CONNECTICUT BAR
JOURNAL
Volume 93 No. 3

Contents

2018 Developments in Connecticut Estate and Probate Law 251
By Jeffrey A. Cooper and John R. Ivimey

Survey of 2019 Developments in International Law in Connecticut 275
By Houston Putnam Lowry and Genevieve H. Harte

Book Review
51 Imperfect Solutions: States and the Making of American Constitutional Law 304
By James E. Wildes

Connecticut Bar Association

CONNECTICUT BAR
JOURNAL
Volume 93 • Number 3

SURVEY OF 2019 DEVELOPMENTS IN INTERNATIONAL LAW IN CONNECTICUT

By Houston Putnam Lowry* and Genevieve H. Harte**

After a hiatus, the annual survey article on recent developments on international law in Connecticut returns to the Connecticut Bar Journal. While some viewed the topic of international law as esoteric, many practitioners have found utility in knowing how to serve process outside the United States and to recover custody of minor children wrongfully removed from the United States. We hope to continue this practical discussion.

I. New Conventions

A. *United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)*[1]

This convention ("Receivables Convention") was issued by the United Nations Commission on International Trade Law ("UNCITRAL") on December 12, 2001. The Receivables Convention was designed to lower the cost of credit by validating the assignment of future receivables (one at a time or in bulk) and clarifying the effect of an assignment on an account debtor (and other possible third parties with a claim to the account receivable). The United States signed the Receivables Convention on December 30, 2003. As so often happens in international law (especially private international law), the process of ratification moves slowly. The Senate gave its advice and consent to the convention on January 2, 2019.[2]

The United States deposited its instrument of ratification on October 15, 2019, becoming the second state party to the

* Of the Hartford bar. Chair of the Connecticut Bar Association's Section of International Law and member, Secretary of State's Advisory Committee on Private International Law.

** Of the New York and New Jersey bars.

1 ____ USTS _____ (2019), 41 ILM 776 (2002), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ctc-assignment-convention-e.pdf as viewed on Monday, November 2, 2020.

2 *See* Senate Ex. Rept. 115-7, *available at* https://www.congress.gov/treaty-document/114th-congress/7 as viewed on Monday, November 2, 2020.

Receivables Convention (after Liberia). While Luxemburg and Madagascar have signed the convention, they have not yet ratified their signatures. The Senate believes the Receivables Convention is self-executing and the instrument of ratification reflects this belief.[3] There will be no implementing United States legislation once the convention comes into force.

According to Receivables Convention Article 45, the convention does not enter into force until the first of the month following six months after the deposit of the fifth instrument of ratification. This means the convention is not yet in force, although the parties can certainly incorporate it by reference into any contract between them. Contracting states may agree to have the convention come into force early between themselves, but none have done so.[4] This is not likely to happen unless it is in connection with another treaty, such as a free trade area.

The United States made the following understandings when its instrument of ratification was deposited with the United Nations Secretary General:[5]

> (1) It is the understanding of the United States that paragraph (2)(e) of Article 4 excludes from the scope of the Convention the assignment of–
>
> > (A) receivables that are securities, regardless of whether such securities are held with an intermediary; and
> >
> > (B) receivables that are not securities, but are financial assets or instruments, if such financial assets or instruments are held with an intermediary.

---

[3] *See* Senate Ex. Rept. 115-7, Part V, page 6.

[4] *See* Lowry, Houston Putnam, "Early Implementation of the 1988 UNCITRAL Bills and Notes Convention" published as a chapter of "Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS", published by the General Secretariat of the Organization of American States, ISBN 0-8270-4424-0, 2002.

[5] *See* Senate Ex. Rept. 115-7, §2, *available at* https://www.congress.gov/treaty-document/114th-congress/7 as viewed on Monday, November 2, 2020.

(2) It is the understanding of the United States that the phrase "that place where the central administration of the assignor or the assignee is exercised," as used in Articles 5(h) and 36 of the Convention, has a meaning equivalent to the phrase, "that place where the chief executive office of the assignor or assignee is located.'"

(3) It is the understanding of the United States that the reference, in the definition of "financial contract'" in Article 5(k), to "any other transaction similar to any transaction referred to above entered into in financial markets'" is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to–

(A) underlying asset classes; or

(B) quantitative measures of economic or financial risk or value associated with an occurrence or contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics.

(4) It is the understanding of the United States that because the Convention applies only to "receivables,'" which are defined in Article 2(a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum.

(5) The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level

> of rights to an assignee with respect to proceeds, but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.

The following declarations were made:[6]

> (1) Pursuant to Article 23(3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances-
>
> > (A) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (*see, for example*, title 11 of the United States Code, sections 364(d) and 506(c)); or
> >
> > (B) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay, or hinder creditors of the assignor.
>
> (2) Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor's location pursuant to Article 5(h) of the Convention is the United States and, under the location rules contained in section 9-307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention.

---

[6] *See* Senate Ex. Rept. 115-7, §3, *available at* https://www.congress.gov/treaty-document/114th-congress/7 as viewed on Monday, November 2, 2020.

> (3) Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5(h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit, a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to "law of the United States" with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer primarily to the conflict-of-laws rules in section 9-301 of the Uniform Commercial Code as enacted in each State of the United States.
>
> (4) Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by chapter V of the Convention.
>
> (5) Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States.
>
> The Senate's advice and consent under section 1 is subject to the following declaration: This Convention is self-executing.

The Receivables Convention covers a number of topics, including asset-based lending (which would be otherwise covered by Uniform Commercial Code Article 9 domestically) and factoring (the sale of receivables, either with or without recourse). Some of the topics would seem settled under domestic United States law (although they are not well settled under the laws of every country).

First, receivables may be assigned. In some countries, this is not permitted.[7] The sale of existing receivables has long been permitted in the United States. Receivables may either be individually assigned or assigned in bulk. While the sale of receivables was supposedly permitted under The Code of Hammurabi,[8] not all countries have followed this venerable precedent.

Second, it is not necessary to assign only existing receivables one at a time. Receivables may be assigned in bulk. Future receivables may also be assigned (and obviously have to be assigned in bulk because they cannot be identified before they exist). An undivided interest in receivables may also be assigned.[9] This makes it rather clear receivables may be sold before they come in to existence. A ***lender*** may take a collateral interest in receivables that do not yet exist under Uniform Commercial Code Article 9. It is unclear under existing US domestic law if a receivable can be ***sold*** before it comes into existence. Once the convention comes into force, this issue will be considered resolved domestically (at least for international receivables).

B. *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019)*[10]

After many years of considering the issue, the Hague Conference on Private International Law drafted and adopted the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Hague Judgments Convention") on July 2, 2019.[11] While the convention has only been signed by Uruguay, it is expected the United States will likely sign the convention in the fairly near future.[12]

---

[7] ¶7 and 8, United Nations document A/CN.9/378/Add.3 (May 28, 1993).

[8] Although several articles make this claim, no article has a citation for it.

[9] Receivables Convention Article 8(1).

[10] 1144 UNTS 249, https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf as of Monday, November 2, 2020.

[11] https://www.hcch.net/en/news-archive/details/?varevent=687 (last visited Nov. 2, 2020).

[12] https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited Nov. 2, 2020).

The United States is not currently a party to any bilateral or multilateral convention on the enforcement of foreign judgments. This has been one of the reasons arbitration has been so common under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[13] ("1958 New York Convention"). With near universal acceptance of the 1958 New York Convention,[14] it has propelled arbitration into the preferred method of dispute resolution. While this does not present a problem for larger companies, the costs of an arbitration often present an obstacle for small and medium enterprises.

The Hague Judgments Convention only covers judgments in civil or commercial matters.[15] It does not apply to family law matters,[16] wills[17] or insolvency,[18] *inter alia*. In addition, the convention covers only final judgments and not interim measures of protection.[19] The general rule is a final judgment issued by the court of a contracting state will be recognized and enforced in another contracting state.[20]

The Hague Judgments Convention provides for a fairly long list of acceptable bases of jurisdiction.[21] Each country is concerned about an unusual exercise of jurisdiction that it considers unacceptably peculiar (commonly called "exorbitant" bases of jurisdiction). The common law lawyer will notice "presence in the forum" is not a listed acceptable basis of jurisdiction under the convention. While United States jurisprudence is not offended by serving a defendant while flying over a jurisdiction (when the airplane neither takes off nor lands in that jurisdiction),[22] other countries would find enforcing such a judgment would violate their public policy.

---

[13] 21 U.S.T. 2517, T.I.A.S. No. 6997.

[14] With 166 states parties, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Nov. 2, 2020).

[15] Hague Judgments Convention Article 1.

[16] Hague Judgments Convention Article 2(1)(b) and (c).

[17] Hague Judgments Convention Article 2(1)(d).

[18] Hague Judgments Convention Article 3.

[19] Hague Judgments Convention Article 2(1)(e).

[20] Hague Judgments Convention Article 4.

[21] Hague Judgments Convention Article 5.

[22] *See Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

Similarly, courts in the United States would be loath to enforce a judgment solely based upon the presence of the defendant's personal property located within the forum.[23]

It is important to note only compensatory judgments will be enforced.[24] This means treble damage awards[25] (such as anti-trust awards) and punitive damage awards will not generally be enforced.[26] Consent judgments will be enforced as well as litigated judgments.[27]

While there can be no assurance this convention will be transmitted promptly to the Senate for advice and consent, it seems likely in light of the business community's interest.

C. *Hague Convention on Choice of Courts Agreement (2005)*[28]

The Hague Convention on Choice of Courts Agreement ("Choice of Courts Convention") was promulgated by the Hague Conference on Private International Law on June 30, 2005. While John Bellinger III (the State Department's Legal Advisor at the time) signed it on behalf of the United States on January 19, 2009, the convention has not yet been ratified. The Choice of Courts Convention came into force on October 1, 2015 and currently has 32 parties.[29] While the Peoples Republic of China, the Republic of North Macedonia and the United States have signed the Choice of Courts Con-

---

[23] The common example is a defendant leaves a hat on a train in Germany and this forms the basis for issuing a judgment against the defendant…even though the hat has nothing to do with the cause of action. In Germany, this would provide a basis for general jurisdiction rather than simply in rem jurisdiction over the hat.

[24] Hague Judgments Convention Article 10.

[25] Or quintuple damages for cutting down Christmas trees under General Statutes § 52-560.

[26] Under Connecticut law, punitive damages are normally considered compensatory for attorney's fees. This means a normal Connecticut judgment providing for punitive damages would be enforceable. This is likely the only state within the United States that treats punitive damages that way. Only punitive damages awarded under the Connecticut Unfair Trade Practices Act ("CUTPA"), General Statutes §42-110g(a), are considered different than an award of attorney's fees because CUTPA separately authorizes attorney's fees at General Statutes § 40-110g(g).

[27] Hague Judgments Convention Article 11.

[28] 44 ILM 1294 (2005), https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf (last visited Nov. 2, 2020).

[29] https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last visited Nov. 2, 2020).

vention, none of them have ratified their signatures.[30]

The Choice of Courts Convention allows the parties to a written commercial agreement to decide what court in a contacting state will hear their dispute.[31] The court chosen must be the exclusive court to hear the dispute.[32] If the parties have not explicitly designated the court as the exclusive court, the convention presumes it is the exclusive court,[33] which is contrary to traditional American jurisprudence's interpretation of contractual text.

Selecting an exclusive court gives rise to three main consequences. First, the chosen court will have the jurisdiction to hear the dispute.[34] Second, other courts of contracting states will not assume jurisdiction of the dispute.[35] The Choice of Courts Convention does not apply to interim measures of protection (including prejudgment remedies), so the selection of an exclusive forum does not affect that.[36]

The primary problem is how to implement the Choice of Courts Convention (and the United States will not ratify a private international law convention as a matter of unofficial policy unless it has been implemented). The longest delay in implementing a recent private international law convention is the 1973 UNIDROIT Convention on the Form of an International Will ("Wills Convention").[37] The implementing legislation was drafted by the Uniform Laws Commission (formerly known as the National Conference of Commissions on Uniform State Laws-NCCUSL) in 1977.[38] The original title "Uniform International Wills Act" was changed to the "Uniform Will Recognition Act" by the Uniform Laws Commission at its January 24-25, 2015 meeting. The implementing

---

[30] *Id*.
[31] Choice of Court Convention Article 5.
[32] Choice of Court Convention Article 3(1).
[33] Choice of Court Convention Article 3(b).
[34] Choice of Court Convention Article 5.
[35] Choice of Court Convention Article 6.
[36] Choice of Court Convention Article 7.
[37] 12 ILM 1298 (1975), https://www.unidroit.org/instruments/international-will as viewed on Monday, November 2, 2020.
[38] This legislation was approved by the American Bar Association on February 14, 1978.

legislation is also contained as part of the Uniform Probate Code Part 10.[39] Since only 19 states have enacted the implementing legislation,[40] the instrument of ratification has not been deposited.

The question about the Choice of Court Convention is how it should be implemented. Recognition of foreign judgments has traditionally been a state law matter, although some have unsuccessfully suggested it should be a matter for federal law.[41] By way of example, this was done for the for the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was implemented by Federal Arbitration Act, Chapter 2,[42] and the 1975 Panama Arbitration Convention, which as implemented by Federal Arbitration Act, Chapter 3.[43] Presumably, this was done pursuant to the holding in *Missouri v. Holland*, 252 U.S. 416 (1920). The federal government may enact implementing legislation for treaties concluded pursuant to the Constitution's treaty power.

Some have suggested the Choice of Court Convention should be implemented at the state level by drafting a uniform law that every state and territory would adopt.[44] As a political matter, such an approach would delay ratification, as the ratification of the Wills Convention has been delayed.

Others have suggested a "cooperative federalism" approach. This would follow the model Federal eSign legislation[45] as a "gap filler" for the Uniform Electronic Transaction Act ("UETA") promulgated by the Uniform Law Commission.

---

[39] https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=df980b01-f7c0-d66e-20fb-8b7425032ada&forceDialog=1 (last visited Nov. 3, 2020).

[40] https://www.uniformlaws.org/committees/community-home?CommunityKey=e0a2332d-5263-4fab-880f-1607fc5affba (last visited Jan. 6, 2020).

[41] *See, e.g.*, the American Law Institute's *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (1999-2006), (formerly known as "International Jurisdiction and Judgments Project").

[42] 9 U.S.C. § 201, *et seq.*

[43] 9 U.S.C. § 301, *et seq.*

[44] Uniform Law Commissioners' Uniform Choice of Courts Agreements Convention Implementation Act, approved July 2012.

[45] Electronic Signatures in Global and National Commerce Act, P.L. 106-229, Statutes at large 114 Stat. 464, codified at 15 U.S.C. § 7001, *et seq.*

While this would be faster than a state by state implementation of the convention, it still will be slower that a pure federal implementation.

At a public meeting of the Secretary of State's Advisory Committee on Private International Law chaired by Harold Hongju Koh (the then legal advisor of the State Department), there was no consensus on how to implement the Choice of Court Convention.[46] Therefore, the matter did not proceed further.

Third, the judgment rendered by the chosen court will generally be recognized and enforced.[47] There is a "laundry list" of grounds for refusing to recognize or enforce a judgment under convention Article 9. However, it is important to note only compensatory judgments will be enforced.[48]

This convention is mentioned because it will likely be packaged for Senate advice and consent with the Hague Judgments Convention.

D. *United Nations Convention on International Settlement Agreements Resulting from Mediation*[49]

The United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Mediation Convention") was promulgated on December 20, 2018. It opened for signature on August 7, 2019 at Singapore. A total of 47 states signed it on August 7, 2019 (including the United States), but 6 additional states have signed since then.[50] There are currently 6 state parties to the Singapore Mediation Convention. The Singapore Mediation Con-

---

[46] This tension is demonstrated by a April 16, 2012 letter from Harold Koh (as State Department Legal Advisor) to Michael Houghton, President of the Uniform Law Commissioners, and Michael Houghton's May 22, 2012 reply, https://www.uniformlaws.org/committees/community-home/librarydocuments/viewdocument?DocumentKey=7de2efec-1632-47f2-b760-ca3036fccfa5 (last visited Nov. 2, 2020).

[47] Choice of Court Convention Article 8.

[48] Choice of Court Convention Article 11.

[49] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (last visited Nov. 2, 2020).

[50] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited Nov. 2, 2020).

vention first entered into force on September 12, 2020 for Ecuador, Fiji, Qatar, Saudi Arabia and Singapore. Belarus approved its signature on July 15, 2020, so the Singapore Mediation Convention will come into force on January 15, 2021 for Belarus.

The Singapore Mediation Convention provides a procedural short-cut to enforce mediated settlement agreements instead of the parties being required to bring a separate suit on the mediated settlement agreement, sort of like an international equivalent of *Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc.*, 225 Conn. 804, 811-12 (1993). There are a number of important differences. *Audubon* requires there must be a pending lawsuit which was withdrawn pursuant to a settlement. The Singapore Mediation Convention has no such restriction.

The parties first show they meet the perquisites under Article 1 for being governed by the Singapore Mediation Convention.

The aggrieved party must demonstrate to the competent authority there was a settlement agreement signed by the parties.[51] The settlement agreement must have resulted from a mediation.[52] This can be demonstrated by a number of ways:

1. The mediator's signature on the settlement agreement;[53]
2. A document signed by the mediator indicating the mediation was carried out;[54]
3. An attestation by the institution that administered the mediation;[55]
4. Any other evidence acceptable to the competent authority.[56]

---

[51] Singapore Mediation Convention Article 4(1)(a).
[52] Singapore Mediation Convention Article 4(1)(b).
[53] Singapore Mediation Convention Article 4(1)(b)(i).
[54] Singapore Mediation Convention Article 4(1)(b)(ii).
[55] Singapore Mediation Convention Article 4(1)(b)(iii).
[56] Singapore Mediation Convention Article 4(1)(b)(iv).

The settlement agreement may be signed electronically.[57] The court shall determine the matter expeditiously (which will probably mean it must be handled by motion rather than a complaint).

A competent authority may refuse to enforce the settlement agreement.[58] The grounds are similar to the grounds for refusing to enforce contracts generally. For instance, one of the parties to the settlement agreement was under some kind of incapacity.[59] The settlement agreement cannot be null and void.[60] The settlement agreement must be binding according to its terms.[61] The settlement agreement cannot be subsequently modified.[62]

The settlement agreement cannot be enforced if it has already been performed.[63] The settlement agreement must be clear and understandable.[64] Of course, the forum may not enforce the settlement agreement if it would be contrary to the terms of the settlement agreement.[65] The settlement agreement may not be enforced if the mediator seriously breached the mediation standards and that was the *sine qua non* for the settlement agreement being entered into.[66]

There are a couple of caveats in light of these restrictions. If you are using an *ad hoc* mediation (and the mediator is elderly), be sure to have the mediator sign the settlement agreement. Since there is no administering mediation institution to attest a mediation took place, it may be hard to elicit the corroborating testimony of a now deceased mediator. The Singapore Mediation Convention may become a useful tool for countries where the court system is only marginally effective because of delays or inefficiency. The commercial parties will pay to seek justice and their settlement agree-

---

57 Singapore Mediation Convention Article 4(2)(a).
58 Singapore Mediation Convention Article 5.
59 Singapore Mediation Convention Article 5(1)(a).
60 Singapore Mediation Convention Article 5(1)(b)(i).
61 Singapore Mediation Convention Article 5(1)(b)(ii).
62 Singapore Mediation Convention Article 5(1)(b)(iii).
63 Singapore Mediation Convention Article 5(1)(c)(i).
64 Singapore Mediation Convention Article 5(1)(c)(ii).
65 Singapore Mediation Convention Article 5(1)(d).
66 Singapore Mediation Convention Article 5(1)(e).

ments will be summarily approved and enforced by the local courts.

While the United States has not begun the process of seeking inter-agency clearance to transmit the Singapore Mediation Convention to the Senate for advice and consent, that process is expected to start soon.

II. Cases

A. *Enforcement of Foreign Judgments*

1. *Arc Capital, LLC v. Asia Pacific*[67]

Regrettably, this opinion does not give much detail or analysis. The matter appeared to be poorly briefed and there was no oral argument, which makes it difficult for the judge to provide a full legal analysis of the issues raised.

The defendants filed a motion to dismiss due to a lack of subject matter jurisdiction and a motion to strike[68] in response to Plaintiff filing an action to enforce a Cayman Islands costs order pursuant to General Statutes § 50a-30, *inter alia*. A costs order is similar to an approved bill of costs under domestic law, except a Cayman Islands costs order normally allows attorney's fees to the prevailing party. If a matter has been hotly contested, the amount of attorney's fees can be substantial.

The court was very clear Connecticut's enactment of the Uniform Foreign Money-Judgments Act, codified at General Statutes § 50a-30, *et seq*, gave it jurisdiction to enforce money judgments from other jurisdictions. Even so, the Superior Court is a court of general jurisdiction, so it should not be necessary to specially plead the court's jurisdiction to invoke it. It is unclear why the motion to dismiss was filed contesting the court's jurisdiction. The Uniform Foreign Money-Judgments Act allows the plaintiff to file a certificate instead

---

[67] No. HHDCV-15-6040236-S, 2019 Conn. Super. LEXIS 1390, 2019 WL 2601829 at *1 (Conn. Super. Ct. May 22, 2019).

[68] Normally, filing a motion to strike would waive a motion to dismiss, Practice Book § 10-7. Judge Schuman did not give any indication of having issued an order allowing this unusual procedure.

of filing a complaint. However, the court denied the motion to dismiss.

The court noted the Uniform Foreign Money-Judgments Recognition Act codified at General Statutes § 50a-30 (which applies only to judgments issued by a foreign country[69]), refers to the Uniform Enforcement of Foreign Judgments Act, codified at General Statutes § 52-604 (which only applies to sister state judgments[70]). The method for enforcing an international judgment is the same as the method for enforcing a sister state domestic judgment. The Cayman Islands does not constitute a governmental unit of the United States, so the court should (and did) allow the matter to proceed under the international judgment enforcement statute. It should not have required pleadings.

It is somewhat troubling the court held the fact the Cayman Islands order was subsequently vacated did not appear in the complaint. Normally, a proceeding to enforce a foreign judgment is done by a certification to the court.[71] Under such circumstances, the procedure is for the clerk to enter judgment immediately, without judicial intervention. Therefore, the normal pleadings under Practice Book §10-6 are dispensed with. The fact pleadings occurred in this case suggest plaintiff sued upon the judgment. Under such circumstances, neither the Uniform Foreign Money-Judgments Recognition Act nor the Uniform Enforcement of Foreign Judgments Act were strictly applicable.[72]

2. *Deutsche Bank AG v. Sebastian Holdings, Inc.*[73]

The Connecticut Supreme Court certified the decision of the Appellate court regarding the enforcement of a judgment

---

[69] CONN. GEN. STAT. § 50a-31.

[70] General Statutes §52-604 provides "As used in sections 52-604 to 52-609, inclusive, "foreign judgment" means any judgment, decree or order of ***a court of the United States or of any other court which is entitled to full faith and credit in this state***, except one obtained by default in appearance or by confession of judgment." (Emphasis added).

[71] Unless the underlying judgment was obtained by a default in appearance or by confession of judgment. CONN. GEN. STAT. § 52-604.

[72] CONN. GEN. STAT. § 52-604 (applied by analogy to CONN. GEN. STAT. § 50a-30, *et seq.*).

[73] 331 Conn. 379, 204 A.3d 664 (2019).

issued by the Queen's Bench Division of the High Court of Justice in England.[74] The Supreme Court adopted the Appellate Court decision, apparently failing to note that the lower courts and counsel made the common error of relying on the Uniform Enforcement of Foreign Judgments Act, codified at General Statutes § 52-604 (which only applies to sister state judgments[75]), instead of citing to the Uniform Foreign Money-Judgments Recognition Act, codified at General Statutes § 50a-30 (which applies only to judgments issued by a foreign country[76]). It would seem obvious Connecticut has not been a part of England since 1776.[77] While the domestic act is a gap filler for the international act, they are separate.

The first question arises because plaintiff filed a complaint. This is a complete mystery because the whole point of proceeding under the Uniform Foreign Money-Judgments Recognition Act is to avoid filing a complaint by filing a certificate. Filing a certificate causes a judgment to be issued immediately instead of going through the normal trial process.

When parties seek to domesticate a judgment from another country in Connecticut, there are two reasons to do so. The first and most obvious is "enforcement." The judgment from a foreign country is brought to Connecticut so it can be enforced, usually by the issuance of an execution.

The rarer form of domestication is called "recognition." The parties want to have the judgment given a preclusive effect. Usually this is through the doctrine of *res judicata* or collateral estoppel. This can be for several reasons. If the defendant wins a judgment, it wants to use that as a shield to prevent the plaintiff from re-litigating their case in the hopes

---

[74] *Deutsche Bank AG v. Sebastian Holdings, Inc.*, 174 Conn. App. 573, 166 A.3d 716 (2017).

[75] General Statutes § 52-604 provides "As used in sections 52-604 to 52-609, inclusive, "foreign judgment" means any judgment, decree or order of ***a court of the United States or of any other court which is entitled to full faith and credit in this state***, except one obtained by default in appearance or by confession of judgment." (Emphasis added).

[76] Conn. Gen. Stat. § 50a-31.

[77] Houston Putnam Lowry's great-great-great-great-great grandfather is General Israel Putnam, who fought at the battle of Bunker Hill.

of getting a different result. If the plaintiff wins a judgment, it wants to use that to prove an element in a new case. This would mean plaintiff would not have to present any evidence to prove the point because it would already be considered proven. This becomes very interesting when a mandatory counterclaim is not presented, which means the defendant can use the judgment as a shield when the counterclaim is later presented in a separate action. The problem will be that what is a mandatory counterclaim differs from forum to forum (including what is mandatory in state court and what is mandatory in federal court).

Sebastian Holdings, Inc. was a Turks & Caicos corporation. It opened a series of trading accounts with plaintiff (including foreign currency trading accounts). When the financial crisis hit in 2008, Sebastian Holdings, Inc. suffered massive trading losses. Plaintiff then made a margin call on Sebastian Holdings, Inc. When Sebastian Holdings, Inc. did not pay the margin call, Plaintiff instituted suit in England before the Queen's Bench Division of the High Court of Justice.

After 45 days of trial, Plaintiff obtained a $243,023,089.00 judgment against Sebastian Holdings, Inc. Plaintiff was unable to recover on the judgment in England, so it decided to enforce the judgment in Connecticut and to pierce Sebastian Holdings, Inc.'s corporate veil. The trial and appellate courts determined piercing the corporate veil claim did not arise from a "common nucleus of operative facts" as did the original claim against Sebastian Holdings, Inc. The court went on to say courts must ensure "that the effect of the doctrine [of *res judicata*] does not work an injustice", citing to *Gladysz v. Planning & Zoning Commission*.[78]

The court determined piecing the corporate veil was not a mandatory claim under English law so the English judgment could not be used as a shield to prevent an action to pierce the corporate veil in Connecticut.

---

[78] 256 Conn. 249, 261, 773 A.2d 300 (2001).

B. *Cases Pursuant to the Hague Convention on the Civil Aspects of Child Abduction*[79]

The Hague Convention on the Civil Aspects of Child Abduction ("Hague Child Abduction Convention") was concluded by the Hague Conference on Private International Law on October 25, 1980. As of Thursday, January 2, 2020, there are 100 parties to the Hague Child Abduction Convention.[80] While the United States signed the convention on December 23, 1981, the convention did not come into force until the United States enacted the necessary federal implementing legislation called the International Child Abduction Remedies Act.[81] The convention has been effective within the United States since July 1, 1988.

The petition is filed where the kidnapped child is located.[82] The petitioner bears the initial burden of proof to show the child was wrongfully removed from the child's habitual residence.[83] While the respondent can resist the petition,[84] the general rule is the child must be returned to their habitual residence *pendente lite*.

---

[79] T.I.A.S. No. 11670, 1343 U.N.T.S. 89, reprinted at 51 Fed Reg 10498.

[80] https://www.hcch.net/en/instruments/conventions/status-table/print/?cid =24 as of Monday, November 2, 2020.

[81] Public Law 100-300 codified at 22 U.S.C. § 9001 *et seq.*

[82] 22 U.S.C. § 9003(b), which provides "Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place ***where the child is located at the time the petition is filed***." (Emphasis added).

[83] 22 U.S.C. § 9003(e)(1)(A), which provides "A petitioner in an action brought under subsection (b) shall establish by a ***preponderance of the evidence-***

(A) in the case of an action for the return of a child, that the child has been ***wrongfully removed or retained*** within the meaning of the Convention…" (Emphasis added).

[84] 22 U.S.C. §9003(e)(1)(A), which provides "In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by ***clear and convincing evidence*** that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a ***preponderance of the evidence*** that any other exception set forth in article 12 or 13 of the Convention applies.

1. *Reynolds v. Reynolds*[85]

The parties were in the process of getting a divorce. The court allowed defendant mother to take the minor child to Costa Rica for a visit, but required the mother and child to return to Connecticut before the March 7, 2017 trial. Neither the mother nor the minor child returned from Costa Rica… and the mother actually refused to return to the United States in response to a December 18, 2017 order from the trial court directing she return.

Generally speaking, the application of the Hague Child Abduction Convention must be resolved when it is raised and all other proceedings are stayed.[86] Plaintiff father filed an application in Costa Rica pursuant to the convention on June 25, 2017. The Costa Rican court declined to return the child pursuant to Article 13[87] in September 2018. The particular reasons under Article 13 were not specified. At the time of this decision in December 2018, the appeal of the denial

---

[85] No. FA155011170S, 2018 WL 7117899 at *1 (Conn. Super. Ct. Dec. 12, 2018).

[86] Hague Child Abduction Convention Article 16, which provides "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

[87] Article 13 provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

of the father's application under the convention remained pending in Costa Rica.

The Connecticut Superior Court found it still has jurisdiction[88] of the underlying custody matter even though an application for return under the convention was pending in Costa Rica. The court methodically analyzed the following factors in determining whether or not it should continue to assert jurisdiction over the child custody proceeding:

> (1) Whether family violence has occurred and is likely to continue in the future and which state could best protect the parties and the child
>
> Although there have been issues raised regarding abuse, physical and sexual, to both the defendant and the child, that matter has not been fully litigated to date and thus, the court cannot reach a reasonable conclusion at this juncture as to whether there has been actual abuse. The allegations are often repeated in the pleadings and innuendoes dropped about there being a finding that the defendant and minor child were found to be the victims of trafficking. Other than dropping that information in footnotes, and making statements in her motion to dismiss, the allegations have not been litigated and determined.
>
> (2) The length of time the child has resided outside this state
>
> The child has resided out of the state of Connecticut for several years but that is because the defendant violated the orders of this court to return to the United States prior to trial and the defendant has clearly stated she has no intention of returning. In light of the fact that the defendant violated the orders of this court by not returning when she was ordered to do so, this court does not consider the length of time the

[88] Under the Uniform Child Custody Jurisdiction and Enforcement Act, codified in General Statutes § 46b-115 *et seq.*

child has resided outside of this state to be a factor in favor of finding Costa Rica to be a more convenient forum than Connecticut.

(3) The distance between the court in this state and the court in the state that would assume jurisdiction

Although there is a very large distance between this court and the court in Costa Rica, this too is of the defendant's own making and is simply not enough to convince this court that Costa Rica should be deciding the issue of custody and visitation in the present case. The defendant's argument to the contrary is simply drawing a legal conclusion about whether the decision of the court in Costa Rica will be upheld on appeal and the fact that the underlying court decision in the defendant's argument somehow is a decision about custody is simply unfounded as found throughout the discussion of the issues in this case.

(4) The relative financial circumstances of the parties

Although the plaintiff is in a better financial position than the defendant to litigate custody in Costa Rica, this too would not have been an issue if the defendant had abided by the court's order rendered December 5, 2016, to return to the United States for trial. There were also subsequent orders for the defendant to return to the United States with the child prior to the start of trial and all the delays the defendant is blaming on others are being caused by the defendant's dilatory actions and filing of repetitive motions, such as, the current motion to dismiss.

(5) Any agreement of the parties as to which state should assume jurisdiction

There is no agreement between the parties as to which state should assume jurisdiction so this is also not a factor for this court to consider.

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child

There is just as much, if not more, evidence in Connecticut as there supposedly is in Costa Rica. Thus, this factor also does not weigh in favor of the court relinquishing jurisdiction.

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence

To this court's knowledge, there is not even a custody case pending in Costa Rica, whereas this court has what it needs to decide the issue expeditiously and this court has the procedures available and necessary to receive evidence from both parties and their witnesses.

(8) The familiarity of the court of each state with the facts and issues in the pending litigation

Again, to this court's knowledge, there is nothing pending in the Costa Rican court regarding custody, yet, there is a great deal of familiarity with the facts and issues in the pending Connecticut litigation. Thus, the plaintiff's choice of forum, Connecticut, prevails on this basis as well.

Therefore, the Connecticut court decided to exercise its jurisdiction to determine the custody of the child. The defendant mother's application to dismiss the Connecticut child custody proceeding was denied.

2. *Dall v. Dall*[89]

The parties were getting divorced in Florida in 2005. The mother took the minor child to South Africa in violation of a

[89] No. NNHFA175040650S, 2019 WL 413586 at *1 (Conn. Super. Ct. Jan. 7, 2019).

Florida custody order (and apparently without advance notice). While she telephonically testified in the Florida divorce case that she was only on vacation in South Africa and would return the child, she didn't for a period of roughly six years. A contempt finding was issued against the mother by the Florida court.

The father filed a petition for return under the Hague Child Abduction Convention in South Africa. He did not have the funds to pursue the action, resulting in the South African court's determination that the mother's removal of the minor child from Florida to South Africa was not wrongful. Ultimately, the father tricked the mother into allowing the child to return to Florida (and the father refused to allow the child to return to South Africa).

The sole question before the court was what effect should be given to the South African court's finding that the mother's removal of the minor child from Florida to South Africa was not wrongful. The Florida courts reached the opposite conclusion after very lengthy evidentiary hearings.

Ultimately, the Connecticut court[90] decided a determination under the convention was not a ruling on the merits. Such a ruling was provisional in nature because it only determines whether or not the child should be returned *pendente lite* and, therefore, not entitled to any *res judicata* effect.[91]

3. *Nietupski v. Del Castillo*[92]

Plaintiff father is from Poland. Defendant mother is from Peru. They were married in East Hartford, Connecticut. The parties' minor child is in kindergarten in Connecticut.

The court initially allowed the parties to take their minor child to their country of origin for up to two weeks a year. Plaintiff father was concerned his minor child might not be

---

[90] The decision gives no hint as to how the matter came before the Connecticut court.

[91] Although the court discussed the matter in the context of full faith and credit, which is not applied to foreign judgments.

[92] No. HHDFA186090459S, 2019 WL 647041 at *1 (Conn. Super. Ct. Jan. 16, 2019).

returned from Peru.

The court noted Peru, Poland and the United States are all state parties to the Hague Convention. This seemed to resolve the issue of return for the court, who did not restrict either party from taking their minor child to their country of origin.

4. *Maria G. v. Commissioner of Children and Families*[93]

The facts of this case are a little strange. Plaintiff is a citizen of Argentina who resides in Stamford, Connecticut. Plaintiff brought a minor child called Santiago to the United States using a fraudulent birth certificate and a fraudulent United States passport. Plaintiff somehow obtained a Guatemala court order based upon a false birth certificate granting her custody of Santiago, even though Plaintiff is not his biological parent and has not adopted him.

The Commissioner of *Children and Families* removed Santiago from Plaintiff's care and placed him in foster care. Plaintiff filed a petition for *habeas corpus*.

In a motion for summary judgment, Plaintiff claimed the Hague Child Abduction Convention allowed her custody of Santiago, *inter alia*. The trial court dismissed the claim as being brought late and without other discussion. The Appellate Court summarily dealt with the matter in a footnote.

It would seem the convention has no role to play in a dispute where there has been no kidnapping in violation of a foreign custody decree. The Commissioner does not kidnap a child when it takes custody of a minor pursuant to a court decree.

C. *Cases regarding the Hague Service Convention*[94]

The Hague Conference on Private International Law concluded the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") on November 15, 1965. The United States

---

[93] 187 Conn. App. 466, 202 A.3d 1100 (2019).
[94] 20 U.S.T.S. 361, T.I.A.S. No. 6638 (1968).

signed it the same day, but did not ratify its signature until August 24, 1967, with the convention coming into force on February 10, 1969. The application of the convention is generally mandatory if service of process is being transmitted abroad.[95]

1. *Mohegan Sun v. Eugene Melnyk*[96]

This was a routine collection matter that needed to be served on a Canadian defendant who was resident in Barbados. In this case, both the United States and Barbados are parties to the Hague Service Convention, which means the convention applies. Normally, this would require service under the Hague Service Convention,[97] which is generally mandatory. Service under the convention in Barbados would take about four months according to the United States central authority. Luckily, General Statutes § 52-59d allows a return date to be set more than two months in the future, if necessary, as otherwise required under General Statutes § 52-48.

Hague Service Convention Article 10(a) provides "Provided the State of destination does not object, the present Convention shall not interfere with –a) the freedom to send judicial documents, ***by postal channels***, directly to persons abroad, …" [emphasis added]. While some countries object to service by mail, Barbados has no objection to service by mail.[98] Therefore, counsel applied for an order pursuant to Practice Book §11-8,[99] because service could not be completed

---

[95] *See Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

[96] No. KNL-CV-19-6041790-S (Conn. Super. Ct. June 11, 2019).

[97] CONN. GEN. STAT. § 52-59d(a).

[98] https://www.hcch.net/en/states/authorities/details3/?aid=283 (last visited Nov. 2, 2020).

[99] Orders of Notice Directed outside of the United States of America

If service of process cannot be made under the applicable international treaty or convention within sixty days from the issuance of the summons, then the judicial authority may issue, upon the application of any party, an order of notice. In determining what manner and form of notice shall be ordered, the judicial authority shall consider the following:

(1) other methods of service specified or allowed in any applicable international treaty or convention, including any reservations;

(2) whether all applicable international treaties and conventions prohibit substituted service;

(3) what method of service provides the greatest likelihood the party being served will receive actual and timely notice of the suit so the party

within 60 days, to allow the Marshal to serve the summons and complaint by Global Express mail instead of via the Connecticut Secretary of the State under General Statutes § 52-59b(c). The motion was granted *ex-parte* and service was accomplished within a week.

Service was not contested, and the defendant received actual notice in time to defend the lawsuit.

D. *Foreign Discovery*

1. *Coan v. Dunne*[100]

While there are a number of international conventions on discovery, such as The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded on March 18, 1970,[101] the common law Letter Rogatory continues to exist.

Richard Coan was acting as the Chapter 7 trustee of the bankruptcy estate of Sean Dunne. Richard Coan sued the debtor to recover certain assets which he claimed were part of the bankruptcy estate because they were fraudulently transferred to various family members of the debtor.

The trustee wanted to take the deposition of Ross Connolly in his country of residence, Ireland.[102] Ross Connolly was the debtor's financial adviser. The trustee applied to the United States District Court for a Letter Rogatory to the Irish courts. A substantial part of the order was undoubtedly drafted by Irish counsel so it would be properly received by the Irish courts.

---

may appear and defend;
(4) whether a particular method of service violates the law, particularly the criminal law, of the foreign country involved;
(5) whether an actual agent of the party being served can be served within the United States.

[100] No. 3:15-CV-00050 (JAM), 2019 U.S. Dist. LEXIS 9838, 2019 WL 276203 at *1 (D. Conn. Jan. 22, 2019).

[101] 847 U.N.T.S. 231, 23 U.S.T. 2555, T.I.A.S. No. 7444, entered into force for the United States on Oct. 7, 1972.

[102] It should be noted Ireland is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Nov. 3, 2020).

One of the requirements was there must be reciprocity between Ireland and the United States regarding judicial assistance to obtain testimony.[103] This was easily answered by referring to 28 U.S.C. § 1782, which provides:

> Assistance to foreign and international tribunals and to litigants before such tribunals.
>
> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

---

[103] *See* Foreign Tribunals Evidence Act 1856 and Order 39, Rules 39-44 of the Rules of the Superior Courts 1986.

This made it easy for the federal court to advise the Irish court that a similar request would be honored by the United States as a matter of statutory law. Presumably, the testimony was taken pursuant to the Letter Rogatory.

E. *Enforcement of Foreign Arbitral Awards*

1. *Savine v. Interactive Brokers, LLC*[104]

Interactive Brokers is a Connecticut based broker/dealer. Antoine Savine used Interactive Brokers to execute a number of trades shorting the Swiss Franc against the Euro. Savine's trades lost substantial money and Interactive Brokers issued a margin call. Even after liquidating Savine's entire account, Savine owed Interactive Brokers US $631,002.88. Needless to say, Savine did not voluntarily pay the shortfall.

Interactive Brokers commenced an arbitration in London under the rules of the London Court of International Arbitration ("LCIA"). After a two-day hearing, the arbitrator ruled in Interactive Broker's favor. Savine filed an application to vacate the London arbitration award in the United States District Court for the District of Connecticut. Interactive Brokers filed a motion to dismiss the petition to vacate the arbitration award.

The question was whether or not the Connecticut Court had the power to vacate the arbitration award under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[105] The answer is fairly clear in the Second Circuit.[106] A foreign arbitral award covered by the New York Convention may not be set aside within the United States. The seat where the award was made has the sole jurisdiction to vacate the award (unless the parties have agreed the law of another jurisdiction will govern the arbitration). While a Connecticut court could refuse to enforce the award (finding the award

---

[104] No. 18-CV-1846 (KAD), 2019 WL 3574575 at *1 (D. Conn. Aug. 5, 2019).

[105] 21 U.S.T. 2517, 330 U.N.T.S. 38, which is implemented by Federal Arbitration Act Chapter 2 (9 U.S.C. § 201, *et seq*).

[106] *Yusuf Ahmed Alghanium & Sons v. Toys "R" Us, Inc.,* 126 F.3d 15, 21 (2d Cir. 1997).

violated United States public policy, for example), it cannot vacate it.

The court ruled accordingly by dismissing the application to vacate the award.[107]

III. Conclusion

Connecticut courts are dealing with more and more international matters. Practitioners need to consider international matters in their practice. It is no longer safe to "put your head in the sand." While an international law argument may not carry the day, it should be brought to the court's attention when relevant. Such issues are no longer unusual and dismissed out of hand.

[107] This is in accordance with the draft Restatement of United States Law of International Commercial and Investor-State Arbitration § 4.2 (April 24, 2019 proposed final draft).