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CONNECTICUT AND INTERNATIONAL LAW

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I. INTRODUCTION

Most states within the United States do not consider international law in their legislative process. The Constitution specifically prohibits states from concluding treaties.[1] In fact, this power is expressly given to the President.[2]

Law students reflect upon *Missouri v. Holland*, 252 U.S. 416 (1920), which suggests the treaty power is defined by those with the power and trumps states' rights.

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1. U.S. CONST. art. I, § 10, cl. 1.

2. U.S. CONST. art. II, § 2, cl. 2.

Such an expansive reading would be antithetical to our system of checks and balances. It would give the federal government too much power to reach into areas that have traditionally belonged to states, such as court procedures. It also ignores states have the Constitutional power to conclude agreements with foreign powers (with the consent of Congress).[3] International delegations often must be implemented locally in numerous ways. As a result of this assumption, states have not properly considered their obligations to implement treaties (and there is often more than one way to implement a treaty).

Connecticut has been markedly different from other states. Connecticut considers the United States' treaty obligations when it enacts legislation. Legislation which violates the United States' treaty obligations is not only void, but it may subject the United States to reparations claims by other countries. While some state legislators may consider the possibility their enactment may be void, they don't consider the possibility their actions may subject the United States to a claim for reparations.

On the positive side, Connecticut has enacted a number of statutes which codify and implement Connecticut's international law obligations. They have generally been codified in Title 50A in the Connecticut General Statutes.

II. CONNECTICUT GENERAL STATUTES: TITLE 50A

A. Uniform International Wills Act[4]

The Uniform International Wills Act (a part of the Uniform Probate Code) regulates the formalities necessary for executing a valid will. It does not regulate the effect of a will, nor how a will is interpreted. The formalities necessary to execute a valid will have traditionally been regulated by states for hundreds of years.

The act is based upon the National Conference Commissions on Uniform State Law's interpretation of what is necessary to implement the 1973 UNIDROIT Convention on the Form of an International Will. While the United States Senate has given its advice and consent for the United States to become a party, the instrument of ratification (signed by President Reagan) has not yet been deposited. The instrument of ratification is unlikely to be deposited until the United States Congress enacts the federal implementing legislation which would cover the citizens overseas, members of the military and so forth.

In the meantime, the following states have enacted the necessary implementing legislation: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Minnesota, Montana, New

3. U.S. CONST. art. I, § 10, cl. 3.

4. CONN. GEN. STAT. §§50a–1–10 (2004).

Mexico, North Dakota, Pennsylvania, and Virginia. This was done even though the United States is not a party to the convention.

It should be noted Connecticut's legislation did not provide for a will registry.

B. UNCITRAL Model Law on International Commercial Arbitration[5]

Arbitration is the most effective way for resolving international commercial disputes because the United States is not a party to any international convention on the enforcement of judgments. While each country is generally convinced of the wisdom of its own laws, there is a need for predictability across countries in enforcing commercial obligations and to avoid a "race to the courthouse."

The Federal Arbitration Act (9 USC §1, *et seq.*) is a rather "bare bones" piece of legislation. Much of its detail comes from decades of judicial interpretation. While Americans may be able to find and apply the judicial interpretations, foreign nationals are concerned because the details are not codified. Interpretations of the Federal Arbitration Act on important points can differ from circuit to circuit.

Connecticut responded to this by enacting the UNCITRAL Model Law on International Commercial Arbitration. The Federal Arbitration Act does not pre-empt this enactment because it mainly supplements the Federal Arbitration Act. In addition, the Federal Arbitration Act was enacted under the Constitution's commerce clause. Disputes being arbitrated in the United States which involve trade solely between other countries do not fall within the commerce clause, meaning Connecticut has the exclusive legislature competence to regulate in this area.

The experience in other countries under the Model Law can be used to aid in its interpretation.

C. Uniform Transboundary Pollution

The American Bar Association and the Canadian Bar Association adopted a report in 1979 prepared by a joint committee entitled "The Settlement of International Disputes Between Canada and the United States of America." Pollution was a major area of concern. Pollution damage pollution does not respect national boundaries. The primary legal problems are caused by the fact the polluter is usually outside the jurisdiction where the damages occurs.

Actions for damages under common law concerning land could be brought only where the land was situated. This means a person whose Connecticut land suffers pollution damage could sue only in Connecticut. If

5. CONN. GEN. STAT. §§50a–100–137.

the polluter was outside of Connecticut, the Connecticut plaintiff had to rely on the Connecticut "long arm" statute to obtain jurisdiction over the polluter.

The long arm statute does not provide jurisdiction if the pollution is an isolated event and the polluter has no other contacts with Connecticut. Under such circumstances, the due process clause of the United States Constitution may prohibit Connecticut from exercising jurisdiction. If the polluter's home jurisdiction is common-law based, it may refuse to hear the case because the land is in Connecticut and the damage was suffered in Connecticut. This means the victim has no effective forum, which is not a result lawyers should support.

Canadian courts are not required to give full faith and credit to the actions of Connecticut courts. There is a very good chance that a Connecticut judgment based on this provision of the long-arm statute would not be honored by Canadian courts. A Canadian court might require the action to be re-litigated or refuse to hear the case at all.

A person owning land damaged by pollution may be unable to find any of the polluter's assets where the land is located. Under present law, any judgment the injured party obtains in his home state may be unenforceable in the polluter's state because of jurisdictional problems. The polluter's home courts might not entertain an action because the harm was not done to land situated within their state. The end result is that a polluter may act with impunity and not suffer the consequences of his actions. This result defies common sense and moral justice. This Act was designed to eliminate this "Catch 22."

The Act allows a suit to be brought in a reciprocating jurisdiction where the pollution originates. A "reciprocating jurisdiction" is one that has enacted the Uniform Transboundary Pollution Reciprocal Access Act or "provides substantially equivalent access to its courts and administrative agencies."[6]

Connecticut courts must use their own rules under the Act, excluding choice of law rules, to determine what constitutes pollution, whether there is a sovereign immunity defense and most other points.

D. Model Law on Conflicts on Jurisdiction[7]

This Model Law was drafted by the American Bar Association and is used to determine which suit should protect when multiple suits are filed on the same topic.

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6. *See* CONN. GEN. STAT. §51–351b(b)(1).

7. CONN. GEN. STAT. §§50a–200–03.

E. Uniform Foreign-Money Claims Act[8]

Whenever damages occur in a foreign transaction, the damages occur in a foreign currency. United States courts would not normally issue judgments denominated in a foreign currency because they didn't have the power.

This subjected plaintiff to unnecessary currency fluctuations. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign-Money Claims Act to address this problem, which as been adopted in twenty three states.[9] A Connecticut court may now issue a judgment denominated in a foreign currency (except for local costs, which are always denominated and incurred in United States dollars).

To eliminate the currency risk, the conversion is done on the day before the date the Marshal obtains the funds. This means the plaintiff is more likely to be made whole.

F. Uniform Foreign-Money Judgments Recognition Act[10]

This Uniform Act was also drafted by the National Conference of Commissioners on Uniform State Laws. It has been enacted in a number of states. Connecticut did not elect to reciprocity before it will enforce a foreign judgment.

G. Registration of International Arbitration Awards

The United States has an obligation under the 1899 Hague Convention, the 1907 Hague Convention and 1965 International Settlement of Investment Disputes to enforce decisions of the Permanent Court of Arbitration and ICSID arbitration panels. This appears to be a fairly discrete and self-executing obligation.

However, there are practical problems. The prevailing party submits an award to the local marshal. What will the marshal do? Probably nothing. The marshal will insist on an execution signed by a judicial authority the marshal recognizes.

So the prevailing party goes to a local court and tries to submit the award to obtain an execution. The court clerk has never seen such a thing and has no procedures for handling such an award. The legislation gives the prevailing party a procedure for enforcing the award.

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8. CONN. GEN. STAT. §§50a–50–66.

9. California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, U.S. Virgin Islands, Utah, Virginia, Washington, and Wisconsin. Connecticut adopted the draft of the act just before it was finalized. Other states have adopted the final act.

10. CONN. GEN. STAT. §§50a–30–39.

Connecticut will enforce both interim measures of protection and final award. Federal legislation for ISCID awards does not allow the enforcement of interior measures of protection.

H. Vienna Convention on Consular Relations

Connecticut recognizes its obligations under the Vienna Convention on Consular Relations to allow foreign nationals to contact their consul. While this convention leaves it up to the foreign national to determine if he was to contact his consul, certain bilateral conventions require notification even over the foreign national's objection.

Connecticut implemented the United States' obligations by a judicial department policy. Foreign governments are notified by fax when their nationals are being detained. The fax is preserved to show notification was actually given. Defendants are notified of this right in open court when they are read their rights.

I. Foreign Legal Consultants[11]

The Connecticut General Assembly legislatively empowered to the Judicial Department to regulate foreign legal consultants. The Judicial Department responded by enacting a comprehensive scheme to allow foreign lawyers to practice foreign (but not Connecticut) law within Connecticut.

J. Overseas Service of Process[12]

Although the United States became a party to the Hague Convention of Service of Process Abroad on February 10, 1969, there was no coordination of the Convention with court rules. Connecticut has taken that step.

K. Taking Evidence Abroad[13]

Although the United States became a party to the Hague Convention on taking evidence abroad on October 7, 1972, there was no coordination of the Convention with court rules. Connecticut has taken that step.

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11. CONN. GEN. STAT. §51–80a; CONN. PRACTICE BOOK §§2–17–21 (2006), *available at* www.jud.state.ct.us/Publications/PracticeBook/PB1.pdf.

12. CONN. GEN. STAT. §52–59d; CONN. PRACTICE BOOK §11–8.

13. CONN. GEN. STAT. §52–197b; CONN. PRACTICE BOOK §13–21.

L. Practicing Law by Foreign Lawyers During Arbitrations[14]

After enacting the UNCITRAL Model Law on International Commercial Arbitration, it was only reasonable to expect international arbitrations to occur in Connecticut. As foreign parties begin to arbitrate, they will want to use their customary counsel.

Hong Kong first raised the issue of whether representing a party in an international arbitration constituted the unauthorized practice of law. Recognizing this restrictive interpretation would have international arbitration more than it helped the local bar, Hong Kong ultimately decided representing a party in an international arbitration does not constitute the practice of law.

The issue had never been raised in Connecticut before. Nevertheless, Connecticut agreed with Hong Kong's analysis. This decision was codified in the unauthorized practice of law statute. If an arbitration is an international commercial arbitration under the UNCITRAL Model Law, anyone (not just a qualified lawyer) may represent a party.

M. Determining Foreign Law[15]

Foreign law is generally a question of fact to be determined by a judge instead of a jury. This doctrine was codified in the National Conference of Commissioners on Uniform State Laws' Uniform Law for the determination of foreign law.

Connecticut's old statute required the foreign jurisdiction to deposit a certified copy of their laws. This was obviously not being done. The laws of many jurisdictions are available from a variety of commercial publishers. Under these circumstances, the parties should be able to rely on commercially available material instead of bringing in a foreign legal expert to testify.

III. CONCLUSION

The federal states within the United States have a real and significant role in implementing international law within their boundaries. It is a responsibility that should neither be taken lightly nor shirked.

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14. CONN. GEN. STAT. §52–163a; CONN. PRACTICE BOOK §10–3 (b).

15. CONN. GEN. STAT. §52–163a; CONN. PRACTICE BOOK §10–3.