

ANNUAL REPORT

International Unification of Private Law: A Report on U.S. Participation—1986–87

This report describes the status in the United States of several conventions unifying private law, and the status of various projects of the four international organizations involved in private law unification and harmonization of which the United States is a member state.

I. Conventions before the Senate

Important developments in the U.S. Senate during 1986 bode well for future United States participation in international unification of private law.

The hearings on four conventions before the Senate Committee on Foreign Relations on June 11, 1986, involved testimony by the spokesperson for the Department of State and a number of witnesses for the American Bar Association.¹ Committee reports recommending favorable Senate action were subsequently issued with regard to the 1975 Inter-American Convention on Letters Rogatory and its 1979 Additional Protocol relating (for the United States) to the service of process and documents abroad;² the 1975 Inter-American Convention on International

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1. There has been no published report on these hearings.

2. See S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. (1984). The text of the Convention may also be found at 14 I.L.M. 339-43 (1975) (Convention) and 18 I.L.M. 1238-47 (1979)

Commercial Arbitration;³ the 1980 Hague Convention on the Civil Aspects of International Child Abduction;⁴ and the 1980 U.N. Convention on Contracts for the International Sale of Goods, on which the Committee had held a hearing on April 4, 1984.⁵

On October 9, 1986, the Senate gave advice and consent to U.S. ratification of all four conventions by votes of ninety-eight to zero.⁶

The President on July 2, 1986, transmitted to the Senate for advice and consent the Convention Providing a Uniform Law on the Form of an International Will that had been prepared by the International Institute for the Unification of Private Law (UNIDROIT), the final text of which had been adopted at an international conference in Washington in 1973 hosted by the United States.⁷

(Additional Protocol). For the Committee report, see S. EXEC. DOC. NO. 21, 99th Cong., 2d Sess. (1986).

3. For the text of the Convention and the message and report, see S. TREATY DOC. NO. 12, 97th Cong., 1st Sess (1981). For the Committee report, see S. EXEC. REP. NO. 24, 99th Cong., 2d Sess (1986).

4. S. TREATY DOC. NO. 11, 99th Cong., 1st Sess. (1985), contains the text of the Convention, message and report; see also 19 I.L.M. 1501-05 (1980) for the Convention text. For the text of the lengthy legal analysis of the Convention submitted by the State Department to the Chairman of the Senate Committee on Foreign Relations (Senator Lugar), see the notice of the Department of State at 51 Fed. Reg. 10495-516 (1986) and the Committee report, S. EXEC. DOC. NO. 25, 99th Cong., 2d Sess. 3-70 (1986). See also Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capital Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285 (1986).

5. For the message, report, and legal analysis relating the provisions of the Convention to the corresponding provisions of the Sales Article of the Uniform Commercial Code, see S. TREATY DOC. NO. 9, 98th Cong., 1st Sess. (1983). The Convention text was also reproduced in 19 I.L.M. 668-99 (1980). For the U.N.-certified official English text of the Convention (the only one likely to be published by the United States Government until several years after the Convention's entry into force), see the annex to the notice of the State Department in 52 Fed. Reg. 6262-80 (1987) [hereinafter State Department Notices]. That notice also provides information about the entry into force of the Convention on January 1, 1988, such as listing the other States for which the Convention is applicable, and the telephone number of the U.N. Treaty Section prepared to provide information about ratifications and accessions and the reservations and declarations to which they may have been subject. For the report of the Senate Foreign Relations Committee, which also reproduces the legal analysis mentioned above, see S. EXEC. DOC. NO. 20, 99th Cong., 2d Sess. (1986), which omits explicit mention of the reservation to the effect that the United States will not be bound by art. 1(1)(b) of the Convention, subject to which the committee recommended that the Senate give advice and consent to ratification and subject which the United States ratified.

6. 132 CONG. REC. S15767-74 (daily ed. Oct. 9, 1986); see Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1987).

7. For the text of the Convention, message, and report, including an explanatory report with commentary on the Articles of the Convention and the uniform law forming its annex, see S. TREATY DOC. NO. 29, 99th Cong., 2d Sess. (1986). The text may also be found in 12 I.L.M. 1298-1311 (1973). For a discussion of the Convention and its implementation in the United States, see Kearney, *The International Wills Convention*, 18 INT'L LAW. 613 (1984).

FURTHER ACTION BY THE GOVERNMENT

As of October 9, 1986, eight States had ratified or acceded to the U.N. Convention on Contracts for the International Sale of Goods (CISG).⁸ The Convention requires ratification or accession by a total of ten countries in order to enter into force about one year later.⁹ Thus, it appeared desirable for the United States to ratify with at least one other State so that it would be known at that time when the Convention would enter into force. For this reason the United States approached a number of other countries believed to be nearly ready to ratify, including Italy and the People's Republic of China, who were prepared to join the United States in putting the Convention "over the top." On December 11, 1986, officials from the missions to the United Nations of the United States, China, and Italy deposited the instruments of ratification of their governments at United Nations Headquarters in New York at a modest ceremony presided over by U.N. Legal Counsel, Carl Fleischhauer. As a result of these ratifications the CISG will enter into force on January 1, 1988.¹⁰

The CISG thereby becomes the first convention to enter into force that was prepared by the U.N. Commission on International Trade Law (UNCITRAL) and adopted in final form at a U.N. Conference. One hopes that the symbolism of joint action by three countries to bring the CISG into force will not be lost. Those countries represent the world's greatest trading nation (a common law country), the country with the world's greatest international trade potential, and viewed by many countries as a leading developing country, and a civil code country that was the first to denounce the 1964 Hague predecessor conventions to the CISG—the ULIS and ULF¹¹—thereby heralding the likely transition to the CISG of the other countries parties to those earlier conventions. Austria, Australia, Czechoslovakia, Finland, and Mexico are expected to ratify during the next year. It remains to be seen whether predictions that there will be about forty states parties to the CISG within four to five years prove to be accurate. At any rate, the international trading community now

8. These states include Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia.

9. United Nations Conference on Contracts for the International Sale of Goods art. 99, *reprinted in* 19 I.L.M. 668, 694 (1980).

10. *See* State Department Notice, *supra* note 5. Note that U.S. ratification was completed with a declaration that the United States would not be bound by art. 1(1)(b), which will have a narrowing effect on the sphere of application of the Convention.

11. Convention Relating to a Uniform Law on the International Sale of Goods, *entered into force* Aug. 18, 1972, 834 U.N.T.S. 107, *reprinted in* 3 I.L.M. 854 (1964); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, *entered into force* Aug. 23, 1972, 834 U.N.T.S. 169, *reprinted in* 3 I.L.M. 864 (1964).

faces for the first time the exciting prospect of a broadly accepted uniform international sales law.

Since 1983 the State Department has been working with the Departments of Justice and Health and Human Services on the drafting of federal legislation related to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹² The final draft was cleared for the Administration by the Office of Management and Budget in late February 1987 and was shortly thereafter transmitted by the State Department to the President of the Senate and the Speaker of the House for introduction.¹³ After Congress enacts the legislation, the United States will ratify the Convention, which will enter into force for the United States two to three months later. As of June 16, 1987, the Convention is in force among seven countries, an eighth has ratified, and a ninth country has acceded.¹⁴

A draft bill providing for the implementation of the Inter-American Convention on International Commercial Arbitration and adding necessary provisions to the Federal Arbitration Act,¹⁵ identical to the bills introduced in the 98th and 99th Congresses for this purpose,¹⁶ has again been submitted to the Office of Management and Budget for the requisite Administration clearance before it is introduced. It is hoped that the 100th Congress will enact this legislation to permit U.S. ratification of the Convention and the entry into force between the United States and party Latin States of a regime for the recognition and enforcement of arbitration agreements and arbitral awards similar to that established by the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁷

The United States will ratify the Inter-American Convention on Letters Rogatory and its Additional Protocol¹⁸ shortly, once certain domestic steps have been taken to designate the Department of Justice as the U.S. Central Authority. These agreements will be the first products of the first three Inter-American Specialized Conferences on Private International Law (1975, 1979, and 1984) to be ratified by the United States.

12. Stotter, *supra* note 4.

13. The Senate bill, S. 1347, was introduced on June 9, 1987 by Senator Simon for himself and Senators Cranston, Dixon, Exon, Gore, Stennis and Wallop. See S. 1347, 100th Cong., 1st Sess., 133 CONG. REC. S7885 (daily ed. June 9, 1987).

14. The Convention is in force between Australia, Canada, France, Luxembourg, Portugal, Switzerland and the United Kingdom; Spain has ratified, and Hungary has acceded to the Convention.

15. 9 U.S.C. §§ 1-14 (1982).

16. S. 1658, 98th Cong., 1st Sess. (1983); H.R. 3894, 98th Cong., 1st Sess. (1983); S. 1828, 99th Cong., 1st Sess. (1985); H.R. 5574, 99th Cong., 2d Sess. (1986).

17. Entered into force June 7, 1959, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3.

18. See *supra* note 2 and accompanying text.

Draft federal implementing legislation (the "International Will Act") for the Convention providing a Uniform Law on the Form of an International Will should shortly be submitted by the State Department to the Office of Management and Budget for Administration clearance. Meanwhile, the National Conference of Commissioners on Uniform State Laws will seek to encourage further states to enact the Uniform International Wills Act.¹⁹ The enactment of uniform state law is needed for the states in the United States to be able to benefit from the eventual U.S. ratification of the Convention and its entry into force for the United States.

The 1984 Hague Convention on the Law Applicable to Trusts and on Their Recognition²⁰ has been endorsed for U.S. signature and ratification by the American Bar Association, the American Bankers Association, and the American College of Probate Counsel. At its meeting on May 8, 1987, the Secretary of State's Advisory Committee on Private International Law, which has representation by eleven national legal organizations, similarly endorsed this Convention. The United States is likely to sign this Convention soon and the State Department will then submit it to the President for transmission to the Senate for advice and consent to U.S. ratification. This may become the first convention unifying rules concerning conflict of laws ("choice of law") that the United States will ratify.

At its meeting on May 8, 1987, the Advisory Committee welcomed a proposal that a review be initiated of conventions unifying private law adopted by the Hague Conference, UNIDROIT, UNCITRAL, and the Organization of American States, with a view to identifying by about 1989 or 1990 those conventions that may prove suitable for eventual efforts to obtain authority for U.S. ratification.

II. Status of Projects of and in International Organizations

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

At its 19th session in summer 1986 the Commission devoted most of its time to the review of the Draft Convention on International Bills of Exchange and International Promissory Notes.²¹ The Convention will

19. The Uniform Act, prepared by the National Conference of Commissioners on Uniform State Laws, has been enacted by California, Minnesota, North Dakota, and Oregon.

20. See 23 I.L.M. 1388-92 (1984); Trautman & Gaillard, *The Hague Conference Adopts a Convention for Trusts*, 124 Tr. & Est. 23-28 (1985); Trautman & Gaillard, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AMER. J. COMP. L. 307-40 (1987). The French version of the latter may be found in Trautman & Gaillard, *La Convention de La Haye du 1er juillet 1985 relative a la loi applicable au trust et sa reconnaissance*, (1986) R.C.D.I.P. 1.

21. For the draft text reviewed by UNCITRAL at its 17th session, see U.N. Doc. A/CN.9/274 (1986).

provide a legal regime applicable to paper written in European Currency Units (ECUs) or Special Drawing Rights (SDRs), or paper with variable interest rates. The hope had been that because of the extensive work already done on this project at thirteen meetings of the Commission's Working Group on International Negotiable Instruments, the Commission would be able to complete its work on this convention by the end of the session and transmit the draft text to the U.N. General Assembly for further action. However, the reduction of the session by one week for budgetary reasons, extensive written comments by several governments on the draft text, and uncertainty about what the recommendations of the Commission should be concerning further steps to put the draft into a form ready for signature and ratification or accession by States, made it impossible for the Commission to complete its work. There were doubts that the U.N. General Assembly would be in a financial position soon to convene an international diplomatic conference to adopt the final text of the Convention. An alternative to such a conference considered was for the General Assembly itself to approve the Convention and open it for signature and ratification by States. The report on the 19th session of UNCITRAL²² and the report on the meeting of its INI Working Group in February 1987²³ reflect the complex and highly technical difficulties encountered during the review process. It is hoped that the dedication to this project of more than two weeks of the 20th session of UNCITRAL during summer 1987 will permit the work by UNCITRAL on this project to be completed.

The next project of this Working Group is to be the development of model legal rules on electronic funds transfers based, at least initially, on the types of legal problems identified in the last chapter of UNCITRAL's legal guide on EFTs.²⁴

The UNCITRAL Working Group on the New International Economic Order (NIEO) at its meeting in spring 1987 gave final review to the twenty-nine draft chapters of the legal guide on the drawing up of international contracts for the construction of industrial works.²⁵ These chapters had

22. Report of the United Nations Commission on International Trade Law on the Work of its 19th session, GAOR, Forty-first session Supp. (No. 17 (A/41/17)).

23. U.N. Doc. A/CN.9/288.

24. For the reports of the Secretary General constituting the draft legal guide, subjected only to the changes indicated in U.N. Doc. A/CN.9/278 (1986) based on comments on the draft received from a number of governments and international organizations, see U.N. Doc. A/CN.9/250 & Adds. 1-4 (1984), and U.N. Doc. A/CN.9/266, Adds. 1 & 2 (1985).

25. For the revised chapters of the legal guide, see A/CN.9/WG.V/WP.20 and Adds. 1-29 (1986-1987) and a note by the Secretariat containing a draft index to the legal guide at U.N. Doc. A/CN.9/290 (1987). For the report of the Working Group on its meeting in Mar.-Apr. 1987 with agreed modifications to the revised draft chapters of the legal guide, see U.N. Doc. A/CN.9/289 (1987).

been revised by the secretariat to reflect the changes proposed and agreed during the several meetings of the Working Group to review the original draft chapters prepared by the secretariat. The Department of State recently circulated the revised chapters for comments to almost sixty experts in the United States in this field. The responses received commented favorably on the draft papers, calling them well-balanced, complete, fair, and useful. The draft legal guide is expected to be approved by the Commission at its 20th session for transmission to the U.N. General Assembly. How quickly the legal guide will be available from the United Nations in its final printed form is not yet certain.

The Commission decided at the 19th session that its NIEO Working Group would next work on the development of a legal guide on international procurement—a procedure preceding the negotiation of construction contracts identified during the development of that legal guide as meriting a legal guide in its own right. The secretariat was asked to prepare preliminary studies on two further projects for future work by the Working Group: joint ventures and counter trade.

The UNCITRAL Working Group on International Contract Practices is continuing its work on the liability of operators of transport terminals. The Working Group has not yet decided on its recommendations to the Commission concerning the final form that the uniform rules should take.²⁶

In preparation for the 19th session of UNCITRAL, the Commission's secretariat produced a number of potentially useful documents, including reports entitled: *Legal Implications of Automatic Data Processing*;²⁷ *Coordination of Work—Activities of International Organizations on Certain Aspects of Arbitration*;²⁸ and *Current Activities of International Organizations Related to the Harmonization and Unification of International Trade Law*.²⁹

B. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Czechoslovakia was the first country to sign the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,³⁰ which is the product of the 1985 extraordinary session of the Hague Conference that was open to the participation of all States. A thorough review of that Convention for the possibility of U.S. signature and rati-

26. For the Working Group Report on its session in December, 1986, see U.N. Doc. A/CN.9/287 (1987).

27. U.N. Doc. A/CN.9/279 (1986).

28. U.N. Doc. A/CN.9/280 (1986).

29. U.N. Doc. A/CN.9/281 (1986).

30. 24 I.L.M. 1573-78 (1985).

fication is not likely before the United States has gained some experience with the 1980 U.N. Convention on Contracts for the International Sale of Goods.

The Hague Conference's Special Commission on Decedents' Estates has met twice in an effort to produce a draft convention on the law applicable to decedents' estates that will form the point of departure for the substantive work of the Conference's XVI session in October 1988. The second meeting produced a first draft of the substantive provisions of the convention³¹ that will be refined at the third meeting of the Special Commission scheduled for September 1987.

Litigation continues in the courts of the United States on the relationship of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters³² to federal and state rules of civil procedure for production of documents and other evidence located abroad in a country party to the Convention. The Supreme Court granted certiorari in the *Aerospatiale* case and a hearing before the Court took place in January 1987. The Solicitor General filed an amicus brief in that case and participated in oral arguments. The Court's decision in *Aerospatiale* was issued on June 15, 1987.³³ The Supreme Court then granted certiorari in the *Messerschmitt* case³⁴ and remanded it for further proceedings and acted similarly in the *Anschuetz* case.³⁵ There may fairly soon be a meeting between representatives of American and German private legal sector groups for the purpose of explaining the Court's decision in *Aerospatiale* and its implications for the future meaning and use of the Hague Evidence Convention and to discuss generally difficulties in the area of evidence production.

A further case before the Supreme Court on a petition for certiorari involves the interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.³⁶ The *Schlunk* case³⁷ raises the question whether service by a plaintiff in the United States on Volkswagen of America to effect service upon Volk-

31. See Hague Conference Document: Successions, Prel. Doc. No. 10, April 1987.

32. *Entered into force* Mar. 18, 1970, 23 U.S.T. 2555; T.I.A.S. 7444; 847 U.N.T.S. 231.

33. *Société Nationale Industrielle Aerospatiale v. United States* Dist. Court, 55 U.S.L.W. 4842 (June, 1987).

34. *Messerschmitt Boelkow Blohm GmbH v. Walker*, 757 F.2d 729 (5th Cir. 1985), *cert. granted and case remanded*, 55 U.S.L.W. 3852 (June 22, 1987).

35. *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 754 F.2d 602 (5th Cir. 1985), *cert. granted and case remanded*, 55 U.S.L.W. 3852 (June 22, 1987).

36. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *entered into force* Feb. 10, 1969, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

37. *Volkswagenwerk Aktien Gesellschaft v. Schlunk*, 145 Ill. App. 3d 594, *app. den.*, 112 Ill. 2d 595 (1986).

swagen A.G. in Germany, its parent company, is consistent in the circumstances of the case with the provisions of the Hague Service Convention that is in force for both the United States and the Federal Republic of Germany.

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

The meeting of the UNIDROIT Committee of Governmental Experts on International Financial Leasing completed its work on the draft of a convention on the topic of international financial leasing that will go to an international diplomatic conference to be hosted by the Canadian Government in Ottawa in May 1988. The United States has noted in its observations on the previous draft of the Convention that the draft generally treated the lessor too much like the seller in an international sales transaction. While significant improvements were made in the final draft, to a certain extent those problems remain.³⁸

A second Committee of Governmental Experts has completed the draft of a convention³⁹ on certain aspects of international factoring that will form the second topic on the agenda of the international diplomatic conference in Ottawa scheduled for May, 1988.

For a number of years a small working group of UNIDROIT consisting of uninstructed legal experts has been working to produce a set of principles, now entitled Principles for International Commercial Contracts. These principles, it is believed, would in their final form be available for use by courts and arbitrators to fill gaps left by applicable law. The preliminary draft of the principles in its present form deals with the subjects of formation; interpretation; mistake, fraud, threat and gross disparity; performance; and nonperformance.⁴⁰

UNIDROIT has convened an international congress in Rome on September 7-10, 1987, on the topic: "Uniform Law in Practice." The Congress is open to paying members of the general public and is directed in particular to academics, judges, civil servants, practicing lawyers, and businessmen. The contributions of the various sessions of the Congress will be focused on the use and influence of uniform law texts following their adoption at the international level. Its themes will be the relationship

38. See UNIDROIT Doc. Study LIX—Doc. 36, Mar. 1987, for the observations and proposals of the United States on the 1986 draft of the convention contained in UNIDROIT Doc. Study LIX—Doc. 33, App. Apr. 1986. The 1987 draft resulting from the Apr. 1987 final meeting will form a part of the UNIDROIT report on that meeting.

39. UNIDROIT working document: Factoring/CGE, 3rd Session—Misc. 4.

40. For the recently consolidated set of draft principles representing the present status of the project, see UNIDROIT 1987, Study L—Doc. 40, May, 1987.

of uniform law to national law, its application by judges and arbitrators, and its impact on business circles, with reports by distinguished legal scholars from many countries active in the international unification of private law.

D. THE ORGANIZATION OF AMERICAN STATES (OAS)

By decision of its General Assembly, the Organization of American States has decided to convoke the Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV) in Montevideo.⁴¹ While the date is not yet formally set, CIDIP-IV is likely to take place during the first half of 1989 and will commemorate the 100th anniversary of the first Latin-American conference in Montevideo to unify private law.

The preliminary draft agenda for CIDIP-IV⁴² includes nine topics; however, a number of States have already commented that the agenda needs reduction to no more than two or three topics. The United States submitted comments on the preliminary draft agenda⁴³ recommending that the topic of the return of minors (also known as international child abduction) receive priority attention and emphasizing the importance of preparatory meetings of experts in any field on which the intention is to adopt a convention at CIDIP-IV. The United States also supported the proposal that there be a meeting of representatives of the central authorities of countries parties to the various Inter-American conventions on international judicial assistance to promote their smooth implementation and resolve problems that may have arisen.

The United States should soon be ratifying the Inter-American Convention on Letters Rogatory and its Additional Protocol.⁴⁴ The United States will ratify the Inter-American Convention on International Commercial Arbitration once Congress enacts the requisite implementing legislation.⁴⁵

41. AG/RES. 771 (XV-0/85).

42. OAS Doc. OEA/Ser. G, CP/CAJP-630/86, Apr. 29, 1986.

43. The U.S. Government observations on the preliminary draft agenda for CIDIP-IV were transmitted to the Chairman of the OAS Committee on Juridical and Political Affairs (Castro Alves) by letter from the U.S. Permanent Representative to the OAS (McCormack) dated Apr. 27, 1987, OAS Doc. OEA/Ser.G., CP/CAJP-635/86 add. 5, Apr. 28, 1987.

44. *See supra* note 2.

45. *See supra* notes 3 and 16.