**The United States as an Actor in Private International Law**

Jeffrey D. Kovar*

The United States and the European Union are now the two largest economic markets in the world, with an ever-expanding amount of mutual trade, commerce, and human interaction. In this dynamic environment, increased judicial cooperation between the U.S. and the EU is a critical component for continued growth. It is particularly gratifying that the EU not only recognizes the role of judicial cooperation, but also is actively sponsoring the dialogue at this and other universities in the U.S. and Europe. We thank the European Commission for its foresight and generosity, and the University of Pittsburgh for its superb efforts to organize this conference.

There has been a great deal of discussion already about differences and similarities in the ways our respective legal systems approach the classic questions of private international law. We have also heard about how the significant changes in the organization of Europe, particularly the movement toward a greater Union, have created both opportunities and obstacles for increased flexibility and cooperation internationally.

Private law is traditionally a matter of the law of the individual states of the United States, and private international law (or "conflict of laws") has largely developed through state common law, or through federal case law development under the Constitution. These developments can be influenced and affected not only by legislative acts and by academic writings, but also through organized efforts by private law harmonization bodies to restate and develop the common law. Linda Silberman has told us about the project of the American Law Institute (ALI) on Jurisdiction and the Enforcement of Judgments. King Burnett will explain the

---

*Assistant Legal Adviser for Private International Law at the U.S. Department of State. The views expressed are those of the author alone and are not necessarily those of the U.S. Department of State or the U.S. Government.

significant way in which the National Conference of Commissioners on Uniform State Laws harmonizes the state law of conflicts through the system of uniform state laws. Indeed, the Uniform Law Conference and the ALI play major roles in shaping the development of private law—from the enforcement of judgments to the Uniform Commercial Code.

Professor Beaumont has asked whether there is a political will in the United States to harmonize private international law on a world-wide basis. The answer, I believe, is a strong "yes" when there is a compelling social or economic reason for the harmonization. The answer is "no" where the reason is not so clear or is itself very controversial. Whereas the general policy goal of greater unification and harmonization at the EU level is a compelling factor in itself in Europe leading to increased efforts toward harmonization of private international law through that intergovernmental organization, this goal does not drive U.S. actions because of the established role the states play in private law in the U.S. federal system. In the U.S. most harmonization is initiated through private institutions like the Uniform Law Commissioners and the American Law Institute.

## I. The U.S. as an Actor in Private International Law

What, then, is the role of the United States as an actor on the international stage in private international law? What motivates it?

If we look back to the first half of the 20th Century, the United States was not an original member of the Hague Conference on Private International Law. The Hague Conference, which held its first session in 1893, was a body of highly technical specialists that existed largely to help the European states harmonize their conflict of laws rules. Since the U.S. did not see itself

at the national level as an actor in the development of private international law, it was not until the 1960s that we began to see the Hague as a relevant forum.

U.S. courts and institutions developed and shaped the law of conflicts in this country in an organic way, and did not look to external treaties to lead the way. Indeed, the U.S. even stayed on the sidelines of the negotiations of the New York Convention in 1958 in large part because of perceived federalism limitations.

The traditional U.S. approach to international judicial cooperation in civil and commercial cases was not to treat it as a sovereign function to be handled by the Executive and Legislative branches, but as a matter of comity between courts. According to this concept, private litigation is a matter only for the courts, which are expected to show respect for the acts of foreign courts and develop the standards for cooperation. In this respect, it is only in areas such as tax cases where U.S. courts will show no comity toward foreign decisions—a principle known as the "revenue rule." Tax judgments are therefore seen not as essentially private matters, but as public ones that should be the subject of government-to-government resolution and not resolution in the courts.

We still see the influence of the "pure comity" view in the debates at the American Law Institute and National Conference of Commissioners on Uniform State Laws over whether enforcement of judgments legislation should have a mandatory reciprocity requirement. Proponents object to any suggestions that enforcement should only be extended to judgments of a country that will reciprocate by enforcing U.S. judgments. They argue that a foreign judgment is a purely private matter between private parties and should be dealt with by the courts on that basis alone, without the interference of sovereign political considerations. Many still hold up the banner of "leading by example" to encourage the development of reciprocal practices in other

countries. No treaty or government intervention is necessary for this golden rule model of friendly cooperation.

We even see the proponents of the "pure comity" view venturing into the public law sphere, where they have launched—so far without success—insistent attacks on the traditional revenue rule limits on the enforcement of foreign tax judgments. Canada and the European Commission and several EU member states recently sued under RICO to take advantage of this view, and attempted to recover three times their lost tax revenue.[1] Ultimately they were not successful in those cases in overcoming the revenue rule.

To the extent that the U.S. moved away from the pure comity approach by joining the Hague Conference and UNIDROIT in the 1960's, and participating actively in the creation of UNCITRAL, what has motivated its participation? Professor Clermont anticipates a world where the federal government would "reform" domestic law through treaty-making in the private law sphere, but let us look at the track record by examining the four major instruments the U.S. has ratified in this field. I believe it shows that the needs of the private sector are what drives U.S. treaty practice, not specific policy goals of the federal government.

First, let us look at the New York Convention on the Enforcement of Foreign Arbitral Awards. The U.S. largely sat on the sidelines of the active negotiations. When the U.S. became a party in 1978, it was only after 20 years of successful practice under the Convention. It was the growing insistence of business and legal institutions that finally brought the U.S. in. With business and the Bar finally demanding it, Congress stepped in and asserted federal authority.

---

[1]European Community v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2002); Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001).

Second, there are the three Hague judicial cooperation conventions: Abolishing the Requirement of Legalization (Apostille); Service Abroad; and Taking of Evidence Abroad. These conventions are largely litigation practice-oriented, and represent the three critical elements of conducting international litigation—serving process; taking evidence; and proving evidence in court.

These four conventions (plus their corollaries in the OAS region) are the sum total to date of the areas in which the U.S. has acted decisively at the national level in the traditional realm of private international law. Why have there not been more? What is the U.S. experience with these conventions? Let's examine the practice.

The New York Convention created a private system of enforceable dispute resolution for international business. It is simple and party-driven, and it works in practice. As one of the largest trading nations, the U.S. has naturally become one of the most enthusiastic proponents of this convention. Led by firm and clear guidance from the Supreme Court in favor of international arbitration,[2] we place few limits on the arbitrability of disputes and apply the Convention even to consumer contracts. The U.S. has been extremely active in UNCITRAL in the negotiation of the subsequent Model Law and Model Rules on Arbitration, which supplement the Convention, and in international arbitral institutions. And the American Arbitration Association now handles more international arbitrations annually than either the International Chamber of Commerce or the London Court of International Arbitration.[3]

---

[2]*See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

[3]According to the American Arbitration Association 2003 Annual Report, the 646 international cases filed represent "the largest number of international filings of any arbitral institution in the world," *available at* http://www.adr.org.

As for the Service and Evidence Conventions the record is a little more mixed, largely because these conventions are more detailed and particular than the New York Convention, and have permitted major imbalances in practice among states. Led by the comity model, the U.S. has long put very few restrictions on the service of foreign judicial documents or the taking of evidence for use in foreign tribunals. Around the same time as the development of the Hague Conventions in the 1960's, the U.S. was busy putting in place federal laws that made taking of evidence in support of foreign proceedings tremendously accessible—far more, in fact, than in most national systems.[4] The stated rationale for these far-reaching statutes was that they would encourage foreign governments to do the same for evidence requests in support of U.S. proceedings.[5] Unfortunately, the benefits of the legislation and the Evidence Convention didn't materialize for American litigants in the way envisioned, as country after country declared that they would not apply the Evidence Convention to pre-trial discovery of documents.[6] Moreover, many continued to prohibit U.S. lawyers from taking depositions, or maintained many traditional restrictions, including on serving process, that are seen as outdated or incompatible with American notions of judicial fairness.

It should not be a surprise that, in light of these realities, the Supreme Court interpreted the Evidence and Service Conventions as providing optional procedures, not cutting off some existing avenues for taking evidence or serving process.[7] This was, in effect, a reversion to the

---

[4]*See, e.g.*, 28 U.S.C. § 1782.

[5]*See* S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782.

[6]The status of the Evidence Convention in the Contracting States, including reservations and declarations, may be found on the Hague Conference website at http://hcch.e-vision.n1.

[7]Volkswagen Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522

comity-based approach that assumed countries would be trying to do the best for each other's courts, rather than using the Conventions to limit judicial cooperation. From abroad, however, came countercharges that the U.S. was not applying the Conventions as they were intended.

Thus, while the Service Convention works quite well because countries are more open to alternative methods of service, the Evidence Convention has not been wholly satisfactory because the private sector parties themselves and courts have not been satisfied that it generally provides comity-based outcomes.

As the third panel in this program indicates, where the U.S. today plays the most active role is not in the traditional private international law (conflicts) area, but in the development of *international private law*—from commercial law to family law. In the commercial law sphere, the link to commercial needs is clear. In the family law area, the Hague Conventions that have been ratified by the U.S. (the 1980 Child Abduction Convention) or will soon be ratified (the 1993 Intercountry Adoption Convention), are primarily administration of justice or regulatory cooperation conventions, not conventions providing harmonized rules of traditional civil law.

As noted before, these developments are largely driven by the needs of the private sector and not by any doctrinal imperative. Perhaps more telling, the difference is significant not just for the United States, but also for the world. Looking at the sweep of projects now under consideration at the Hague Conference, UNIDROIT, and UNCITRAL, the vast majority are not private international law but are international private law.

---

(1987).

## II. What Can We Foresee?

First, the Hague Prima Securities Convention demonstrates that a pure conflict of laws instrument can succeed when industry specifically demands it and the project is carefully focused. This convention provides a badly needed choice of law rule, driven by concerns for party-autonomy, in a new and growing area of international transactions that are collateralized using interests in electronic securities. It departs radically from traditional choice of law rules by following the actual industry standards and practice.

Second, thanks to far-sighted Scottish and European Commission leadership, the large Hague Enforcement of Judgments Convention was not scrapped altogether, but was focused down to the essence of what business needs—a convention on choice of court agreements. Like the New York Convention, it will provide rules on enforcing the agreement on the chosen court and rules on enforcing the resulting judgment.

Finally, in the area of child support (maintenance) enforcement, the Hague Conference is developing a new instrument that will provide a mechanism for recognizing and enforcing foreign support orders without any need to harmonize rules of jurisdiction. This approach recognizes just how difficult it is to harmonize fundamental rules of jurisdiction, and how at least in this specialized area, it is unnecessary. Moreover, the negotiations have a major focus on defining the administrative structures necessary at the national level properly to implement the Convention.

## III. Conclusion

The role and practice of the U.S. Department of State in private international law reflects the needs of our citizens and residents who are carrying out activities across international borders. We have few, if any, doctrinal requirements, and largely seek to find pragmatic and flexible solutions that will provide fair and largely balanced mechanisms for cooperation. This approach seeks flexible structures to authorize and facilitate the reciprocal exercise of comity among courts.

Is it impossible to think that the U.S. will implement more traditional private international law instruments? The 1996 Hague Convention on the Protection of Children is probably beyond reach for the foreseeable future. The Convention requires the implementation of strict new jurisdiction rules, but various exceptions and the traditional case-by-case nature of courts examining the best interests of the child seem to point to little more certainty in outcome than a traditional comity approach outside of the Convention. However, the prospects for the 1999 Hague Protection of Adults Convention may be considerably brighter. The practical need is so great to sort out the affairs of the growing number of elderly tourists and foreign residents who become disabled abroad, that the interest in the Convention is very strong. We hope to be able to make a major push to ratify it soon.

We are optimistic about the future of U.S.-EU judicial cooperation endeavors, provided that the increasing EU integration leads to greater confidence, flexibility, and pragmatic approaches to cross-border judicial cooperation. This conference is an outstanding beginning.