

June 27, 2011

MEMORANDUM

To: Executive Committee and Scope and Program Committee

From: International Legal Developments Committee (ILDC)

Re: Supplemental Committee Report and Recommendations to Executive Committee and Recommendations to Scope and Program Committee

After the ILDC submitted its annual report to the Executive Committee, it held an additional meeting by conference call. The minutes of that meeting are attached. As a result of that meeting, the ILDC makes the following recommendations:

A. Recommendations to the Executive Committee.

1. The ILDC recommends to the Executive Committee that the Guidelines for the Implementation of International Conventions, section IIIA2, be amended as follows:

Current version:

2. Commissioners appointed by the ULC to participate in the negotiation of private international law conventions will be committed to the ULC policy concerning the implementation of conventions and to the ULC's objective to advocate for provisions in conventions that will result in the least disruption possible to state law if the convention were to be implemented in the U.S. Appointed commissioners will regularly report back to the ULC concerning convention negotiations and whether it will be feasible to implement the convention by uniform state law.

Amended version:

2. A ULC Commissioner who is appointed to participate in the negotiation of a private international law convention, and a ULC Commissioner who is selected to work with the State Department in connection with the negotiation of a private international law convention, will be committed to the ULC policy concerning the implementation of conventions and to the ULC's objective to advocate for provisions in conventions that will result in the least disruption possible to state law if the convention were to be implemented in the U.S. Those Commissioners will regularly report back to the ULC concerning convention negotiations and whether it will be feasible to implement the convention by uniform state law.

The revision reflects more accurately the manner in which ULC Commissioners might participate or assist in the negotiation of private international law conventions.

2. The ILDC recommends that, if the Executive Committee approves the documents submitted by the ILDC setting forth Guidelines and Processes for the Implementation of International Conventions, the Executive Committee send them out to the Conference for comment within a specified period. The ILDC further recommends that the Executive Committee refrain from formally adopting the Guidelines and Processes until the period for comment has passed and until the ILDC has had an opportunity to review the comments, if any, and propose any changes it deems appropriate. Until that time, the ILDC recommends that the Executive Committee use and follow the Guidelines and Processes.

The ILDC understands the Executive Committee may decide to submit the Principles of Federalism to the Conference for comment. If that occurs, the ILDC recommends that the comment period be the same as the comment period for the Guidelines and Processes.

3. The ILDC's focus in recent years on the implementation of international conventions has meant that it has not done as much as it would have liked to build direct relationships with other entities engaged in the harmonization and improvement of international law. The ILDC recommends that a telephone meeting of the committee be scheduled for early fall to enable the committee to begin work on that issue earlier than would occur if the committee waited until its in-person meeting to do so.

B. Recommendations to Scope and Program Committee

1. The ILDC concurs with the Study Committee on an Act on the Recovery of Stolen Cultural and Artistic Property not to recommend the creation of a drafting committee.
2. With respect to the recommendation of the Study Committee on the Consular Notification Requirements of the Vienna Convention, the ILDC has the following recommendations:
 - a. A uniform state law would serve to educate state courts and law enforcement personnel of their obligations under the Vienna Convention. A uniform state law could also include provisions that would be more specific as to the means by which states should act to meet those obligations. If a uniform state law were broadly enacted and followed, our demonstrated compliance in the United States would encourage greater compliance abroad, for the benefit of state citizens who travel in foreign countries. ILDC members raised questions about whether a uniform state law would be broadly enacted, however. If the Vienna Convention is already the law, states may wonder why state law is necessary. It may be difficult to achieve consensus on the consequences of failing to follow the state law. Courts and law enforcement may want the law to specify that noncompliance is not a basis for seeking reversal of a conviction, but others may want that consequence to be stated. If we leave the question of enforcement to other state law, state legislatures may question whether we are accomplishing more than announcing an existing obligation of compliance. If we cannot

achieve broad enactment, then the question arises whether we have strengthened our argument that we should be involved in the implementation of other conventions.

- b. The ILDC understands that Senator Leahy has proposed federal legislation on this topic. That legislation would require that state law enforcement officers and courts implement the Vienna Convention by taking specified actions to give the required notice. The ILDC also understands that Congress may not have the power, under the case of *Prinz v. United States*, 521 U.S. 898, 925 – 31, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997), to require that state law enforcement officers take the specified actions. As a result, federal legislation alone may be insufficient to accomplish Congressional goals. Additional state law that does have the power to direct the actions of state law enforcement officials may be required. The ILDC thinks that the existence of the federal legislation presents the Conference with an excellent opportunity to educate Congress about the circumstances in which the two sovereigns, (the federal and state governments) can work together to implement a convention. The ILDC recommends that the Study Committee or other appropriate persons (perhaps those with contacts with Senator Leahy) immediately contact Senator Leahy or his staff to explore this opportunity.
- c. If the Conference can work with the federal government to implement the Vienna Convention in a way that will serve to educate others about the importance of the state role, mitigate some of the concerns that the ILDC has expressed about enactability and generate resources for the project, the ILDC believes that the drafting of a uniform state law would be consistent with Conference goals and the reasons for our participation in this international issue and recommends that the Conference undertake the project.
- d. If the Conference cannot work in tandem with the federal government in the way the ILDC describes, the ILDC is less enthusiastic about the formation of a drafting committee. The ILDC concluded that without the participation of the federal government and the opportunities that that participation presents, a drafting project is a lower priority.

3. Cross Border Protocol for Recognition of Life Planning Instruments

The ILDC recommends forming a study committee on possible collaboration with the Uniform Law Commission of Canada on Interjurisdictional Recognition of Life-Planning Documents. The ILDC believes that the Conference should take this opportunity to study a proposal that will allow us to work directly with our neighbor on these cross-border issues. The ILDC also believes that work on these issues will support the work to obtain more enactments of legislation implementing the International Wills Convention.