

The Hague Conference on Private International Law: Some Observations

I. The Hague Conference

The Hague Conference on Private International Law is an international organization of thirty-two member states.¹ Its purpose is to unify the rules of conflict of laws (private international law) that are applied in Member States and to a lesser extent, by reason of the Conference's influence, throughout the entire world. The normal practice of the Conference is to meet in plenary session in October of every fourth year. These sessions are devoted to the preparation of proposed conventions, which are then submitted to the member states for ratification, and to the planning of future work. During the interim between sessions, so-called Special Commissions meet to prepare initial drafts of conventions that are considered in detail at a plenary session. The affairs of the Conference are administered by a Permanent Bureau located in The Hague.

The United States has been associated with the Conference since 1956. It sent Observer Delegations to the plenary sessions held in 1956 and 1960. Prior to the 1964 session, the United States joined the Conference as a full-fledged member, and since that time has sent representatives to all of the plenary sessions as well as to most of the Special Commission meetings.

It is my good fortune to have been a member since 1956 of every U.S. delegation that has attended a plenary session of the Conference. In addi-

*Charles Evans Hughes Professor of Law Emeritus, Columbia University; Reporter, RESTATEMENT OF CONFLICT OF LAWS (SECOND).

1. Argentina, Australia, Austria, Belgium, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic of), Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States, Uruguay, Venezuela, and Yugoslavia.

tion, I have participated in the meetings of a number of Special Commissions. I served as Rapporteur for the Convention on the Law Applicable to Products Liability (on which work was completed in 1972) and as Chairman of the various meetings which led in 1976 to the approval by the Conference of the Convention on Celebration and Recognition of the Validity of Marriage.

A. TOPIC SELECTION AND ORGANIZATION

During my long association with the Conference, there has been no marked change in its method of work. General directions with respect to future work are given at each plenary session, but it is customary to give the Permanent Bureau some discretion in regard to the exact order in which each topic is to be addressed. Work on each topic is usually commenced by the preparation by the Permanent Bureau of a voluminous study which investigates the ramifications of the subject and sets forth the relevant rules that are in force in each of the member states. The member states are then invited to appoint so-called "experts" to participate in the work of a Special Commission, whose task is to prepare the text of a draft convention for consideration at a plenary session. In the normal course of events, the first meeting of a Special Commission will last for four or five days and will be devoted to a general discussion of the problems involved. Thereafter, future meetings will be held, usually two or three in number, at which the text of a draft convention will be produced. This draft will form the basis for discussion at a plenary session. Normally, agreement on a final text is reached at the first plenary session at which the topic is considered. Sometimes, however, there will be need for a special meeting of the entire Conference to complete the work.

B. PRESENT WORK AND OTHER UNIFICATION EFFORTS

At the present time, the Conference is engaged on a special project—to prepare a Convention on the Law Applicable to Contracts for the International Sale of Goods. This project is special because it is being undertaken in cooperation with the United Nations Commission on International Trade Law (UNCITRAL). All states that are members of the United Nations will be invited to send delegations to a session that will be held in October, 1985. It is hoped that agreement on the final text of the Convention can be reached at this meeting.

This departure from ordinary practice may well prove of immense importance to the Conference. In its early days, the Conference stood without competitors in its efforts to bring some uniformity on the international scene

to the rules of conflict of laws. Today there are a number of organizations, of which the United Nations is the foremost example, that are engaged in seeking to unify certain fields of substantive law such as international sales. There is a possibility that at least some of these organizations may in due course turn their attention to conflict of laws. Since these organizations are likely to be better financed and to have a larger membership than the Conference, there is a danger that ultimately they would take over major portions of the conflicts field. If this were to occur, the Conference would become less influential and eventually it might either be forced out of existence or, what is more likely, have its functions severely curtailed. This would be unfortunate because over the many years of its existence the Conference has acquired a real expertise in working on conflict of laws problems on an international level.

This cooperative venture between the Conference and UNCITRAL augurs well for the future. UNCITRAL has recently completed work on a convention dealing with the substantive law of international sales. Instead of having this convention deal with choice-of-law problems, UNCITRAL has requested that the Conference do so. To the extent that this practice is continued, the Conference will be afforded new opportunities for doing important work and will have little to fear from the ever increasing number of international organizations that are concerned with legal matters. Also, a practice of reserving choice-of-law problems for the Conference would be more likely to attain sound results. Such problems involve peculiar difficulties and the Conference has had long experience in dealing with them. In all probability, no other organization could deal with these problems as well.

C. CONFERENCE'S METHODS OF OPERATION

During the thirty-year period of my connection with the Conference, methods of operation have remained essentially the same. There have, however, been other changes. The most important change relates to language. Originally, the only official language was French although a certain grudging accommodation was made for those souls who could only speak and understand English. Now English and French are both official languages, and simultaneous translation is provided. The delegates who attend the various meetings of the Conference at present are also quite different than those who attended in 1956. In the earlier years, the delegates were usually either judges of a high appellate court or professors with an established reputation. Today the typical delegate is a relatively young civil servant. By and large, the discussions retain their high intellectual character, although they lack the old world charm and elaborate courtesy they previously possessed.

D. CONFERENCE ACCOMPLISHMENTS

One must realize at the outset that it is very difficult to formulate satisfactory rules of conflict of laws and that this is particularly true of choice of law, which is the area to which a major part of the work of the Conference has been directed. The difficulty is the vastness of the subject, covering as it does jurisdiction, the recognition and enforcement of foreign judgments, and choice of law, combined with the fact that many of these areas remain relatively unexplored. As a consequence, most rules will almost surely be found to cover situations that were never contemplated by the original draftsmen. Quite naturally, when applied to such situations, a rule is likely to lead to unfortunate results. The problem is most intractable in the case of choice of law. Even a relatively simple rule is likely to include within its literal scope situations involving many different groupings of contacts between two or more states having numerous variations in their relevant local laws. Further difficulties will be encountered by any organization that seeks to bring uniformity among states to the rules of conflict of laws. Each state will have its own approaches to and preconceptions of the subject. Few states will be inclined to agree to any complete departure from their existing rules and principles. Any proposed convention is therefore likely to be in the nature of a compromise which, not being completely satisfactory to any state, may never come into force for lack of the necessary ratifications and, even if it does, may not work well in practice. Without question, organizations dedicated to the unification between states of rules of substantive law have a far easier task than does the Hague Conference on Private International Law.

In view of these problems, it is hardly surprising that only a relatively small number of the conventions prepared by the Conference have been ratified by a majority of the member-states. By and large, the conventions that have enjoyed the greatest success have involved international judicial assistance (service of process, the taking of testimony abroad, etc.), the law governing child support, the recognition and enforcement of judgments providing for child support, the form of wills and simplification of the requirements for establishing the authenticity of foreign public documents. It will be noted that only two of these conventions deal with choice of law. The child support one called for the application of the law of the state of the child's habitual residence. This was a sensible solution, but the success of the convention was due in large part to the fact that there was great need at the time (shortly after World War II) for agreement on the point. The convention on the form of wills provides in essence that a will shall be held valid with respect to formalities if it complies with the requirements of any one of a number of designated states.² By way of contrast, the Conference

2. In so far as a will concerns immovables, the convention provides that the will shall also be held valid with respect to formalities if it complies with the requirements of the state where the immovables are situated.

has had little success in dealing with the more difficult subjects, such as enforcement of foreign judgments, adoption, and the law governing traffic accidents, products liability, agency, and marriage. These are areas where states quite understandably would be reluctant to bind themselves by convention to apply relatively hard-and-fast rules of choice of law.

The success of the Hague Conference, however, cannot properly be judged by the number of ratifications its conventions have received. Without a doubt, the Conference is the preeminent international body that is concerned exclusively with conflict of laws problems. Its various meetings afford occasions for the fruitful exchange of ideas among persons who are well versed in the subject. Its conventions, even when not ratified, are treated everywhere with respect and undoubtedly have wide influence on courts and legislators. This influence is not limited to states that are members of the Conference. It extends throughout the world and undoubtedly has an important effect upon the thinking of persons in developing countries in the area of conflict of laws. The Conference, in short, has world-wide significance; it also has particular importance to the United States. States that have ratified a particular convention may well be required to apply its provisions to transactions involving Americans. In any event, those with whom Americans deal in their international transactions are likely to know and to be influenced by the Conference's work.

II. Role of the United States

Since it attained membership in 1963, the United States has sent representatives to all of the plenary sessions and to a majority of the Special Commission meetings as well. By and large, the American representatives have been well versed in their subjects and have expressed their views forthrightly. Where the United States can perhaps be faulted is with the relatively small number of conventions that it has ratified. To date, only three conventions have been ratified by the United States. Two involve judicial assistance, namely the service of process and the taking of evidence abroad, and the third deals with the simplification of the requirements for establishing the authenticity of foreign public documents.

The reasons for this small number of ratifications are as follows. Frequently, there is some dissatisfaction on the part of the United States with the provisions of a proposed convention. This is hardly surprising in view of the extreme difficulty, alluded to above, of drafting satisfactory rules of conflict of laws. Either the provisions of a convention are likely to be so broad as to afford only a general guide to decisions, and hence to be unsuitable for a convention designed to achieve uniformity of result in some area of conflict of laws, or by reason of their precision, it may be feared that the provisions would compel the courts to reach unfortunate results in situations that either are known or, although currently unforeseen, would

fall within their literal scope of application. In addition, it is difficult to have delegations from a number of countries agree on any conflicts formulation and the ultimate text may be in the nature of a generally unacceptable compromise.

A further reason for the small number of U.S. ratifications is to be found in the ratification process. Under our constitutional system, a convention must receive the "Advice and Consent" of "two-thirds of the Senators present." Before being brought before the full Senate, the convention must be considered by the Senate's Foreign Relations Committee. Also, experience has shown it to be highly desirable that a convention be approved first by the American Bar Association. All of these organizations are extremely busy and, quite understandably, do not attach as much importance to conflict of laws as they do to many other matters. As a consequence, there is little inclination to devote a significant amount of time to consider the merits of a convention and the necessary approvals are unlikely to be obtained if opposition is voiced by as few as two or three persons. In any event, the ratification process will almost surely be protracted in part because of the feeling that there are more important matters for the Senate to consider.

There is a further difficulty because the State Department can assign only two members of its staff to work on private law matters. They have the task of keeping track of the activities of a substantial number of international organizations and can devote only a small fraction of their time to Hague Conference problems. Many steps must be taken before a convention can be brought to the Senate. The paucity of available personnel is a further reason for the paucity of U.S. ratifications.

No objective person could justly accuse the United States of lacking interest in the work of the Hague Conference. The fact that this country has ratified relatively few of the Hague conventions, however, does have the unfortunate result that American delegates do not have the same influence that they otherwise would. Regarding the decision as to whether or not to adopt an American suggestion, foreign delegates today will not be influenced by fear that if they do not, the United States will not ratify the convention under consideration. U.S. ratification in any event is improbable.

It is unfortunate that in the United States the ratification process is plagued with so many difficulties. How they are to be overcome is a question that is not easy to answer. In these times of financial stringency, it seems idle to suggest that the State Department should assign more of its personnel to private law matters. Perhaps changes could be made in the ratification process that would permit consideration at greater length in the Senate of the merits of a particular convention. In any event, the present situation is far from ideal. The United States is not presently receiving all the benefits that membership in the Hague Conference should entail.