CONGRESS' ROLE IN THE INTERNATIONAL UNIFICATION OF PRIVATE LAW

Peter H. Pfund and George Taft***

INTRODUCTION

Congressional authorization for the United States to become a member state of the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT) was actively supported before the Congress in 1963 by many representatives of the private legal sector.[1] Congress' enactment in that year of Public Law 88-244 resulted in United States membership in those organizations in early 1964, and marked the beginning of full United States participation in international efforts to unify private law.[2] Since joining the Hague Conference and UNIDROIT, the United States has participated in the work of the United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly in 1966, and in the first three Inter-American Specialized Conferences on Private International Law in 1975, 1979 and 1984, by reason of its membership in the United

* Assistant Legal Adviser for Private International Law, United States Department of State, and Vice-Chairman, Secretary of State's Advisory Committee on Private International Law.

** Attorney Adviser, United States Department of State, and Executive Director, Secretary of State's Advisory Committee on Private International Law. The views expressed in this Article are those of the authors and are not necessarily those of the Department of State.

[1] "We must enter into the problems of great unification in fields of law touching social intercourse and business activity at a time when we can get the viewpoint of the United States heard in the original drafting, not at the time it is considered for final adoption. It is in the preparatory stages that there is an opportunity to weave into it the basic problems that we face in the United States and upon which the commissioners [on Uniform State Laws] have been working for years." *U.S. Participation in The Hague Conference and the Rome Institute: Hearing on H.R.J. Res. 732 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 88th Cong., 1st Sess. 15 (1963) [hereinafter *Hague Hearing*] (statement of Joe Barrett, attorney, and Commissioner on Uniform State Laws for the State of Arkansas).

[2] Act approved Dec. 30, 1963, Pub. L. No. 88-244, 77 Stat. 775 (codified as amended at 22 U.S.C. § 269g (1982)) [hereinafter Membership Act]. *See* Statute of the Hague Conference, 15 U.S.T. 2228, T.I.A.S. No. 5710, and Statute of UNIDROIT, 15 U.S.T. 2494, T.I.A.S. No. 5743.

Nations and the Organization of American States, respectively.[3]

This Article seeks to describe the crucial role of Congress and the interaction of Congress, the private legal and business sectors, and the executive branch in determining the manner and measure of participation by the United States in the international process of unification and harmonization of private law. The Article further seeks to demonstrate that the United States interests, objectives and expectations, as they were perceived in the 1960s, have been borne out since that time, and justify our continued active participation in the process.

I. THE CONGRESSIONAL ROLE IN THE TREATY-MAKING PROCESS

Although this Issue commemorates the 200th anniversary of Congress, the treaty practice of our nation antedates the Constitution establishing the Congress as we know it. In 1778, commissioners selected by the Continental Congress concluded a treaty of alliance and a treaty of amity and commerce with the King of France.[4] Indeed, between the time of the Declaration of Independence in 1776 and the establishing of our government under the Constitution in 1789, the United States entered into fourteen treaties related to amity, commerce, and consular matters, as well as a treaty of peace with Great Britain.[5]

It was clear from an early time that the treaty power of the United States extends to all proper subjects of negotiations between our government and the governments of other nations. In 1844, Secretary of State Calhoun stated that "the treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent,

---

[3] For an article summarizing the first seven years of full United States participation in international efforts to unify private law, see Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L.J. 1-16 (1972). For a summary of activities between 1971 and 1985, see Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985) [hereinafter Pfund I]. For a summary of developments during the following year, see Pfund, Annual Report, *International Unification of Private Law: A Report on United States Participation, 1985-86*, 20 INT'L LAW. 623 (1986) [hereinafter Pfund II].

[4] J.C.B. Davis, Notes, Treaty Volume (1776-1887) 1219, *reprinted in* 5 J. MOORE, DIGEST OF INTERNATIONAL LAW 157 (1906).

[5] Moore's American Diplomacy 33, reproduced in 5 J. MOORE, DIGEST OF INTERNATIONAL LAW 159-60 (1906).

whether the subject matter be comprised among the delegated or the reserved powers."[6] Furthermore, the Supreme Court in 1890 stated:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.[7]

It seems clear that the treaty power may touch upon international, national and individual concerns, and it is with this in mind that Congress took the steps which culminated in our joining the Hague Conference and UNIDROIT in 1964. Congress did not, however, by this action commit the United States to the conventions produced by these organizations. That could only be justified and done on a case by case basis. At the same time, it must be recalled that between the time of our earliest treaties and the joining of the Hague Conference and UNIDROIT, the United States had developed a treaty practice concerning the unification of law affecting parties to private transactions and relationships. The Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea,[8] the International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea,[9] and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, with Additional Protocols (Warsaw Convention),[10] are all conventions unifying private law in the

---

[6] Secretary of State Calhoun, June 28, 1844, MS. Inst. Prussia, XIV., 75 *reprinted in* 5 J. MOORE, DIGEST OF INTERNATIONAL LAW 164 (1906).

[7] Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

[8] Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, T.S. 576, 1 Bevans 780 (entered into force Mar. 1, 1913).

[9] International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155, 2 Bevans 430 (entered into force June 2, 1931).

[10] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, 2 Bevans 983 (entered into force Feb. 13, 1933).

sense that they deal directly with the legal rights and obligations of private parties to international transactions and relationships. Only in 1963, however, did Congress take the necessary step to authorize the United States to join international organizations whose sole purpose was to unify and harmonize private law. The role of the Congress in 1963 in providing authority for the United States to join that work was as essential as the authority it granted in 1778 for the United States to become a party to and implement treaties such as those resulting from international efforts to unify private law.

Such international efforts are most often in areas of the law governed by state law in the United States, but which are controlled by national law and enacted by national legislatures in most other countries. Individual states of the Union, however, are not in a position to agree to the unification of law with other countries. In fact, not even Congress, by enacting domestic legislation, is able to unify in a fully effective manner laws with other countries. This is only possible by international cooperation in developing treaties that establish rules that nations are free to accept or reject by either becoming a party to the treaty or refusing to do so. If the United States becomes a party to a treaty, the law and rules set out in that treaty become the law that the United States is obligated to apply vis-a-vis other party States. By participating in the preparation and negotiation of such conventions, countries' representatives are acting in what they believe to be the best interests of the private sectors in their countries which are most likely to be affected. They seek to ensure, as much as any one nation's representatives can in a process involving many nations and a need to give and take, that the resulting convention will provide the greatest possible benefits to their countries' nationals, and the least possible disruption of and intrusion into their country's existing domestic law and procedures. In this process the experts representing the United States act on the basis of laws and procedures common to most of the fifty jurisdictions in this country.

II. UNITED STATES INTERESTS—THEN & NOW

The awakening of an interest in the United States in international efforts to unify private law occurred as the United States was succeeding in one of the most far-reaching law unification projects ever undertaken — the development and adoption of the Uniform Commercial Code (UCC). The amibitious nature of the project and the quality of the resulting product brought the process of law unification in the United States to the attention of European law makers. More-

over, the work on the UCC led to a new awareness in the United States of Western European efforts to unify private law which date back to the late 19th century (the Hague Conference first convened in 1893). The contacts that ensued, participation of United States lawyers as non-government observers at sessions of the Hague Conference in 1956 and 1960, and the observation of activities of the National Conference of Commissioners on Uniform State Laws by the Secretary General of UNIDROIT in 1954, led to considerable activity in the United States legal sector.

Although the adoption of the UCC was an important step in the unification of private law, other considerations also prompted Congress to authorize United States membership in the Hague Conference and UNIDROIT. First, there was an awareness of both the dramatic increase in international trade, commerce, investment and travel, and the probability that further increases were likely to occur. This awareness was expressed at the 1963 hearings on H.J. Res. 732 before the House Foreign Affairs Committee. At one point during the hearings, a representative of the private legal sector quoted a passage from the 1961 Report of the Special Committee on International Unification of Private Law of the American Bar Association, which may contain the first formal recommendation that the United States join the Hague Conference and UNIDROIT:

> We therefore have a picture of a large and increasing movement of people, goods, and money which seems destined to continue into the foreseeable future. The legal problems raised by these movements, which necessarily involve the application of differing legal rules, are extremely complex. It scarcely requires argument to prove that diversity of legal standards, uncertainty as to what law is applicable, conflicting provisions of law with regard to a functionally unified transaction — all these create risks for the trader and investor, require expenditures for legal research and opinion and, most importantly, demand a complex internal administration for every business engaged in international trade and investment. Costs of doing business mount rapidly if employees are to be instructed, and trusted, to deal with different forms and provisions for similar transactions taking place in different countries, and in many cases without adequate knowledge of either what law is to be applied or the content of the law selected for application.[11]

---

[11] Statement by Clifford J. Hynning on behalf of the American Bar Association, quoting from "Unification of International Law," Report of the American Bar Association Special Committee on International Unification of Private Law, American Bar Foundation, July, 1961. *See Hague Hearing*, *supra* note 1, at 19.

Second, the movement toward economic integration in Europe had made the harmonization of laws a priority for European nations, and there was an express need to ensure that the common law system would be adequately represented in future European unification efforts. The spokesman for the American Society of International Law, Herbert C. Merillat, pointed out that the common law system was represented in the membership of the Hague Conference and UNIDROIT only by the United Kindgom and the Irish Republic. Merillat noted that this system needed to be more fully represented because countries with legal systems based on the common law formed a large part of the world trading community.[12]

Finally, membership in the Hague Conference and UNIDROIT would allow the United States to exercise influence in the international unification of private law. In a letter to the Speaker of the House of Representatives, reproduced in the report on the hearings, Acting Secretary of State George W. Ball stated that official United States delegates to the meetings of the Hague Conference and UNIDROIT "will be able to expound the U.S. points of view on the various legal matters under discussion and participate in the formulation of the uniform rules which will govern common transactions."[13]

Thus, the considerations expressed by proponents of membership in the Hague Conference and UNIDROIT provided justification for the action taken by Congress which authorized United States membership. The considerations mentioned above also explain why it has been important for the United States to participate in the international process, and why continued United States participation remains a matter of self-interest.

As noted earlier, Congress' enactment of the joint resolution and its approval on December 30, 1963,[14] led directly to United States membership in both organizations in early 1964.[15] Upon joining, the United States sent a delegation to an international diplomatic conference at The Hague in April, 1964, which formally adopted the final text of certain conventions, based primarily on civil law concepts, relating to international sales of goods (ULIS) and the formation of contracts for such sales (ULF). UNIDROIT had earlier prepared these

---

[12] *Hague Hearing, supra* note 1, at 23.

[13] Letter from George W. Ball, Acting Secretary of State, to Speaker of the House of Representatives John W. McCormack, (Aug. 9, 1963). *See Hague Hearing, supra* note 1, at 4.

[14] *See* Membership Act, *supra* note 2.

[15] *See supra* note 2.

conventions in draft form without United States participation.[16] The United States delegation perceived certain defects in the conventions in light of United States experience with the preparation and adoption of the UCC. The delegation tried valiantly, but unsuccessfully, to address these problems. At this conference the United States discovered how important it is to be an organization member and full participant during the formative stages of a project to be able to succeed in having its views and proposals given meaningful consideration. The changes to ULIS and ULF reflected in the most recent international unification of the law of international sales, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG),[17] further establish the importance of active United States participation in the international unification of private law. These changes, many of them urged by the United States delegation, also demonstrate how effective full United States participation in the international process can be.

It should be borne in mind that the executive branch urged congressional approval of United States membership at the request of the private legal sector, and that Congress acted at the behest and on behalf of the legal profession in the United States. The executive branch, the Senate, and when required, the entire Congress, continue to act on behalf of the United States as a whole, but more particularly on behalf of the legal profession and its clients. The government, of course, does have interests of its own in the results of the private law unification process; for example, in trade expansion and exports that may result from facilitation of international trade, in streamlining the procedures used to certify documents intended for use abroad, in the effective settlement of commercial disputes by the recognition

---

[16] Convention Relating to a Uniform Law on the International Sale of Goods, Aug. 23, 1972, 834 U.N.T.S. 107; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Aug. 23, 1972, 834 U.N.T.S. 169.

[17] S. TREATY DOC. No. 98-9, 98th Cong., 1st Sess. 22-43 (1983), *reprinted in* 19 I.L.M. 668-99 (1980). S. EXEC. REP. No. 99-20, 99th Cong., 2d Sess. (1986), omits explicit mention of the reservation subject to which the Senate Foreign Relations Committee recommended that the Senate give advice and consent to ratification. For a comparison of the provisions of the United Nations Convention with the corresponding provisions of the Sales Article of the Uniform Commercial Code, see the Legal Analysis of the United Nations Convention with Appendices that accompanied the Convention from the State Department to the President and from the President to the United States Senate. S. TREATY DOC. No. 98-9, 98th Cong., 1st Sess. 1-22 (1983).

and enforcement of arbitration agreements and arbitral awards, and in more successful procedures for dealing with and deterring international parental child abductions in custody-related disputes. In all of these activities, however, which are carried out at international meetings and conferences in the name of the United States government, legal experts representing the United States are also immediately acting on behalf of the United States legal profession and its clients. It is important to note that the legal profession cannot act in these inter-governmental organizations unless it is clothed with the mantle of government representation. Many other countries are represented by non-governmental legal experts, including law professors, attorneys, and corporate counsel, rather than by government officials.

III. LEGAL PROFESSION GUIDANCE

Before discussing the further role of Congress with regard to specific projects of law unification or harmonization, it may be useful to summarize the ways in which the legal profession provides guidance to the Department of State. Without proper guidance from practitioners, law professors, bar associations, and legal societies, United States delegations to international meetings and conferences could not accurately represent the United States legal profession or effectively participate in the international unification process.

As most topics of law unification addressed by international organizations concern matters largely governed by state law, the Department of State must rely upon the legal profession to provide it with much of the needed expert advice and guidance. The input of the legal profession takes place in the Secretary of State's Advisory Committee on Private International Law. This Committee is made up of representatives of eleven national legal organizations. This umbrella group oversees the Advisory Committee's study groups which are made up of experts in specific legal areas in which work is being done at the international level. An attempt is made to ensure that each study group has a representative mix of various elements of the legal profession, including corporate counsel and representatives of business, trade or other associations where applicable.

The study groups usually meet several times during the period when work is being done on a project. The first meeting is customarily devoted to formulating United States positions which will guide representatives at the subsequent international meetings, in light of the interests and concerns of the specialized bar in the United States and its clients. The United States delegates at international meetings in-

variably are members of the relevant study group. Study group members are kept apprised of all developments. Some international meetings are preceded by a meeting of the study group at which the group reviews the current status of the convention, draft uniform law, model law, set of model rules or legal guide which is under consideration, and provides guidance with regard to future steps. Meetings of the study groups and of the Advisory Committee are announced in advance in the *Federal Register* and are open to the public.

If a draft convention is to go to a diplomatic conference for adoption of a final text, representatives will consult the study group before the conference. If the conference adopts a final text that may be acceptable to the United States, members of the study group and the organizations from which they come form a core of experts on the convention. This group provides invaluable assistance to the legal profession during the period of scrutinization of the convention. Before the State Department is in a position to have the United States sign the convention and to recommend that the President transmit it to the Senate for advice and consent to ratification, there must generally be support for United States ratification in the legal profession.[18]

IV. THE CONTINUING IMPORTANT ROLE OF CONGRESS

Since joining the Hague Conference, the United States has become a party to three Hague conventions dealing with the service of process abroad,[19] the taking of evidence abroad,[20] and the certification of documents intended for use abroad.[21] These conventions did not require implementing legislation since they were self-executing treaties. A fourth convention, the "New York" Convention on the

---

[18] For more information on the activities of the international organizations, the State Department, its Advisory Committee and that Committee's study groups, see Pfund I & II, *supra* note 3.

[19] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 162, VII MARTINDALE-HUBBELL LAW DICTIONARY (Part VII) 1-8 (1986) (entered into force for United States Feb. 10, 1969).

[20] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, VII MARTINDALE-HUBBELL LAW DICTIONARY (Part VII) 12-21 (1986).

[21] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. No. 10072, 527 U.N.T.S. 189, VII MARTINDALE-HUBBELL LAW DICTIONARY (Part VII) 21-23 (1986), *reprinted in* 20 I.L.M. 1405-19 (1981).

Recognition and Enforcement of Foreign Arbitral Awards,[22] prepared under United Nations auspices, received Senate advice and consent, and Congress subsequently amended the Federal Arbitration Act to ensure the Convention's full implementation in the United States.[23] These four conventions, which represent only a portion of the total number of conventions resulting from the law unification efforts of the Hague Conference and the United Nations, are the only ones the United States has adopted since 1964. The modest record of United States acceptance of the products of these international efforts has made other countries skeptical of the United States commitment to the international process of private law unification. This skepticism exists despite, and possibly in part because of the fact that the United States has actively participated in the preparation and negotiation of about three dozen conventions by four international organizations (the Hague Conference, UNIDROIT, UNCITRAL and the OAS) since 1964.

In discussing the role of the United States in the Hague Conference, Professor Reese, who attended all sessions of that organization since 1964 and, in a private capacity, the two sessions before the United States joined the organization, states:

> No objective person could justly accuse the United States of lacking interest in the work of the Hague Conference. The fact that this country has ratified relatively few of the Hague conventions, however, does have the unfortunate result that American delegates do not have the same influence that they otherwise would. Regarding the decision as to whether or not to adopt an American suggestion, foreign delegates today will not be influenced by fear that if they do not, the United States will not ratify the convention under consideration. United States ratification in any event is improbable.[24]

On October 9, 1986, the United States Senate gave its advice and consent to the ratification of four conventions, subject to certain reservations recommended by the Department of State.[25] Two of the

---

[22] June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, VII MARTINDALE-HUBBELL LAW DICTIONARY (Part VII) 9-12 (1986).

[23] Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (codified as amended at 9 U.S.C. §§ 201-08 (1982)).

[24] Reese, *The Hague Conference on Private International Law: Some Observations*, 19 INT'L LAW. 881, 886 (1985).

[25] *See* 132 CONG. REC. S15,767-74 (daily ed. Oct. 9, 1986).

conventions are regional adaptations of the Hague Service Convention[26] and the "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[27] developed by the OAS at its Inter-American Specialized Conferences on Private International Law. The Convention on Letters Rogatory required only Senate advice and consent preparatory to United States ratification. The Convention on International Commercial Arbitration will require enactment by Congress of federal legislation adding a chapter to the Federal Arbitration Act.[28]

The Senate Committee on Foreign Relations held hearings in April 1984,[29] on the third convention, the 1980 United Nations Convention on Contracts for the International Sale of Goods.[30] This Convention is the culmination of over fifty years of international effort to develop uniform substantive law on the formation of international sales contracts and the rights and obligations of the buyer and seller. This Convention could become the cornerstone of treaties unifying private law for the purpose of facilitating international trade. UNCITRAL prepared the conference draft of the 1980 Convention between 1968 and 1978 after it became clear that, because of the orientation of earlier sales

---

[26] 1975 Inter-American Convention on Letters Rogatory and the 1979 Additional Protocol Thereto, S. TREATY DOC. No. 98-27, 98th Cong., 2d Sess. (1984), *reprinted in* 14 I.L.M. 339-43 (1975 Convention) and 18 I.L.M. 1238-47 (1979 Additional Protocol). S. EXEC. REP. No. 99-21, 99th Cong., 2d Sess. (1986), omits mention of the two reservations subject to which the Senate Committee on Foreign Relations recommended that the Senate give advice and consent to ratification.

[27] 1975 Inter-American Convention on International Commercial Arbitration, S. TREATY DOC. No. 97-12, 97th Cong., 1st Sess. (1981) (and errata sheet correcting the chart of signatory countries), *reprinted in* 14 I.L.M. 336-39 (1975); S. EXEC. REP. No. 99-24, 99th Cong., 2d Sess. (1986).

[28] *See* S. 1828, 99th Cong., 1st Sess. (1985).

[29] *International Sale of Goods: Hearing on S. Treaty Doc. No. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. (1984) (S. Hearing 98-837, Apr. 4, 1984) contains the transcript of testimony, reproduces the written submissions to the Committee, and includes written supplementary questions submitted to the Department of State and to persons from the private legal sector who testified at the hearing, as well as the written answers to those questions. The written answers include the response by the Department of State, with specific language for possible use in international sales contracts, to the question: "The Convention provides that if both parties agree, they can 'opt out' of the Convention's application. How would this be accomplished? Does 'opting out' raise any special problems?" *Id.* at 58-59.

[30] *See supra* note 16. The most complete and authoritative book on the Convention is J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982), which reproduces the full text of the Convention.

conventions (ULIS and ULF) toward the civil law, these conventions would not attract more adherents, and thus could not be successful in effecting a broadly accepted unification of international sales law. Ratification of the 1980 Convention in December 1986, by the United States, China, and Italy, will bring the Convention into force on January 1, 1988, and is likely to stimulate many other countries to become parties. The Convention is self-executing and will require no federal legislation for its implementation in the United States.

The fourth convention approved by the Senate for United States ratification is the 1980 Hague Convention on the Civil Aspects of International Child Abduction,[31] designed to deal with the burgeoning problem of international parental abduction of children in custody-related disputes. This Convention provides for the prompt return of a wrongfully abducted or retained child and the restoration of that child's situation before the abduction or retention took place. The Convention is intended not only to negate the harmful effects of such wrongful activity, but also to deter such activity in the future. Although the Convention is self-executing in form, the Administration will seek enactment of federal legislation by the 100th Congress to facilitate the full and uniform implementation of the Convention into the United States. Such legislation should be introduced in Congress in early 1987.

It seems that the United States will become a party to at least two other conventions fairly soon. The UNIDROIT prepared drafts of the Convention Providing a Uniform Law on the Form of an International Will was the subject of a 1973 international conference in Washington hosted by the United States Government. The President transmitted this Convention as adopted by the conference to the United States Senate for advice and consent on July 2, 1986.[32] The Convention provides that a will which meets certain generally accepted procedural requirements, and which is covered by a certificate indicating that the testator chooses to make an "international will," is to be recognized as to its form in all countries party to the Convention.

---

[31] S. TREATY DOC. No. 99-11, 99th Cong., 2d Sess. (1986), *reprinted in* 19 I.L.M. 1501-05 (1980); 51 Fed. Reg. 10,494-516 (1986) (containing a 16-page legal analysis of the Convention); S. EXEC. REP. No. 99-25, 99th Cong., 2d Sess. (1986).

[32] S. TREATY DOC. No. 99-29, 99th Cong., 2d Sess. (1986), *reprinted in* 12 I.L.M. 1298-1311 (1973). For a discussion of this Convention and its implementation in the United States, see Kearney, *The International Wills Convention*, 18 INT'L LAW. 613-32 (1984).

Federal legislation is required, however, to ensure that international wills made both within the United States and beyond our borders are accorded equal treatment, and to empower United States consular and diplomatic officers to complete and attach such certificates. Moreover, each state must enact the Uniform International Wills Act[33] If that state wishes to empower attorneys in the state: (1) to supervise the execution of international wills within its jurisdiction, and (2) to issue the certification provided for by the Convention.

A second convention likely to be transmitted to the Senate for advice and consent in the near future is the 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition.[34] This Convention would ensure that the trust property, the trustees, and the beneficiaries of a trust located in a non-trust jurisdiction will be treated in a manner consistent with the wishes of the settlor, if the settlor established the trust pursuant to the laws of a country which makes provisions for trusts. The American Bankers Association, the American Bar Association, and the American College of Probate Counsel have endorsed the Convention for United States signature and ratification. The Convention will require only Senate advice and consent to United States ratification since no implementing legislation is necessary.

The Senate's role in the treaty process and Congress' role with regard to related legislation are the most obvious manifestations of Congress' continuing responsibilities with regard to international unification of private law. International organizations are, however, increasingly turning their attention to law harmonization by other means. Recently, these organizations have developed model rules, model laws, and legal guides by which they suggest to governments, legislators, and private parties, certain common international standards for consideration, and hope thereby to facilitate international legal transactions and relations. Perhaps the most successful example of such a work product is the UNCITRAL Arbitration Rules,[35] which

---

[33] HANDBOOK OF THE N.C.C.U.S.L., Uniform International Wills Act (1977); VII MARTINDALE-HUBBEL LAW DICTIONARY (Part VI) 206 (1986).

[34] *See* 23 I.L.M. 1889 (1984); Trautman & Gaillard, *The Hague Conference Adopts a Convention for Trusts*, 124 TR. & EST. 23-28 (1985). *See also* Trautman & Gaillard, *La Convention de La Haye du ler juillet 1985 relative a la loi applicable au trust et sa reconnaissance* [1986] REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 1 (The English version of this Article will appear in the May 1987 issue of American Journal of Comparative Law).

[35] *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, 31 U.N. GAOR Supp. (No. 17) at 35, U.N. Doc. A/31/17 (1976), U.N. Sales No. E.77.V.6 (1977).

have received broad attention and acceptance in arbitral proceedings. The Rules have been accepted by reference in arbitration agreements between parties to private legal transactions, and have influenced the rules of procedure of international arbitration centers and national practice. A number of national governments are studying the UNCITRAL model law on international commercial arbitration.[36] The legislatures of political subdivisions in some countries already have enacted the model law. Moreover, it seems certain that national legislatures considering arbitration legislation will actively examine the provisions and harmonizing influence of this model law.

Some forms of private law harmonization, such as the UNCITRAL legal guides on the drawing up of international contracts for the construction of industrial works[37] and on electronic funds transfers (EFTs),[38] probably will not require follow-up action by Congress. It seems possible, however, that the legal guide on EFTs could result in UNCITRAL development of a set of rules that Congress may take under advisement at such time when it may be ready to consider enacting federal legislation to deal with this means of international payment. Any UNCITRAL-developed model rules in this area will deserve attention by national legislatures since many other countries may eventually base their domestic EFT laws on the UNCITRAL rules. Moreover, it may prove desirable that the domestic EFT laws of countries not diverge unnecessarily from one another on such matters as scope and applicability, interactions with laws governing bank secrecy, the legal value of applicable computer records, the burden of proof of various institutions involved in such transfers, and responsibility of public and private communications services for errors and fraud. This is an area where achieving international agreement on possible rules before they are embodied in national legislation may help to avoid troublesome differences among national laws. Such

---

[36] *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/40/17 (1985). *See* Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L LAW. 327 (1986).

[37] The initial drafts of the individual chapters of the legal guide, all of which have been reviewed and discussed in a working group of UNCITRAL, are contained in several dozen UNCITRAL working documents. A revised and consolidated draft of the entire legal guide became available for review by governments in early 1987, UNCITRAL Working Doc. A/CN 9/W.G.V/WP. 20 and Adds. 1-29.

[38] UNCITRAL recently has placed the topic of EFTs on its work program. The legal guide dealing with EFTs, which will reflect changes proposed by some governments, should become available in 1987.

differences in more traditional areas of the law have necessitated difficult reconciliation efforts to achieve the maximum unification and harmonization possible. With regard to EFTs, unnecessary differences in national laws could, perhaps, be avoided from the start.

V. CONCLUSION

In 1963, Congress responded to the wishes of the legal profession that the United States become a full participant in the private law unification efforts of the Hague Conference and UNIDROIT. Congressional authorization of United States membership, and subsequent United States membership in UNCITRAL and participation in the private law unification work of the Organization of American States, has involved the United States fully in these international efforts. The legal profession has provided invaluable guidance to the Department of State, as well as highly qualified experts from the private legal sector to represent the United States in the work of the international organizations. This commitment has made the United States one of the most important participants in these international unification efforts. Although the legal profession plays an important role in the law unification process, Congress has the final word on whether or not the United States becomes a party to a convention unifying private law. The United States can benefit fully from the efforts of the legal profession with regard to the work of these international organizations, and from the resulting conventions, only if the Senate authorizes United States ratification of the conventions and if the entire Congress enacts federal legislation that may be legally required or desirable.

The recent favorable action by the United States Senate on the four conventions discussed in this Article, and the enactment of related federal legislation by Congress for two of them, will double the number of conventions unifying private law to which the United States is a party. Because of the nature of these conventions and the importance of their goals, United States adherence may help to overcome the last remnants of United States reluctance to full participation in the international process. Adoption of the conventions may mean that the United States can extend its current leadership, until now largely limited to the preparatory work of these international organizations, to the acceptance of more such conventions that foster United States interests.

The authors hope that the foregoing review of the roles of Congress, the legal profession, and the Executive Branch in the international

unification/harmonization of private law process demonstrates the essential role of each in the promotion of United States interests. Cooperation and consultations among the concerned elements of the private sector within the United States, the Executive Branch, and Congress are essential to advance our national interests. The role of Congress, however, is particularly important if the United States is to participate effectively in law unification in areas that are primarily the subject of state law, but that have an international element making international cooperation necessary or desirable and in the national interest. Fortunately, as Congress enters its third century, it has shown an appreciation of the breadth of its role, which already had been perceived at a very early time.