Secretary of State's
Advisory Committee on Private International Law
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Review of Developments from December 1992 to May 1994

Prepared by
Harold S. Burman
Peter H. Pfund

The pace of activities in private law unification/ harmonization at the international level continues to quicken. This review will briefly summarize the major developments related to the work of our office (L/PIL). More detailed information on the various topics is set out in the reports and documents referred to below or in the List of Documents prepared for this annual meeting (L/PIL Doc. AC 46/3). Participants are encouraged to obtain these documents at the Advisory Committee meeting or to request them in writing or by fax from our Office. Certain documents required for the meeting are being sent in advance to those who have indicated by May 6 that they plan to attend the May 13 meeting.

At the end of this review there appears a note in memorium for Donald T. Trautman and Willem Vis.

Completion of work on International Legal Texts

Since December 1992, work was completed on the following texts:

1992 UNCITRAL Model Law on International Credit Transfers (electronic funds transfers)(ACPIL Doc. 45/UNC-1)
1992 UNCITRAL Legal Guide on International Countertrade Transactions (ACPIL Doc. AC 46/UNC-4) (Table of Contents only)
1993 Hague Convention on Intercountry Adoption of Children (ACPIL Doc. AC 46/HC-1)
1993 UNCITRAL Model Law on Procurement of Goods and Construction (ACPIL Doc. AC 46/UNC-9)
1994 Inter-American Convention on the Law Applicable to International Contracts (ACPIL Doc. AC 46/OAS-1)
1994 Inter-American Convention on the International Traffic in Minors (ACPIL Doc. AC 46/OAS-2)

Computer Bulletin Board for PIL

L/PIL hopes to have operational by end of 1994 a PIL bulletin board or database that would offer convention texts and documents on which work is ongoing in the various international

legal organizations (ACPIL Doc. AC 46/4). The bulletin board would also have notices about upcoming meetings and the status of various projects.

Users would be able to download convention texts and texts of working documents. This means that, provided UNCITRAL, UNIDROIT, the Hague Conference and the OAS provide L/PIL documents via diskette or computer-to-computer, the documents will become almost immediately available on the system and for print-out by bulletin board users. As the system will be accessible via INTERNET and FEDWORLD, access to it should be possible for most law firms, law school libraries, national legal associations and interest groups and associations, wherever located, by a local call to the nearest INTERNET access point.

Once the system is about to go on line, L/PIL will send notices with instructions for accessing the system to all our stalwarts, and will probably also publish a notice in the Federal Register.

Organization of American States -- Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V), Mexico City, March 14-18, 1994

Nineteen OAS Member States -- more than at any other previous CIDIP -- participated at CIDIP-V. Two conventions were adopted, which are discussed below. A resolution adopted by the conference, co-sponsored by six States on the basis of a U.S. draft, calls for an examination of resources made available for Secretariat legal services in support of the CIDIP process. The study could include recommendations for funding and other support for preparatory meetings as well. The purpose of the resolution is to encourage a reexamination of the OAS process by the new Secretary General and the new head of the Legal Secretariat, who will take office in mid-1994. This could include an increase in PIL support functions between the CIDIP conferences, along the lines of work now done by the secretariats of the other international organizations specialized in this field.

Inter-American Convention on the Law Applicable to International Contracts

Although that preparatory work was limited to one meeting prior to CIDIP-V, a potentially effective final convention on applicable law embodying several modern commercial and conflicts of laws concepts was completed at CIDIP-V (ACPIL Doc. AC 46/OAS-1). The earlier draft convention text (distributed at the last ACPIL meeting), prepared by Mexico and approved by the Inter-American Juridical Committee, introduced a significant change by combining elements of Latin legal traditions with recent conventions completed by the Hague Conference and the European Community, as well as conflicts of law case developments in the

U.S. Delegates at the preparatory meeting in Tucson, Arizona, co-hosted by the OAS and the National Law Center for Inter-American Free Trade (CIFT), introduced provisions significantly raising the role of business practice and custom, together with those which would enhance validity and enforceability of commercial agreements.

The Convention text favors validation of agreements and commercial transactions, rather than applying conflicts rules in a neutral fashion without regard to their potential impact. States parties are assured the right to exclude categories of contracts from the Convention's coverage, which the U.S. will need to invoke. Its innovations in an Inter-American context include coverage of governmental contracts, unless excluded; reference to extension of the Convention to new methods of contracting (primarily meant to encompass contracts utilizing electronic data interchange); recognition and enforcement of party choice of law; inclusion as a source of applicable law of general principles of international commercial law formulated by international organizations (primary examples discussed were the UNIDROIT General Principles and the ICC's rules on letters of credit); inclusion of commercial usages as a source of law; a rule linking commercial practices to determinations as to whether a principal is bound by acts of an agent; and rules favoring existence and validity of contracts.

The drafting of the Convention leaves something to be desired, in large part due to time limitations at the diplomatic conference and the absence of additional preparatory meetings; clarifications can be made by the U.S. in the form of reservations and understandings that would accompany the U.S. instrument of ratification.

The Convention reflects an apparent change in approach by a number of countries in the Americas, who are now seeking to enhance economic integration by unifying transborder law. It offers us an opportunity to facilitate trade and support the process of Inter-American law modernization. The Convention will be distributed for comment with a view to possible action for its ratification by the U.S. in 1995, if sufficient support exists among potentially affected interest groups in this country. A number of commentators have stated that the appropriate litmus test should not be whether the Convention deals perfectly with a multitude of conflicts issues, but whether it can facilitate trade by improving commercial predictability, as compared to the greater uncertainty that exists in the Americas in the absence of such a convention.

Inter-American Convention on International Traffic in Minors

Despite U.S. efforts since 1992 to have the criminal aspects of trafficking in minors removed from this agenda item for a conference on private international law, the topic was to deal with both the civil and criminal aspects of child trafficking. A four-day meeting of experts in October 1993 in Oaxtepec, Mexico under the auspices of the Inter-American Children's Institute, produced a draft convention that was the point of departure for work on this topic at CIDIP-V (ACPIL Doc. AC 46/OAS-2). The Convention adopted at the conclusion of CIDIP-V requires States to criminalize child trafficking as described in the Convention, requires extradition or prosecution of perpetrators. It also requires the return of victim children, annulments of adoptions if they had their origin or purpose in international traffic in minors, and requires the indemnification of victims of trafficking. Both the civil and criminal provisions of the Convention are problematical, but if many Hemisphere countries should become parties to it, the Convention deserves close scrutiny by the United States for possible signature and ratification.

OAS future work program and CIDIP-VI

The diplomatic conference proposed that the OAS approve the convening of a sixth CIDIP, as well as a preliminary list of topics for possible consideration (ACPIL Doc. AC 46/OAS-4). These topics will require further study, and will then be considered by the Inter-American Juridical Committee and the OAS Permanent Council. They include power of attorney and commercial representation; secured interests in movable property; conflicts of laws on extra-contractual liability (such as torts); standardized commercial documentation for free trade; international bankruptcy; private international loan contracts; international protection of minors (custody, guardianship, etc.); and private law aspects of civil liability for transborder contamination damages. An additional topic, transfer of technology contracts, was discussed but deferred. We expect to solicit views on the feasibility of these various topics and would anticipate preliminary discussions within the OAS by mid-1995.

With regard to one proposed topic, civil liability for transborder contamination, the U.S. noted that while it did not oppose the subject generally, international efforts were now focussed on implementation of the Basel Convention on transboundary movements and disposal of hazardous wastes, and recent trends were toward establishment of special claims funds for settlement of transboundary pollution occurrences rather than resolution by individual private law actions. These factors

would argue for deferring the attempt to focus on the PIL aspects at this time. The U.S. also noted a concern about the ability of the CIDIP process to focus on private law issues and their harmonization, if this were attempted in the context of subjects with a high social and economic policy content.

Hague Conference on Private International Law

Intercountry Adoption

After a third two-week special commission session in January 1993, the final text of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption was approved on May 29, 1993 at the conclusion of the Hague Conference's three-week 17th session (ACPIL Doc. AC 46/HC-1). That session also celebrated the **100th anniversary of the Hague Conference**'s first session in 1893. Sixty-six countries, 30 of them non-member States that are major countries of origin of children made available for intercountry adoption, unanimously adopted the Convention's final text. The U.S. delegation consisted of 12 members focused on this project, two of them the adoptive parents of children from Southeast Asia placed on the delegation by the White House. The United States, after ABA endorsement of the Convention, signed the Convention on March 31 as the 10th country to sign. Since that date three additional countries have signed the Convention.

In its preamble the Convention recognizes the importance of a family environment for the full and harmonious development of the child's personality and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in its State of origin. The Convention's norms and procedures are to govern all adoptions of children habitually resident in one contracting State by spouses or a person habitually residence in another such State. It sets out certain determinations to be made by the State of origin and the receiving State of the child before an adoption may take place, requires the establishment of a Central Authority by every party State with non-delegable general functions, and functions with regard to individual adoptions that are delegable to accredited agencies. The Convention permits and regulates private/independent adoptions and the activities of prospective adoptive parents to act directly on their own behalf. It requires the recognition of adoptions certified as made in accordance with the Convention, subject to a narrow public policy exception, sets out the effects of a Convention adoption, and the requirements for conversion of a simple adoption to a full adoption.

The fourth meeting of the Study Group on Intercountry Adoption on October 4, 1993 to commence government-private sector consultations on U.S. implementation of the Convention was attended by 140 persons. Various issues likely to be addressed in federal implementing legislation for the Convention to ensure its full and uniform implementation throughout the United States were discussed. The Convention gives party States considerable flexibility as to how to implement the Convention in detail. Thus, federal legislation must bring together elements of the U.S. adoption community with very different views on how we should implement the Convention if it is to receive the necessary political support for Senate advice and consent to U.S. ratification and enactment of federal legislation. Peter Pfund and other U.S. delegation members have given countless briefings to various adoption organizations and groups as well as to Congressional staff concerning the Convention and issues involved in its implementation.

We hope, with the help of the U.S. adoption community, to have federal implementing legislation ready for Administration clearance by the end of 1994 so that it may be introduced early during the term of the 104th Congress. We also hope to have prepared the article-by-article legal analysis of the Convention by Fall so that by late 1994 the Convention may be submitted to the President for transmission to the Senate. Senate consent and Congressional enactment do not seem likely before late 1995 at the earliest.

The United States participated in a meeting of experts (including UNHCR) at The Hague in April 1994 discussing the availability of the Convention to safeguard refugee children to be adopted abroad from their country of asylum. The recommendations of that group, and recommended forms for Convention adoptions and for the requisite written consent of the birth parents or institutions to the intercountry adoption of children covered by the Convention, and other implementation issues will be discussed at a first Hague Conference special commission session in October 1994 that will be important to assist States seeking to become parties to the Convention to arrange to implement it as fully and uniformly as possible.

Hague Conference Future Work Program

At its 17th session the Hague Conference placed on its agenda for completion by the 18th session in October 1996, revision of the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the **protection of minors.** It decided to include on the agenda work on the question of **recognition and enforcement of foreign judgments,** requesting the convening of a special commission to study problems involved in drafting a new convention and make proposals with regard to further work and its timing, with a final decision

on continued work to be taken at the 18th session in 1996. The first of possibly two special commission sessions is scheduled for June 20-24, 1994. (See ACPIL Doc. AC 46/HC-1).

Meeting of Special Commission on Implementation of the 1980 Hague Convention on International Child Abduction

The second meeting of the Hague Conference's special commission on implementation of the Child Abduction Convention took place in January 1993 (chaired by Peter H. Pfund) (ACPIL Doc. 46/HC-2). Participants generally agreed that the Convention was working very well, and that the return of many wrongfully removed or retained children had been effected that would not have taken place if the Convention had not been available. Also numerous visitations had been facilitated by operation of the Convention.

The U.S. Central Authority within the Consular Affairs Bureau of the State Department was recognized for its valiant efforts and successes in finding pro bono counsel for persons abroad seeking return of children from the United States pursuant to the Convention. However, the United States was asked to redouble its efforts in this regard in order to ensure that all left-behind parents abroad are able to invoke the return obligations provided by the Convention to seek to effect the return of children from the United States.

United Nations Commission on International Trade Law (UNCITRAL)

U.S. accession to the UN Limitations Convention and Protocol

We are pleased that authorization has been sent by the Department to the US Mission to the UN to deposit the US instrument of accession to the 1974 UN Convention on the Limitation Period in the International Sales of Goods, and its 1980 Additional Protocol. The actual deposit is likely to occur by the time of the ACPIL meeting, and the Convention, as amended by the Protocol, will enter into force for the U.S. approximately six months thereafter.

The Convention and Protocol (see ACPIL Doc. AC 46/UNC-10 for consolidated text) establishes statute of limitation rules for a number of commercial sales cases, and its uniformity as between contracting states will replace the present array of applicable laws, concepts and time periods, which differ widely. Adoption of the Convention will contribute to commercial predictability. Many of its provisions are consistent with or will reach generally similar results as would cases under the Uniform Commercial Code, including Article 2-275. One difference is that while the Convention adopted the UCC's 4-year standard, it does not permit negotiation of a lesser period, down to one year, as does the UCC. On the other hand, the Convention caps the total

period for claims, including extensions, at 10 years. These are compromise solutions brought about by negotiating countries whose national laws ranged from
6-month standards to 30 years. The Convention fully protects the right of parties to opt out of its coverage.

U.S. accession will be accompanied by a reservation permitted by the 1980 Protocol, under which the U.S. will apply the original Article 3, rather than the Article as amended by the Protocol. The original Article provides a more narrow scope of application, but at the same time creates more commercial predictability, by requiring that for the Convention to apply to a particular transaction, the parties must have their places of business in different contracting states. The 1980 Protocol would have expanded the scope by providing that the Convention would also apply when applicable conflicts rules also pointed to the laws of a contracting state. This was objected to as diluting commercial predictability, since an examination of various possibly applicable conflicts laws would then need to be undertaken to determine if the Convention might apply. The U.S. took a similar reservation for similar reasons when it ratified the 1980 UN Convention on Contracts for the International Sale of Goods ("CISG").

UNCITRAL Model Law on Procurement of Goods and Construction

The Commission completed at its 26th plenary session in July 1993, after more than four years of work, a model national law on procurement (ACPIL Doc AC 46/UNC-1). The General Assembly by resolution 48-33, on December 9, 1993, endorsed the Model Law for use by member States. This effort, which drew on generally established principles in the OECD States, was supported by international lending agencies ("ILAs"), as well as a number of developing countries. It is expected that a number of recipient countries of World Bank and other ILA loans may utilize a modern procurement code system with a United Nations imprimatur, in preference to otherwise required procurement guidelines necessary in international lending transactions. The provisions of the Model Law have been drafted consistent with the GATT agreement on procurement.

The next step, which may be completed at the upcoming UNCITRAL plenary session in New York this June, is the proposed addition of provisions covering international procurement of services. The recently completed Uruguay round of GATT negotiations included services, making the UNCITRAL effort very timely.

Development of modern procurement laws and regulations has become increasingly important because public agency acquisitions or funding represent a substantial portion of international trade activity for many States. This project may lead to generally

recognized international commercial law norms as well. The U.S. delegation, which has been very active in this process, has premised its positions on international transactional needs rather than the domestic federal procurement system, which would have been far too complex to have been acceptable as the basis for a multilateral treaty, although the fundamentals remain the same.

The Model Law achieves several important objectives, including rules based on a structured and accountable system for expenditure of public funds, transparency of all processes and regulations, nondiscrimination and openness to foreign bidding, and a method of dispute resolution. The basic scope, "goods", is defined as including raw materials, products, equipment and other physical objects, whether in solid, liquid or gaseous form, and electricity; States are permitted to add additional categories. The Model Law excludes procurement involving national defense or national security, although the U.S. had sought a more limited exclusion. The proposed provisions on services are set forth in ACPIL Doc. AC 46/UNC-2, and are discussed in the delegation report in the same ACPIL document. An Advisory Committee Study Group meeting will take place on Wednesday, May 18 at the International Law Institute in Washington to review U.S. concerns and proposals about the services provisions.

Draft UN Convention on Independent Guarantees

The completion of a draft convention covering European-law-based bank guarantees, American-law-based standby letters of credit, and possibly commercial letters of credit, now appears likely by UNCITRAL's Working Group on International Contract Practices in its meetings in September 1994 and early 1995. The draft convention should be ready for final Commission consideration at its 1995 plenary session.

It is now likely that the convention will contain a single set of rules covering both types of instruments. This has become possible by limiting the scope to those financial undertakings which are documentary in nature and which limit discretion for non-payment. Less than one year ago, concluding that such an effort was unlikely to be successful, the U.S. had proposed a "two-track" convention, which would have provided for mutual recognition and enforcement of both types of instrument in accordance with rules designed for each. This process has come a long way from its beginning, in which a group of EC States sought a single set of rules based on guarantee practice, which could not have accommodated American-style letters of credit or UCC Article 5 instruments.

The draft convention (ACPIL Doc. AC 46/UNC-5) addresses many of the common legal issues that arise in such financial

undertakings, which are used in the great majority of international trade and financial transactions, including independence of the undertaking, establishment and amendment, transfer and assignment, cessation and expiry, demand, liability of issuers, standards for examination and dishonor, and certain rights of recourse. Provisions on determining "internationality", or otherwise identifying those instruments subject to the convention, remain to be worked out in final form.

U.S. positions have been formulated so as to support rules designed to facilitate the 90% or so of transactions which work, rather than the limited number which become involved in litigation or arbitration. U.S. positions have also been drawn carefully with an eye to two concurrent law harmonization efforts in the letter of credit field, the recently completed ICC revision of the Uniform Customs and Practice for Documentary Credits (UCP 500), and the soon-to-be completed revision of Uniform Commercial Code Article 5. The revisions to Article 5, which are expected to be considered for final adoption at the Uniform Law Commissioners annual meeting this August, are now in large measure compatible with UCP 500. It is hoped that the final UNCITRAL convention text will be compatible with both Article 5 and the UCP. The concurrence of these law revision efforts has afforded an unusual opportunity to achieve harmonization. A statement of proposed final US positions is expected to be prepared and circulated for comment before the September UNCITRAL Working Group meeting.

Proposed rules for international commercial transactions utilizing electronic data interchange (EDI)

Following UNCITRAL Working Group meetings in September 1993 and March 1994, draft rules have been prepared for possible final Working Group consideration this Fall. This effort has been undertaken in view of the commonly shared concern that rapidly expanding EDI uses in commercial transactions are not supported by appropriate national legal rules. However, the formulation of rules in advance of the usual slow development of national laws and proliferation of conflicting legal traditions, is difficult in itself, and made more complicated by changing technologies. The U.S. view that this effort may significantly facilitate trade is shared by a number of WEO States (a UN term connoting West European and North American States and Australia), and others active in support of national EDI services, such as Singapore, as well as a number of developing countries who recognize the trade advantages for them of such rules. Nevertheless, the success of this effort remains uncertain.

The draft rules (ACPIL Doc. AC 46/UNC-7) will include definitions of data records and electronic data interchange, and may include intermediaries such as third party service providers ("TPSPs"). It has generally been agreed that a party autonomy rule will prevail, although possibly with exceptions. Extended

discussion has taken place on the concepts of "functional equivalency" of signature, writing, and originals, in order to ensure legal validity of EDI contractual undertakings. Other provisions cover admissibility and evidential value of EDI records, and legal effectiveness of EDI communications. It has not yet been resolved whether such rules should focus only on international transactions, in part because traditional concepts of internationality may not meaningfully apply to EDI.

This effort has been built on the recent successful conclusion by UNCITRAL of its Model Law on international credit transfers, which from the U.S. point of view was primarily aimed at support for transborder electronic funds transfers. Other international legal developments concerning EDI are an integral part of this process as well, including the development of UNEDIFACT computer message standards and a draft trading partner agreement by the UN Economic Commission for Europe (the U.S. participates actively in this UNECE work through the Department of Transportation), proposed standards under development by the American National Standards Institute, and the new trade facilitation projects based on EDI underway through UNCTAD (United Nations Conference on Trade and Development). The U.S. will host an UNCTAD conference in September in Columbus, Ohio to explore potential trade development through EDI, including the pilot "Trade Point Centers" which electronically link various trade facilities such as freight forwarders, insurers, shippers, banks and other financial facilities, customs, and other trade facilitator.

Assuming completion of the general EDI commercial rules, the U.S. has proposed that UNCITRAL undertake a follow-on EDI topic, the formulation of rules for negotiability of rights in goods through computer messages. Developing acceptable rules which could lead to such negotiability could be a significant factor in trade facilitation. At the same time, assuring transferable and negotiable rights based on rapidly moving computer messaging presents difficult issues which have not been successfully overcome before. To some extent, it may be possible to build on experience of securities and commodities markets, as well as UCC Article 8.

UNCITRAL's future work program

The Commission at its annual plenary session in June will have before it the first draft of proposed guidelines for arbitral pre-hearing conferences (ACPIL Docs. AC 46/UNC-6). The rules provide a check-list of issues that should be considered in order to facilitate arbitration, as well as commentary. Brief coverage of multi-party arbitration is included, although this subject may itself form a separate topic for future consideration. Pre-award judicial assistance is not included at this stage.

The Commission will examine at the upcoming plenary session several possible topics for law harmonization, including international insolvency and assignment of claims (ACPIL Doc. AC 46/UNC-8); and "build, operate and transfer" (BOT) contracts. These topics were reviewed briefly at the Commission's previous plenary session, along with the topic of legal issues in privatization, on which a decision was deferred.

A recent seminar co-hosted by UNCITRAL and INSOL (Association of International Insolvency Lawyers) met in Vienna to discuss the feasibility of work on international bankruptcy. Support appeared more likely for an effort to harmonize procedural and judicial access issues, permitting coordinated resolution of creditors rights in different countries on particular cases, rather than for any effort to harmonize substantive law, including priorities, at this stage.

UNCITRAL legal guide on international countertrade transactions

The countertrade legal guideline was recently issued in final form and is now available from the UN or from any UN document depositary, by reference to "UN Sales No. E.93.V.7", or UN Doc. A/CN.9/SER.B/3. While the U.S. participated in preparation of the guide, we did not take a position on the appropriateness of such contractual arrangements, in view of the concerns that have been expressed about possible distortion in international trade patterns from such practices. At the same time, it was recognized that many American import-export firms need to consider countertrade transactions if they wish to enter markets where access to foreign currency or credit facilities is very limited.

The Legal Guide is one of the few resources available in this field and likely to be acceptable to parties in different countries and representing different legal systems. The seven-page table of contents, and introductory material is reproduced in ACPIL Doc. AC 46/UNC-9, and is itself a useful check list of the many legal issues that need to be considered in the context of multi-party and multi-country "tied" commercial contracts.

International Institute for the Unification of Private Law (UNIDROIT)

Principles for international commercial contracts

After more than a decade of work, the UNIDROIT Governing Council is expected to have given final approval to the text of the Principles and the accompanying commentary by the time of the ACPIL meeting. The final draft text and commentary covers slightly more than 200 pages (UNIDROIT Doc. 1993, study L-Doc.54 Prov.). The final draft text contains approximately 120 articles divided into 7 chapters, including: general provisions (covering

freedom of contract, form, mandatory rules, usages and practices, etc.); formation; validity; interpretation; content (covering expressed and implied obligations, determinations of quality, price, etc.); performance and non-performance.

The Principles may play a significant role as an acceptable source of intentional commercial rules for arbitrators, and in some cases for courts, where drawing on these rules may avoid the need to choose applicable national rules in cases involving a diversity of parties or jurisdictions. The rules appear to draw a reasonable balance between common law and civil law concepts, as well as practices in various countries.

Draft convention on the international return of stolen or illegally exported cultural objects

UNIDROIT, at its fourth intergovernmental meeting in October, 1993 attended by more than 50 States as well as a number of international organizations, completed a draft convention on the return of illegally removed cultural property. A host country is expected to be selected in the near future, and a diplomatic conference may be convened in mid-1995 to finalize the convention. The U.S., in view of its status as a party State of the 1970 UNESCO convention on protection of cultural property, has participated actively in the preparation of this draft. A decision whether to support such a treaty is only possible once its final provisions have been negotiated.

The 1970 UNESCO convention, which the U.S. implemented through federal legislation in 1983, has drawn over 70 States parties but has largely failed to achieve its objective, since most of the "art market" countries have remained outside its regime. The only so-called market countries to have joined have been the United States, Canada and Australia. UNESCO has turned to UNIDROIT to draft a second convention focusing on the private law aspects of recovery in an effort to achieve a treaty regime which could attract more market States. The core provisions of the convention include a right of return, subject to compensation for bona fide possessors, and repose (both conditions have been rejected in U.S. domestic law). Most West European art market States and the key art source countries appear to be willing to agree on those core provisions.

In other respects, the draft treaty has been improved but many key provisions need further clarification. Certain provisions raise issues peculiar to the U.S. These include U.S. proposals for special provisions for recovery of illegally excavated objects, since the convention's provisions may not be effective in cases originating in the U.S. in view of the absence of U.S. export controls over cultural property, and the fact that recovery may be sought by agencies such as the Interior Department that might not have been the owner or regulator of the property in question. In addition, the U.S. has sought to include non-profit institutions in any provision granting special protective rights to "public" collections; the U.S. is one of the

few countries whose principal collections are not State-owned. Finally, the U.S. has sought provisions to take into account special needs of tribal and native communities. On an overall basis, it is hoped that the treaty would achieve a reasonable balance between the interests of rights of recovery and the legitimate art trade. This requires a careful assessment of the legal concerns of the U.S. museum and research institution community, the Department of the Interior (which has regulatory responsibility for a significant portion of American archaeological and native artifacts), and others.

Among the unresolved issues is the level of compensation required by the treaty, whether special rules would obtain for objects removed by military or occupying forces, whether consideration should be given to proposals for an internationally approved certificated export system, and whether a treaty standard should be established for the concept of "stolen".

It is anticipated that an Advisory Committee Study Group meeting to provide guidance for U.S. positions will be scheduled once the diplomatic conference has been scheduled. U.S. positions would take into account the likely need for enactment of federal implementing legislation. As was the case previously under legislation implementing the 1970 UNESCO convention, provisions of the convention could be further defined and their application clarified in such legislation.

Draft convention on secured interests in mobile equipment

An UNIDROIT working group has met twice and expects to meet twice more to prepare a preliminary draft convention. After review, and if the Governing Council so authorizes, the preliminary draft could then be circulated for comment by member States. If there is sufficient support among member States for the work to proceed, meetings of governmental experts on the draft convention would then be authorized by the Council and convened. We have supported this effort in view of the potentially significant impact on trade in high-end equipment (the convention could cover, for example, aircraft, rail equipment, trucks, oil rigs, agricultural equipment, freight containers, etc.), and the negative effect on trade that now exists because of the uncertainties of security in equipment once it crosses borders. Existing international uncertainties are not unlike, but more pronounced than, those that existed among the American States before widespread adoption of Uniform Commercial Code Article 9.

U.C.C. Article 9 is generally recognized as an important influence in this process, although it supports commercial transactions to a greater extent and reduces competing priorities more than most national laws. It is not certain how many countries are prepared to go that far at this stage. The fact

that Article 9 itself is concurrently under revision also makes the American "model" a moving target (in order to enhance coordination domestically, one of the Uniform Law Commissioners' Art. 9 rapporteurs was included among the participating U.S. experts).

A number of issues confront this effort (see ACPIL Doc. AC/46/UD-5), including whether a special security interest would be created by the convention; what standard to use for "internationality" which would trigger the convention's provisions; whether such a security interest could cover non-monetary obligations; whether "proceeds" include insurance or other property recovery value; whether after-acquired property can be covered as with a floating lien; and whether the convention should establish priorities and whether and to what degree they would preempt national law. One of the proposed innovative features that could make this UNIDROIT effort succeed where others have not is the concept of a convention-recognized registration system, probably utilizing computer-based EDI systems.

Coordination between international organizations may need sorting out with this topic. UNIDROIT's draft convention does not reach general commercial property such as inventory, fungibles, etc. The UNCITRAL Secretariat has proposed that consideration be given by the Commission to preparing UNCITRAL rules on assignment of claims, which potentially can overlap and possibly conflict with solutions reached at UNIDROIT. Such an eventuality could also create problems for wider implementation of the UNIDROIT Leasing and Factoring Conventions, which the U.S. may ratify. Other organizations, such as the OAS, may consider regional approaches to law harmonization in the secured interests field.

UNIDROIT future work program

Several topics are under consideration as possible future harmonization projects, including franchising contracts, on which an experts group will be convened at UNIDROIT May 16th in order to report on the need for, and the feasibility of, such work. Any efforts in this field will be of considerable interest to the U.S., which is one of the leading jurisdictions in the franchising field. Franchising law is not harmonized among the states of the U.S., and whether there is a sufficient benefit to be derived from harmonization in international franchising remains an open question. Other topics at a preliminary stage of consideration are inspection agency contracts, civil liability arising from dangerous activities such as transborder transportation of hazardous wastes, and legal issues involving software.

Donald T. Trautman and Willem C. Vis

We were saddened to learn that Don Trautman and Willem Vis died since the last Advisory Committee meeting.

Don represented the United States at the work of the Hague Conference between 1980 and 1984 on the Hague Convention on the Law Applicable to Trusts and on Their Recognition. He continued thereafter, as long as his health permitted, to attend Advisory Committee meetings and to counsel L/PIL on its work, in particular preparations to transmit the Trusts Convention to the Senate for advice and consent.

Willem Vis was Chief of the International Trade Law Branch of the Office of the UN Legal Counsel (UNCITRAL Secretariat) from 1974 to 1980, and continued thereafter to be interested in the work of UNCITRAL and L/PIL from his teaching position at Pace University School of Law.

We shall miss both of these staunch supporters of international private law unification work and the work of L/PIL.

L/PIL Externs

L/PIL has again been fortunate to benefit from the hard work of a number of externs who have contributed importantly to our ability better to perform our work during the past two plus years. These externs were:

Richard D. Dault (Arizona)
Mark Epstein (Pittsburgh)
Samantha Hughes (American)
Anne-Marie Kagey (George Mason)
Orde Kittrie (Michigan)
Teresa Leets (California, Davis)
Brian Larson (Arizona)
David Levy (Southern Methodist)
Keith Molkner (Berkeley)
Diana Preston (American)

We have come to rely heavily on the assistance of externs for research and other tasks, many of which would not get done without them.

Externs for the 1994 Fall semester have not yet been chosen. Applications in the next few weeks by qualified third year law students who may be interested in working for L/PIL starting in September 1994 would be welcome, and should include a CV, transcript and writing samples.

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