIDROIT Y.B. (1964) (The Differences in the Interpretation of Uniform Law; Relations Between Unification at a regional and at a Universal Level); 1967-1968 UNIDROIT Y.B., vol. 2, 33-323 (1969) (Unification and Harmonization of Law: The criteria governing the choice between the various methods); 1973-II Unif. L. Rev. 13-197 (Uniform Law as a Means of Technical Assistance to Developing Countries; Methods of Co-ordinating the Different International Organizations and Team-Work Among Them). In addition, the Institute edits the

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[240] The proceedings of the three congresses appear in UNIDROIT, *Actes du Congrès international de droit privé tenu à Rome en juillet 1950*, Unification of Law, 2 (1951); UNIDROIT, *New Directions in International Trade Law: Acts and Proceedings of the 2nd Congress on Private Law held by the International Institute for the Unification of Private Law, Rome, 9-15 September 1976 (1977)*; UNIDROIT, *International Uniform Law in Practice: Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law*, Rome, 7-10 September 1987 (1988).

digest of legal activities of international bodies mentioned earlier,[241] and publishes the semi-annual *Revue de droit uniforme/Uniform Law Review* and a semi-annual *News Bulletin*. The *Uniform Law Review* includes digests of court decisions and arbitral awards construing "uniform" laws, while both the *Uniform Law Review* and the *News Bulletin* contain bibliographies.

Although U.S. legal experts have participated actively in the work of the Institute, the United States has not yet adopted any of the UNIDROIT texts. The State Department is, however, preparing to send to Congress draft legislation to implement the Convention Providing for a Uniform Law on the Form of an International Will, 1973, a treaty that received Senate advice and consent in 1991.[242]

Soon after the 1973 conference, the National Conference of Commissioners on Uniform State Laws referred the Wills Convention text to the Editorial Board for the Uniform Probate Code. The Editorial Board recommended that the National Conference adopt a uniform state law implementing the Convention and in 1977 the Conference adopted the Uniform International Wills Act. States may adopt the Act as a free-standing act or as an amendment (new Part 10) of Article 2 of the Uniform Probate Code. [243] In addition, the State Department plans to forward the Conventions on international factoring[244] and international financial leasing[245] to the Senate for advice and consent in the near future.[246]

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[241] *See* note 219 *supra*.

[242] The United States sponsored the diplomatic conference at which this text was adopted and as a consequence the text is often cited as the "Washington" wills convention. The United States signed the convention on October 27, 1973. The Senate gave its advice and consent to ratification on August 2, 1991 subject to enactment of federal implementing legislation.

[243] 8 U.L.A. 178 (Master ed. 1983).

[244] UNIDROIT Convention on International Factoring, May 28, 1988, 27 I.L.M. 943 (1988).

[245] UNIDROIT Convention on International Financial Leasing, May 28, 1988, 27 I.L.M. 931 (1988).

[246] Remarks of Harold S. Burman at the 46th meeting of the Secretary of State's Advisory Committee on Private International Law (May 16, 1994) in Washington, D.C.

The Institute's working methods have evolved over time and vary with the subject matter.[247] Once the Governing Council decides what topics should be on the Institute's work program, the secretariat or a consultant will prepare a comparative law study of each topic. This study may be prepared after questionnaires are circulated to member governments and interested persons. On completion of the study, the Governing Council may convene a study group of private experts or a committee of governmental experts. If a study group is used, the Governing Council will usually submit its work to a committee of governmental experts.

On completion of the review by the committee of governmental experts, the Governing Council may choose to forward the draft text to another international body, such as UNCITRAL, or to arrange for the convoking of a diplomatic conference to adopt the text. A recent example of a text developed within UNIDROIT and forwarded to another body is the 1991 United Nations Convention on Liability of Operators of Transport Terminals.[248] After a decade of work on the topic, the Institute submitted its draft text to UNCITRAL for completion of the project. The factoring and leasing conventions are recent examples of texts submitted directly to an international conference.

At its June 1992 session, the Institute's Governing Council adopted[249] the following work program for the period, 1993-1995:

1. Principles for international commercial contracts
2. International protection of cultural property
3. International aspects of security interests in mobile equipment

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[247] For further elaboration on UNIDROIT's working methods, see *United Nations Legislative Series, Review of the Multilateral Treaty-Making Process*, note 231 *supra*, at 478-482.

[248] United Nations Convention on the Liability of Operators of Transport Terminals, April 19, 1991, United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Official Records, at 101, U.N. Doc. A/Conf. 152/14 (1991); I.L.M. 1506 (1991).

[249] UNIDROIT, *Governing Council 71st session (Genoa, 22 to 24 June 1992): Report on the Session (prepared by the Secretariat)*, UNIDROIT 1992, C.D. (71) 18 at 3-4 & Appendix III (August 1992).

4. International franchising
5. Inspection agency contracts
6. Civil liability connected with the carrying out of dangerous activities
7. Legal issues connected with software
8. Program of legal assistance
9. Organization of an information system or data bank on uniform law
10. Organization of a congress or meeting on uniform law during the triennial period 1993-1995.

At its May 1994 meeting, the General Council approved the final text of the first of these items, the Principles for International Commercial Contracts.[250] This project (Study L) restates the general principles governing transnational commercial contracts much in the same way that the Restatement of Contracts does for domestic U.S. contracts. Although the text has been circulated among governments and international organizations for comment, the Institute will not present the text for formal adoption at an international diplomatic conference or by national legislation. The Principles will apply if parties to a contract agree that their contract will be governed by them. They may also be considered "general principles of contract law" or "lex mercatoria" by arbitrators or judges.

At a request of UNESCO, the Institute has also undertaken work on draft convention on stolen or illegally exported cultural objects (Study LXX). As presently drafted, the convention will provide private law rules governing the rights of owners and purchasers of cultural property that has been stolen or that has been exported illegally. It is hoped that the text will be attractive to art-importing countries that have not accepted the 1970 UNESCO Convention.[251] A committee of governmental

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[250] UNIDROIT, *Principles for International Commercial Contracts* (forthcoming).

[251] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, November 14, 1970,

experts has been meeting since May 1991 to review a text prepared by an UNIDROIT study group. This committee had its fourth session in October 1993. As of March 1994, the UNIDROIT secretariat hoped that the Italian government would convoke a diplomatic conference to review the draft convention in early 1995.

Buoyed by the success of the 1988 Ottawa conference that adopted the factoring and leasing conventions, the Institute has begun work on draft rules governing the recognition of security interests in mobile equipment (Study LXXII). A study group has met several times, most recently in February 1994. It is not yet clear, however, what the scope of this project will be.

C. United Nations Commission On International Trade Law

The United Nations General Assembly created the United Nations Commission on International Trade Law (UNCITRAL) in 1966 for "the promotion of the progressive harmonization and unification of the law of international trade."[252]

Thus, like UNIDROIT and unlike the Hague Conference, the U.N. Commission prepares uniform substantive law texts rather than texts unifying the conflict of laws. The topics addressed by UNCITRAL are limited, however, to ones related to trade and its mandate is consequently more limited than that of UNIDROIT. At the same time, the Commission has been more eclectic in the methods used, adopting not only international conventions but also model laws, voluntary rules, and guidelines. This is consistent with the charge to the Commission to "prepar[e] or promot[e] the adoption of new international conventions, model laws and

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823 U.N.T.S. 231, 10 I.L.M. 289 (1971).

[252] G.A. Res. 2205, U.N. GAOR, 21st Sess., Supp. No. 16 at 99, U.N. Doc. A/6316 (1966) as amended by G.A. Res. 3108, U.N. GAOR, 28th Sess., Supp. No. 30 at 145 para. 8, U.N. Doc. A/31/390 (1973) and G.A. Res. 31/99, U.N. GAOR 31st Sess., Supp. No. 34 at 182 para. 10(b), U.N. Doc.A/9408 (1976). The Commission is a "subsidiary organ" within the meaning of Article 22 of the United Nations Charter. Rules governing UNCITRAL's composition and work are set out in the cited General Assembly resolutions. For more detailed information about the origin and working methods of the U.N. Commission, see *United Nations Commission of International Trade Law*, U.N. Sales No. E.86.V.8 (1986; 2d ed. forthcoming). This volume also includes the texts adopted by the Commission.

uniform laws and promot[e] the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field."[253]

The Commission meets annually, usually for a three-week session. At these sessions, it reviews reports submitted by one or more of its working groups. Annual meetings of the Commission and meetings of its working groups alternate between Vienna and New York. The Commission's Secretariat is located in Vienna, Austria.[254]

The General Assembly elects the 36 members of the Commission for six-year terms. Members are selected to represent the different economic, social, and political viewpoints. The United States has been a member from the Commission's inception.

The Commission reports to the General Assembly through its Sixth Committee. The Commission also submits its annual report to the United Nations Conference on Trade and Development (UNCTAD) for comments. Documents generated by the Commission, relevant UNCTAD and Sixth Committee reports, and General Assembly resolutions are published in the UNCITRAL yearbook.

UNCITRAL's working methods are now well-established.[255] Having identified a topic it wishes to pursue, the Commission refers it to a working group. In recent years there have been three working groups. These working groups meet once or twice a year to prepare, with the help of the secretariat, a draft text. Although the working groups reports to the Commission after each working group meeting, the Commission will not usually intervene in the ongoing work. When a working group submits a final report with a draft text, the Commission reviews the text at an annual session. In recent years the Commission has devoted much of its annual

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[253] G.A. Res. 2205, U.N. GAOR, 21st Sess., Supp. 16 at 99, para. 8(c), U.N. Doc.A/6316 (1966).

[254] UNCITRAL, Vienna International Centre, P.0. Box 500, Wagramer Strasse 5, A-1400 Vienna, Austria (tel. 43-1-21131-4060; fax 43-1-237485).

[255] *United Nations Commission on International Trade Law* 7-12, U.N. Sales No. E.86.V.8 (1986). A second edition of this volume is forthcoming.

session to the review of one text. The resulting text is incorporated in the Commission's report to the General Assembly together with a recommendation on the disposition of the text. In the case of draft UNCITRAL conventions, the General Assembly will usually convoke a diplomatic conference although in at least one recent instance the General Assembly itself adopted the Convention after thorough review by its Sixth Commission.[256] As for model laws and other texts, the General Assembly will usually adopt a resolution endorsing the text. The Commission publishes an annual report setting out the Status of these texts.[257] Current information about the status of UNCITRAL conventions is available from the Treaty Section of the U.N. Office of Legal Affairs.[258]

Its arbitration and sales law texts are the best known of the UNCITRAL texts. In the field of arbitration, the Commission has adopted the UNCITRAL Arbitration Rules[259] and the Model Law on International Commercial Arbitration.[260] Adoption of the 1980 U.N. Convention on Contracts for the International Sale of Goods[261] is also wide-spread. A Limitations Convention for claims arising from international sales contracts[262] supplements the 1980 convention.

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[256] The United Nations Convention on International Bills of Exchange and International Promissory Notes was promulgated by the General Assembly without reference to a diplomatic conference. *See* [1988] 19 UNCITRAL Y.B., Annexes I & II at 173 and 187, U.N. Doc. A/CN.9/SER.A/1988.

[257] *See, e.g.*, United Nations Commission on International Trade Law, *Status of Conventions: Note by the Secretariat*, U.N. Doc. A/CN.9/381 (14 July 1993).

[258] Treaty Section of the Office of Legal Affairs, United Nations, New York, N.Y. 10017 (tel. [212] 963-5047).

[259] *Report of the United Nations Commission on International Trade Law on the Work of Its Ninth Session*, U.N. GAOR, 31st Sess., Supp. No. 17, at 34, U.N. Doc. A/31/17 (1976).

[260] *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985)*, U.N. GAOR, 40th Sess., Supp. No. 17, at Annex I, 81-93, U.N. Doc. A/40/17 (1985).

[261] United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980) Annex I, reprinted in 19 I.L.M. 668 (1980).

[262] Convention on the Limitation Period in the International Sale of Goods, June. 4, 1974, U.N. Doc. A/CONF.63/15, (1974), reprinted in 13 I.L.M. 952 (1974), and Protocol Amending the Convention on the Limitation Period in the

UNCITRAL has also been active in the areas of transportation and international payments. In the field of transportation, the U.N. Convention on the Carriage of Goods by Sea, 1978 (commonly known as the "Hamburg Rules")[263] recently came into force. The more recent U.N. Convention on the Liability of Operators of Transport Terminals in International Trade[264] is not yet in force. Adoption of UNCITRAL texts governing different aspects of international payments -- the U.N. Convention on International Bills of Exchange[265] and International Promissory Notes and the Model Law on International Credit Transfers has been slow.[266]

The State Department is considering whether to incorporate provisions in the North American Free Trade Agreement to bring the text of the Convention into force among Canada, Mexico, and the United States.[267] Efforts to approve the Model Law on International Credit Transfers-- have been slow.

The Commission's most recent work has focused on government procurement and aspects of arbitration. At its 1993 session the Commission adopted a Model Law on Procurement of Goods and Construction.[268] In the course of

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International Sale of Goods, April 11, 1980, U.N. Doc. A/CONF.97/18, reprinted in 19 I.L.M. 696 (1980).

[263] United Nations Convention on the Carriage of Goods by Sea, 1978, U.N. Doc. A/CONF.89/13, reprinted in 17 I.L.M. 608 (1978).

[264] United Nations Convention on Liability of Operators of Transport Terminals, 1991, U.N. Doc. A/CONF.152/13, *reprinted in* 30 I.L.M. 1506 (1991).

[265] United Nations Convention on International Bills of Exchange and International Promissory Notes, G.A. Res. 43/165 U.N. GAOR, 43rd Sess. Supp. 49 at 280, U.N. Doc. A/43/820 (1988), 19 UNCITRAL Y.B. 19.

[266] UNCITRAL Model Law on International Credit Transfers, U.N. GAOR, 47th Sess., Supp. 17 at 48, U.N. Doc. A/47/17 (1993), reprinted in 32 I.L.M. 588 (1993). The Model Law is similar in scope and content to Article 4A of the Uniform Commercial Code.

[267] Remarks of Harold S. Burman at the 46th meeting of the Secretary of State's Advisory Committee on Private International Law, May 16, 1994, in Washington, D.C.

[268] UNCITRAL Model Law on Procurement of Goods and Construction, U.N. GAOR, 48th Sess., Supp. 17 at 67,U.N. Doc. A/48/17, (1993), reprinted in 33 I.L.M. 456 (1994). G.A. Res. 48/33, *U.N.* GAOR, 48th Sess., Supp. 49 at 330, U.N. Doc. A/48/613 (1193). *See also* United States Commission on International Trade Law, Guide to Enactment, of UNCITRAL Model Law on

debate on this Model Law it was agreed that there should also be model legal rules for procurement of services. The Commission adopted a draft text modifying the 1993 Model Law to provide for procurement of[2] services.[269] Work on procurement was entrusted to the Working Group on the New International Economic Order. At the 1994 session the Commission also considered Guidelines for Preparatory Conferences in Arbitral Proceedings.[270]

Working Groups continue work on electronic data interchange and international guarantees and stand-by letters of credit. Looking ahead, the Commission is also considering the feasibility of several other projects. These include cross-border insolvency and legal aspects of receivables financing. To explore how to proceed with possible insolvency issues, the Commission and INSOL, an organization of national associations interested in international insolvency, sponsored a colloquium in April 1994.

To encourage uniformity in the interpretation of the UNCITRAL texts, the Commission has established a case-reporting system under the acronym "CLOUT" (Case Law On Uncitral Texts). The Commission has invited states to appoint national correspondents charged with collecting relevant court opinions and arbitral awards and with preparing an abstract of these decisions. The Commission will then publish compilations of these abstracts and make copies of the full decisions available upon payment of a fee.[271] The U.S. national correspondents are Professor John O. Honnold (Univ. of Pennsylvania) and Professor Peter Winship (S.M.U.). As of October

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Procurement of Goods and Construction, U.N. DocA/CN.9/393 (1993).

[269] For the draft text submitted to the Commission's 1994 session, see United Nations Commission on International Trade Law, *Report of the Working Group on the New International Economic Order on the Work of Its Seventeenth Session (New York, 14-25 March 1994), U.N. Doc. A/CN.9/392 (1994).*

[270] For the draft text submitted to the Commission's 1994 session, see United Nations Commission on International Trade Law, *Draft Guidelines for Preparatory Conferences in Arbitral Proceedings: Report of the Secretary-General,* U.N. Docs. A/CN.9/396 and A/CN.9/396/Add.1/(1994).

[271] For an explanation of CLOUT, see United Nations Commission on International Trade Law, Case Law on UNCITRAL Texts (CLOUT), *User Guide,* U.N. Doc. A/CN.9/SER.C/GUIDE/1 (19 May 1993).

1994, the Commission has published five compilations of abstracts.[272]

The United States is a party to the Sales Convention and the Limitations Convention. In addition, the United States has signed the Hamburg Rules, the International Bills of Exchange Convention, and the Terminal Operators Convention but has not yet ratified these treaties. Individual states (California, Connecticut, Oregon, and Texas) have enacted the Model Law on International Commercial Arbitration.

D. Organization Of American States

The Organization of American States was established in 1948 as a successor to the Pan American Union. Although known primarily for its political and public international law activities, the OAS has convoked specialized conferences on private international law.[273] There have been five such conferences (CIDIP-I through CIDIP-V), the most recent one in Mexico City in March 1994.

Although the term "private international law" is used, the texts adopted at these conferences reflect an eclectic methodology. Thus, some of the conventions incorporate substantive law rules as well as conflict of laws rules.

Unlike the three other inter-governmental bodies already described, there is no permanent secretariat devoted specifically to OAS harmonization efforts. The OAS General Secretariat, through the Bureau of Legal Affairs (formerly the Department of Legal Affairs), prepares technical and information documents to facilitate the work of the Conference. Scholarly review of particular topics is

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[272] United Nations Commission on International Trade, *Case Law on UNCITRAL Texts (CLOUT)*, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/1-5(1993-1994).

[273] Organization of American States, 17th Street and Constitution Ave., N.W., Washington, DC 20006 (tel. (202) 458-6046). All members of the OAS are invited to attend these specialized conferences. Membership in the OAS includes: Antigua & Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (participation suspended), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Christopher-Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. 3 U.S. Department of State Dispatch 99 (1992).

left to the Inter-American Juridical Committee, a body of 11 jurists elected by the OAS General Assembly. Article 105 of the OAS Charter charges the committee "to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and insofar as may appear desirable, the possibility of attaining uniformity in their legislation."[274] The committee may prepare and review drafts to be submitted to the specialized conferences, although the committee membership is composed principally of jurists with public international law interests.

Critics of the OAS process suggest preparatory work is inadequate. Although there has been a meeting of experts for each of the conventions submitted to the last two conferences, these meetings are *ad hoc* and relatively poorly funded. Recognizing the lack of resources, delegates to CIDIP-V adopted a resolution calling on the Secretary General to report on the allocation of resources to support these harmonization efforts.[275]

The topics covered by the CIDIP conventions include general principles of private international law,[276] family law,[277] commercial law,[278] procedural law and judicial cooperation.[279] At

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[274] Protocol of Amendment to the Charter of the Organization of American States, 1967, art. 105, 21 U.S.T. 607, 721 U.N.T.S. 324 (1967).

[275] CIDIP-V/RES. 10 (94) (1994).

[276] Inter-American Convention on General Rules of Private International Law, 54 O.A.S. T.S., 1979, 18 I.L.M. 1236 (1979); Inter-American Convention on Domicile of Natural Persons in Private International Law, 55 O.A.S. T.S., 1979, 18 I.L.M. 1234 (1979); Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, 1984, 63 O.A.S. T.S., 24 I.L.M. 465 (1985).

[277] Inter-American Convention on Conflict of Laws concerning the Adoption of Minors, 62 O.A.S. T.S., 1984, 24 I.L.M. 460 (1985); Inter-American Convention on the International Return of Children, 70 O.A.S. T.S., 1989, 29 I.L.M. 66 (1990); Inter-American Convention on Support Obligations, 1989, 71 O.A.S. T.S., 29 I.L.M. 75 (1990).

[278] Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, 1975, 40 O.A.S. T.S., 14 I.L.M. 332 (1975); Inter-American Convention on Conflicts of Laws concerning Checks, 1979, 49 O.A.S. T.S., 18 I.L.M. 1220 (1979); Inter-American Convention on Conflicts of

the most recent specialized conference, CIDIP-V, the delegates approved a draft Inter-American Convention on international traffic in Minors, March 18, 1994, 33 I.L.M. 723 (1994).[280] and a draft Inter-American Convention on the law applicable to international contracts.[281] The conference also adopted a resolution[282] recommending that the following topics be included in the agenda of the next conference:

(a) Power of attorney and commercial representation.

(b) Conflict of laws on extracontractual liability; (limited to a specifically defined scope).

(c) Standardized commercial documentation for free trade.

(d) International bankruptcy.

Laws concerning Commercial Companies, 1979, 50 O.A.S. T.S., 18 I.L.M. 1222 (1979); and Inter-American Convention on Contracts for the International Carriage of Goods by Road, 1989, 29 I.L.M. 83 (1990).

[279] Inter-American Convention on the Legal Regime of Powers of Attorney to be used Abroad, 45 O.A.S. T.S., 1975, 14 I.L.M. 325 (1975); Inter-American Convention on the Taking of Evidence Abroad, 1975, 44 O.A.S. T.S., 14 I.L.M. 328 (1975), and 1984 Protocol, 65 O.A.S. T.S., 24 I.L.M. 472 (1985); Inter-American Convention on International Commercial Arbitration, 1975, S. Treaty Doc. No. 12 97th Cong., 1st Sess., 42 O.A.S. T.S., 14 I.L.M. 336 (1975); Inter-American Convention on Letters Rogatory, 1975, S. Treaty Doc. No. 27, 98th Cong. 2d Sess., 43 O.A.S. T.S., 14 I.L.M. 339 (1975), and 1979 Additional Protocol, S. Treaty Doc. No. 27, 98th Cod Sess., 56 O.A.S. T.S., 18 I.L.M. 1238 (1979); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1979, 51 O.A.S. T.S., 18 I.L.M. 1224 (1979); Inter-American Convention on Execution of Preventive Measures, 1979, 52 O.A.S. T.S., 18 I.L.M. 1227 (1979); Inter-American Convention on Proof of and Information on Foreign Law, 1979, 53 O.A.S. T.S., 18 I.L.M. 1231 (1979); and Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, 1984, 64 O.A.S. T.S., 24 I.L.M. 468 (1985).

[280] Inter-American Convention on International Traffic in Minors, March 18, 1994 33 I.L.M. 723 (1994).

[281] Inter-American Convention on the Law Applicable to International Contracts, March 17, 1994, 33 I.L.M. 733 (1994).

[282] CIDIP-V.RES.8 (94) (1994).

(e) Problems in private international law regarding private international loan contracts.

(f) Civil international liability for crossboundary pollution. Aspects of private international law.

(g) International protection of children in private international law: authority over children, custody, visitation rights, status.

(h) Uniformity and harmonization of secured transactions law.

The United States is a party to only two of the OAS private international law treaties: the arbitration convention,[283] and the Convention on Letters Rogatory.[284] Acting on the advice of the private sector, the State Department has shown interest in forwarding the evidence convention for advice and consent of the Senate.[285]

III. ILLUSTRATION OF HARMONIZATION AND UNIFICATION EFFORTS: TRANSNATIONAL SALES

The following excerpt turns from a study of the organizations engaged in international unification or harmonization efforts to a study of how these bodies have addressed unification efforts for a specific topic, the law of sale. Discussion of non-governmental means by which merchants develop uniform rules suggest the limits of formal unification efforts.

[also from Peter Winship & John A. Spanogle, *Transnational Sales Contracts: Course Materials* 6-10 (Spring 1994):[286]]

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[283] The Senate gave its advice and consent on October 6, 1986 but Congress did not enact implementing legislation until 1990. Pub. L. 101-369 (1990) (codified as 9 U.S.C. §§ 301-307).

[284] The treaty came into force in the United States on August 27, 1988.

[285] Lucinda A. Low, *Inter-American Convention on the Taking of Evidence Abroad*, 24 Int'l Law. 880 (1990).

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A. UNIFORM SUBSTANTIVE SALES LAW

The International Institute for the Unification of Private Law (UNIDROIT) began work in 1929 on preparation of uniform substantive legal rules to govern international sales. Although the issue was hotly debated, the Institute decided for political reasons to limit the proposed unification to legal rules governing *international* sales rather than to sales law governing both national and international sales. A diplomatic conference meeting at The Hague in 1964 ultimately incorporated the Institute's work in two uniform sales laws appended to international conventions and usually known by the acronyms *ULIS* and *ULF*.[287] These uniform laws dealt respectively with the formation of international sales contracts and the substantive rights and obligations of parties to such contracts. The United Nations Commission on International Trade Law (UNCITRAL), in turn, redrafted these 1964 texts and proposed a 1978 draft incorporating the substance of the two earlier uniform laws. This UNCITRAL text was the basis of the U.N. Convention on Contracts for the International Sale of Goods adopted at a 1980 diplomatic conference meeting in Vienna.[288]

Regional efforts to unify sales law have also been successful. Early in the 20th century, for example, the Scandinavian countries agreed to adopt a uniform sales law. More recently, they have amended this uniform law to conform with the 1980 Sales Convention.[289] Prior to the events of 1989, Socialist States that were members of the Council for Mutual Economic Assistance had adopted "General Conditions of Delivery of Goods between Organizations of the Member Countries of the [CMEA]."[290]

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[287] Convention Relating to a Uniform Law on the International Sale of Goods, 1964, 834 U.N.T.S. 107 (1972); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964, 834 U.N.T.S. 169 (1972)....).

[288] United Nations Convention on Contracts for the International Sale of Goods (A/CONF.97/18, Annex I), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 178-90 (1981) (A/CONF.97/19).

[289] *See* Swedish Act of June 20, 1905, Relating to the Purchase and Exchange of Goods (Generally cited as The Sale of Goods Act) (English translation *printed in* UNIDROIT, 1961 *Unification of Law Yearbook* 203....

[290] General Conditions of Delivery of Goods between Organizations of the

B. UNIFORM CHOICE-OF-LAW RULES.

The Hague Conference on Private International Law also began work in the late 1920s on a proposal to unify choice-of-law rules for international sales, a project that led to a 1955 convention[291] and the 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods.[292] Although the former convention is in force it has had limited success; the latter convention is not yet in force. More successful has been the regional European Economic Communities Convention on the Law Applicable to Contractual Obligations, which came into force on January 1, 1991.[293]

C. RULES OF THE "LAW MERCHANT."

In the last 30 years legal writers in Europe have expressed great interest in the development of what they describe as a new "law merchant" or lex mercatoria. Relying especially on evidence in arbitral awards that arbitrators look to general principles of law for the resolution of contract disputes, these authors argue that there is now a body of supranational legal principles and rules that govern transnational contracts. Working against this background, UNIDROIT has worked on "Principles for International Commercial Contracts"[294] that, although not in the form of an

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Member Countries of the Council for Mutual Economic Assistance, 1968 (English translation *printed in* 1 United Nations, *Register of Texts of Conventions and Other Instruments Concerning International Trade Law* 72 (1971)).

[291] Convention on the Law Applicable to International Sales of Goods, 510 U.N.T.S. 147 (1964). (Although adopted in 1951 at the Seventh Session of the Hague Conference on Private International Law, the convention was first signed in 1955 and therefore bears that official date.)

[292] Convention on the Law Applicable to Contracts for the International Sale of Goods, *in* Hague Conference on Private International Law, *Proceedings of the Extraordinary Session, 14 to 30 October 1985* at 691 (1987) and *reprinted in* 24 I.L.M. 1573 (1985). Adopted at the 1985 extraordinary session of the Hague Conference, the convention was signed in 1986 and therefore bears the later date.

[293] Convention on the Law Applicable to Contractual Obligations, 1980, 23 *Official Journal of the European Communities* (L266) 1980. The convention came into force on April 1, 1991.

[294] UNIDROIT, *Principles for International Commercial Contracts (Draft text and comments)* (Study L - Doc. 52) (May 1993).

international convention, might serve as the basis of a supranational "Restatement" of the *lex mercatoria*.

D. STANDARD CONTRACTS AND GENERAL CONDITIONS.

Several trades actively engaged in international sales have developed standard contracts which are then adopted in whole or in part by traders who enter into these sales. The Grain and Feed Trade Association, for example, have developed such standard contracts widely used in the sale abroad of North American grain.[295] Other trades have developed usages of trade that may not be codified or expressly incorporated in sales contracts although recognized by the parties.[296]

States need not have any role in the development and enforcement of these standard contracts other than making available their courts for the enforcement of contracts or arbitral awards. In the 1950s, however, the United Nations Economic Commission for Europe prepared widely-used standard form contracts and general conditions for particular types of sale or for particular industries.[297] After its creation in 1966, UNCITRAL also studied ways to encourage general conditions of sale and standard contracts.[298]

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[295] *See* "Contract for Canadian and United States of America Grain in Bulk No. 30 (for use in export from North America of grain in bulk)," *reprinted in* 1 Andreas F. Lowenfeld, *International Private Trade* at DS-30 (rev. 2d ed. 1988); A. Slabotzky, *Grain Contracts and Arbitration for Shipments from the United States and Canada* (1984).

[296] For an interesting study of usages and standard terms in the international oil trade, see Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law*, ch. 4 (1983) (assessing interdependence between commercial practice and commercial law).

[297] *See, e.g., General Conditions for the Supply of Plant and Machinery for Export* (574), *reprinted in* 1 Andreas F. Lowenfeld, note 294 *supra*, at DS-53 (rev. 2d ed. 1988); Peter Benjamin, *The ECE General Conditions of Sale and Standard Forms of Contract*, 1961 J. Bus. L. 113.

[298] *See, e.g.*, United Nations Commission on International Trade Law, *General Conditions of Sale and Standard Contracts: Report of the Secretary General*, U.N. Doc. A/CN.9/78 (1973), *reprinted as* Report of the Secretary General: the feasibility of the developing general conditions of sale embracing a wide scope of commodities *in* IV UNCITRAL Y.B. 80 (1973).

IV. THE UNITED STATES AND INTERNATIONAL UNIFICATION PROJECTS

Until the 1960s the United States was reluctant to participate in private international law unification efforts. Questions of constitutional authority or propriety were said to inhibit action by the federal government. In the late 1950s and early 1960s, however, leaders of the bar urged Congress to authorize the United States to participate in the Hague Conference and UNIDROIT. A 1961 report of a special A.B.A. committee on international unification of private law was particularly influential.[299] The result of these efforts was that in 1963 Congress enacted legislation authorizing the United States to join these inter-governmental bodies.[300] The following year the United States formally became a member of the two bodies and sent a delegation to the conference at The Hague convoked to adopt uniform sales laws

The Legal Adviser's Office in the Department of State is the principal office in the federal government charged with organizing U.S. participation in international unification projects. This allocation of responsibility is not essential. In many other countries these efforts fall within the jurisdiction of the Ministry of Justice rather than the Ministry of Foreign Affairs. In the earlier part of the century, there was even consideration of authorizing individual states to participate in the international projects.[301]

Within the Legal Adviser's Office there is an office devoted specifically to private international law.[302] This office has not received consistent support within the State Department. Ambassador Richard Kearney, who began work on unification projects in 1964, resigned in July 1978 and the work of his office dispersed within the Legal Adviser's Office. At the end of 1979 he

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[299] 1961 A.B.A. Rep. 219.

[300] 77 Stat. 775 (1963), codified as 22 U.S.C. § 269g (1988).

[301] For discussion of some of these proposals for state action, see Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. Pa. J. Int'l Bus. L. 227, 239-252 (1992).

[302] Office of the Legal Adviser, L/PIL, Suite 203, South Building, 2430 E Street, N.W., Washington D.C. 20037-2800 (tel. (202)776-8420 fax (202) 776-8482).

was replaced by Peter H. Pfund, who was designated the assistant legal adviser for private international law. Mr. Pfund has continued in that position and, as of April 1994, has the assistance of one other full-time lawyer.

The office of private international law arranges for representation by U.S. delegates in the operations of the four international organizations described in Part II. The office prepares the position papers during the drafting process, represents the United States at diplomatic conferences, and shepherds resulting texts through the subsequent review by the administration and Congress. The lawyers in the office have periodically published reports on the work of the office.[303]

When carrying out these tasks, the office relies heavily on the private sector. The Secretary of State's Advisory Committee on Private International Law provides a formal vehicle for consultation. Established in 1964, the Advisory Committee's purpose is "to serve the Department in a solely advisory capacity with respect to significant issues of private international law arising or likely to arise in the work of international organizations of which the United States is a Member State or in the foreign relations of the United States."[304] Membership includes representatives from other executive bodies and nominees of eleven national legal organizations.[305]In the early years, the Advisory Committee met

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[303] *See, e.g.*, Richard D. Kearney, *The United States and International Cooperation to Unify Private Law*, 5 Cornell Int'l L.J. 1 (1972; Richard D. Kearney, *Progress Report -- International Unification of Private Law*, 23 Rec. Ass'n Bar of the City of N.Y. 220 (1968); Peter H. Pfund, *Overview of the Codification Process*, 15 Brooklyn L. Rev. 7 (1989); Peter H. Pfund, Annual Report, *International Unification of Private Law: A Report on U.S. Participation -- 1987-88*, 22 Int'l Law. 1157 (1988); Peter H. Pfund, Annual Report, *International Unification of Private Law: A Report on U.S. Participation -- 1985-86*, 20 Int'l Law. 623 (1986); Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 Int'l Law. 505 (1984). For a brief overview of the work of the State Department office, see Patricia B. Rogers, *Private International Law*, 23 Int'l Law. 207 (1989).

[304] Charter of the Secretary of State's Advisory Committee on Private International Law, art. I (November 20, 1992).

[305] As of November 1992, the following private organizations have been invited to nominate representatives: American Society of Comparative Law, American Bar Association, American Branch of the International Law Association, American Corporate Counsel Association, American Law

several times a year and had numerous study groups that met as appropriate. In recent years, full meetings have been at least one year apart and there have been numerous study group meetings. All meetings are open to the public and notices of the meetings are published in the *Federal Register*.

Institute, American Society of International Law, Association of American Law Schools, National Association of Attorneys General, National Conference of Commissioners on Uniform State Laws, the Conference of Chief Justices, and the Judicial Conference of the United States.