

1999

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Recommended Citation

Harold S. Burman, *International Private Law - Heading toward the Millennium*, 33 INT'L L. 607 (1999)
<https://scholar.smu.edu/til/vol33/iss2/29>

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International Private Law— Heading Toward the Millennium

HAROLD S. BURMAN*

Real progress was made in 1998 on a number of private law “fronts” at the international level. Some of these projects are expected to be concluded in the year 2000, which could make that year a major year in the field of international private law. At the same time, what can be accomplished in this field may now have been stretched to the limits, which may be a guidepost for the next decade.

I. Organization of American States (OAS)

The OAS in 1998 agreed to three topics for private law negotiations, of which two are expected to be completed in 2000 at the Sixth OAS-sponsored Inter-American Specialized Conference on Private International Law (CIDIP-VI), although this may turn out to be optimistic. Most recently, OAS preparatory meetings in December 1998 set the stage for work on secured financing, carriage of goods by road, and cross-border environmental damage.

A. SECURED FINANCING

An Inter-American model national law on secured financing and international loan agreements, based in part on draft legislation pending in Mexico, could open up capital markets for many Latin and Caribbean states. Extending the concepts of secured finance law from Canada and the United States to other OAS states may call, however, for significant change in domestic law traditions. The cross-border legal aspects were reviewed in September 1998 at a Mexico City conference of Latin American banking and other interests. These developments could tap the estimated sixty percent or higher of total asset value in many countries in the Americas which is in the form of inventory or other personal property assets, and which is not now available to support commercial credit because of the existing laws.

Also on the table at the Mexico City conference was the possible adoption by Latin states of the 1995 United Nations Convention on Independent Guarantees and Standby Letters of

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Credit, together with the newly-released "ISP98" that provides uniform operating standards for standbys in international transactions. Forward movement on adoption of those two texts could increase the feasibility of commercial financing and the acceptance of an OAS secured interests model law for implementation in the Americas.

B. UNIFORM INTER-AMERICAN BILLS OF LADING

The OAS will seek to harmonize key transportation and carriage of goods legal requirements, which now vary widely across the Americas. A primary concern is non-uniform bills of lading, as well as insurance, letters of credit, and other supporting documents necessary to move commercial goods efficiently across borders and permit orderly transfer of rights in goods. This OAS initiative may include a possible protocol amending the 1989 Inter-American Convention on carriage of goods by road in order to make it relevant to commerce in the year 2000 and beyond. OAS states agreed to take up difficult issues left out of the 1989 convention, such as liability limits for loss to cargo, and to consider modern provisions for electronic documentation. It has also been suggested that this topic may be a good candidate to test inter-economic bloc discussions on PIL reform, possibly beginning with NAFTA and Mercosur.

C. CROSS-BORDER ENVIRONMENTAL DAMAGE

International law standards are today unavailable for environmental causes of action for damages resulting from sources external to the jurisdiction. Efforts in this field are generally focused on public international law and the obligations of states. In part due to an increase in alleged cross-border environmental damages occurring between various states in the Americas (Uruguay and Argentina are a case in point), the OAS placed the topic on the CIDIP-VI agenda. Efforts will be made to explore possible PIL work that could be undertaken, with an emphasis on jurisdiction and applicable law standards. There are as yet, however, no clear objectives likely to be achieved through private law, and therefore as yet no real expectation among OAS states that progress can be made.

It should be noted that this topic was previously examined at the request of India but not pursued at UNIDROIT, and the Hague Conference on Private International Law has placed it on the back burner as a possible project for the period 2000-2004.

II. Upgrading International Commercial Finance Laws— Are Economic Objectives Enough?

In addition to the proposed OAS draft model national law on secured financing, two multilateral treaty projects on secured interest financing were underway in 1998, including four weeks of meetings at the UNCITRAL, as well as preparatory work at UNIDROIT. These projects reflect the importance of the topic, although the outcome on both projects is far from clear. The U.S. approach is to reject traditional harmonization of existing legal regimes, and instead to promote the upgrading of national laws that facilitate access to commercial finance, especially for developing and emerging states. Such laws, common in the United States and Canada, would be a significant departure for many legal systems, although they could produce new credit and lower rates for underserved countries. The extent to which such countries, as well as developed countries with civil law systems, will accept these changes remains to be seen.

A. UNCITRAL

The year 1998 saw tentative acceptance by most states of the fundamental rules for modern receivables financing. For decades, bulk assignments and assignments of future receivables have

been an economic engine under the UCC. There has, however, been slow progress in UNCITRAL on minimal and clearly ascertained pointers to determine "internationality" and the need to assure lenders of sufficient legal predictability in transactions involving multiple assignors and assignees spread out in different countries. The year 1998 also at last saw tentative acceptance of optional provisions on UCC-type notice filing systems. From the U.S. viewpoint, public filing systems are key to priority rights and the willingness of international non-government lenders to finance commercial undertakings in many countries.

B. UNIDROIT

In July 1998, a drafting group completed a draft framework convention on equipment finance and a special protocol for aircraft transactions. The group had limited state membership but included industry and NGO representatives. The draft convention is crucial for infrastructure development in many countries.

A preparatory meeting hosted by the United Kingdom in November 1998 brought civil aviation and finance representatives together to review international law and treaty issues, including the relationship of the draft protocol to the post-World War II civil aviation treaty systems for air transportation, such as the Chicago and Geneva Conventions. The proposed treaty system would go beyond existing national governmental registries and include both future private sector filing systems and some form of new international system that would provide coordination and oversight.

Full inter-governmental negotiations are scheduled to start in 1999. They will present several *de novo* international process issues. The negotiations will need to merge completely different procedures between two international bodies, that of the ICAO, a highly-structured regulatory body of 185 member states with experience in air industry safety and soundness, and UNIDROIT, with fifty-five members and a track record on commercial law treaties. In addition, a less common treaty system has been proposed: a framework convention with specialized protocols for each industry. If the first protocol on aircraft transactions succeeds, it is expected that protocols on space equipment and railway rolling stock will probably be next in line.

While limited to specific high-end equipment transactions, acceptance of the proposed treaty regime may provide a basis on which many countries would consider further private law changes that would facilitate their position in international commerce and boost domestic finance. The extent to which economic benefits are accepted as sufficient reason to alter legal traditions remains, however, to be tested.

III. Electronic Commerce—Reaching the Outer Limits Between New Technologies and New Laws?

Electronic commerce saw significant advances in international private law throughout 1996. These advances include the now widely-used 1996 UN Model Law on Electronic Commerce (a number of provisions of which have been incorporated into the draft UETA under preparation by the Uniform Law Commissioners). They also include the new provisions concerning copyrights and intellectual property in the computer media adopted by the World Intellectual Property Organization (WIPO).

The year 1998, however, saw efforts at further progress on private law aspects of E-Commerce heading into areas of more conflict as economic regulation and other public policy issues began to take precedence. UNCITRAL's efforts to prepare international rules on electronic message authentication and signature systems, originally based on the ABA's Science and Technology

Section's work on legal systems to support U.S.-based digital signature technology, may run aground in the face of a U.S.-led effort to prevent early adoption of legal standards before further developments both in technology and business applications. The same conflict was mirrored in discussions of the public law aspects within the OECD. These discussions concluded in October 1998 with a much scaled down set of OECD principles.

The private sector business use of computer data, especially in transatlantic trade, became a standoff in 1998 when the EU issued privacy protection standards and threatened to impose sanctions of firms using or transmitting data to or from the United States that are not in compliance with these standards. Still under negotiation, the outcome is uncertain but potentially could give rise to substantial trade and regulatory disputes across the Atlantic. A third area—user and producer/distributor rights in software and computer-based data—also ran into substantial difficulty. This is reflected in the debates with respect to draft UCC Article 2B. The combination of these factors may have led to a significant slowdown in efforts to provide private law frameworks for electronic commerce at the international level.

IV. Initial Progress on a Draft Convention on Jurisdiction and Enforcement of Foreign Judgments

Over forty countries from all regions of the world, including all major U.S. trading partners, are participating in negotiations at the Hague Conference on a draft convention on jurisdiction and the recognition and enforcement of foreign civil judgments, including torts and contracts. If successful, the convention would put in place a regime governing jurisdiction to sue defendants from party states and ensuring predictability in the enforcement of resulting judgments. The United States is not currently a party to any bilateral or multilateral agreement on the reciprocal enforcement of civil judgments. A successful treaty could have profound beneficial effects on international commercial transactions, in particular for the middle level litigant who has substantial business dealings, but a claim that cannot justify hiring counsel in more than one jurisdiction for protracted litigation in both.

The negotiations are facing serious obstacles. Because the goal is to regulate jurisdiction as well as provide rules for recognizing and enforcing judgments, any resulting convention must bridge differences in approaches toward general and specialized jurisdiction between common law and civil law countries, as well as countries outside of Europe and North America. Defining required and prohibited grounds of jurisdiction, providing for flexibility for differing national approaches, maintaining the ability of courts to decline jurisdiction, dealing with a lack of fairness or impartiality in the judgment court, and questions of excessive damages are simply a few of the stumbling blocks.

The second and third two-week negotiating sessions were held in March and November 1998. A partial, heavily-bracketed, preliminary text of some of the provisions of a convention was produced at the November session. The next round is scheduled for June 1999, with the final session set for October 2000.

V. International Personal and Family Law Developments

A. CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Family law organizations, the national Center for Missing and Exploited Children (NCMEC), and the Departments of Justice and State are working on an action plan for improvement of implementation of the 1980 Hague Convention (requiring the prompt return of wrongfully

removed or retained children). The low rate of return from some countries, coupled with a handful of high-profile non-returns in apparent violation of the convention's return obligations (from such countries as Germany, Switzerland, and Austria), has evoked the concern of the Senate Foreign Relations Committee and resulted in an SFRC hearing on October 1998.

B. CROSS-BORDER CHILD SUPPORT ENFORCEMENT

On the basis of authority granted in the 1996 welfare reform legislation, the Departments of State and Health and Human Services have embarked on a series of negotiations with other countries with a view to concluding arrangements for the reciprocal enforcement of family support obligations. The Hague Conference will also discuss the feasibility of preparation of a convention on child support that would supercede a 1956 UN (ECOSOC) Convention and two earlier Hague conventions in this field.

C. PROTECTION OF CHILDREN AND INCAPACITATED ADULTS

The 1996 Hague Convention on the Protection of Children sets out rules for jurisdiction, applicable law, recognition, and judicial cooperation concerning measures for the protection of children, including who has parental responsibility. The convention has now been endorsed by the ABA for U.S. signature, which may take place in the near future. Following preparatory work in 1998, final negotiations on a new convention on the protection of incapacitated adults and their property will take place at The Hague in September 1999. The draft convention is patterned as closely as possible on the Hague Child Protection Convention.

The foregoing represents substantial movement in 1998, with the prospect that several conventions in the private law field may be completed in the years 1999 and 2000. Whether that forward progress will continue beyond the year 2000 remains to be seen. Coincidentally, new international agendas will need to be set around the turn of the century for many of the international organizations active in this field, which will need to assess new priorities. In addition, the playing field may change during the coming years, as a result of the increase in regional law development by the OAS, the European Union, and others, such as the French speaking countries of Africa who have newly entered this field, and possibly other regional bodies. The year 1998 saw some increased willingness of countries to focus on harmonizing private law, as yet not matched by an equal number of ratifications. It is also uncertain whether the current U.S.-backed approach to law harmonization, which rests on economic, family law, or other result-driven standards, rather than the traditional approach of common denominators between national legal systems, will continue to take root.

