

## PERSPECTIVES

# Award of the Leonard J. Theberge Prize for Private International Law to Peter F. Pfund

### Introduction by Don Wallace, Jr.\*\*

This is the fifth award of the Theberge Prize for Private International Law, named in honor of our former Chairman Leonard J. Theberge and awarded annually "to an individual judged by the Section [of International Law and Practice] to have performed distinguished services in the field of private international law." Leonard Theberge, working through our section, was the driving force that re-established the private international law function in the Department of State. This prize was his idea. In awarding it to Peter Pfund, the Section recognizes his achievement in restoring the function of Private International Law in the Office of the Legal Adviser of the Department of State to its former esteem. I will not quote from the many testimonials he has received except from Judge Abraham D. Sofaer, the Legal Adviser, who stated, "you are the first career civil servant to receive this award while still on full-time active duty in the service of the Department of State and the nation. You are, I believe, the quintessential civil servant." No one is more deserving of the Theberge Prize for International Law than Peter Pfund.

### Remarks by Peter F. Pfund

I am very moved and honored to have been chosen this year for the Leonard J. Theberge Award for Private International Law. With a sense of awe I think of the learning and accomplishments of the other recipients of this Award: *Phil Amram, Dick Kearney, Willis Reese, and John Honnold*. I consider that it is the many distinguished contributors, in Government but mostly in the private legal sector, to our program of participation in international efforts to unify and harmonize private law, and also to our related domestic political and legislative efforts, with whom I have become associated, who are being accorded recognition. In this connection I would like to mention by name at least those within my part of the Office of the Legal Adviser who have contributed greatly to this program: *Jami Selby, Bob German, and most recently, George Taft*.

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In accepting the Award for this year with sincere thanks, I do so on behalf of all these practicing lawyers, law professors, and others without whose commitment and generous donation of uncompensated expertise the United States would not have moved to what is a very promising stage in this program.

At a time when the State Department has been in the news for the Iran/Contra matters, the broad interpretation of a certain treaty, the security of its missions abroad, I count it as one of our greatest accomplishments that we have managed successfully to keep information about recent exciting developments in private international law off the front pages of the Washington Post, the New York Times, and even out of the Evans-Novak column. It is a tribute to Don Wallace's discretion that Charles Redman and Phyllis Oakley were not caught off guard at a noon press briefing by any questions about our position in 300 pages of the revised draft UNCITRAL legal guide on the drawing up of international contracts for the construction of industrial works. I must tell you, however, that I resisted Don's insistence that we create an air of mystery by classifying our position as secret-sensitive, although he had a point. What all this means, of course, is that my revelations during the next eight minutes about our PIL activities will be an eye-opening and riveting experience for all of you.

The United States became a full participant in international private law unification work when it joined the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT) in 1964, after Congress, at ABA urging, gave its authorization in late 1963. In the twenty-three years since, more than forty conventions have been adopted by the four international organizations engaged in private law unification of which the United States is a member state; however, the United States has become a party to only four, two of them antedating 1964: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and three procedural conventions produced by the Hague Conference: on service of process abroad, the taking of evidence abroad, and the legalization of documents intended for use abroad. It almost seemed that the United States might never become a party to any convention unifying substantive law or setting out uniform rules for choice of law. Participants in law unification work from other countries, especially those who year after year encountered *Dick Kearney*, *Willis Reese*, *Arthur von Mehren*, *Allan Farnsworth*, *Joe Sweeney*, and some of our other stalwarts, began to express puzzlement why we should so actively participate in the preparation of these conventions when the United States did not seem to intend or be able ever to become a party to them. They do not, of course, realize how fragile such conventions are in our political process, most of them being from countries

with parliamentary systems of government, where action on government proposals, at least concerning treaty ratifications, seems generally to be quicker and more certain.

The 1980 U.N. Convention on Contracts for the International Sale of Goods, known as the CISG, gave the United States a unique opportunity to demonstrate its commitment not only to the preparation and negotiation of a convention unifying substantive law, but also to its entry into force. The Sales Article of the Uniform Commercial Code, recognized by many other countries as the most modern sales law in the world, probably was more of a model for the concepts and provisions of the CISG than any other single law. The degree to which the Sales Article is reflected in the CISG, while testimony to the merits of that Article of the UCC, and of the U.S. experts who explained it and urged consideration of its concepts and provisions, also undoubtedly raised some expectations among other countries, despite their general doubts, that the United States would ratify the Convention. It may even have prompted some to sit back, on the theory that if the United States did not ratify a convention so reflective of U.S. law, then perhaps they would have no good reason to ratify.

Happily, eight countries did not adopt this wait-and-see attitude, but ratified or acceded in the belief that if enough others did, the Convention would enter into force and others would follow.

The major supporters of U.S. ratification—*John Honnold, Allan Farnsworth, Dick Kearney, Peter Kaskell, Don Wallace, Peter Winship, Reed Kathrein, Grant Ackerman, Craig Babb*, and many others—favored ratification believing that it was the right course of action for the United States and U.S. traders. We never stopped to consider what the consequences might be of our possible failure to achieve Senate advice and consent. We had picked perhaps the potentially most important convention unifying substantive law ever adopted, dealing with the law to govern many basic aspects of the most fundamental legal transaction underlying international trade, the international sales contract, to be the first convention of this type that the United States should ratify. John Honnold's steady and unperturbed conviction that sooner or later the United States would do the right thing, based on his experience with country-wide adoption of the UCC, helped to tide us over until the Senate gave its advice and consent in October 1986.

U.S. ratification on December 11, 1986, as the world's greatest trading nation, together with China, the country with an immense international trade potential, and Italy, the first state party to the 1964 predecessor conventions to break ranks with the other parties to those conventions and denounce them in favor of the CISG, was a heartening development for those of us involved in the little world of private law unification. It was heartening because the effort had paid off: the United States had

taken a lead together with ten other countries, to bring the Convention into force; our action is likely to prompt many other countries to follow suit; the broad acceptance of the CISG—the culmination of fifty years of international effort to unify the law of international sales—now seems assured; we have proven that the United States is seriously committed to the entire process of private law unification, including the ratification of conventions unifying substantive law; and we have overcome what at least seemed to be a hurdle for us in this country—a hesitation about ratifying a convention providing unified substantive law that could preempt State law.

In light of these considerations, those involved in this area of work are optimistic and looking forward to further developments. The United States will soon ratify one of the other three conventions to which the Senate gave advice and consent last October—the Inter-American Convention on Letters Rogatory and its Additional Protocol—that provides for a regime for the service of process among countries of the hemisphere similar to that of the Hague Service Convention. It is the first convention produced by the three Inter-American Specialized Conferences on Private International Law that the United States will ratify. The draft federal implementing legislation for the Inter-American Convention on International Commercial Arbitration was re-submitted to OMB in March for Administration clearance; its eventual enactment will permit us to ratify the Convention. The Administration-cleared bill for the “International Child Abduction Act” was transmitted to the Senate and House in early March and should shortly be, we hope with co-sponsors, in the Senate and House. Its enactment will permit the United States to ratify the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the first PIL Convention dealing directly with the status of persons: children who are the objects of international abductions or wrongful retentions in custody-related disputes. The Convention, by establishing a treaty obligation for their prompt return, subject only to express conditions and exceptions, stands to benefit such children for the rest of their lives. It promises eventually to effect the return to the United States of many of the 300-350 children abducted or retained abroad annually from this country, whose return at present is far from assured.

The UNIDROIT-prepared Convention Providing a Uniform Law on the Form of an International Will was transmitted to the Senate in July 1986. Draft federal implementing legislation will be submitted to OMB shortly for Administration clearance. We believe that our PIL Advisory Committee on May 8 will endorse for U.S. ratification the Hague Convention on the Law Applicable to Trusts and on Their Recognition, following the endorsements of the American Bar Association, the American Bankers Association, and the American College of Probate Counsel. This Con-

vention could be the first unifying rules to govern choice of law that we would ratify—another milestone.

Bearing in mind Bob Rendell's request that my remarks be notable for their wit, eloquence, and erudition, which I fear I have not followed, and his admonition that my remarks, "most important of all" he wrote, be noted for their brevity, with which I may still be able to comply, I will end my remarks here, and once more say: "Thank you very much!"

