REMARKS

PETER H. PFUND*

These remarks were made in October 1992, during the conference on which this issue is based.

Let me begin by thanking Professor Carrington and the Private Adjudication Center at Duke University, as well as David Rivkin and the ABA's Litigation Section, for undertaking possibly the first program in the United States specifically to note and celebrate the centennial of the first session of the Hague Conference on Private International Law and to honor that very competent and professional international organization. I hope that this program and others like it will take account of this milestone.

In his remarks, Steve Burbank referred to the generous practice of courts in the United States in according recognition to and in enforcing judgments of the courts of other countries, when the requirements of due process are met.[1] I would like to point out that the U.S. proposal for the Hague Conference to prepare a recognition and enforcement convention is a proposal for multilateral negotiations by the member states of the Hague Conference, under the auspices of that international organization, which would involve many states besides the United States. The Hague Conference has thirty-eight member states, most of which could be expected to participate in such a convention if the U.S. proposal were accepted at the Seventeenth session of the Hague Conference in May 1993. The situation in the United States would be relevant only as a situation in one of the many countries that would be involved in those negotiations.

Despite Steve Burbank's critical and disappointed observations with regard to the U.S. handling of the Hague Service and Evidence Conventions, we have seen progress in the right direction with regard to the recently proposed amendments to Rules 4 and 26. The Rule 26 Amendments and Committee Notes, giving rise to U.K., Swiss, and Irish government concerns and U.S. State and Justice Department objections, have been dropped. The cost-shifting in the Rule 4 amendments for refusal to waive service of process is being made inapplicable unless both parties are in the United States. At a minimum, this removes the basis for objection on the ground that the cost sanctions make questionable the consensual nature of the waiver request.

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* Assistant Legal Adviser for Private International Law, U.S. Department of State. The views expressed in these remarks are those of the author and are not necessarily those of the Department of State.

1. See also his contribution to this volume, Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103 (Summer 1994).

This development resulted in part from a request by Judges Keeton and Pointer, for which we are very grateful, for a meeting with the Solicitor General, the Assistant Attorney General for the Civil Division, and representatives of the State and Justice Departments and the U.K. Embassy. That meeting resulted in a consensus favoring the recommendation of the minority of the Advisory Committee that the cost-shifting be dropped if the defendant is abroad.

At that meeting, the State Department representatives were asked and agreed to have the Department undertake a survey of the views of a number of foreign governments on the following issues:

1. whether and for what reasons they may object to the remaining proposed amendments to Rule 4 having international effects; and
2. whether a United States judgment, if consent to waive service of process has been accorded, would be enforceable, or if it might be considered defective as a service of process in that country, despite the defendant's agreement to waive service of process.

The Department may have responses and be able to compile them for consideration by the Supreme Court or Congress before the amendments to Rule 4 become final. These responses may also be useful when further amendments to these rules are considered. These recent consultations, coming after expressions of concern by foreign governments and the State and Justice Departments, and following the return of certain proposed amendments by the Supreme Court for further consideration and review, suggest a growing willingness by the persons that Professor Burbank calls the "Rulemakers" to give serious consideration to the international implications and effects of proposed Rules changes.

I hope that in the future the State and Justice Departments will be expressly invited to become involved early in proposed rulemaking when effects both on foreign countries and on our treaty and international legal obligations are foreseeable. So far as the State Department is concerned, the U.K. Embassy note first brought to our attention the proposals amended following the return by the Supreme Court of the changes originally proposed to Rules 4 and 26. It was rather disquieting and embarrassing that the U.K. government was somehow more aware of these developments within the United States than was the State Department. The consequent need to catch up has not been comfortable for any of the agencies and persons involved. While we realize that the troublesome Rules 4 and 26 changes and Committee Notes were only a small part of the total proposed amendments, the Advisory Committee of the Judicial Conference best knows when contemplated changes to the Rules present potentially troubling international implications for our treaty and other international obligations. It is only reasonable for the two federal government agencies accountable for our actions to other countries to be consulted by the Advisory Committee or the Standing Committee. The State Department has general responsibility for U.S. compliance with its obligations under treaties and international law, and the Justice Department is responsible, as the U.S. Central Authority, for making the Hague Service and Evidence Conventions work in

individual cases concerning the U.S. government. Of course, the Justice Department may not always consider the responsibility of the Office of Foreign Litigation (within the Department) to be as great as the whole Department's interest in some matters as a litigating agency. That fact may provide reason for the State Department in the future to comment on proposed changes to the Rules for itself and not in conjunction with the Justice Department.

I appreciate Steve Burbank's suggestion that greater weight should be accorded to State Department views than in the past. His proposal for a standing study group to evaluate proposed rules assisting the Department to prepare comments and monitor other relevant developments deserves further consideration—but only if he informs me that he would be willing to serve on such a study group if it should be established!

I have some hesitation about Steve Burbank's and George Walker's idea that Congress should become more fully involved—Steve's idea of a two-tier process, by which recommendations of the rulemakers would be implemented by congressional legislation, and George Walker's idea that for policy with respect to non-U.S. defendants in transnational litigation as a class, Congress should be the decisionmaker.[2] We have heard Steve and Hans Smit describe what they called penuriousness based on a powerful congressman's attitude to the whole field of international judicial assistance.[3] Is it not likely that members of the entire Congress would have little patience for State Department efforts to argue for sensitivity to the concerns of other countries and the consequent need for special rules based on the "alien-to-us" concept of service of process abroad and discovery abroad as affecting their (judicial) sovereignty? As indicated earlier, my hope would be that the rulemakers would develop a more complete appreciation for such sensitivities and for the merits of the concerns of the State and Justice Departments and the SEC, based in part on those sensitivities, as well as on U.S. treaty obligations and international law. Discussions like this and the changes made in the proposed amendments and Committee Notes over the last eighteen months or so let me hope that improvements in consultations and fuller consideration of the implications abroad of rules changes can be expected.

Turning to the unilateralism that concerned Steve, let me suggest that we have overcome it at least in some areas. The Hague Child Abduction Convention, discussed in detail by Linda Silberman,[4] is being implemented very effectively by the United States and most other party states. While the Convention is self-executing in nature and therefore does not necessarily require federal implementing legislation, the Secretary of State's Advisory Committee on Private International Law in 1983, three years after the Convention's

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2. George K. Walker, *The Federal Rules of Civil Procedure in the Context of Transnational Law*, 57 LAW & CONTEMP. PROBS. 183 (Summer 1994).

3. Hans Smit, *International Control of International Litigation: Who Benefits?*, 57 LAW & CONTEMP. PROBS. 25 (Summer 1994).

4. Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209 (Summer 1994).

adoption in final form, strongly recommended that there be federal legislation both to ensure the effective and uniform implementation of the Convention throughout the United States and to anticipate problems that otherwise might have necessitated appeals delaying the return of the children involved. The subsequently prepared Administration bill recommended that for certain exceptions to the child return obligations under the Convention to be applicable, a person resisting return of a child from the United States would be required to meet a "clear and convincing evidence" burden of proof—a burden of proof higher than that required by the language of the Convention. This burden was considered by the Administration and Congress to be desirable to help ensure that courts in the United States could not facilely deny return requests on the basis of the most easily misused exceptions provided by the Convention to the return obligation it sets forth. If certain other states party to the Convention had equally required a higher burden of proof for such exceptions, denials of return inconsistent with the intent of the negotiators could have been avoided in those countries. The success of the return and visitation rights requests addressed to the United States that go to final disposition—over 90% as Linda indicated—attests to an attitude very different from and very much better than the one attributed by Steve Burbank to the Administration and the courts with regard to the Hague Service and Evidence Conventions. This is so at least in the area of wrongful removals and retentions of children abroad.

It may, of course, be that there was always a greater meeting of the minds on the need promptly to undo wrongful removals and retentions of children abroad without deciding on the merits of the underlying conflicting custody claims, than on certain elements of service of process and obtaining of evidence abroad. Effectively dealing with such otherwise intractable removals and retentions of children, however, also meets an important need of the international legal order.

On another issue, the United States has yet to ratify its first convention setting out rules for determining governing law. The Hague Convention on the Law Applicable to Trusts and on Their Recognition and the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, both formally endorsed by important elements of the private sector, may well be the first conventions to test whether the United States is ready to make these types of conventions the law of the land.

Steve Burbank has referred to scarce resources for the work of the Office of the Legal Adviser. It is his view that more human and other resources are needed. The private legal and other sectors have, however, been very generous in the help they have provided to L/PIL. They have filled the breach as only they can by providing expertise to guide the United States in formulating U.S. positions on private international law unification and harmonization work, and by providing experts to represent us in international negotiations. These experts are accountable to our Department for this representation and their work is reviewed by both the members of their specialized study group and our Advisory Committee.

I should emphasize that budgetary constraints have not, in my view, unduly limited the numbers of experts whose advice is sought or the diversity of interests represented on our study groups. Instead, as resources have become scarcer, the size of our study groups has actually increased. Whereas for the work on the CISG in the 1970s we had a study group consisting of about ten experts, for the Hague Conference's intercountry adoption convention project we have a study group of fifty persons and organization representatives. For the judgment convention proposal, we have a study group of thirty, and fifty people attended its first meeting on September 2, 1992. For the adoption convention project, our mailing list contains 180 interested persons and organizations in addition to the fifty actual study group members. The persons are informed of developments and given actual notice of study group meetings that they may attend. I venture to say that the process by which we get expertise and guidance is more highly participatory than the corresponding process of any other country. Only through widespread participation in the process of creation can we ensure that knowledge of and support for the resulting work products from the international process will benefit us when in convention form. Private sector political support for Senate advice and consent to U.S. ratification and for congressional enactment of any requisite federal implementing legislation is thereby facilitated.

Private international law conventions are fragile and their implementation often preempts inconsistent state law provisions. As we do not have a parliamentary form of government, the mere transmission of a convention of this kind to the Senate does not ensure favorable Senate action. We need private sector support; without it, the Senate will simply not act. The very representative experts from our Advisory Committee and study groups form the core of potential political support for favorable Senate action and congressional action on implementing legislation.