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# Private International Law

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## I. What Is Private International Law?

Any discussion of private international law usually includes one or more of the following comments: "Oh, you mean conflicts of law," or, "Do you also mean the unification of substantive law?" Most practitioners who do not consider themselves "international" lawyers usually will not pursue the subject further. Private international law in its broad sense does indeed involve both conflicts of law and the unification of substantive law. The issues addressed affect a broad spectrum of legal concerns. They include such diverse areas as child abduction, wills and trusts, sales contracts, negotiable instruments, the enforcement of foreign judgments, and the taking of evidence abroad. These concerns are not limited to attorneys with an international practice. This article reviews the process of international unification of private law and the role of attorneys in that process. Further, this article attempts to identify areas where attorneys' input is most significant.

Private international law has come to mean both the development of multilateral international agreements (conventions) to set out rules concerning applicable law, as well as efforts by conventions or other means to unify and harmonize substantive law.[1] The United States is already a party to conventions dealing with the recognition and enforcement of

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1. For excellent summaries of the international organizations involved in private international law and the status in the United States of several conventions adopted by them, see Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985) [hereinafter Pfund (1985)]; Pfund, *International Unification of Private Law: A Report on United States Participation*, 1985–86, 20 INT'L LAW. 623 (1986); Pfund, *International Unification of Private Law: A Report on U.S. Participation—1986–87* 21 INT'L LAW. 1245 (1987).

foreign arbitral awards,[2] the service of documents abroad,[3] and the taking of evidence abroad.[4] It is also a party to the convention abolishing the requirement of legalization for documents used abroad.[5] On October 9, 1986, the United States Senate gave advice and consent to: United States ratification of 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;[6] the 1975 Inter-American Convention on International Commercial Arbitration;[7] the 1980 Hague Convention on the Civil Aspects of International Child Abduction;[8] and the 1980 U.N. Convention on Contracts for the International Sale of Goods.[9] The 1980 U.N. Convention on Contracts for the International Sale of Goods entered into force on January 1, 1988. The Convention Providing a Uniform Law on the Form of an International Will has been transmitted to the United States Senate for advice and consent.[10]

These areas are as diverse as any encountered by a lawyer in general practice. As more individuals find themselves involved in international business or international travel, the chances of encountering an issue covered by one of these conventions becomes greater.

## II. Early U.S. Participation Hampered by State Versus Federal Jurisdiction.

Full U.S. participation in the area of private international law is fairly recent. Not until 1964 did the United States join the Hague Conference on Private International Law (Hague Conference) and the International Institute for the Unification of Private Law in Rome (UNIDROIT). These organizations were founded in 1893 and 1926, respectively.[11]

Early participation by the United States was hampered by the attitude, articulated by Charles Evans Hughes before he became Chief Justice of the United States Supreme Court, regarding the conference to discuss

2. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; T.I.A.S. No. 6997, 330 U.N.T.S. 3.

3. Service Abroad of Judicial and Extrajudicial Documents, *done* Nov. 15, 1965, 20 U.S.T. 361; T.I.A.S. No. 6638; 658 U.N.T.S. 163.

4. Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555; T.I.A.S. No. 7444; 847 U.N.T.S. 231.

5. T.I.A.S. No. 10072; 20 I.L.M. 1405–19 (1981).

6. *See* S. TREATY DOC. No. 27, 98th Cong., 2d Sess. (1984).

7. *See* S. TREATY DOC. No. 12, 97th Cong., 1st Sess. (1981).

8. *See* S. TREATY DOC. No. 11, 99th Cong., 1st Sess. (1985).

9. *See* S. TREATY DOC. No. 9, 98th Cong., 1st Sess. (1983).

10. *See* S. TREATY DOC. No. 29, 99th Cong., 2d Sess. (1986).

11. Pfund (1985), *supra* note 1, at 505–06.

the Bustamante Code.[12] The Bustamante Code was an attempt to unify conflicts of law rules and was drafted by the Pan-American Congress at Havana in 1928. Charles Evans Hughes felt that these matters related only to choice of law issues, and these issues were of concern to the States and not to the federal government.[13]

This same concern, that these were issues properly regulated by state law and not federal law, was deemed to apply with equal or greater force to private international law efforts that focused on substantive rather than procedural law. Contract law, wills, and child abduction are primarily the subjects of state law rather than federal law. The federal government was long reluctant to become involved in international negotiations that sought to unify private law.

After World War II a slight change in this attitude occurred. This change can be attributed partly to an increase in international trade and contracts, as well as to an increase in U.S. participation in efforts to develop uniform laws for enactment as state law. International efforts in the Hague Conference, UNIDROIT, the European Community, and elsewhere to unify "private law" without U.S. participation threatened to confront the U.S. bar and its clients with unified law that the United States had not participated in drafting. Concern over the consequent disadvantages to U.S. interests prompted the U.S. bar to support the federal legislation that authorized U.S. membership in the Hague Conference and UNIDROIT.[14] "[S]tates are not constitutionally free to negotiate for uniformity with other nations, and by the federal government's refusal to do so the citizens of the United States and of the several states are being denied several of the privileges that could be theirs."[15]

## III. The Role of the U.S. Private Bar

The United States first participated as an observer in the Hague Conference in 1956. Four U.S. observers were sent to the Eighth Session of the Hague Conference upon the invitation of the Netherland Government: Philip W. Amram attended on behalf of the District of Columbia Bar; Joe C. Barrett represented the National Conference of Commissioners on Uniform State Laws; Dr. Kurt Nadelmann of Harvard Law School attended on behalf of the American Branch of the International Law Association; and Professor Willis L. M. Reese of Columbia Law School attended on

12. Special Committee on International Unification of Private Law, American Bar Foundation, Unification of International Private Law 15 (1961).

13. *Id.* at 40.

14. *Id.*

15. *Id.* at 41.

behalf of the American Law Institute and the Association of the Bar of the City of New York.[16] The American Bar Association did not send any representatives to the conference. As Mr. Amram reports, the position of U.S. observers at the conference was somewhat anomalous. "Whereas other delegates could speak officially for their governments, we could speak for no government, neither state nor federal."[17] Upon their return from the conference, Mr. Amram and Mr. Barrett suggested the organization of a national advisory commission on international unification of private law with membership drawn from the American Law Institute, the American Association for the Comparative Study of Law, the National Conference of Commissioners on Uniform State Laws, and other interested organizations. This recommendation reflected an early recognition that diverse legal topics were involved.

While it appears that the private bar and the academic community were largely responsible for the eventual participation of the United States in international efforts to unify private law, individuals in the government also did their part to encourage official participation. Bruno Ristau, now in private practice, then headed the Foreign Litigation Section of the Department of Justice. He regularly faced the types of issues dealt with in the Hague Service and Evidence Conventions and tried to encourage the Justice Department to take a more active role. He has completed a text on International Judicial Assistance, to be published by the International Law Institute.[18]

Ambassador Richard D. Kearney has been credited with marshalling the efforts that resulted in congressional authorization in 1963 for U.S. membership in the Hague Conference and UNIDROIT. Ambassador Kearney was the principal Deputy Legal Adviser of the Department of State and was responsible for organizing the Secretary of State's Advisory Committee on Private International Law. Ambassador Kearney has given credit to Herman Phleger and Abram Chayes, two outstanding State Department Legal Advisers, for leading the campaign within the United States Government to take up work on private international law and to establish part of the Office of Legal Adviser to deal with U.S. participation in the international unification of both private and public international law. In late 1979, Robert Owen, the Legal Adviser, established a part of his office to deal primarily with private international law.

The Justice Department does not have a specific office for private international law. Nevertheless, its office of Legal Counsel advises the

16. Conversation with Mr. Philip Amram, in Washington D.C. (May 2, 1985).
17. *Id.*
18. Conversation held with Mr. Bruno Ristau, in Washington D.C. (May 2, 1985).

Department of State on a subject matter basis and represents the Justice Department on the State Department's Advisory Committee.[19]

## IV. Organization of Participation

At the present time, the State Department's office of Legal Adviser has two attorneys responsible for private international law. The office of the Legal Adviser uses an advisory committee and specialized study groups to obtain expert advice in particular areas of the law from the academic community, specialized legal organizations, private practitioners, and corporate counsel. This input is used in developing guidance, in representing the U.S. at international meetings and conferences, and in the advice and consent process in the United States Senate. The Advisory Committee includes representatives appointed by: the Department of Justice; the American Bar Association's Sections of International Law and Practice, Corporations, Banking and Business Law, and Litigation; the National Conference of Commissioners on Uniform State Laws; the Judicial Conferences of the United States; the Conference of Chief Justices; the Association of State Attorneys Generals and other national legal organizations.[20]

By drawing on the participation of the private legal sector, a wealth of knowledge and expertise is available to the Department of State. While this structure provides the means for addressing most issues that might arise, the resources of the Department are used in gathering information, disseminating it to interested parties, providing notification of meetings, as well as adequately assessing various interests that need to be represented at the conference and to the United States Senate. The State Department must examine the federal government's interest, the states' interest, and the private interests of those impacted by this private law area.

The very nature of the international process requires compromise. Those parties whose interests the resulting conventions do not adequately reflect may not support, or may work against, the ultimate ratification of the conventions by this country. Such dissatisfied parties may exert pressure at the Senate level. The result may be Senate inaction, even with regard to conventions enjoying considerable U.S. support and thus transmitted by the President to the Senate for ratification. Thus, private interests may not mobilize to advance the broader interests of the nation as a whole.

Although the State Department seeks input from all interested parties throughout the international process of drafting and adopting a conven-

19. Pfund (1985), *supra* note 1, at 509.
20. *Id.*

tion, the diversity of the subject matter, as well as the time involved in discussion and adoption of the conventions, makes it difficult to maintain interest. The State Department's limited resources are stretched by (i) running the Advisory Committee and (ii) its study groups attending international meetings and conferences, (iii) preparing conventions enjoying wide U.S. support for transmission by the President to the Senate, and (iv) shepherding the conventions and related federal legislation through the congressional process.

## V. Areas of Input

One role of the State Department is to represent the interests of the private U.S. legal sector as U.S. national interests before international organizations. The expert input must come from those who have a specific interest in the private law areas involved. For the United States to become a party to conventions, domestic U.S. political support must come from those in the private legal sector who may be benefited by, and must deal with the consequences of, these conventions. This is perhaps the most important area of participation by the private bar and should include efforts by private practitioners, corporate counsel, and legal organizations.

Monitoring the developments and activities at the international level, and the screening of conventions through the ratification process, must be done with a broad range of interests in mind. Not only do the interests of lawyers need consideration. Equally important are the interests of their clients, including business concerns. This participation should not be reserved solely to lawyers engaged in international practice. Also involved should be attorneys who deal with family law issues, trusts, wills and probates, and who encounter problems with regard to the enforcement of foreign judgments in the United States or abroad.

Finally, a primary function of the organized bar must include the conveyance of information. The Committee on Private International Law of the American Bar Association's Section of International Law and Practice monitors these activities. All potentially affected sections of the American Bar Association, however, need to be aware of developments in this area and to participate actively in assisting the State Department's private international laws activities. The American Bar Association's involvement, and that of other national legal organizations, must not end before the ratification process is complete.