Private International Law

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The year 1997 saw globalization of private law efforts move forward, including the completion of a U.N. project to upgrade national laws on procedural aspects of cross-border insolvency cases, and slow but steady progress forward on international law unification work based on economic goals, rather than a focus on harmonizing existing national laws with an eye toward simply finding a common denominator. Progress also continued on treaty regimes to upgrade international family law.

New projects came on-line, which will make the remainder of the 1990s very active in the Private International Law (PIL) field. These projects include the initial stages of work on a multilateral treaty (convention) on recognition and enforcement of foreign judgments under the auspices of the Hague Conference on Private International Law; work on uniform rules for electronic and digital signature systems at the United Nations Commission on International Trade Law (UNCITRAL); tentative agreement at the Organization of American States (OAS) to begin work on three PIL topics; and others noted below. The Section is an active participant in many of these projects, and it is our goal to engage more Section participants and Committees in work on globalization of private law in the coming year.

I. Cross-Border Insolvency

UNCITRAL completed negotiations in May 1997 at its 31st plenary session at the United Nations in Vienna on international procedural rules to govern cross-border cases. The rules were endorsed by the U.N. General Assembly in November 1997. Prior to that, in what may be a hard to beat track-record, the Congressionally established National Bankruptcy Law Revision Commission recommended in October that Congress adopt the U.N. model law as amendments to the U.S. bankruptcy code. The U.N. rules were recast in bankruptcy code format and are expected to be introduced by the Judiciary Committees in the Senate and the House.

The U.N. model law, unlike recent E.U. initiatives, incorporates as a goal the reorganization of going concerns, as well as liquidation, which is a welcome tilt toward the long-standing U.S. approach on this important economic and social issue. The model law provides for rights of

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representation for foreign creditors and insolvency administrators, including debtors-in-possession, and sets out types of relief that may be granted upon application without delay, as well as after recognition of a foreign proceeding. Importantly, the rules provide authorization for judicial cooperation between countries, a concept recognized in some common law jurisdictions, building in part on earlier efforts by the International Bar Association (IBA), but a difficult one for civil law jurisdictions to accept. Provisions were included to equalize payouts between similar classes without distinction as to national location, to the extent possible, and to a limited extent to deal with statutory super-priorities.

Private sector associations played a major part in the fast track work at UNCITRAL, although the role generally of non-state actors in other international fora became somewhat controversial. The International Association of Insolvency Practitioners (INSOL) and the IBA provided the ground work, and through a series of international meetings were able to arrive at a limited scope for provisions on which consensus was more likely to be reached. This limited scope became the guidepost for work at the United Nations that was ultimately successful and that may serve as a model for some further projects.

In a related development, the American Law Institute (ALI) also completed its first phase of work comparing insolvency practices in the three NAFTA states. The ALI plans to move to the second phase, examining particular substantive issues on which harmonization may be achievable between Canada, Mexico, and the United States. These projects made progress in what was otherwise seen as an intractable field, in part because of the effects of globalization. International insolvency law is becoming an important front-end factor in extension of cross-border credit, not because of the issues involved in the pathology of failed businesses, but because it reflects an important point in assessing non-market risk and the attitudes of different legal regimes.

II. Convention on Jurisdiction and Recognition/Enforcement of Judgments

At the 18th diplomatic session of the Hague Conference on Private International Law, the organization's Member States decided to place the preparation of a convention on jurisdiction and the recognition/enforcement of judgments in civil and commercial matters on its priority agenda. Two of the planned four sessions of the Hague Conference's special commission on this project took place, with further sessions planned for November 1998 and June 1999. The final negotiations will take place at the 19th diplomatic session of the Hague Conference in October 2000, at the conclusion of which the convention is to be opened for signature and ratification.

Most issues were discussed during the June 1997 and March 1998 sessions without decisions being taken. However, before the November 1998 session the Hague Conference's Permanent Bureau is to produce a document to consolidate language reflecting the direction of discussions so far, with alternative formulations for those issues on which no consensus or agreement is apparent. That document should help the Member State delegations to reach decisions in November and make possible the preparation of a preliminary draft convention to be refined at the June 1999 session.

Among the most difficult issues is deciding which bases of jurisdiction on the margins should be either required or prohibited. Important for this issue and others is whether the convention is structured to list only required bases of jurisdiction, leaving all others prohibited, or whether the convention lists both required and prohibited bases, leaving all unlisted bases permitted, but with the resulting judgment not entitled to recognition/enforcement under the convention.

While common law countries give courts chosen by the plaintiff the discretion to relinquish jurisdiction to the courts of another country in certain circumstances, civil code countries do not generally apply the doctrine of forum non conveniens and do not give their courts such discretion. It remains to be seen whether agreement can be reached on this issue or whether the treaty could make optional the application of that doctrine, while at the same time retaining the enforcement rights otherwise available under the treaty.

Delegations are also wrestling with various alternative draft provisions to deal with non-compensatory damages in tort and product liability judgments. Damages viewed as grossly excessive by the court requested to enforce a foreign judgment under the convention present another difficult challenge.

Yet to be discussed fully, in addition to the basic structural question mentioned above, are possible enforcement of provisional orders and conservatory measures, group and multiple defendant actions, and whether intellectual property jurisdiction is to be addressed by the convention.

III. Extending International Secured Interests Laws

Negotiations continued at two international organizations, UNIDROIT in Rome and UNCITRAL in Vienna, and may begin soon at the Organization of American States (OAS), on draft multilateral treaties aimed at increasing the flow of commercial credit to more countries by upgrading national laws on secured interest financing and by creating internationally enforceable rights.

While a common feature of U.S. and Canadian laws, the so-called non-possessory security interests are relatively lesser-known in other countries and are often subject to very restrictive limitations. The U.S. effort goes further than upgrading national laws, however, and proposes that both treaty regimes include an important second step, i.e., adoption of open and transparent notice filing systems, to give notice to future parties of the possible existence of prior rights. Such a system was created in the United States under U.C.C. Article 9, and is the economic engine of our commercial law. At the same time, in order to obtain these benefits internationally, and especially for developing countries, such a system needs to be computer-based. This will, curiously, be a potentially difficult goal for the United States, which since the 1960s has established hundreds of paper-based state filing systems that would need to be converted under a treaty system.

The UNCITRAL project is centered on accounts receivable financing, which is the bedrock of modern commercial finance in our type of legal system. Consensus was tentatively reached on a number of key substantive issues, including the ability to assign future as well as present interests, and to do so in bulk transfers. The target date for completion was moved from mid-1999 to year 2000; this delay may have some advantages, since the completion by NCCUSL and the ALI of the new revisions to U.C.C. Article 9 were themselves delayed. The United States proposed that the second step for such a treaty regime, adoption of an internationally linked computer filing system, not be mandatory (because of opposition by a number of states), but instead be optional under the treaty.

The UNIDROIT project took on somewhat of a different cast. Focused on a more narrow range of commercial transactions, the sales and leasing of high value and separately identifiable equipment, the project presents less of a concern to some countries in that it requires less change to their overall commercial law structure. One international industry, aircraft frames and engines, saw competitors in different countries join together to present common positions

on development of the commercial law, leading now to the likelihood that the first phase of this convention system will extend only to aircraft. It is expected at the same time that procedures will be established to take up at a later time special provisions for other types of equipment that often move across national borders, such as space and satellite equipment, construction and agricultural equipment, freight containers, and possibly large commercial trucks and certain classes of vessels.

The coverage of aircraft necessitates working out treaty law issues because of the existence of other conventions that will remain in force, such as the post WW-II Chicago and Geneva conventions on aircraft registration and related matters. In order to facilitate working out these issues, the International Civil Aviation Organization and UNIDROIT will combine efforts.

IV. 1995 U.N. Convention on Independent Guarantees and Standby Letters of Credit

UNCITRAL completed, and the General Assembly endorsed, a multilateral treaty regime in 1995 intended to accommodate both the American U.C.C. Article 5 letter of credit law standards and European Geneva Convention-based bank guarantee standards. This regime was accomplished by narrowing the scope to documentary undertakings only and agreement on provisions that create a relatively high likelihood of payment, thus ensuring a strong discount rating and their ability to be used as collateral to support commerce. The United States formally signed the convention in December 1997, and a review is underway to consider whether the United States should ratify the convention.

The convention incorporates concepts more often used in common law jurisdictions of *lex mercatoria* by drawing on established business practices and banking standards as a basis on which compliance with treaty provisions can be measured. In support of this action, an international effort, essentially completed in 1977, was undertaken to prepare international standby practice rules. The ISP focuses on distinct practices that emerged in handling standbys, which are not reflected in the UCP, a consensual body of rules prepared by the International Chamber of Commerce. Private sector rule making activity, supported by a focused industry, joined governmentally based treaty development in producing a new legal regime for commerce. Its success may depend on the extent to which national banking systems support ratification of the treaty regime within their countries.

V. International Electronic Commerce

The 1996 UNCITRAL model law on electronic commerce, which contains basic functional rules equating computer based commercial activities with older paper world standards, adds computer era special requirements, such as attribution, allocation of risk, and default rules on when and where contractual events may be deemed to have taken place. The model law was increasingly used as a source for new law proposals both within states of the United States and foreign countries, and now appears in a number of provisions in NCCUSL's fast moving efforts toward developing new computer law, both in the draft U.C.C. Article 2B and the new draft Uniform Electronic Transactions Act.

UNCITRAL has now moved to a second, and possibly much more difficult, phase in its effort to prepare uniform international rules for electronic and digital signature systems. Several countries in 1997, notably including Germany, Italy, and Malaysia, enacted standards focused on digital signature systems that are regulatory in nature and that are based in part on earlier work in the United States, including proposals developed at the American Bar Association. While recognizing the importance of digital systems for governmental uses and certain more

limited classes of commercial communications, many in the United States now believe such systems are inherently regulatory and inappropriate for a wide variety of commercial uses unless chosen by the parties.

The OECD took a leading role in many aspects of electronic commerce as it relates to trade and cross-border communications. A new conference is scheduled for Ottawa in the Fall of 1998, at which consensus will be sought on issues such as trade access; cross-border provision of electronic services; and privacy, information security, and data protection. The United States will seek to broaden the acceptance of private sector standards and to allow multiple solutions to the use of cross-border computer-based systems, in contrast to some countries, including several in the European Union, such as Germany and Italy, which sought to impose greater regulation on these developing areas of technology as they relate to commerce and trade.

Not yet seriously engaged is the pervasive issue of jurisdictional standards. A growing number of domestic U.S. cases are beginning to define jurisdictional risk domestically, but no movement has been made at the international level, an obvious and major concern in a new communications era that in many respects is borderless. Network responsibility for content, privacy concerns, cryptology export, and data rights protection each add new dimensions to the cross-border aspects of this problem.

VI. Infrastructure Project Development in Foreign Countries: the New Era of Private Sector Partnership?

International organization work began on legislative guidance for new methods of project finance. UNCITRAL is actively engaged in preparing such legislative guidance, the first phase of which may be completed by mid-1999. The OAS may also soon begin work on a related topic for its next Specialized Conference on Private International Law, international loan agreements with an emphasis on secured interest financing.

The last decade saw a shift away from the post-1950s focus on multilateral and bilateral governmental funding and oversight of foreign projects toward privatization that in turn prompted a move toward private sector funding, construction, and management. While governmental funding and recipient state regulation of public services (and in some cases government guarantees) remain, the balance shifted toward building on private sector initiatives as a means of realizing the efficiencies of the market place. This shift also has the effect of moving major infrastructure work off-budget, leaving recipient governments more free to direct their available capital toward other purposes. This movement at the same time raises new issues of competition policy and other aspects of privatization of public services.

To accomplish these ends, the focus has now shifted at some bodies to private law regimes on management, financing, and corporate law issues. These issues include recognition of foreign investment and management rights, profit repatriation, securitization, authorization for special corporate entities necessary for long-term private loan placement, new regulatory and dispute resolution methods that recognize private interests in the provision of public services, standards for long-term development contracts and management, and new rules on applicable law.

VII. Hague Intercountry Adoption Convention

The 1993 Hague Intercountry Adoption Convention was signed by thirty-two countries (including the United States) and was ratified by seventeen, with one further acceding country. It is fast becoming the established internationally agreed set of norms and procedures designed to safeguard children moving from one party country to another in adoption, to protect the

interests of the birth parents and the adoptive parents, and thereby to prevent and to discourage child trafficking.

U.S. national adoption and child welfare interests provided guidance to the Department of State since the beginning of the international meetings to prepare this convention and were represented on the U.S. delegations to such meetings and the final 1993 negotiating session of the Hague Conference. Most endorsed in principle U.S. ratification of the Convention and the enactment of necessary federal implementing legislation.

Federal legislation has been in preparation by State, Health, and Human Services (HHS) and Immigration and Naturalization Services (INS) since Fall 1996 and, as of early April, is close to receiving final Administration clearance for introduction in Congress. The Convention is to be submitted by the Secretary of State to the President for transmission to the Senate for advice and consent to U.S. ratification in the near future.

Once the legislation is enacted, it may take up to two years to establish the U.S. Central Authority in the State Department and the procedure in HHS for Convention accreditation of U.S. adoption service providers wishing to offer adoption services covered by the Convention. Much of those two years will be required to process the applications of 100-200 adoption service providers likely to seek Convention accreditation. INS and the State Department would process immigrant visa applications for Hague Convention adoptees and children coming to the United States for adoption under new provisions of the Immigration and Nationality Act establishing special categories of children whose adoptions are safeguarded by the Hague Convention.

VIII. Protection of Children

In August 1997 the American Bar Association endorsed the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, and Cooperation in respect of Protection of Children for U.S. ratification. As its title implies, the Convention deals with basic elements of child custody, and also deals specifically with jurisdiction in cases of wrongful removal or retention of a child, thereby supporting the return requirements of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Based on the favorable action of the ABA and the Secretary of State's Advisory Committee on Private International Law, the State Department soon expects to authorize U.S. signature of the Convention. The Convention will be considered for transmittal to the Senate for advice and consent to U.S. ratification once there is further consideration of the effects of its provisions and additional private sector support for U.S. ratification.

IX. Family Support Enforcement

Section 371 of the 1996 Welfare Reform act authorized the Secretary of State, with the concurrence of the Secretary of Health and Human services, to declare any country to be a foreign reciprocating country if it enforces family support obligations owed by persons in the foreign country to persons in the United States substantially in accordance with the requirements set forth in the legislation. Such a declaration entitles a person residing in the reciprocating country to enforcement of a family support obligation against a person residing anywhere in the United States.

Since enactment of the legislation in August 1996, negotiations were commenced with over two dozen countries, primarily in western, eastern, and southern Europe (as well as in Canada), on federal government-foreign government arrangements for reciprocal enforcement of family

support orders and obligations. Once such federal government level arrangements are in place, they supersede any U.S. State to foreign government arrangements for such support enforcement that may exist.

Arrangements were concluded with Ireland, and should be completed soon with the Slovak and Czech Republics. Negotiations are planned with a number of Latin American, Caribbean, and additional eastern European countries during the next year.

Once arrangements are concluded with a foreign country, the HHS/Office of Child Support Enforcement becomes responsible for overseeing and monitoring the operation of the arrangements—enforcement of foreign orders and obligations against obligors in the United States, and enforcement of U.S. support orders and obligations against obligors abroad.

X. New UNIDROIT Work Program for 1999-2001

The new triennial work program was approved in early 1998; in addition to the ongoing work on the convention on mobile equipment discussed above, new projects will come on line. The now widely used 1994 UNIDROIT "Principles of International Commercial Contracts," which merge common law and civil law contract law principles, will be updated in a four to five year process by considering new provisions in the following areas: agency law, assignments, third party rights, limitation periods, and possibly electronic contracting.

Following completion of a detailed legal guide to international franchising (copies of which will be available in the near future, as soon as the French and English language versions are complete), it was agreed that work would move to the next phase—preparation of a model national law. A draft model law may be presented to the next Governing Council meeting in 1999, and if approved as a basis for negotiation, may set the stage for intergovernmental meetings.

Initial work was also authorized on a possible model national law on leasing (including financial leasing), which would build on the 1988 UNIDROIT Convention on International Financial Leasing. The United States is expected to move toward ratification of that convention in 1999. Preparation of a conforming model law was believed to offer assistance to countries that might want to upgrade their commercial law structure, but that were not in a position to immediately join the treaty regime.

XI. A New Era for PIL Issues as Non-Tariff Trade Barriers?

Aside from dispute resolution and international family law, some of the economic law topics above may move closer to becoming the basis for possible non-tariff trade barrier issues. While trade agreements may provide access in theory for foreign investment and business, a possibly significant amount of cross-border commerce nevertheless does not occur, or may occur in more limited trade routes or at increased cost and less competitive terms, because of the failure to harmonize and to upgrade where necessary the applicable commercial laws governing private rights in such transactions.

These de facto barrier issues are less likely to arise in the general law of contracts and sales of goods, since those are not industry specific, and in any event a significant degree of harmonization was achieved through the Vienna Convention on Contracts for the Sale of Goods and the UNIDROIT principles on international commercial contracts. At the same time, the rapidly growing area of electronic commerce is likely to be confronted with sharp disharmony in applicable laws, which in new industries can significantly change risks depending on the countries of origin of the providers of goods and services. Other examples are agreeing

to allow banking and financial institutions to transact across borders, but not harmonizing check clearing, letter of credit, and bank instrument standards, or not upgrading secured interest laws to permit the flow of commercial credit across borders, which may be necessary for foreign interests to competitively enter a market.

Differences in such laws can sharply alter trade patterns and inhibit market entry, which may begin to be seen as inconsistent with undertakings by the same states on trade access. The emerging globalization of trade and commerce may thus cause a reexamination of whether commercial law standards need to be harmonized as an integral part of trade liberalization.