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SYMPOSIUM ARTICLES

THE PROJECT OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW TO PREPARE A CONVENTION ON JURISDICTION AND THE RECOGNITION/ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

*Peter H. Pfund**

INTRODUCTION

I would like to thank Brooklyn Law School and especially Professor Maryellen Fullerton for arranging this timely and useful symposium. It offers a first opportunity for public discussion in the United States of the new project of the Hague Conference on Private International Law and the issues that will be involved in that intergovernmental organization's important effort to prepare a convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters.

My purpose at the beginning of the symposium is to set the scene for you by explaining why the United States made the proposal for this project to the Hague Conference and how the Department of State, in consultation with the U.S. private legal and business sectors, plans to deal with the project until October 2000.

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I. U.S. PROPOSAL TO THE HAGUE CONFERENCE

The U.S. Proposal for the project was made in May 1992 by letter from the Legal Adviser of the Department of State to the then Secretary General of the Hague Conference.¹

Over four years later, the Hague Conference Member States decided in October 1996: "to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters."² The Nineteenth Session is scheduled for October 2000.

II. REASONS WHY WORK IN THIS AREA IS TIMELY

The United States is not, and never has been, party to any treaty providing for the recognition/enforcement of U.S. judgments abroad and the reciprocal recognition/enforcement of foreign judgments in the United States. Officials of the Department of State so inform attorneys in the United States many times every month in response to their inquiries. Some of those attorneys ask in connection with an existing judgment either for or against their client, issued by a court in the United States or abroad. However, many make their inquiry as they are considering whether it would be worthwhile for their clients to seek the judgment of a court in the United States when the possible defendant is not believed to have adequate assets in the United States to satisfy the judgment they would seek.

In the 1970s, the United States tried to achieve a bilateral treaty with the United Kingdom on judgments but without success, largely due to late opposition of the U.K. manufacturing and insurance industries. The U.S.-U.K. treaty was to be the model for a possible series of bilateral treaties that never got off the ground.

The 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards³ in 1992 had close to

1. Letter from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92))

2. Hague Conference on Private International Law, Final Act of the Eighteenth Session, Oct. 19, 1996, pt. B(1), 35 I.L.M. 1391, 1405.

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force

100 party States (now over 104); however, arbitration is not an alternative for dispute settlement available to or desirable for all aggrieved parties or for all types of disputes.

Pursuant to *Hilton v. Guyot*,⁴ foreign judgments meeting certain due process requirements are generally enforced in the United States—at least so far. At the same time, U.S. judgments are not generally accorded the same generous enforcement abroad—sometimes, admittedly, because of deficiencies in service of process on the defendant. U.S. judgment creditors and uncountable would-be but discouraged U.S. plaintiffs are disadvantaged by the absence of a judgments convention or bilateral treaties requiring enforcement of U.S. judgments abroad. The absence of a treaty requiring the enforcement of U.S. judgments means that in some countries U.S. judgments cannot be enforced.

Entities and individuals not domiciled in the European Union, including U.S. citizens and entities, are subject under the Brussels Convention,⁵ in force among European Union Member States, to litigation based on heads of jurisdiction recognized as exorbitant and impermissible under that convention for litigation against any domiciliary of the European Union. Such non-domiciliaries are subject to having any resulting judgment against them enforced throughout the European Union. While this possibility is not known as yet to have resulted in a problem for any U.S. entity or individual, a Hague convention could satisfy the requirements of Brussels Convention Article 59⁶ and abolish this discriminatory possibility.

with respect to the United States Dec. 29, 1970) (commonly referred to as the New York Arbitration Convention).

4. 159 U.S. 113 (1895).

5. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1989 accession of Spain and Portugal, see 1990 O.J. (C 189) 2, *reprinted in* 29 I.L.M. 1413). The Convention is also subject to the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Nov. 29, 1996, 1997 O.J. (C 15) 1.

6. The basic and first paragraph of Article 59 provides:

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second

III. ALTERNATIVE APPROACHES TO NEGOTIATIONS

The State Department considered the relative advantages and disadvantages of several alternatives for achieving treaty-based obligations for the recognition and enforcement of judgments issued by courts in the United States.

A series of bilateral treaties would require several negotiating sessions with each country of at least one week each. Each treaty finally adopted would differ in at least some of its provisions from other treaties in the series. This would confront attorneys in the United States with a different text for every country with which a treaty is adopted and enters into force. It would confront the U.S. negotiators with the efforts of other countries to exploit to their advantage every provision concluded with other countries that they might prefer over what the United States is offering and prepared to accept for that country. Every such bilateral treaty would need to be transmitted separately to the Senate for advice and consent to U.S. ratification, and each might require enactment of its own federal implementing legislation. In the course of hearings, the Senate might seek explanations of differences in the provisions of such treaties that could touch on sensitive differences in how the U.S. government evaluates the fairness of the legal systems and the independence of the judiciary of the countries involved. Moreover, the human and other resources that would need to be devoted to the adoption of a series of bilateral treaties and to obtaining authorization for the ratification of each treaty in the series would be very great indeed. For these reasons, the effort to negotiate a series of bilateral judgment treaties was deemed too resource-intensive and not worthwhile.

We also considered the possibility of proposing that there be an effort to conclude a multilateral treaty with the Member States of the European Union. Given the number of EU Member States, it is reasonable to assume that the negotiations with them would not have taken place in the United States but only in Europe and at the invitation of any EU Member State willing to serve as host State for one session of such negotiations. Several negotiating sessions would have been required. After the first session, invitations to further sessions would

paragraph of Article 3.

Brussels Convention, *supra* note 5, art. 59.

probably have been forthcoming only if the EU Member States had satisfactory (to them) assurances that the United States would be prepared to offer sufficient additional concessions over those offered at previous sessions to make the invitation and further session in Europe worthwhile. The United States would have always been the demandeur for further sessions, and would have been substantively disadvantaged by that fact. The EU Member States would also have wished to depart as little as possible from the text of the Brussels Convention, which is authoritatively interpreted by the High Court of the European Union in Luxembourg when there are differences between party countries on its interpretation. In the EU Member States, interpretation of any U.S.-EU convention, while not formally subject to authoritative interpretation by that Court, would have unavoidably been influenced by High Court interpretations of identical or similar provisions in the Brussels and Lugano⁷ Conventions, *i.e.*, interpretations to the decisions on which the United States would have had no input.

For reasons including those just summarized, we decided that an intergovernmental organization devoted to the unification of private law would offer the most promising and cost-effective forum and ambience for an international effort to prepare a convention on jurisdiction and the recognition and enforcement of judgments having world-wide appeal.

IV. WHY THE HAGUE CONFERENCE?

The State Department decided upon a multilateral effort under the auspices of the Hague Conference on Private International Law for many reasons. The Hague Conference has a membership that includes the United States, Canada and Mexico, and all Member States of the European Union, plus several Latin American countries, China, Japan, Australia, Israel, Morocco, Egypt, and several countries of Eastern Europe. The organization has successfully prepared many sound legal conventions. It has experience with judicial assistance conventions on service of process abroad,⁸ taking of evidence

7. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (popularly known as the Lugano Convention).

8. Convention on the Service Abroad of Judicial and Extrajudicial Documents

abroad,⁹ legalization of documents for use abroad¹⁰ and a 1971 convention dealing with recognition/enforcement of judgments¹¹—all but the lattermost ones to which the United States is a party.

The Hague Conference also has an established four-year rhythm of work, with preparatory studies done by the Permanent Bureau,¹² and preparatory work done by Member States at regularly scheduled special commission sessions that offer the opportunity for thorough, non-confrontational, non-politicized, professional, legal-technical, and goal-oriented discussions. Moreover, the Hague Conference's Permanent Bureau appeared to believe that the organization and its Member States could successfully prepare and adopt a useful and broadly acceptable convention for this purpose.

The Hague Conference also offers all the other necessary infrastructure and services: simultaneous interpretation (into French and English), access to adequate facilities for meetings, and a routinized process for preparatory meetings and final diplomatic negotiations. The process includes a routine for work by a drafting committee and a balanced "bureau" of project officers from country delegations for guiding the procedures and negotiations, as well as financial arrangements for the organization's operation and sessions, the costs of which are covered by the contributions to the organization's budget

in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

9. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

10. Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1971, 33 U.S.T. 883, 527 U.N.T.S. 189.

11. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *done* Feb. 1, 1971, 1144 U.N.T.S. 249.

12. Once the Hague Conference Member States had placed the topic on the organization's agenda for the years 1996-2000, Ms. Catherine Kessedjian of the Permanent Bureau produced a 56-page report that summarized the issues involved in the project and alternative approaches for dealing with them that had been identified at the 1993 meeting of a working group and at two sessions of its Special Commission in June 1994 and June 1996, which were convened to examine the feasibility of the proposal for this project. See CATHERINE KESSEDJIAN, *INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS* (Hague Conference on Private Int'l Law, Prel. Doc. No. 7, Apr. 1997). This document formed the basis for the review of those issues at the June 1997 first Special Commission session that is to be completed at the second Special Commission session in March 1998. This document is available on the internet and can be found on the U.S. Department of State home page at: <http://www.his.com/~pildb/jud_rp7.html>.

by the host government (The Netherlands) and the organization's other Member States.

To summarize, the Hague Conference offered all the necessary and desirable institutional, procedural and other facilities and services, and the expertise, support and Member State motivation to make the project successful.

V. THE HAGUE CONFERENCE PROCESS AND APPROACH, AND CURRENT STATUS OF THE PROJECT

This topic was addressed by T.B. Smith, Canadian Chairman of the Hague Conference's special commission, in his luncheon remarks between the morning and afternoon sessions of the Brooklyn Law School Symposium.

VI. CONSULTATIONS WITH THE U.S. PRIVATE LEGAL/BUSINESS SECTORS

Consultations with the U.S. private legal and business sectors began in October 1992 just after we had submitted our proposal and put together a study group on judgments of the Secretary of State's Advisory Committee on Private International Law. Represented so far on the Study Group on Judgments are: the ABA Litigation Section; the Association of Trial Lawyers of America; the National Association of Attorneys General; the American Insurance Association; the American Law Institute; the National Conference of Commissioners on Uniform State Laws; the American Corporate Counsel Association; the American Branch of the International Law Association; representatives of the Federal and State court systems; and representatives of the practicing bar. We shall seek to ensure, through an ever-increasing mailing list, that all other organizations and individuals interested in following this project and providing guidance on it will have the opportunity to attend Study Group meetings and otherwise provide us with their views and comments throughout the "creation" of the judgments convention. Any additional persons or organizations interested are invited to let the Department have their names, affiliation, addresses, phone, fax numbers and e-mail addresses. We will put them on our mailing list for meeting notices, documents and information on developments.

The Department expects in December to receive a complete report from the Permanent Bureau on the June 1997 first

session of the special commission that my office will place on its home page as soon as it is received on diskette from the Hague Conference Permanent Bureau and has been appropriately formatted.¹³

On the basis of that report, we will convene a meeting of our Study Group on Judgments in February 1998, before the second special commission session in March 1998. At that meeting we will seek guidance on those bases of jurisdiction that should, so far as the United States is concerned, go into the list of required bases and those bases that the U.S. delegation could agree should go on the list of impermissible bases for litigation against any habitual resident of a party country. There will, of course, also be other issues on which we will seek guidance at that meeting. The meeting will be announced in advance in the Federal Register and will be open to the public. Those on our mailing list by January 1998 will receive notices and materials prepared for the February Study Group meeting. Other meetings of the Study Group will be convened as the need for further guidance arises. The mailing list will always be open and subject to additions at all times.

We are aware that for the convention that results from the efforts of the Hague Conference to have any good chance of receiving the political support that is essential for it to receive Senate advice and consent to U.S. ratification, the private legal and business sectors will need to have the opportunity to be involved in its creation by providing guidance throughout the preparatory and negotiation stages. We will need the same kind of guidance in connection with the preparation of federal implementing legislation in order for the legislation to garner the necessary political support for its enactment by Congress. The participation in preparation of the convention will be through persons on the U.S. delegation to sessions at The Hague and participants at Study Group meetings before and, with regard to implementing legislation, also after the final intergovernmental negotiations on the convention in October 2000.

13. For the home page on private international law of the U.S. Department of State see <<http://www.his.com/~pildb/>>.

CONCLUSION

The 1992 U.S. proposal to the Hague Conference has resulted in the acceptance of a difficult and challenging project for *all* Hague Conference Member States. With the extent of U.S. legal contacts, transactions and relationships across our borders, and the substantial concern of many countries regarding certain aspects of U.S. law—especially long-arm jurisdiction, punitive, multiple and what they consider to be “excessive” damages in tort and product liability cases—the United States is generally viewed as an especially important participant, although we have only one vote. We hope that this means that U.S. concerns, *i.e.*, the Constitutional/legal constraints imposed on us and our assessment of what is politically acceptable in the United States, will adequately be taken into account by other countries participating in this project. It would be a pity if the project resulted in a convention broadly acceptable to other countries but not acceptable to the United States for legal, Constitutional and/or political reasons. This is especially true, as a project for the unification of law and procedure in any field of law comes along only every twenty to thirty years. In view of concerns about U.S. bases of jurisdiction and judgments, the U.S. delegation to work at The Hague must have some latitude to *give* in the process of give-and-take that is normal for any such negotiations and project. We hope, too, that the U.S. legal community, especially, will become aware of what the final convention may offer by way of advantages over the *status quo* in the absence of such a convention and will judge the merits of the final convention by that standard.

The Department of State and the U.S. delegates to this work believe that it will be possible to achieve a convention the advantages of which to U.S. interests will be greater than its perceived and actual disadvantages. We will, however, need the help and active support of the private legal and business sectors to ensure that this vision becomes a reality.

