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The United States and International Cooperation to Unify Private Law

RICHARD D. KEARNEY*

This is an appropriate time to have a review of United States participation in the unification of private law. It was seven years ago that the first meeting of the Secretary of State's Advisory Committee on Private International Law took place. To pinpoint the occasion, it was March 9, 1964.

Seven is a number with a certain cabalistic connotation. Quite apart from its overriding importance to devotees of dice, there are the seven heavens of Mohammedanism, the seven deadly sins, the seven liberal arts, the seven champions of Christendom, and others too numerous to mention. Seven years, however, always reminds me of the periods in the Book of Genesis,¹ the seven fat years and the seven lean years.

From that viewpoint we might consider whether the first seven years of United States participation in the field of private international law have been fat years or thin years. The question, of course, has to be viewed in context, and the context contains a number of factors that would indicate a greater likelihood of famine than of feast. For example, at that first Advisory Committee meeting we were exclusively occupied with the preparation of the United States positions for participation in a conference on the international sale of goods that was to open at The Hague on April 2, 1964.

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1. *Genesis* 41:29-30.

The major document for consideration at that conference, the Draft Uniform Law on the International Sale of Goods, had been in a rather spasmodic process of formulation for thirty-three years. The first draft had appeared in 1935. There had been a 1951 conference to consider one of the revisions of the draft law at which it was decided to set up a special commission to produce a new draft. The commission produced a series of drafts, the last one appearing in 1963.

All of this work had gone on under the aegis of the International Institute for the Unification of Private Law (Rome Institute) without any participation by the United States. We maintained an isolationist position in the field of private international law long after we had abandoned this ostrich posture in the public law area. For example, as late as 1958 the United States delegation to the United Nations Conference on International Commercial Arbitration, because of the traditional concern regarding federal-state relations, was under instructions not to participate actively in formulating a convention for the recognition of foreign arbitral awards. After the conference adopted such a convention, the delegation recommended against our adherence thereto on the ground, among others, that the United States lacked a sufficient domestic legal basis for acceptance of an advanced international convention on the subject of arbitration.² This always struck me as making us out even more backward than we were.

Fortunately the legal profession was not as backward as the bureaucracy. The American Bar Association,³ the National Conference of Commissioners on Uniform State Laws, the American Law Institute, and other legal organizations urged the government to abandon the nineteenth century concept that our federal system required us to stand aloof from international efforts to unify private law. As a consequence of this private initiative⁴ Congress enacted legislation authorizing our entry into the two major international organizations then concerned with private international law, the Rome Institute and the Hague Conference on Private International Law.⁵ The legislation was signed by the President on December 30, 1963, which is why at this

2. REPORT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION 22 (1958) (unpublished materials on file at the Dep't of State).

3. The REPORT OF THE A.B.A. SPECIAL COMMITTEE ON INTERNATIONAL UNIFICATION OF PRIVATE LAW (1961) played an important role in crystallizing support by the legal profession for official United States participation in unification of private law. 36 A.B.A. REP. 219 (1961).

4. See *Hearings on H. J. Res. 732 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 88th Cong., 1st Sess. (1963).

5. 22 U.S.C. § 269g (1970).

first meeting in March seven years ago we were trying to work out in thirty days positions regarding a draft convention which had been solidifying for a period of thirty years. A major complication was that, in our view, the draft uniform law contained a good many flaws and a number of major weaknesses. Among the latter were that the draft law was directed primarily at problems arising in intra-European trade and not to sales problems arising in transoceanic trade.

We were unable to achieve any sweeping changes in the uniform law at the conference. As one possible consequence, seven years later the proposed law remains in the draft stage and in the process of yet another revision.⁶ Allan Farnsworth is going to discuss this process at our afternoon session and I am happy to leave the topic to one of the outstanding experts in the field. My major purpose in referring to the subject was to illustrate that our progress in the field of international unification must be measured in light of the fact that in some areas we are new boys who have moved into a rather old and in many ways close-knit neighborhood. We have a variety of problems that are of greater concern to us than to the older inhabitants, and their approach to solving problems often differs from ours.

There is one additional element that I would like to introduce into our context for determining whether our unification activities in the last seven years could be called prosperous. The process of international legislation is a cumbersome and time-consuming one. Even after general agreement is reached on a text, bringing it into force is a slow and frustrating process.⁷ Nowhere is this more true than with respect to private law matters. While codification of public international law often moves with less than all deliberate speed—the twenty-one year gestation period of the Convention on the Law of Treaties is a substantial example—there are occasions when action is taken and treaties become effective in a surprisingly short time.⁸ The nuclear test ban treaty is a notable example.

Such celerity is a great rarity in the private law field, which makes the results of our second venture into the area all the more interesting. Nineteen sixty-four seemed at the time to our Advisory Committee a slightly ill-starred year in which to begin operations because we im-

6. For the current status of this work, see U.N. Comm'n on Int'l Trade L., Report, 26 U.N. GAOR, Supp. 12, at 35-36, U.N. Doc. A/8417 (1971).

7. Ago, *The Final Stage of the Codification of International Law*, [1968] 2 Y.B. INT'L L. COMM'N 172-73, U.N. Doc. A/CN.4/Rev. 1 (1968). For an informative statistical presentation see UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, WIDER ACCEPTANCE OF MULTILATERAL TREATIES 31-36 (UNITAR Series No. 2, 1969).

8. The Convention for the Suppression of Unlawful Seizure of Aircraft entered into force in less than ten months. [1971] T.I.A.S. No. 7192.

mediately encountered the sales conference, which was shortly followed by the quadrennial meeting of the Hague Conference on Private International Law.⁹

The Hague Conference concerns itself with conflict of laws and procedural problems that arise in the course of transnational transactions, while the Rome Institute, or UNIDROIT, attempts to unify substantive law on an international basis as is illustrated by the uniform law of the international sale of goods.

Three draft conventions were under active consideration at The Hague in October 1964. Again, we were under the disadvantage of not having participated in the preliminary work on these drafts. Nevertheless, with respect to one item, our timing was superb. One of the draft conventions was a proposal to amend part one of the 1954 Convention on Civil Procedure. This part one was a narrow set of provisions for transmission of judicial documents abroad through diplomatic or consular channels.

On October 3, 1964, the President signed Public Law 88-619¹⁰ which empowers the United States District Courts to order service of foreign judicial documents and authorizes the State Department to serve as the channel for transmission of requests for judicial assistance. The revision of part one of the civil procedure convention which was to be considered at the 1964 session had as its core element the establishment of a Central Authority which would serve or have served judicial documents received from abroad. Public Law 88-619 was, however, in a number of respects more liberal in providing judicial assistance than the draft convention, which put the U.S. delegation in the pleasant position of being able to accept the proposed procedure and to concentrate on eliminating restrictions on its use. These efforts were reasonably successful and the convention, as adopted by the conference, is, as the President said in submitting it to the Senate for advice and consent, "a notable step in the field of international judicial cooperation."¹¹

There are two features that are worthy of remark in this Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.¹²

The first is that, in the absence of objection by the State of destination, freedom of using channels of transmission other than the Central Authority is preserved. The second point is the convention contains

9. Article 3 of the Statute provides that Ordinary Sessions shall, in principle, be held every four years. [1964] 2 U.S.T. 2228, T.I.A.S. No. 5710, 220 U.N.T.S. 121.

10. 28 U.S.C. §§ 1696, 1781 (1970).

11. S. EXEC. DOC. C, 90th Cong., 1st Sess., 1 (1967).

12. [1969] 1 U.S.T. 361, T.I.A.S. No. 6638.

certain substantive provisions having a due process character. Article 15 prohibits default judgment in cases when service is undertaken pursuant to the convention, in the absence of proof that service was made in time to enable the defendant to defend. However, a Contracting State may reserve the right to allow the Court entry of judgment in the absence of proof of service, if six months have elapsed since the date of transmission and all reasonable efforts have been made to obtain proof of service.

Article 16 requires reopening of a default judgment at the instance of a defendant who can establish that, without fault on his part, he did not have notice in sufficient time to defend or knowledge of the judgment in sufficient time to appeal and that he has a prima facie defense on the merits. Any Contracting State can place a time limit on this right of the defendant but not less than one year from date of judgment.

This convention entered in force, with the United States as an original party, on February 10, 1969. There are now eleven States party to the convention.¹³ Two years of operation under the convention offer too short a span to determine how it is working out in practice, but thus far we have not heard of any serious problems.

The other draft conventions considered at the 1964 Conference were concerned with adoption and contractual provisions on choice of courts. Neither convention as worked out at the conference appeared particularly attractive to us. This would appear to be the general view as no State has ratified the choice of court convention¹⁴ and only one State the adoption treaty.¹⁵

One other subject was under active consideration at the 1964 Conference—recognition and enforcement of foreign judgments. This exceptionally difficult subject has had an exceptionally confused career. The hesitation of States regarding a multilateral convention for enforcing foreign judgments led to a decision in 1964 to use a hybrid form in which a general convention on recognition would become applicable between the individual States party to it only on the basis of

13. Belgium, Barbados, Botswana, Denmark, Finland, Japan, Norway, Sweden, United Arab Republic, United Kingdom, United States. Five additional States have signed but not yet ratified the Convention: Germany, Greece, Israel, Netherlands and Turkey.

14. Convention on the Choice of Court of November 25, 1965, CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, RECUEIL DES CONVENTIONS [hereinafter cited as REC. DES CONVENTIONS] 96 (1970); 13 AM. J. COMP. L. 629 (1964); IV INT'L LEG. MAT. 348 (1965) (English text).

15. Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoptions of November 15, 1965, REC. DES CONVENTIONS 64 (1970); 13 AM. J. COMP. L. 615 (1964); IV INT'L LEG. MAT. 338 (1965) (English text).

bilateral agreements between those States. The consequence of this decision was to inject into an already complicated problem the additional question of how far two States could depart in the bilateral agreements from the requirements laid down in the parent multilateral.

An Extraordinary Session of the Hague Conference was held in April 1966 to draft the judgments convention. This session produced a draft treaty¹⁶ that has many merits. It deals with most of the problems that plague recognition—including time of enforceability, due process requirements, fraudulent judgments, extent of review by the enforcing court, counterclaims and exclusivity of jurisdiction. The problem of jurisdiction is approached by laying down seven bases for the exercise of jurisdiction by the court issuing the judgment. If one of these bases is present the court requested to enforce the judgment cannot reject the request on a jurisdictional ground.

The provisions regarding the bilateral agreements to implement the basic convention give wide latitude for variance. Article 23 lists twenty-three permissible deviations that may be included in bilateral agreements. This cafeteria approach to the bilaterals posits the obvious query—why bother with the multilateral at all if it can be so widely varied. The answer is that many of these variations represent problems peculiar to one or two countries and that the multilateral would, in operation, ensure a substantial degree of uniformity in enforcement of judgments practice.

A greater problem with the convention lay elsewhere—in a dispute over the likelihood of discrimination under a proposed Common Market convention on judgments.¹⁷ The situation is too complicated to describe in the time available except to say that courts in Common Market States would be barred from enforcing certain types of foreign judgments against Common Market residents. These States would be permitted to enforce such judgments against nonresidents of the Common Market even though these persons resided in States which had become parties to the Hague convention. The result was discrimination of the first class, second class-citizen type. The dispute resulted in a second meeting which produced a protocol to the judgments convention.¹⁸ The protocol seeks to eliminate the possibility of discrimination

16. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of February 1, 1971, REC. DES CONVENTIONS 106 (1970); 15 AM. J. COMP. L. 362 (1966/1967); V INT'L LEG. MAT. 636 (1966) (English text).

17. 2 CCH COMMON MKT. REP. ¶ 6003.

18. Supplementary Protocol of February 1, 1971, to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, REC. DES CONVENTIONS 124; 15 AM. J. COMP. L. 369 (1966/67); VI INT'L LEG. MAT. 1083 (1967) (English text).

by prohibiting Contracting States from enforcing a foreign judgment if the jurisdictional basis in the original action is based only on one or more of six specified grounds. Among the six grounds are jurisdiction based on the nationality of the plaintiff and service of process on a plaintiff during temporary presence in the State.

The value of this protocol diminished greatly when a number of Common Market States indicated they considered they could ratify the basic convention without the protocol. At the 1968 Hague Conference, renewed efforts to paper over the differences took the form of declarations in the Final Act of that meeting that everyone intended to be good.¹⁹ Our inclination is to wait and see what other States do before we decide on any positive action regarding the convention. In the meantime we are studying the desirability of negotiating straight bilateral agreements on recognition and enforcement.

Among the subjects that the Advisory Committee on Private International Law directed its attention to, once we got through the initial flood of business, was the U.N. arbitral awards convention.²⁰ The American Bar Association had urged United States accession to the convention.²¹ After a thorough review we reached the conclusion that the adverse factors that had troubled our delegation to the conference were, in the main, not substantial obstacles. There would be a series of operational problems in aligning the convention with the Federal Arbitration Act of 1925.²² For example, we would have to separate arbitration in interstate commerce from arbitration in foreign commerce and provide for the enforcement in United States courts of agreements to arbitrate at places outside the United States. But all the problems seemed superable by carefully designed implementing legislation. Consequently the Advisory Committee recommended that the convention go up to the Hill.

The President submitted the convention to the Senate on April 24, 1968.²³ The Senate gave advice and consent to ratification on October 4, 1968, on the understanding that ratification would be postponed until

19. A fuller treatment of the discussion at the Eleventh Session on the relationship between the Judgments Convention and the Supplementary Protocol and the possible complications which might arise if and when the Common Market Convention enters into force appears in the *Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law*, VIII INT'L LEG. MAT. 785, 820-822 (1969).

20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, [1970] T.I.A.S. No. 6997, 330 U.N.T.S. 3.

21. The resolution recommending accession that the House of Delegates of the Association adopted on September 1, 1960, is printed in S. EXEC. DOC. E, 90th Cong., 2d Sess. 27 (1968).

22. 9 U.S.C. §§ 1-14 (1964).

23. S. EXEC. DOC. E, 90th Cong., 2d Sess. 1 (1968).

enactment of the enabling legislation.²⁴

When we began considering the final form of the legislation we encountered a splendid assortment of problems we had not focused on, such as venue provisions and whether the jurisdictional amount should be retained or eliminated in removal actions. We came up with a relatively short Chapter 2 to be added to Title 9 of the U.S. Code, the basic approach of which was to ensure that the U.S. District Courts would enforce agreements to arbitrate foreign trade transactions and enforce awards arising out of such transactions. It was enacted without any noticeable opposition and signed by the President on July 31, 1970.²⁵ The United States deposited its instrument of accession to the convention on September 30, 1970—the thirty-seventh country to do so.

It is now possible to enforce in the District Courts of the United States agreements in writing to arbitrate a dispute arising in the foreign commerce of the United States except an agreement between two U.S. citizens that does not have a reasonable relation with one or more foreign States.²⁶

Arbitral awards which meet the same foreign commerce requirement will be recognized and enforced by the District Courts, subject to the provisions of the convention²⁷ which specify that certain defenses such as invalidity of the contract, lack of proper notice, and *ultra vires* award may be raised. In addition, a defendant may remove any case involving such an arbitration agreement or award brought in a state court to a Federal District Court.²⁸

The general opinion in the foreign trade community is that the accession of the United States to the U.N. arbitration convention is a significant step forward.

Our initial experiences in the sales conference and the 1964 Hague Conference had underscored the desirability of having experts from the United States on the expert groups that prepare draft conventions for the full-scale conferences. The 1968 Hague Conference scheduled three topics for consideration: taking evidence abroad, recognition of divorce judgments, and conflict of laws applicable to traffic accidents.

The first of these topics, taking evidence abroad, was put on the agenda as a result of a U.S. initiative. We prepared a memorandum proposing a treaty in this area that was circulated to all members of the Hague Conference in 1967. The response was favorable and a

24. S. EXEC. REP. NO. 10, 90th Cong., 2d Sess. 1-2 (1968).

25. Pub. L. No. 91-368, § 4, 84 Stat. 692 (1970).

26. 9 U.S.C. §§ 201, 202 (1970).

27. Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, [1970] T.I.A.S. No. 6997, 330 U.N.T.S. 3.

28. 9 U.S.C. § 205 (1970).

special commission was appointed to prepare a draft treaty. Philip W. Amram, the moving spirit behind this operation, went to the special commission meeting in June 1968 carrying a draft that had been hammered out in one of our working groups. The special commission accepted the basic features of the United States draft, made some revisions, and sent the text to the Hague Conference for consideration at the October 1968 meeting.

The speed of this operation is unprecedented in the private law field. The momentum continued through the October meeting, which adopted a final text²⁹ containing all of the innovations and improvements that the United States had proposed originally.

Our basic approach was to introduce much greater flexibility in the means available to obtain evidence abroad and to make it possible for the requesting court to obtain evidence in the form best suited for use under its own legal system. For example, a French court may want evidence from the United States in the form of a judicial summary of a witness' testimony while an American court might want a verbatim transcript of a hearing in France with counsel doing the bulk of the questioning rather than a judicial officer.

As in the service of documents convention, the internal primary mechanism under the convention is a Central Authority in each Contracting State to which letters of request for obtaining evidence may be sent directly by any judicial authority in another Contracting State.³⁰ The Central Authority is obliged to ensure the request is fulfilled expeditiously.³¹

The convention lays down fairly detailed requirements as to the content of letters of request.³² An interesting aspect on language is that a Contracting State is required to accept a letter in either English or French unless it has made known that it will not accept letters in either or both of those languages but only in its own language.³³ The letter may specify that a special method or procedure be followed in taking the evidence, and the judicial authority executing the letter must comply unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.³⁴ This, coupled with provisions to ensure that the parties requesting the evi-

29. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970, REC. DES CONVENTIONS 152 (1970); 16 AM. J. COMP. L. 5 (1968); VIII INT'L LEG. MAT. 37 (1969) (English text).

30. *Id.*, Art. 2.

31. *Id.*, Art. 9, para. 3.

32. *Id.*, Art. 3.

33. *Id.*, Art. 4.

34. *Id.*, Art. 9, para. 2.

dence and their representatives may be present when the request is executed,³⁵ will go far to produce evidence in the form best suited to the needs of the requesting court. With regard to recalcitrant witnesses, provision is made for the executing court to employ the same "appropriate measures of compulsion" as it would in internal cases.³⁶

The convention preserves all existing diplomatic and consular channels for obtaining evidence from abroad and clarifies their use in certain respects. An innovation is the formal recognition in a multilateral treaty negotiated by civil law and common law representatives of the use of commissioners in taking evidence abroad subject to general or specific approval of the foreign State concerned.

In summing up the convention in the *American Bar Association Journal*,³⁷ Philip W. Amram remarks that "it makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants."

This view is concurred in by all those who have studied the convention. We are hoping to submit it to the Senate for advice and consent to ratification within the next few months.

We had also participated actively in the work of the special commission that formulated the proposed convention on the recognition of divorces and legal separations. The patent major issue any such convention raises is the basis for jurisdiction and, in particular, the conflict between the common law thesis of domicile or habitual residence as the preordained source of authority and the civil law concept that nationality should be the determining factor. The chasm between the two systems was bridged by accepting both concepts subject to a variety of protective limitations. Article 2 of the convention³⁸ as accepted by the Conference requires recognition of divorces and legal separations if the defendant habitually resided in the State granting the divorce on the date proceedings were instituted.

If the habitual residence of the plaintiff is relied on, then he must have habitually resided in the State for at least a year immediately prior to the institution of proceedings, or the last habitual residence of both

35. *Id.*, Art. 7.

36. *Id.*, Art. 10.

37. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 655 (1969).

38. Convention on the Recognition of Divorces and Legal Separations of June 1, 1970, REC. DES CONVENTIONS 142 (1970); 16 AM. J. COMP. L. 532 (1968) and VIII INT'L LEG. MAT. 31 (1969) (English text).

spouses must have been in that State.³⁹

Nationality is a sufficient basis for jurisdiction if both spouses are nationals of the granting State or the plaintiff has his habitual residence therein or, a slightly complicated formula, had had his habitual residence there for a continuous period of one year, any part of which falls within the two years preceding the institution of proceedings.⁴⁰ This last proviso was a final concession to the last-ditch adherents of nationality. Article 3 equates domicile for the purposes of the convention to habitual residence but excludes domicile based on dependency of the wife.⁴¹ This blow for freedom was achieved without any representative of Women's Lib being present at the Conference.

The requirement of recognition is reinforced by Article 6 in two respects. First, if the defendant has appeared in the proceedings, the findings of fact on which jurisdiction is based are binding. Second, recognition cannot be refused because the internal law of the State in which recognition is sought would not allow divorce upon the same facts. Finally, there cannot be a re-examination of the merits of the decision except as required in the application of other provisions of the convention.

United States participation in the preliminary work and in the Conference was influenced by the special considerations resulting from the application of the full faith and credit clause in our federal system. For a recognition convention to be acceptable to us we thought it essential to achieve recognition of divorce decrees that must be accorded full faith and credit under the Constitution. The crunch point was the Sherrer-type divorce⁴² in which, as you recall, the Supreme Court held a Florida Court decision on jurisdiction was not subject to collateral attack in Massachusetts by a defendant who had appeared in the action in Florida. Inasmuch as the proceedings in that instance were filed three months after the plaintiff had moved from Massachusetts to Florida and the spouses had not habitually resided together in Florida, the Sherrer-type divorce would not have met the requirements for recognition under Article 2(2) of the convention. However, if non-unified legal systems such as that of the United States had the benefit of the nationality principle in Article 2(3), the Sherrer-type divorce would be covered by the convention.

Since acceptance of the nationality principle was an essential element

39. *Id.*, Art. 2, para. 2.

40. *Id.*, Art. 2, paras. 3 and 4.

41. See DICEY'S CONFLICT OF LAWS 113-15 (J.H.C. Morris gen. ed. 1967) for a discussion of the English rule that a married woman cannot acquire a domicile of her own. The English rule is not followed in the United States. *Id.*, 113 n. 99.

42. *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

of the convention, our delegation decided to put it to work for us. We proposed a new article applicable to States having varying legal systems in different territorial units. The major result would be to ensure recognition by other parties to the convention of a divorce granted, for example, within the United States when the husband and wife are both U.S. nationals on the same basis as divorces granted to nationals in a State having a unified legal system. In other words the place of habitual residence within the United States of the two U.S. nationals would not be a matter of concern to the foreign court asked to recognize the divorce decree if the nationality test had been satisfied. We urged the adoption of this article on the ground that nationality was indivisible. Apparently this struck a responsive note because, despite earlier indications of opposition to "Reno" divorces,⁴³ the amendment was accepted.⁴⁴

Some foreign courts have refused to recognize Sherrer-type divorces on such grounds as fraud on the court. The divorce convention thus offers us a special plus in addition to a salutary general house-cleaning in a rather muddled legal area. But it does raise sharply the question of federal-state relations. The convention is being carefully studied by the other governments concerned, and we are following the same course.⁴⁵

Consideration by the Conference of the third subject — traffic accidents — had not appealed to us at the time it was suggested and became steadily less appealing as it developed. In general, our position was that conflict rules applicable to traffic accidents were in a state of flux and any codification exercise should be postponed until some settling down had taken place. Our worst fears were justified when the Conference came out with a choice of law test based on the State of registration of the motor vehicle.⁴⁶ Perhaps the only thing in the exercise that became clear to us was that this selection had been largely affected by European insurance interests. The Advisory Committee has decided that we want no part of the exercise.

The Hague Conference has two major items scheduled for its 1972 meeting — choice of law in products liability and the international ad-

43. Cf. *Bellet & Goldman, Rapport Explicatif*, CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, II ACTES ET DOCUMENTS DE LA ONZIÈME SESSION, DIVORCE, para. 56 (1970) [hereinafter cited as ACTES II].

44. ACTES II 186 (there designated Article 13 *bis*; the provision became Article 14, paragraph 1, of the Convention).

45. As of April 1, 1971, only the United Kingdom had signed. A number of other States have more recently indicated that they expect to sign the Convention within the next few years.

46. Convention on the Law Applicable to Traffic Accidents of May 4, 1971, REC. DES CONVENTIONS 142 (1970); 16 AM. J. COMP. L. 589 (1968); VIII INT'L LEG. MAT. 34 (1969) (English text).

ministration of movables in the estates of deceased persons. Willis Reese will fill you in on the first; the second is at too early a stage of development to permit discussion.

The cyclical nature of the Hague Conference with its fixed quadrennial sessions guarantees a turnover of subject matter. The Rome Institute follows a policy of developing a draft uniform law and then seeking a State that will host an international conference to consider its adoption. The absence of the cyclical pressure for productivity that is built into the Hague system together with the considerably greater obstacles to the unification of substantive law than to procedural or choice-of-law rules results in a much slower rate of development in the latter organization. A number of the Rome projects in which we are now actively participating have been on the ways for a fair number of years and are not yet seaworthy. These include additional aspects of international sales—draft conventions on the substantive validity of contracts of international sale and on agency law in the field of international trade. One UNIDROIT project to be considered at a diplomatic conference was the convention on travel contracts.⁴⁷ The objective of the convention is to regulate the form and content of the contracts entered into between travel agents and travelers, lay down rules to govern such ancillary matters as cancellations and refunds, and, the knottiest problem, provide rules regarding the liability of the travel agent to the traveler for loss or damage suffered in the course of the trip and provide a limitation of liability.

We had participated in the experts group that had produced the draft convention and were seriously concerned about its provisions on liability. The most controversial issue in the draft⁴⁸ considered by the conference was a provision that a travel agent who organized a trip, defined to include all packaged travel arrangements, undertook absolute liability for the acts of third parties who performed services or provided accommodations. The theory was that this sweeping responsibility would be coupled with a fairly low limit of liability. We considered this approach unsound and pressed, both in the experts group and at the conference, to make the travel organizer liable for nonperformance of the contract as well as for loss or damage sustained by the traveler in those cases in which the travel organizer or persons under his control carried out the service. Our proposal also made the travel organizer liable for the nonperformance or improper performance of the contract by third parties in cases in which the travel agent failed to exercise due diligence in their selection.

47. International Convention on Travel Contracts (CCV), done at Brussels, April 23, 1970. IX INT'L LEG. MAT. 699 (1970).

48. [1967-1968] 1 Y.B. INT'L INST. UNIF. PRIV. L. (UNIDROIT) 189 (1969).

The issue was sharply disputed in the conference, and a wide variety of proposals on liability were advanced. At one stage every proposal had been voted down. The final result was a convention with low limits of liability, \$16,500 for personal injuries, \$660 for property loss, and \$1,600 for any other type of damage or loss, and a confusing compromise on scope of liability. Our delegation reported that it appeared the travel agent is held liable for the failure of third parties to perform the services requested, such liability being limited, however, to the rules governing these services. For example, should a hotel fail to honor a reservation, the traveler can seek redress against the agent who organized the travel, who will then be liable in the same manner as the hotel would have been liable if the action had been brought against the hotel under the laws of the country in which the hotel was situated.⁴⁹ Where the hotel proceeds to furnish the services but is negligent and such negligence results in the injury of the traveler on the premises, the travel agent will be liable only if it is shown that he failed to exercise due diligence in the choice of the hotel.

The convention will require a good deal of study to determine what its effects in relation to existing law will be and whether some obvious deficiencies, among which the low limits of liability are especially noticeable, are outweighed by the advantages of some degree of international regularization in an area that has been badly affected from time to time in various parts of the world by loose practices.

There is another Rome Institute draft which we find promising—the draft convention for a uniform law on the form of wills.⁵⁰ The purpose of the convention would be to establish an international form of will that “shall be valid as regards form, irrespective of the place where it is made and irrespective of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the provisions set out hereafter.”⁵¹

This draft convention has been circulated quite widely among States and the proposal has received substantial support. A considerable number of suggestions for improvement have been made and a working group, in which we will participate, is to meet in Rome to revise the draft in light of the comments received. The major problem for the United States arises from the fact that in many countries the common practice is for a will to be deposited with the notary who supervises the

49. Report of the United States Delegation to the Diplomatic Conference on the Travel Contract 9-10 (1970) (unpublished materials on file at the Dep't of State).

50. For the Draft Convention Providing a Uniform Law on the Form of Wills together with significant extracts from the Rome Institute's Explanatory Report (1966), see 2 INT'L LAW. 251, 257 (1968).

51. Draft Uniform Law on Wills, Art. I, para. 1. *Id.* at 255.

execution. This practice has been embodied in the uniform law as a requirement to ensure the validity of the will. The will must be left in the custody of the qualified person supervising execution and if withdrawn from that custody the will ceases to be valid as an international will. We do not really have any official with functions parallel to the civil law notary, who supervises the making of the will as a part of the judicial system and retains it in the same capacity. There is also the fact that a substantial percentage of testators in the United States prefer to keep wills in their own custody rather than leave them with trust companies or attorneys. In our comments we suggested that there was no real equivalent for the Continental practice available in the American system and that an option such as having an approved will-custodian retain a completely-identified photocopy might be allowed.⁵²

We are reasonably confident that a satisfactory solution can be reached because the international will concept is conceived as an option available to people with property holdings in more than one country who wish to simplify and reduce the cost of probate procedures. The intent is not to change the formal requirements of any national legal system regarding the validity of a will but to construct an optional standard that will meet the most strict formal requirement. It is a highest-common-denominator approach. This gives more room for adjustments than would be available if we were seeking a compromise solution among the varying national systems.

Given what seems a geometric progression in the mobility of people, the need for probate of wills in a number of States is certain to increase dramatically. This international form of will convention is a modest but quite useful contribution to reducing legal complexities in these cases and we will cooperate fully in seeking to produce a widely-acceptable convention.

At approximately the midpoint of the seven-year period which we are surveying, a new organization, the United Nations Commission on International Trade Law (UNCITRAL), held its first session in New York. Established by General Assembly Resolution 2205 (XXI) of December 20, 1966, the Commission is actively engaged in the unification and harmonization of the private law of international trade. The United States is among the twenty-nine members of the Commission. As you will have a fairly full-dress review of what is happening in that forum at lunch and this afternoon, there is no need to make more than one com-

52. The Committee of Governmental Experts on the Form of Wills which met in Rome from May 3 to 8, 1971, deleted Article 12 of the 1966 draft uniform law which required that the will be left in the custody of the qualified person who received it. The Committee decided that the question of the deposit and custody should be governed by local law.

ment. When UNCITRAL was established and during the initial years of operation, there was a good deal of skepticism as to its ultimate utility. That is now disappearing. It is still too early for any definitive proof of accomplishment such as a generally accepted convention in the international trade field to have appeared; nor can this be anticipated for several more years.⁵³ But the work in UNCITRAL is moving forward and may well turn out to be the principal instrument for the development of world-wide private law.

In all of these enterprises we have received an enormous amount of cooperation and assistance from members of the bench and bar in the United States. Without assistance of this character, the United States would not have been able to participate with any real degree of effectiveness in these private law activities. The Ford Foundation has played an indispensable part by making funds available to the National Conference of Commissioners on Uniform State Laws for such essentials as independent research and assembling private experts to help hammer out the positions to be taken by the United States in international conferences.

You now have a somewhat sketchy record of the first seven years of United States participation in the unification of private law. Whether they have been seven fat years or seven thin years I leave to your verdict. All I can say is that whatever may be the measure of these first seven years, we will try to make the record of the next seven years a fuller measure.

53. UNCITRAL recently requested its Working Group on Time-Limits and Limitations (Prescription) to prepare a final draft of a Uniform Law on Prescription for submission at the 1972 session. U.N. Comm'n. on Int'l Trade L., Report, 26 U.N. GAOR, Supp. 9, para. 118, U.N. Doc A/8417 (1971). A number of delegates expressed the hope that the Commission might be in a position to transmit an approved draft convention on the subject to the General Assembly by 1973.