

ANNUAL REPORT

International Unification of Private Law: A Report on United States Participation, 1985–86

This report describes the status of various recent and current projects of the four international organizations involved in private law unification (named below) of which the United States is a member State, and the status in the United States of conventions unifying private law to which the United States may become a party.

I. Status of Projects in International Organizations

A. U.N. COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)¹

At its eighteenth session in summer 1985, the Commission reviewed in detail the *Draft Model Law on International Commercial Arbitration* prepared by one of its working groups and approved the law's final text.² The work of UNCITRAL on this project has received much attention from the

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1. See UNITED NATIONS HANDBOOK (1985) published by the New Zealand Ministry of Foreign Affairs, at 18 & 19 with background on UNCITRAL.

2. For the text of the model law as adopted, see the Report of the Commission to the U.N. General Assembly on the work of its 18th session (1985), Official Records of the General Assembly: Fortieth Session, Supplement No. 17 (A/40/17).

international arbitration community.³ The Model Law was the subject of a U.N. General Assembly resolution adopted in December 1985 requesting the U.N. Secretary General to transmit its text and the *travaux préparatoires* from the Commission's eighteenth session to governments and arbitral institutions. The resolution also recommended that "all States give due consideration to the Model Law . . . in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial practice."⁴

At the December 1985 meeting of the UNCITRAL Working Group on International Negotiable Instruments increasing interest was shown by representatives of participating States in the regime for an instrument for international payments available to payors on an opt-in basis that would be established by a convention based on the *Draft Convention on International Bills of Exchange and International Promissory Notes* produced by the Working Group. The Draft Convention is to receive thorough substantive review during three week UNCITRAL plenary session in June-July, 1986.⁵ It remains to be seen what will be the procedures for adoption of the draft convention in final form. It does not currently seem likely that more work will be done on the Working Group's *Draft Convention on International Cheques*.⁶

An UNCITRAL working group in March, 1986 reviewed the final draft chapters of the *Draft Legal Guide on the Drawing Up of Contracts for the Construction of Industrial Works*. The secretariat will revise all draft chapters in the light of comments on them made by government experts at working group meetings during the past several years and hopes to produce a revised and shortened draft by spring 1987 for review by the Commission itself during its plenary session in summer 1987.⁷

There have now been two meetings of an UNCITRAL working group on Draft Rules concerning the Liability of Operators of Transport Terminals.⁸ The rules are to fill gaps in existing and proposed liability regimes for loss of or damage to cargoes in the course of international transport. Among other

3. See Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L LAW. (1986) and Herrmann, *UNCITRAL's Work Toward a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537-580 (1984).

4. U.N. General Assembly Resolution 40/72, 11 December 1985.

5. The Draft Convention text to be reviewed at the Commission's 1986 plenary session may be found in UNCITRAL Document A/CN.9/274, 10 February 1986.

6. The Draft Convention is contained in UNCITRAL document A/CN.9/212, 18 February 1982.

7. The draft chapters prepared during the past several years by the Commission's working group on this project are contained in more than thirty working documents and are to be revised by spring 1987 and issued in a single document.

8. See UNCITRAL Document A/CN.9/275, 5 February 1986, for the report of the UNCITRAL working group charged with this project on its January 1986 session.

issues, the final form that the rules will take—convention or model law—remains to be determined.

The final draft of a *Legal Guide Concerning Electronic Funds Transfers (EFT)*, prepared by the secretariat with the assistance of an international group of legal experts in this field, was submitted to governments for review by the Commission at its session in summer 1986. It seeks to describe the basic facts and procedures involved in EFT and should permit eventual further work by the Commission to be built on a common basis of understanding.⁹

The future in the United States of the UNCITRAL-prepared 1978 U.N. Convention on the Carriage of Goods by Sea (Hamburg Rules) remains uncertain.¹⁰ Shippers generally favor U.S. ratification of the Hamburg Rules and oppose U.S. ratification of the 1968 Visby Amendments¹¹ to the 1924 Hague Rules.¹² Carriers and marine insurers generally favor U.S. ratification of the Visby Amendments and oppose ratification of the Hamburg Rules. For progress in the United States on these conventions to become politically possible, some sort of accommodation by these private interests seems necessary.

B. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW¹³

The major recent development in the United States concerning a product of the Hague Conference was the transmission by President Reagan to the Senate on October 30, 1985 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹⁴ Briefly, the Convention seeks to effect the prompt return of wrongfully removed or retained children

9. The Secretariat has produced draft chapters of the Legal Guide on Electronic Funds Transfers for the 17th and 18th sessions of the Commission—see A/CN.9/250 and Add. 1-4, and A/CN.9/266 and Add. 1 and 2.

10. United Nations Convention on the Carriage of Goods by Sea, *done* Mar. 31, 1978, XVII I.L.M. 608.

11. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *signed* at Brussels, Aug. 25, 1924, *done* at Brussels, Feb. 23, 1968, Command No. 3743 (1968); TETLEY, *MARINE CARGO CLAIMS*, (2d ed. 1978) 489; *THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA* (Mankabady ed. 1978), 301.

12. 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, 51 Stat. 233; T.S. No. 931; 2 Bevens 430.

13. U.S. DEPARTMENT OF STATE, 33RD ANNUAL REPORT, UNITED STATES CONTRIBUTIONS TO INTERNATIONAL ORGANIZATIONS, REPORT TO THE CONGRESS FOR FISCAL YEAR 1984, 92-93 summarizes the origin, purpose and membership of the Hague Conference.

14. For the text of the Convention see U.S. Senate Treaty Doc. 99-11, which includes the text of the Secretary of State's Letter of Submittal and President Reagan's Letter of Transmittal; 19 I.L.M. 1501-1505 (1980); see *note American and International Responses to International Child Abductions*, 16 N.Y.U.J. INT'L L. & POL. 415-474 (1984).

whether they are the subjects of custody orders or not, provides for the establishment in each party State of a Central Authority to process requests for the location and return of such children, and, through its effectiveness in returning children and provision of known and clear-cut procedures for obtaining return, seeks to deter wrongful removals/retentions from occurring in the first place. Federal legislation to facilitate the implementation of the Convention in the United States is in the process of clearance by the Office of Management and Budget on behalf of the Administration and may be introduced in the Senate and House by summer 1986. The Department has sent a detailed legal analysis of the Convention, describing the purpose of its provisions and how it is to be invoked and implemented, to the Chairman of the Senate Committee on Foreign Relations to assist the Committee, and eventually the full Senate, in their consideration of the Convention. The Department has printed the text of the Convention, the President's Letter of Transmittal, the Secretary of State's Letter of Submittal, and the entire legal analysis in the *Federal Register*¹⁵ to help the bench and the bar, parents, and federal, state and local authorities more uniformly and effectively to implement the Convention in the United States. It is hoped that Committee hearings on the Convention in spring 1986 will result in favorable Senate action before the term of the 99th Congress ends. Similarly, it is hoped that federal legislation will be enacted before the end of 1986. New cases of children abducted from the United States to foreign countries or retained abroad that are brought to the Department's attention seem to average about forty per month. U.S. ratification of the Convention would mean that future cases involving countries already parties to it—Canada, France, Hungary, Portugal, Switzerland and the United Kingdom—and other countries becoming parties would benefit from its provisions.

The Conference's Fifteenth session in October 1984 adopted the Hague Convention on the Law Applicable to Trusts and on Their Recognition. The report prepared by the reporter of the Hague Conference commission that worked on this convention¹⁶ and the report of the U.S. delegation to the Department of State¹⁷ should provide a good basis for the American Bar Association, the American Bankers Association and the American College of Probate Counsel to formulate their positions on possible U.S. signature

15. 51 Fed. Reg. 10494-10516 (1986).

16. See Hague Conference document bearing the name of the Convention and subtitled: *Draft Convention Adopted by the Fifteenth Session and Explanatory Report by Alfred E. von Overbeck*—an off-print of PROCEEDINGS OF THE FIFTEENTH SESSION (1984) BOOK II, TRUSTS—APPLICABLE LAW AND RECOGNITION.

17. REPORT OF THE U.S. DELEGATION TO THE FIFTEENTH (1984) SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, prepared by Professor Donald T. Trautman, Harvard Law School, Cambridge, Massachusetts. See also Trautman & Gaillard, *The Hague Conference Adopts a Convention for Trusts*, 124 TRUSTS & ESTATES 23-28 (1985).

and ratification of the Convention. The positions of these organizations will do much to determine whether sufficient support for U.S. ratification appears to exist for the State Department to recommend that the President transmit the Convention to the Senate for advice and consent to U.S. ratification.

The 1985 extraordinary session of the Hague Conference, that was open to participation by all states, adopted the final text of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,¹⁸ with rules for choice of applicable law that give special consideration to the 1980 U.N. Convention on Contracts for the International Sale of Goods.

In May 1985 there was a second meeting under the auspices of the Hague Conference of representatives of Central Authorities of States party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹⁹ While the major purpose of the meeting was to discuss problems arising for Central Authorities in the performance of their functions and responsibilities under the Convention, much attention was given to the relationship of direct U.S. discovery requests with regard to documents and persons located in party States pursuant to Federal or State rules of civil procedure and requests pursuant to the Convention.²⁰ The tension between these procedures is reflected in a number of recent federal and state court cases and opinions of circuit courts of appeal, as well as the pending petition for *certiorari* before the U.S. Supreme Court in the *Anschuetz*²¹ and *Messerschmitt*²² cases and the grant of *certiorari* in *Aerospatiale* case.^{22a} The views of some of the governments participating at the May meeting were reflected in diplomatic notes that their embassies transmitted in connection with these cases and the *amicus* briefs of the Federal Republic of Germany in the 5th Circuit Court of Appeals and the Supreme

18. Hague Conference, Extraordinary Session, Diplomatic Conference on the Law Applicable to Contracts for the International Sale of Goods, Final Act, The Hague, 30th October 1985.

19. 23 U.S.T. 2555; T.I.A.S. No. 7444; 847 U.N.T.S. 231; VII MARTINDALE-HUBBELL LAW DIRECTORY (Part VII) 12-21 (1985).

20. Hague Conference Permanent Bureau Note on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Preliminary Doc. No. 1 of March 1985); REPORT ON THE SECOND MEETING OF THE SPECIAL COMMISSION ON THE OPERATION OF THE HAGUE (EVIDENCE) CONVENTION, prepared by the Permanent Bureau, July 1985. For a thoughtful analysis of the problem, see Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733 (1983).

21. *Anschuetz & Co. GmbH v. Mississippi River Bridge Authority*, No. 85-98, 754 F.2d 602 (5th Cir. 1985).

22. *Messerschmitt Bolkow Blohm, GmbH v. Virginia Walker*, No. 85-99, 757 F.2d 729 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (April 21, 1986) *cert. vacated* (June 9, 1986).

22a. *Societe Nationale Industrielle Aerospatiale and Societe de Construction D'Avions de Tourisme v. United States District Court for District of Iowa*, no. 85-1695, 782 F.2d 120 (8th Cir. 1986), *cert. granted*, June 9, 1986.

Court.²³ The United States submitted a brief as *amicus curiae* on March 24, 1986 in the *Anschuetz* and *Messerschmitt* cases.²⁴ At the initiative of the German private legal sector directed to its counterparts in the United States, an effort at informal dialogue between private sector experts in the two countries is getting under way with a view to achieving better understanding of each other's attitudes and concerns and thereafter exploring the possibilities of ameliorative action. Both governments will be monitoring this effort as observers.

The 1984 session of the Hague Conference decided that a Convention on the Law Applicable to Decedents' Estates would be the major substantive item on which work would be done in preparation for the Sixteenth Conference session in 1988.²⁵

C. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)²⁶

The United States has been actively participating in UNIDROIT's work on developing two conventions—one with uniform rules on international financial leasing²⁷ and another with uniform rules on international factoring. The Draft Factoring Convention, after review by an UNIDROIT Committee of Governmental Experts in April 1986,²⁸ is almost ready for review at an international diplomatic conference. The Draft Leasing Convention will require two more such meeting before it reaches that stage. As UNIDROIT does not have the infrastructure to arrange directly for diplomatic conferences like UNCITRAL and the Hague Conference it is hoped that one or more countries will agree to host conferences on these two projects.

U.S. participation in UNIDROIT's work on what are now called General Principles of International Commercial Contracts—an effort to develop

23. No. 84-3286 (5th Cir.).

24. Nos. 85-98 & 85-99.

25. Hague Conference Fifteenth Session, Final Act, Part B(1).

26. See DEPARTMENT OF STATE, 33RD ANNUAL REPORT, *supra* note 13, at 113-114, summarizing the origin, purpose and membership of UNIDROIT.

27. The Appendix to the Summary Report prepared by the UNIDROIT Secretariat entitled: COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A CONVENTION ON INTERNATIONAL FINANCIAL LEASING (First Sess. 15-19 Apr. 1985), Study LIX-Doc. 24, April 1985, contains the preliminary draft of uniform rules in the form in which they were reviewed at the second meeting of the Committee; an explanatory report on those preliminary draft rules is contained in UNIDROIT Study LIX-Doc. 25, December 1985.

28. Annex III to the Summary Report prepared by the UNIDROIT Secretariat entitled: COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT CONVENTION ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING (First Sess. 22 to 25 Apr. 1985), Study LVIII-Doc. 19, May 1985, contains the text on the Preliminary Draft Convention in the form in which it was reviewed at the second meeting of the Committee in April 1986; a commentary of the preliminary draft convention, prepared by the Secretariat, may be found in UNIDROIT Study LVIII-Doc. 20, July 1985.

Restatement-like rules—has not been continuous but has resumed.²⁹ It remains to be seen what comes of this project on which much further work is needed.

U.S. participation in the work of UNIDROIT reached a high point when the United States hosted the Conference in 1973 that adopted the final text of the "Washington" Convention Providing a Uniform Law on the Form of An International Will.³⁰ This Convention, endorsed by various U.S. legal organizations for U.S. ratification, may soon be transmitted to the Senate. It is to be implemented in the United States by federal legislation and state enactment of the Uniform International Wills Act developed by the National Conference of Commissioners on Uniform State Laws.³¹

D. ORGANIZATION OF AMERICAN STATES³²

The three Inter-American Specialized Conferences on Private International Law (CIDIP's) in 1975, 1979, and 1984 produced several conventions potentially of interest to the United States. Two have been before the Senate Foreign Relations Committee for some time, and a hearing was held on June 11, 1986. One would establish between the United States and Latin American countries becoming parties a regime for service of process very similar to that established by the Hague Service Convention.³³ The second establishes rules for the recognition of foreign arbitral awards similar to those of the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the United States is a party with almost seventy other countries.³⁴ U.S. ratification of these two Conventions—which would be the first products of these conferences ratified by the United States—could enhance U.S. standing to shape and participate effec-

29. There are too many draft documents on different parts of this project in various stages of preparation to permit a useful citation at this time.

30. 12. I.L.M. 1298-1311 (1973); UNIDROIT Publication: CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL, SIGNED AT WASHINGTON ON OCTOBER 26, 1973 WITH EXPLANATORY REPORT BY MR. JEAN-PIERRE PLANTARD, DEPUTY SECRETARY-GENERAL OF UNIDROIT (1974).

31. For a discussion of the Convention and its planned implementation in the United States see Kearney, *The International Wills Convention*, 18 INT'L LAW. 613-632 (1984).

32. See Low, *International Judicial Assistance Among the American States—the Inter-American Conventions*, 18 INT'L LAW. 705 (1984) and its footnotes for information on the private law unification work of the Organization of American States, particularly in the field of international judicial assistance.

33. SENATE COMM. ON FOREIGN RELATIONS, 1975 INTER-AMERICAN CONVENTION ON LETTERS ROGATORY AND ITS 1979 ADDITIONAL PROTOCOL, S. Treaty Doc. No. 98-27, 98th Cong., 2d Sess. (1984); 14 I.L.M. 339-343 (1975) (1975 Convention); 18 I.L.M. 1238-1247 (1979) (1979 Additional Protocol).

34. SENATE COMM. ON FOREIGN RELATIONS, 1975 INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, S. Treaty Doc. 97-12, 97th Cong., 1st Sess. (1981) (and errata sheet correcting chart of signatory countries); 14 I.L.M. 336-339 (1975).

tively in preparation for the fourth such conference, already approved in principle by the OAS General Assembly for 1989, that will commemorate one hundred years of Latin American efforts to unify private law.

II. Conventions Currently Pending in Senate

The four organizations mentioned above have adopted and opened for signature over three dozen conventions since the United States began fully to participate in these efforts by joining the Hague Conference and UNIDROIT in 1964. A number of these conventions are not now, and are not likely to become, acceptable to the United States. However, so far the United States has become a party to only four conventions unifying private law.³⁵

Four other conventions are now before the Senate for advice and consent to U.S. ratification. The Inter-American Convention on International Commercial Arbitration was received by the Senate in June 1981.³⁶ The U.N. Convention on Contracts for the International Sale of Goods was received by the Senate in September 1983.³⁷ The Inter-American Convention on Letters Rogatory and its Additional Protocol³⁸ were received by the Senate in June 1984, and the Hague Convention on the Civil Aspects of International Child Abduction³⁹ has been before the Senate since October 1985.

Delay in United States ratification of these conventions would be regrettable because they are not controversial and their ratification is widely supported in the United States. The two Inter-American conventions are regional equivalents of conventions to which the United States has been a party for many years. Delay denies to the private sector that has devoted considerable time and effort to the preparation, negotiation and support of these conventions the benefits that they promise to confer on the private legal sector and its clients. Furthermore, the modest record of United States ratification of conventions unifying private law does not enhance the U.S. commitment in the eyes of other countries to the international efforts to

35. The 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361; T.I.A.S. No. 6638, 658 U.N.T.S. 162; the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555; T.I.A.S. No. 7444, 847 U.N.T.S. 231; the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, T.I.A.S. No. 10072, 527 U.N.T.S. 189; and the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517; T.I.A.S. No. 6997, 330 U.N.T.S. 3.

36. See *supra* note 34.

37. For the text of the Convention, see 19 I.L.M. 668-669 (1980); S. Treaty Doc. 98-9; for the record of the hearings, see *International Sale of Goods: Hearings before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. (1984).

38. See *supra* note 33.

39. *Supra* notes 14 & 15.

unify private law and that, in turn, may have some detrimental effects on the influence of the United States in the pending work of these international organizations. Moreover, a number of other countries seem to expect and await United States leadership in ratifying these conventions before initiating the domestic legal steps to enable them to become parties themselves.

It is to be hoped that the United States will be able to ratify these conventions before the end of 1986.

