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# United States Participation in International Unification of Private Law

For over twenty years, the United States, as a member of four intergovernmental organizations, has participated fully in international efforts to unify and harmonize private law. Law professors, practicing attorneys and others from the private sector have assisted the Department of State in developing and carrying out the program of U.S. participation in these efforts. Yet, the scope of this program, the mechanism used to achieve U.S. objectives, and the positive results achieved are not widely known.

This article examines: what the international organizations are; what they have produced; how the United States participates and what benefits have resulted; how the State Department consults with the private sector; what the pending projects are; and what lies ahead. It is limited to a brief discussion of the work of these organizations that is of particular interest to American lawyers and their clients. It seeks also to emphasize the importance of private sector expertise and of that sector's political support if the United States is to become a party to good conventions resulting from international cooperation in this area.

## I. The United States Joins the Effort

The United States remained aloof from full participation in international efforts to unify private law until it joined the Hague Conference on Private International Law (Hague Conference) and the International Institute for the Unification of Private Law in Rome (UNIDROIT) in 1964.[1] These

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1. For an article taking stock of the first seven years of U.S. membership in the Hague Conference and UNIDROIT, *see* Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L. J. 1–16 (1972).

organizations were founded in 1893 and 1926, respectively; thus, the United States in 1964 was very much a Johnny-come-lately. It was the organized American bar that urged the federal government to abandon its policy of U.S. non-participation that had been based on the view that U.S. ratification of conventions unifying private law would interfere with the more traditional development of private law primarily by the individual States. The efforts of the bar resulted in the 1963 authorization by the Congress of U.S. membership in the Hague Conference and UNIDROIT.[2] Underlying the efforts of the bar was concern that without U.S. participation, the process of private law unification (then largely limited to European civil code countries and without sufficient input from countries with a common law heritage) could confront U.S. interests with conventions, uniform laws and procedures adopted by other countries that could put the United States legal community at a disadvantage.

In 1966 the United Nations General Assembly established the U.N. Commission on International Trade Law (UNCITRAL) with a small Secretariat located within the Office of Legal Affairs of the United Nations.[3] UNCITRAL has a 36-state, largely rotating, membership with a geographic spread ensuring that it represents U.N. member states from all world regions and major legal systems and at all stages of economic development. The Commission enjoys the support of the infrastructure of the United Nations and has the primary mandate to unify and harmonize the law of international trade with a view to facilitating such trade. It is also charged with monitoring and coordinating the trade law unification work of other international organizations to avoid duplication of effort. The United States has been a member of UNCITRAL since its establishment. Professor John Honnold of the University of Pennsylvania Law School was the first substantive head of its secretariat from 1969 to 1974, during the years when its working procedures and major elements of its initial work program were developed.

The fourth international organization with activities in the field of private law unification of which the United States is a member is the Organization of American States (OAS), which has a continuing tradition of private law unification going back to 1898. In 1975 the OAS convoked the first Inter-American Specialized Conference on Private International Law (CIDIP) designed to involve the United States and other non-civil law countries in regional efforts to unify private law. The United States participated in the

2. 22 U.S.C. 269g. The Hague Conference Statute may be found at 15 U.S.T. 2228; T.I.A.S. 5710; the UNIDROIT Statute at 15 U.S.T. 2494; T.I.A.S. 5743. For a brief summary of these organizations' background, mandate, and membership as of mid-1983, *see* United States Department of State, *32nd Annual Report, United States Contributions to International Organizations, Report to the Congress for Fiscal Year 1983*, 82–83 (Hague Conference) at 100–101 (UNIDROIT).

3. G.A. Res. 2205 (XXI) of December 17, 1966.

1975 Conference as well as the second (CIDIP-II) and third (CIDIP-III) conferences in 1979 and 1984.

## II. Elements Common to the Work of the Hague Conference, UNIDROIT, UNCITRAL and the OAS

The law unification work of all of the above-named organizations has been focussed on the unification/harmonization of law governing private legal transactions and relationships. The work on any project is carefully tailored to deal with a topic having a manageable scope capable of resulting in a broadly acceptable work product that is, however, also of sufficient breadth and importance to serve a useful purpose and makes the product worthwhile for the effort involved and for acceptance by governments. The member states of these organizations have avoided tasking them with topics primarily involving public international law and areas of private law in which the differences in national laws and procedures that burden such transactions and relationships has resulted largely from different national policies, e.g., economic or trade policies, rather than differences occasioned primarily by different legal traditions and procedures. In those relatively few instances, such as the UNCITRAL attempt to prepare rules on liquidated damages and penalty clauses when law unification efforts were not successful, the lack of success often can be explained by an initial failure by member states to appreciate that the underlying problems involved fundamental principles of law that were irreconcilable. The projects that have been most successful have been ones where differences in law and procedure that have created impediments to trade, international judicial assistance, and to legal transactions and relationships could be overcome by compromise. But even in the area of taking of evidence abroad, for which an international convention was adopted by the Hague Conference to which the United States is one of 16 parties, there is at present considerable uncertainty in the United States about the relationship of the Hague Convention procedures to procedures for direct discovery under U.S. state and federal rules of procedure. That uncertainty stems from the needs or demands of litigants in the United States for pre-trial discovery and the confrontation of that need with the equally fundamental concept of judicial sovereignty of many other countries.[4]

The most effective participants of countries involved in the law unification efforts of these organizations have generally been distinguished experts in a particular field of law—most often law professors and government officials

4. For a very useful discussion of the problems encountered by U.S. litigants and courts with the Hague Evidence Convention, 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. 733–795 (1983).

from the ministry responsible for the development and implementation of national legislation in the particular field. Professors and such government ministry experts are, for the most part, better able than lawyers in private practice to set aside several weeks annually over a period of several years for preparatory meetings, and thus have the possibility to see a project through from identification of resolvable issues to their possible resolution in a first draft, and, ultimately, to adoption of a final text.

The work is done in these organizations in a collegial and informal atmosphere, with simultaneous interpretation and virtually none of the East-West, North-South confrontations common to many organizations in the U.N. system. Moreover, the work benefits from the very high quality of preparatory studies and other assistance by small but expert and dedicated international legal secretariats.

Once a project has been completed a new phase of effort begins. As the final work product receives more and more attention and governments consider ratifying the convention or enacting legislation based on the convention, uniform law or model law or otherwise making use of the work product, meetings and symposia often bring together once again some of the experts from different countries who prepared and negotiated the work product. Through these functions and legal publications these experts exercise a certain stewardship with regard to their unification work, and in explaining its purpose and operation they help to ensure that the courts and authorities in their countries and others interpret and implement the conventions, rules or law in a manner falling within the framework intended by the negotiators during the formative stage.

## III. Private Sector Advice to the Department of State

The areas of private law on which international unification work is done are frequently ones in which the U.S. states, rather than the federal government, develop the law and related procedures. Thus, there is little or only narrowly specialized expertise within the federal government when the unification work concerns such topics as trusts, parental child abductions, decedents' estates and the like. However, this does not hold true for such areas as liability for loss of or damage to marine cargoes or international commercial arbitration. The need was recognized early for experts from the private sector to participate in the formulation of policy guidance by the Department of State and the representation of the United States in the international organizations involved. That private sector participation was also considered essential if that sector was to provide the necessary political support for the United States to become a party to substantively acceptable conventions or for U.S. acceptance in other ways of the products of international law unification and harmonization.

When the United States joined the Hague Conference and UNIDROIT in 1964 the Department of State established the Secretary of State's Advisory Committee on Private International Law, which now has a membership consisting of representatives appointed by ten major national legal organizations and the Departments of State and Justice. These organizations include three sections of the American Bar Association, the American Law Institute, the National Conference of Commissioners on Uniform State Laws, the American Association for the Comparative Study of Law, the American Society of International Law, the Conference of Chief Justices, the Judicial Conference of the United States and the National Association of Attorneys General. In annual meetings announced in advance in the *Federal Register* and open to the public, this umbrella group, chaired by the Legal Adviser of the Department of State, reviews the U.S. program and, among other things, makes recommendations as to whether or not the United States should become a party to conventions in this field.

In addition to the umbrella Advisory Committee there are a number of study groups under it specialized in particular areas of the law that assist with guidance on particular projects of interest to the United States. They include study groups on international business transactions, arbitration, trusts, the law applicable to international sales, international child abduction, international negotiable instruments, and a new one in formation that has yet to meet, on the liability of international terminal operators. Each study group is made up of a representative mix appropriate to the particular topic of practicing attorneys, law professors, corporate counsel and representatives of interested specialized organizations such as the American Bankers Association and the American College of Probate Counsel. The study groups generally consist of between 10 and 20 persons who make their expertise available without compensation. Their meetings, also announced in the *Federal Register* and open to the public, are convoked as work on a project reaches a stage when the Department of State must have the benefit of expert guidance from the specialized private sector. This need usually occurs in the formative stage of a project and later when U.S. Government positions or written comments on a draft convention or other draft work product are needed and should take account of the views of the U.S. private sectors that stand to be affected.

Unlike some large government advisory committees, the Advisory Committee on Private International Law and its several study groups are relatively small, permitting real working meetings that last most of a day, are informal, and permit the give and take that makes possible the achievement of a consensus on most issues discussed. One or more members of each study group assume a leadership role on a given project, are in touch with the Office of the Assistant Legal Adviser for Private International Law between study group meetings, and represent the United States on the expert work-

ing bodies of the respective organizations. These experts also participate on the United States delegation to the organization meeting that finally reviews and decides on the draft and, if a convention is involved, usually serve on the U.S. delegation to the diplomatic conference at which formal intergovernmental negotiations result in the final adoption of a convention.

## IV. Status of Conventions and Other Work Products

### A. Conventions to Which the United States is a Party

Since becoming an active member in the international law unification process, the United States has become a party to only four conventions: the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards;[5] the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;[6] the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;[7] and the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[8]

As a result, the arbitral awards of over sixty countries are now enforced in the United States as a matter of treaty law, and U.S. arbitral awards are similarly entitled to recognition and enforcement in those countries. This is so although the enforcement of foreign court judgments in the United States and of U.S. court judgments abroad is still based only on comity, largely because there is no world-wide convention on judgments like the New York Convention on Arbitral Awards. We have a treaty-supported system of service of process with twenty-two countries and a corresponding system for the taking of evidence with sixteen countries. Moreover, we have substantially simplified the certification of documents originating in one country and intended for use in any one of twenty-nine other countries that are parties to the 1961 Convention.

5. 21 U.S.T. 2517; T.I.A.S. 6997; VII Martindale-Hubbell Law Directory (Part VII) 8–12 (1985). For a very useful recent book on the Convention, *see* A. van den Berg, The New York Arbitration Convention of 1958 (1981).

6. 20 U.S.T. 361; T.I.A.S. 6638. VII Martindale-Hubbell Law Directory (Part VII) 1–8 (1985) has the text of the Convention and required and optional forms, lists states parties, their declarations upon becoming parties, and the areas to which they have expressly extended the Convention.

7. 23 U.S.T. 2555; T.I.A.S. 7444. VII Martindale-Hubbell Law Directory (Part VII) 12–21 (1985) contains the text of the Convention, a list of states parties, their declarations upon becoming parties, and the areas to which they have expressly extended the Convention. *See also* Oxman, *supra* note 4.

8. Entered into force for the United States on October 15, 1981. T.I.A.S. 10072; 20 I.L.M. 1405–1419 (1981). VII Martindale-Hubbell Law Directory (Part VII) 21–23 (1985) contains the text of the Convention, lists the states parties to it and the areas to which they have expressly extended the Convention, and contains the list of U.S. authorities in the federal government, the federal court system and in the states and territories that are competent to issue the Convention certification (apostille).

## B. Conventions Pending Before Congress

The United States played a major part in the preparation and negotiation of the following conventions that are now before the Senate for advice and consent to ratification:

1. The 1975 Inter-American Convention on Letters Rogatory and its 1979 Additional Protocol that would provide for the hemisphere a system for service of process very similar to that of the 1965 Hague Service Convention;[9]
2. the 1975 Inter-American Convention on International Commercial Arbitration that would provide a similar regime to that of the New York Convention for the recognition and enforcement of arbitral awards;[10] and
3. the 1980 U.N. Convention on Contracts for the International Sale of Goods that would make it possible for parties to sales contracts who are located in different contracting states to let the Convention's substantive rules on formation of the contract and the rights and obligations of the buyer and seller apply to their contract.[11]

## C. Conventions Soon to be Transmitted to the Senate

The State Department hopes to send the 1980 Hague Convention on the Civil Aspects of International Child Abduction to the Senate in Spring, 1985, with federal implementing legislation to be introduced in the Congress about the same time.[12] That Convention, already in force among France, Portugal, Switzerland and several provinces of Canada, seeks to provide an effective deterrent to international parental child abductions and retentions resulting from custody disputes. It seeks to deal with this burgeoning prob-

9. U.S. Senate Treaty Doc. 98-27, 98th Cong., 2nd Sess. (1984); 14 I.L.M. 339–343 (1975) (1975 Convention); 18 I.L.M. 1238–1247 (1979) (1979 Additional Protocol).

10. U.S. Senate Treaty Doc. 97-12, 97th Cong., 1st Sess. (1981) (and errata sheet correcting chart of signatory countries); 14 I.L.M. 336–339 (1975).

11. For text of the Convention, *see* 19 I.L.M. 668–699 (1980); U.S. Senate Treaty Doc. 98-9, 98th Cong., 1st Sess. (1983) 22–43. For the legal analysis accompanying the Convention to the Senate and relating its provisions to the corresponding provisions of the Sales Article of the Uniform Commercial Code, *see id.*, at pages 1–18. For hearings on the Convention and supplementary written questions and answers, *see International Sales of Goods: Hearing before the Senate Committee on Foreign Relations,* 98th Cong., 2d Sess. (1984), (S. Hrg. 98–837, April 4, 1984). For a brief introductory article on the purpose and operation of the Convention *see* Winship, *New Rules for International Sales,* 69 A.B.A.J. 1230–1234 (1982). For a useful introduction to the issues and bibliography, *see Symposium-International Sale of Goods,* 18 Int'l Law. 3–56 (1984), and for an opposing view to adoption, *see* Rosett, *International Sales Convention: A Dissenting View,* 18 Int'l Law 445 (1984). The most complete and authoritative book on the Convention is J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (Boston: Kluwer, 1982). *See also,* Parker School of Foreign & Comparative Law (N. Gaston & H. Smit eds.), International Sales: The United Nations Convention on Contracts for the International Sale of Goods (New York: Matthew-Bender, 1984) for proceedings of the international "conference" of scholars and practitioners in October, 1983, sponsored by the Parker School. The proceedings reproduce U.S. Senate Treaty Doc. 98-9 in its entirety.

12. 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).

lem by providing the expedited return of the wrongfully removed or retained child subject only to a few specified narrow exceptions. The Convention applies whether the child is already the subject of a custody decree or not. It does not go into the substantive merits of the conflicting custody claims.

Based on the belief that international parental abductions are harmful to the children involved and that this form of parental self-help should not be condoned and should not result in legal advantage to the abducting parent in the country to which the child is abducted, the Convention imposes only the obligation for the physical return of the child and thereby essentially return of the legal situation of its parents to the *status quo ante*. In order to help aggrieved parents know where to turn for help, the Convention requires that contracting states establish a national Central Authority to receive return requests from other countries and to initiate and oversee the efforts to find the child and effect its return.

Current thinking is that the U.S. Central Authority will be in the State Department. In view of our federal system, that Central Authority will need to rely heavily on the cooperation of state welfare and other authorities to locate the child, facilitate the efforts to effect its return, provide for foster care where necessary, and facilitate return transportation arrangements. There is a strong expectation that more children abducted from the United States to other contracting countries will be returned to the United States, i.e., the state from which they were abducted, pursuant to the Convention than are now returned in its absence. However, there are very basic differences in how the United States can handle return requests addressed to it and how many other countries are equipped to handle return requests that they receive. These differences result largely from the difficulties encountered in locating persons in the United States, the size and decentralized nature of this country and the mobility of its population, the adversarial approach to litigation and dispute resolution, and the considerable court costs and legal fees involved in formal legal proceedings.

There are about 1,500 cases of unresolved child abductions from the United States currently known to the Department of State—a number that has almost doubled in the last 2 years. About half of these abductions are to countries that participated in the Convention's negotiation and may eventually become parties to it. In light of these figures and with the increase in attention in the United States to interstate abductions, missing children and child abuse, this Convention seems to be one that the United States should be able to ratify without much delay.

Also planned is early transmission to the Senate of the 1973 Washington Convention Providing a Uniform Law on the Form of an International Will.[13] It makes provision for a standardized certificate that would entitle a

13. 12 I.L.M. 1298–1311 (1973). *See* booklet published by UNIDROIT in 1974 with the text of the Convention and the Explanatory Report by Jean-Pierre Plantard, Deputy Secretary-

will as a matter of treaty law to recognition in other contracting states as to its formal validity.

The fifteenth session of the Hague Conference that took place in October, 1984 adopted the Convention on the Law Applicable to Trusts and on their Recognition.[14] This Convention should help considerably to ensure that trusts—an institution not known as such in civil code and certain other countries—are better understood and that the responsibility of the trustee and his title to trust property that may be located in non-trust jurisdictions, and the rights of trust beneficiaries, are more fully recognized.

There is a possibility that the Department will be in a position soon to arrange for the transmission to the Senate of the 1968 Protocol to Amend ("Visby Amendments") the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea ("Hague Rules"), and the 1978 U.N. Convention on the Carriage of Goods by Sea ("Hamburg Rules").[15] The arrangement contemplated would have the Visby Amendments to the 1924 Hague Rules enter into force for the United States to set more realistic liability limits for loss of or damage to marine cargoes and to take account of containerization in the maritime carriage of goods. Once it becomes clear that more U.S. seaborne trade is with countries becoming parties to the Hamburg Rules than Hague-Visby, the Hague-Visby regime would be superseded by the Hamburg Rules which would modernize the current liability system for such loss or damage.

The Conference which adopted the 1980 U.N. Convention on Contracts for the International Sale of Goods also adopted a Protocol amending the UNCITRAL-prepared 1974 U.N. Convention on the Limitation Period in the International Sale of Goods.[16] The Protocol aligns the 1974 Convention with the 1980 Convention. If the United States were to become a party to the 1980 Convention it is possible that sufficient private sector support for this internationally developed statute of limitations for international sales would

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General of UNIDROIT. *See also* the Uniform International Wills Act, prepared and approved by the National Conference of Commissioners on Uniform State Laws and recommended for enactment by all States at the Conference's annual conference in 1977. The Uniform Act has been enacted by Minnesota, North Dakota, California and Oregon. The proposed operation of the Convention in the United States and the federal implementing legislation to be proposed are discussed in R.D. Kearney, *The International Wills Convention,* 18 INT'L LAW. 613–632 (1984).

14. 23 I.L.M. 1388–1392 (1984). For the text of the Convention and an introductory note co-authored by the U.S. expert who attended preparatory meetings of the Hague Conference's Special Commission on Trusts and was chief spokesman on the Convention for the U.S. delegation to the Conference's 15th Session, *see* Trautman & Gaillard, *The Hague Conference Adopts a Convention for Trusts,* 124 TRUSTS & ESTATES 23–28 (1985).

15. (Hague Rules) 51 Stat. 233, T.S. 931, 2 Bevans 430; The 1968 Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments) may be found in HILL & EVANS, TRANSPORT LAWS OF THE WORLD, Section I-E-15, at pages 1–9 (1980); the Hamburg Rules are contained in 17 I.L.M. 608–630; the entire Hamburg Conference Final Act at 603–631.

16. 13 I.L.M. 952–961 (1974) (1974 Convention); 13 I.L.M. 949–951 (1974 Conference Final Act); 19 I.L.M. 696–699 (1980) (1980 Protocol).

develop for the United States to become a party to the 1974 Convention, as amended by the 1980 Protocol.

An international conference in Geneva in early 1983 hosted by Switzerland adopted in final form the UNIDROIT-prepared Convention on Agency in the International Sale of Goods.[17] The Convention provides substantive rules governing the relations between the principal or the agent on the one hand, and the third party on the other, in connection with the conclusion of contracts for the international sale of goods.

The Third Inter-American Specialized Conference on Private International Law (CIDIP-III) in May, 1984 adopted a Protocol to the 1975 Inter-American Convention on the Taking of Evidence Abroad.[18] It may eventually be possible for the United States to become a party to the Convention and Protocol, which would result in a regime for the taking of evidence between states parties to both instruments quite similar to that established by the Hague Evidence Convention.

### D. Conventions in Preparation

At an extraordinary session of the Hague Conference in October, 1985, open to all states, governments will negotiate on a draft convention prepared by a special commission of the Hague Conference on the law applicable to contracts for the international sale of goods.[19] The convention's rules would fill gaps concerning applicable law in international sales contracts when such contracts are not covered by applicable provisions of conventions setting out substantive law, such as the 1980 U.N. Convention on Contracts for the International Sale of Goods.

An UNCITRAL working group developed a Draft Convention on International Bills of Exchange and International Promissory Notes that is now being reviewed by the recently expanded working group. The effort may finally result in the adoption of a convention that would provide for optional instruments governed by the rules established by the convention.

At its 1984 session, the Hague Conference decided to work on a Convention on the Law Applicable to Decedents' Estates with a view to adopting a convention on this subject in final form at its sixteenth session in 1988.

17. 22 I.L.M. 246–259 (1983). In 1983 UNIDROIT published the Acts and Proceedings of the Conference.

18. 14 I.L.M. 328–332 (1975) (1975 Convention). The English version of the 1984 Protocol to the 1975 Convention has not yet been published by the Organization of American States.

19. Sales, Prel. Doc. No 4, August, 1984 (Hague Conference document), prepared by the Conference's Permanent Bureau, contains the text of the draft convention and the Report by Professor Arthur T. von Mehren, reporter of the Conference's Special Commission that prepared the draft convention.

## E. Work Products in Other Forms

The work products of these international organizations is increasingly also taking on forms other than international conventions. UNCITRAL developed its Rules of Arbitration,[20] widely known, respected and increasingly used, as well as Rules of Conciliation[21]—a process preferred for dispute settlement by some countries, notably the People's Republic of China. UNCITRAL is working on a model law on international commercial arbitration that is to be reviewed for approval by the Commission in Summer, 1985 and endorsed by the UN General Assembly for consideration by states later that year.[22] The model law could provide useful assistance to States seeking to develop domestic legislation on commercial arbitration that would facilitate international trade and investment.

The Commission is also working on a legal guide for the drawing up of contracts for the construction of industrial works. The guide will describe the thirty to forty types of provisions found in contracts for the construction of manufacturing plants, mills and the like. The aim is to produce a legal guide with the imprimatur of UNCITRAL that may supersede specialized guides of more limited scope already in use. The guide is to describe the range of possibilities for each type of contract provision, the relationship of each type of provision to other provisions and the trade-offs involved, but without making a judgment which kinds of provisions "should" be used or setting out "model" contract provisions. It is believed that the guide, if successful, will facilitate the task of both contractors and their customers in the negotiation of construction contracts.[23]

As a logical continuation of its work on the carriage of goods by sea, UNCITRAL has begun work on the formulation of uniform legal rules on the liability of operators of transport terminals, basing its work at least initially on the draft convention and explanatory report prepared by UNIDROIT that UNIDROIT had offered to UNCITRAL for further work.

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20. 15 I.L.M. 701–717 (1976); II Yearbook Commercial Arbitration 159–171 (1977), with commentary by P. Sanders at 172–223. *See also* booklet prepared by the American Arbitration Association, *Procedures for Cases Under the UNCITRAL Arbitration Rules* 13–31.

21. VI Yearbook Commercial Arbitration 165–169 (1981), followed by commentary by G. Herrmann, member of the staff of the UNCITRAL secretariat at pages 170–190.

22. The draft model law is annexed to a commentary on the model law prepared by the UNCITRAL Secretariat staff member with primary responsibility for this project, Herrmann, *UNCITRAL's Work Toward a Model Law on International Commercial Arbitration,* 4 Pace L. Rev. 537–580 (1984).

23. The legal guide is to be completed in draft form by 1986 and will not be available in a single document before that time. It may then undergo drafting revision and is likely to be considered in revised form by UNCITRAL at its annual plenary session in 1987. Upon approval by UNCITRAL it will probably be submitted to the U.N. General Assembly for a resolution recommending the legal guide to U.N. member states for use and consideration in future negotiations of international contracts for the construction of industrial works.

The Hague Conference has produced for purchase loose-leaf Handbooks on the Hague Service Convention and the Hague Evidence Convention, each with the text of the respective convention, describing its purpose and scope, the procedures for service or evidence-taking required by each contracting state, the declarations by each state made at the time they became parties, how the required and recommended forms to accompany requests are to be completed, and containing a bibliography.[24]

The Hague Conference is convoking in May, 1985 a second Special Commission meeting (following up on the first in 1978) to bring together experts on international judicial assistance and representatives of the Central Authorities of states parties to the Hague Evidence Convention, with a view to promoting better understanding of problems encountered with that Convention's use or non-use and ways of resolving them.

UNIDROIT in April, 1985 is convoking a meeting of governmental experts to review the work of two of its expert study groups that have produced preliminary draft uniform rules on international financial leasing and on certain aspects of international factoring. It remains to be seen what form the final work product of UNIDROIT's rules in these two areas will take.

## V. Benefits Other Than U.S. Acceptance of Conventions

While the benefits from U.S. ratification of or accession to the four Conventions mentioned above are fairly clear, there are also benefits to the U.S. private sector from other means of private law harmonization like the UNCITRAL Rules of Arbitration and Conciliation and the Hague Conference Handbooks on the Service and Evidence Conventions. The UNCITRAL-developed model law on international commercial arbitration may result in the enactment of modern legislation on such arbitration in a number of countries, with a beneficial effect on business transactions with those countries.

The Department of State, and the members of its Advisory Committee and study groups believe that the active role of the United States in the work of the four organizations on conventions and other forms of law unification and harmonization produces more broadly useful results through exposure of foreign legal experts to the U.S. and common law approach. That approach is often more modern and pragmatic than the approach of other legal systems. An example is the view that the 1980 U.N. Convention on Contracts for the International Sale of Goods is more like the Sales Article

24. The Handbooks are available for a modest fee from its distributors in the United States: Butterworth Legal Publishers in Boston and Newton Upper Falls, Massachusetts; Austin, Texas; Redmond, Washington; St. Paul, Minnesota and from D and S Publishers in Clearwater, Florida.

of the Uniform Commercial Code (UCC) than the sales law of any other country. This is because the UCC was viewed by experts from many countries who participated in the Convention's preparation as perhaps the most modern commercial code in the world and the U.S. legal experts involved were able to convince their foreign counterparts of the merits of the UCC approach and provisions.

## VI. The Domestic Process Authorizing the United States to Become a Party to Private International Law Conventions

While the international process of law unification by convention is a deliberate and ponderous one, there remains a long and arduous process before the United States can actually become a party when such a convention seems to be substantively acceptable for U.S. ratification or accession. Before the Department submits any such convention to the President for transmission to the Senate, it seeks its Advisory Committee's endorsement of U.S. signature and ratification. The endorsement of the convention by the American Bar Association and other interested specialized associations may also be sought in order to demonstrate to the Senate the support of the organized bar. Even then, ultimate Senate advice and consent is not certain. For example, the organizations urging Senate advice and consent to U.S. ratification of the 1980 United Nations Convention on Contracts for the International Sale of Goods include: American Bar Association; Lawyer's Committee for the Convention on Contracts for the International Sale of Goods—an *ad hoc* committee consisting of eminent former Senators and federal cabinet members, law professors and chief legal officers of some three dozen large U.S. corporations engaged in extensive international trade; Business International; the American Association of Exporters and Importers; the United States Council for International Business; the National Foreign Trade Council; the National Association of Manufacturers. Despite this impressive support, the necessary action by the Senate has not yet been achieved, in part, it seems, because proponents have not yet fully succeeded in convincing the Senate Committee on Foreign Relations that in the view of the private legal and business sectors such action is in our overall national interest.

Those involved in private law unification work in the United States are continuously reminded that law unification conventions potentially acceptable to the United States are seeking, through change, to improve on a legal situation that many have long accepted and could continue to tolerate. However uncertain and unsatisfactory the existing legal situation may be, there is a natural reluctance to see the situation changed for the United States to a situation that may effect improvements but that will initially be unfamiliar and cannot but involve some new uncertainties.

The ultimate test of U.S. participation in the international unification of private law is whether the United States ratifies the conventions that result after such conventions have been transmitted to the Senate for advice and consent with the formal endorsement of the organized bar. If the Senate does not do so, we will not have achieved what we set out to do when Congress authorized the United States to join the Hague Conference and UNIDROIT more than twenty years ago. Moreover, unless ratification is achieved the private sector, which urged the United States to join international efforts to unify private law and which has provided the crucial expertise to make U.S. participation possible, cannot fully benefit from its sustained support of the Department of State and its active and successful participation in the work that resulted in these conventions.

The magnitude of this country's international trade and the scope of the involvement of its people in private transactions and relations with parties in other countries gives it a very important role in determining the ultimate success of efforts to unify private law. The success of conventions in this area, measured in terms of the numbers of countries becoming parties to them, depends to a very considerable extent on whether the United States ratifies them or fails to do so. State Department officials are frequently told by foreign officials that U.S. ratification will encourage or even induce other countries seriously to consider doing likewise. In addition, U.S. action or inaction on the several above-mentioned conventions will have an effect on whether other countries consider our active participation in their negotiation justified or increasingly discount future U.S. participation in the international process because the United States so often does not become a party to the conventions adopted.

It must be borne in mind that once the President has transmitted to the Senate for advice and consent a convention unifying private law that enjoys the formal support of the private sector, the role of the State Department becomes less important. The federal government's interest in such conventions is derived from that of the private sector and while the government can explain the merits of a given convention it is the private bar from which the Senate expects support for U.S. ratification. If the private sector does not succeed in convincing the Senate of its support for U.S. ratification, and the Congress that it should enact any necessary implementing legislation, ratification by the United States is unlikely to be achieved.

## VII. Conclusion

It is hoped that the above background on U.S. participation in international efforts to unify private law and the description of private sector input will help American lawyers better to understand the respective roles of the private sector and the Department of State in the process. The areas of the

law that are receiving the attention of the named international organizations are very diverse and the benefits that the work products may provide can be considerable and long-lasting. However, without the full continued involvement and support of the private sector in the constitutional process by which the United States becomes a party to the conventions identified by the private sector as meriting ratification, the full benefits from its important voluntary contributions to the development of those conventions will never be achieved.