International Unification of Private Law - Current Activities

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On December 30, 1963, the President approved legislation authorizing membership of the United States in both the Hague Conference on Private International Law and the International Institute for Unification of Private Law. The latter is better known and reference will hereafter be made to it as The Rome Institute.

Impetus for action by Congress and the President grew out of a recommendation to the American Bar Association by the National Conference of Commissioners on Uniform State Laws, that a special committee of the American Bar Association be created and assigned the task of studying unification efforts, and of suggesting what United States policy should be. A special committee was created, and its report was published by the American Bar Foundation in July, 1961.1

At the time of the President’s approval of this legislation, a diplomatic conference had already been called to meet at The Hague on April 2, 1964, with the aim of producing a treaty on the law of international sale of goods. A proposed draft of the treaty had been under preparation by The Rome Institute for over thirty years.

It was considered that the sales conference was of significant importance to the United States business community; hence, hectic preparations were begun for United States participation. Obviously, the Department of State needed the assistance of the private bar in preparing position papers for this conference, as well as other international efforts at the unification of private law.

In February, 1964, the Secretary of State invited nine major national

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legal organizations\(^2\) to designate individuals to provide this advice and counsel. This group became the Department of State's Advisory Committee on Private International Law, which has functioned and still is functioning well.\(^3\)

Funding of the work of the Advisory Committee was not available through the budget of the Department of State; nor was it available through congressional appropriations. The members served gratuitously and at their own expense.

At a later date, the Ford Foundation made a grant to the Commissioners on Uniform State Laws for the specific purpose of partially funding the work of the Advisory Committee. Under the terms of the grant, the Conference of Commissioners periodically reports to the Ford Foundation on the work supported by the grant.

A summary of a recent report of this kind will indicate the range of activities going forward at present, and will illustrate the wide participation by leading scholars in helping the Advisory Committee to arrive at sound policies for the guidance of those representing this country, in conferences with their counterparts from other participating sovereign states.\(^4\) The following summary is accordingly offered as being of interest to readers of *The International Lawyer*.

Preliminary to a narrative report on work now under consideration by this Advisory Committee, several items should be noted.

1. The Hague Convention on Taking of Evidence Abroad in litigation concerning civil and commercial matters has been signed by the United States, and the President has sent the document to the United States Senate for its advice and consent to ratification.

2. The United States has become a party to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.

3. The Department of State is giving serious consideration to sponsoring a diplomatic conference in 1973, with the aim of producing a treaty and uniform law on the form of international wills. If this occurs it will be the first conference in the private international law field to have been sponsored by the United States.

4. The United Nations Commission on International Trade Law (UNCIT-
RAL) has become an important forum for unification of legal principles having international application.

(5) Canada, Argentina and Brazil have become members of the Hague Conference on Private International Law.

(6) Barbados, Botswana, Cyprus, Malawi, Malta, Mauritius and Somalia have acceded to one or more of the conventions on private international law developed at the Hague Conference.

Part I – The Hague Conference

Products Liability

The subject of choice-of-law problems relating to products liability will be on the agenda for the October, 1972, session of the Hague Conference. Work began on this subject as early as April, 1968. Questionnaires were submitted to all member governments of the Hague Conference. The Advisory Committee selected Professor Willis L. M. Reese, Director of the Parker School of Foreign and Comparative Law at Columbia University, to prepare suggested replies to the questionnaire.

His advisers were Michel A. Coccia, Esq., Baker & McKenzie, Chicago; Professor Robert A. Gorman, University of Pennsylvania Law School; Peter H. Kaminer, Esq., Winthrop, Stimson, Putnam & Roberts, New York; Professor Kurt H. Nadelmann, Harvard University Law School; Professor Maurice Rosenberg, Columbia University Law School; and Professor Donald T. Trautman, Harvard University Law School.

On March 20, 1970, the Advisory Committee considered the report of Professor Reese, and with some changes therein approved the submission of the replies to the Hague Conference. Professor Reese was selected as the United States representative to attend a meeting of the special commission created by the Hague Conference to prepare a suggested draft. At that meeting in September, 1970, Professor Reese was named rapporteur.

The discussions at the meeting of the special commission were directed largely to the problem of what law should govern the rights of the plaintiff against a manufacturer or supplier, with whom he had no direct contractual relationship. The consensus of the special commission was that the law of the plaintiff's habitual residence should be applied to determine his rights against the manufacturer or supplier, provided that goods of similar type supplied by that entity are sold in the state of plaintiff's habitual residence. It was the further consensus that if such goods are not sold in that state, the law of the state where the plaintiff acquired the goods should be applicable, provided goods of similar type to those involved are sold in that state.

It was the special commission's further view that if the plaintiff did not acquire the goods (for example, if a pedestrian is injured by a defective automobile), the law of the place of injury should be applied subject to the
same proviso. Finally, if neither the law of the place of habitual residence nor the place of accident is applicable, then the law of the place of production or supply should control.

The commission also recommended that the draft should include wholesalers, dealers and individual sellers; and that the draft contain no provisions relating to bases of jurisdiction or the recognition and enforcement of foreign judgments.

After the draft based upon the decision of the special commission was received in the United States, Professor Reese again met with his advisers to formulate a suggested position to be taken by the United States representative to a future meeting of the special commission.

The Department of State's Advisory Committee then considered and approved instructions to the United States representative to the special commission.

At the second meeting of the special commission, it was apparent that the Department of State's Advisory Committee had accurately forecast the issues that would emerge. The final act of the special commission approved some of the changes recommended by the Advisory Committee. The revised draft is still subject to study by the Department of State's Advisory Committee, for the preparation of instructions to the United States delegation to the October, 1972, meeting of the Hague Conference.

Succession

That session of the Hague Conference will consider the international administration of movable property of deceased persons. This subject is of practical importance, because of the increased number of individuals holding property in more than one jurisdiction.

Work on this topic follows generally the pattern described under the caption of "Products Liability." Dr. William L. Boyd, President of the University of Iowa, was named as the United States expert, and he represented this country in both meetings of the special commission created by the Hague Conference to prepare a draft. Dr. Boyd's advisers are Professor Fred L. Morrison, University of Minnesota Law School; Professor Stephen L. Sass, Dean David H. Vernon and Professor Allan D. Vestal, University of Iowa Law School; and Professor Walter O. Weyrauch, University of Florida Law School.

While the Department of State's Advisory Committee felt that prospects for substantial unification in this field are not bright, still a substantial step forward might be made if agreement could be reached on the issuance of a certificate, that would specify the powers of the person entitled to repre-
sent the estate of a deceased person in the state where such certificate may be issued.

A draft convention along these lines was prepared by the special commission. In most respects the draft embodied the principles approved by the Department of State's Advisory Committee. There has been close cooperation between representatives of the Advisory Committee and the draftsmen of the Uniform Probate Code, to correlate the two tests insofar as possible.

Evidence

The Advisory Committee continued to be active in connection with the Hague Convention on the Taking of Evidence Abroad in litigation involving civil and commercial matters. The United States played a leading role in drafting that convention. Its ratification by the United States has the approval of the Judicial Conference of the United States, the National Conference of Commissioners on Uniform State Laws, and the American Bar Association. The Advisory Committee recommended that this convention should be signed by the United States, and submitted to the United States Senate for its advice and consent.

Service of Documents

The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, entered into force for the United States and two other contracting states on February 10, 1969. By June 30, 1971, five additional states had signed the convention, but as of that date had not ratified it.

It is significant that the United Kingdom extended the application of the convention to Antigua, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat, St. Lucia, St. Vincent, Seychelles, Turks and Caicos Islands, and to a number of Pacific Islands.

Accession to this convention by a number of non-member states of the Hague Conference, has resulted in an enlargement of the field of application of the convention far beyond the expectation of the Hague Conference in 1964. This illustrates the attractiveness of foreign states to this type of procedural convention in the private international-law field.

During the period January 1, 1970 to June 30, 1971, some 300 requests for service were received by the Department of State. Other requests were transmitted through consular channels to state and federal courts. The volume of such requests is constantly growing as the number of parties to
the convention increases, and the legal fraternity becomes aware of its provisions.

Legalization

During the period mentioned above the Advisory Committee has received suggestions from a number of legal scholars and practitioners, that a group of experts be named to study the convention abolishing the requirement for legalization of foreign public documents, and to make recommendations with respect to possible accession by the United States.

This convention is designed to abolish the prior practice of chain authentication in which a document issued by a local authority, has to be authenticated by a series of higher agencies until it reaches the top national level, and further certified by a diplomatic or consular officer of the country in which the document is to be produced as evidence.

Under the convention the prior method of legalization (authentication) of foreign documents would be replaced by a system under which an officer would be replaced by a system under which an officer of a country in which the document is executed, simply attaches a uniform certificate which identifies the document as one governed by the convention and attaches a serial number to it.

Since the revision in 1966, of Rule 44 of the Federal Rules of Civil Procedure, there has been an improvement in procedures for the handling of foreign documents in United States courts. It should be remembered, however, that a strictly unilateral approval is not satisfactory to protect the interest of United States litigants abroad.

If and when the Advisory Committee recommends that the United States accede to this convention, there would still remain problems of implementation, principally as regards the documentation of the authority competent to issue the certificate. The Department of State's Advisory Committee has determined that a study group, chaired by Philip W. Amram, be named to prepare a report to the Advisory Committee on whether or not the United States should accede to this convention.

Divorce

The Advisory Committee has continued to study the Hague Convention on Recognition of Divorces and Legal Separations. The Solicitor General, Erwin N. Griswold, continues to serve as the United States expert on this topic. It is the consensus of the Advisory Committee that it seems desirable for states to attempt an agreement on choice-of-law rules that will significantly reduce divorces recognized as valid in one state but invalid in another.
The basic problem for the United States on this subject is to insure international recognition of divorce decrees, which our Constitution requires sister states to recognize under the full-faith-and-credit clause. An example of this problem is the Sherrer case in Florida, where the Supreme Court of Florida held that a Florida court’s decision on jurisdiction was not subject to collateral attack in Massachusetts by a defendant who appeared in the Florida action. Such a divorce would probably not be recognized under the present Hague draft.

To correct this situation, the United States experts suggested that our delegation propose an amendment that would extend the scope of the convention to cover the Sherrer type of divorce. To some extent this was accomplished by the addition of a new article providing that where both spouses were nationals of the State of which the territorial unit where the divorce or legal separation was obtained forms a part, then the divorce is to be recognized regardless of the habitual residence of the parties.

There seems to be a consensus in the Department of State’s Advisory Committee, that the divorce convention would provide considerably more protection for United States divorces than is presently available on the basis of comity. There is, however, hesitation to move forward too rapidly for two reasons:

A. The attractiveness of the convention for the United States will depend upon the number and identity of other contracting states, and it will be some time before one can assess accurately the potential benefits, and

B. The United States has not heretofore used the treaty-making power to deal with the recognition of status judgments, looking upon them as being matters solely within the legislative and judicial departments of the several states, insofar as the full-faith-and-credit clause applies.

As of June 30, 1971, only the United Kingdom had signed the convention. It has now adopted legislation to enable it to ratify the convention. There are indications that Norway, Finland, the Netherlands and Sweden are likely to sign this convention and there are reports that Belgium, France, Luxembourg and Switzerland are seriously contemplating ratification.

The recent submission of the convention to the Conference of Commissioners on Uniformity of Law in the Dominion of Canada, suggests that the Department of State’s Advisory Committee will soon be required to give further attention to the divorce convention, and make recommendations on whether or not the United States should become a party.

Recognition of Judgments

The Advisory Committee still has under consideration the Hague Convention on the Recognition and Enforcement of Foreign Judgments and the
Supplementary Protocol thereto. It should be borne in mind that the protocol was developed at the insistence of the United States delegation supported by the United Kingdom and others. The original convention would have required contracting parties to recognize and enforce judgments rendered in what to us would be considered improper fora, particularly in states that are members of the European Common Market.

The Advisory Committee is considering the possibility of developing bilateral agreements in this area, but deferred action pending a study by the Foreign Law Committee of the Association of the Bar of the City of New York. It has been asked to elicit information from practitioners concerning what problems, if any, presently exist in the recognition and enforcement of foreign judgments, in what countries such problems arise, and the approximate volume by country of the judgments with which practitioners have had experience.

When that study is complete, the Advisory Committee will reconsider whether or not it will recommend that the United States approach the problem by means of bilateral agreements, rather than to consider ratification of the Hague Convention. It is unlikely that ratification of the Hague Convention will be recommended unless states adhering to it also agree to be bound by the protocol supplementary to the convention.

Part II — The Rome Institute

The Rome Institute has been active in unification efforts, but those activities have more to do with substantive law rather than choice of law in conflict situations. Topics under consideration by The Rome Institute, among others, include form of will, agency, commission agency, contracts for international sale of goods, travel agency contracts, and the like.

Travel Agency Contracts

The object of the draft here is to provide uniform contents of contracts entered into by travel agents and travelers, and to provide rules governing such ancillary matters as cancellations, refunds and liability of the travel agent to the traveler for losses suffered in the course of travel.

The Institute is aware of the fact this is a considerable undertaking, because the law in member states is rudimentary. In the United States, for example, there are a limited number of cases involving issues in this field. Further, drafting in this area might well embrace problems arising both in contract and in tort.

The Committee selected Dean Francis Walsh of San Francisco Law School as its expert on this subject, and his advisers were Jerry J. Cusumano, Esq., American Express Company; Professor Peter Hay, University
The Advisory Committee submitted some twenty-five amendments to the preliminary draft. These were of three general kinds:

1. Technical improvements;
2. Scope and a provision that would permit a contracting state to ratify, with reservations as to the scope of the article that would limit application to contracts for international travel. Without the latter provision, ratification by the United States of the proposed draft would seriously affect our internal law; and
3. The third group of amendments dealt with liability. The original draft contained a provision making a travel agent who organized a trip abroad liable for the acts of third parties who performed services or provided accommodations for the traveler, but coupled this liability with rather low limits.

The latest draft coming from The Rome Institute is still under consideration by the Department of State's Advisory Committee. The basic issue is whether obvious deficiencies are out-weighed by the advantages of some degree of international regulation in an area in which injured travelers have, from time to time, found themselves without legal remedies.

Uniform Law on Form of Wills

A promising draft convention has recently been approved by a committee of experts convened by The Rome Institute. That draft would establish an international form of will valid as regards form, irrespective of the place where it is made, and irrespective of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in a proposed uniform law annexed to the convention.

Professor Richard V. Wellman was selected as the United States expert on the subject. His advisers include Judge Charles Horowitz of Seattle, Washington; Sverre Roang of Janesville, Wisconsin; Dean Eugene Scoles of the University of Iowa Law School; Professor Allan D. Vestal of the University of Iowa Law School; Professor Harrison F. Durand, Esq., Durand, Twombly & Imbriaco; and Robert E. Dalton of the Department of State.
Probably the most difficult problem for the United States under the draft is the requirement that an international will be left in the custody of the person who supervised its execution. Such practice is common in civil law jurisdictions, but uncommon in the United States. It was thought possible that a solution could be found by leaving a photostatic copy of the will with the person drafting it, with the testator to retain the original.

The Department of State's Advisory Committee has recommended that the United States host a diplomatic conference on this subject to be held in 1973, but decision so to do has not yet been made.

Agency and Commission Agency

Work of The Rome Institute on this topic continues. The United States expert is Professor E. Allan Farnsworth of Columbia Law School. At various meetings of the experts, a trend has developed shifting from emphasis on the common law concept to dealing with the problem more in the concept of the common law countries. Work on this subject began prior to the time of the United States becoming a member of The Rome Institute.

Originally there were separate drafts on agency and commission agency. The two were subsequently combined after the United States advised The Rome Institute that "commission agency" is an uncommon area in our law. The Advisory Committee will circulate a draft text to experts in this country, for opinions and recommendations that may be considered in formulating the United States position.

Validity of Contracts of International Sale

The validity of contracts of this character was not treated in the 1964 Hague Convention on International Sale of Goods. This was recognized at the conference adopting that convention, but there had not been sufficient preparatory work prior thereto, to make it possible to include the subject in the draft. Professor Farnsworth's advisers include Professor Ian Macneil of Cornell University Law School and Soia Mentschikoff of the University of Chicago Law School.

Two former advisors, Professor Robert Braucher of Harvard University Law School and Professor John Honnold of the University of Pennsylvania Law School have resigned. Braucher is now a Justice of the Supreme Judicial Court of Massachusetts, and Honnold heads the Legal Secretariat of the United Nations Commission on International Trade Law.

Protection of the Bona Fide Purchaser

This subject was not treated in the 1964 Hague Convention on International Sale of Goods. It is now under consideration by The Rome
Institute. Professor Robert Braucher, who was first named the United States expert, has, as stated, resigned, and the Advisory Committee will soon suggest a successor to him.

**Code of Law for Contractual Obligations**

The United States has received a proposal from the Institute for codification in this field, accompanied by a report from Professor Tudor Popescu, a member of the Institute’s Governing Council. Professor Rudolf Schlesinger of Cornell University Law School has been asked to serve as the United States expert. He has prepared an analysis of the proposal, and is doubtful whether the assumptions on which the proposal was based are well founded. Pending verification of these assumptions and further study, the Advisory Committee has deferred action but has called the comments of Professor Schlesinger to the attention of The Rome Institute.

**Summary**

As mentioned earlier in this article, the United Nations Commission on International Trade Law has become an important forum for unification efforts. Space limitations forbid detailed analysis of activities in that forum other than to suggest that they include international sale of goods, international payments, negotiable instruments, security interest in goods, international commercial arbitration and international shipping.

Obviously, international unification of substantive rules of law is infinitely more difficult than the unification of choice of law in conflict situations. In the foreseeable future, success of effective programs in unification efforts by the Hague Conference are likely to exceed those of The Rome Institute.

When funds available through the Ford Foundation grant to the National Conference of Commissioners on Uniform State Laws have been exhausted, some method of funding the work of the Advisory Committee must be found if its work is to be continued.

The above recital demonstrates the value of the Committee’s work to the United States. Its efforts should be expanded rather than diminished. Up until this time the Committee has performed admirably, but the writer cannot emphasize too strongly the need for it to continue, if not to expand, its activities.