Panel: International Treaties in U.S. Practice

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Discussion Outline

The Interpretation of Treaties by United States Courts

I. The Constitutional language and purpose.

A. U.S. Const. Art. III, sec. 1:

" The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

B. U.S. Const. Art. III, sec. 2:

" The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; …--to controversies to which the United States shall be a party;…--and between a State or citizens thereof, and foreign States, citizens or subjects."

II. Authority to interpret international agreement: law of the United States.

A. Restatement, 3d, Foreign Relations law of the U.S. sec. 326:

“ (1) The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relation with other states.

“ (2) Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States but will give great weight to an interpretation made by the Executive Branch.”

B. Cases relating to sec. 326(2)

Kolovrat v. Oregon, 366 U.S. 187(1961)
Coplin v. United States, 6 Cl. Ct. 115 (1984), rev’ d on other grounds, 761
F.2d 688(Fed Cir. 1985).
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)
Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177F.3d 1142 (9th Cir. 1999)
El Al Israel Airlines v. Tseng, 525 U.S. 155, 168 (1999)
Perkins v. Elg, 307 U.S. 325 (1939)

III. Definitions and distinctions

A. Definition of “ treaty” under international law

B. Definition of treaty under U.S. Const. Art. II, sec. 2, cl. 2

C. Conditions in Senate resolutions of advice and consent to art. II treaties

D. Reservations, Understandings, Declarations, and Provisos

E. Ratification of Treaties by the President

F. Successive Treaties on the Same Subject Matter

IV. General Principles of Treaty Interpretation

A. Rest. 3rd, Restatement of the Foreign Relations law of the United States
sec. 325:

" (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

" (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation."

B. The rules set out in the Restatement are based on Articles 31 (1) and 31 (2) of the Vienna Convention on the Law of Treaties, which is not in force for the United States. The Restatement' s Comments notes that while the section does not " strictly govern"

interpretation by U.S courts, " it represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis."

C. Case

Eastern Airlines v. Floyd, 499 U.S. 530 (1991).

D. The principal difference between the Vienna Convention rules on interpretation and the practice of U.S. courts is that U.S. courts have been more willing to look beyond the instrument to determine its meaning than the Vienna Convention' s article 32 on supplementary means of interpretation seems to contemplate. With respect to what the Convention calls the " preparatory work" of the treaty, domestic courts and most international tribunals seem inclined to look at such supplementary international material whenever it is brought to their attention. However U.S. courts seem more inclined than the courts of many other countries to look at the domestic legislative history – notably the record of the Senate' s consideration of the treaty and the consideration by the Congress of implementing legislation when the treaty is not self-executing. As evidence of subsequent practice in the application of treaties becomes more readily available, courts have a greater opportunity to take such practice into account when it establishes the agreement of the parties regarding the interpretation or the application of the provisions of a treaty.

E. Different treaties, and occasionally different provisions in the same treaty, may call for different interpretive approaches. The sections

that follow discuss two multilateral treaty regimes in which the overall approach to interpretation seems to differ. The first regime is a series of self-executing treaties that expressly indicate that their object and purpose is the unification of certain rules relating to international transportation by air. The second is a single treaty, the Hague Convention on the Civil Aspects of International Child Abduction, concluded October 25, 1980. Article 1 of the latter treaty states that the objects of the Convention are " a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

V. Interpretation by U.S. Courts of the Warsaw Convention and Other Multilateral Conventions for the Unification of Certain Rules Relating to International Carriage by Air.

A. The preamble to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw on October 29, 1929 states that the purpose of the convention is to regulate " in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. " This Convention and a series of Conventions modifying those rules are among the multilateral treaties that have been most often interpreted and applied by United States courts. Although the Convention no longer applies as between the United States and other countries that have become parties to a superseding convention bearing a

substantially identical title done at Montreal, May 28, 1999, the 1929 treaty will continue to apply between the United States and parties to the 1929 treaty that have not become parties to the new treaty. Since a number of articles in the two treaties are identical, existing interpretations of those articles by U.S. courts will, in principle, continue to apply to the corresponding articles in the new treaty. Many of the U.S. cases interpreting the convention take into account the purpose of the Convention and seek to achieve uniformity. Nearly all the cases under these conventions are decided by U.S. courts.

B. Cases interpreting the Warsaw Convention

Air France v. Saks, 470 U.S.392, 399 (1985)
Eastern Airlines v. Floyd, 499 U.S. 530 (1991)
Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)
El Al Israel Airlines v. Tseng, 525 U.S. 155 (1999)

VI. Interpretation of the Convention on the Civil Aspects of International Child Abduction by Court in the United States.

A. In contrast to the Aviation Conventions discussed in Part V and other treaties that affect private rights, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods, that call on the interpreter of the convention to have regard to " its international character and to the need to promote uniformity in its application…" , there is no reference to uniformity in the Child Abduction Convention. Article 1 states that its objects

– “ a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other contracting States.” A second difference is that the implementing legislation for the Abduction convention grants concurrent jurisdiction to state and federal courts. To the extent that cases are decided by state courts, there is less likelihood of achieving uniformity of interpretation than under a system where most cases are tried in federal courts.

B. Even when cases have fallen within federal jurisdiction, inconsistent interpretations have arisen among federal judicial circuits. Since the Supreme Court has yet to agree to hear any cases under the Convention, there are growing discrepancies in treaty interpretation between the circuits and little clearly settled convention law in the United States.

C. A number of terms used in the Convention are not well defined.

These include:

1. “ rights of custody” ;
2. “ rights of access” ;
3. “ habitual residence” ; and
4. “ grave risk” .

D. Inconsistent interpretations of these terms by various domestic and foreign courts made it difficult in many cases for a parent seeking to

obtain return of a child under the Convention to assess the possibilities of success.

F. A meeting of the Central Authorities for the Abduction Convention taking place at The Hague from October 30 to November 9 will discuss several of the basic concepts of the Convention noted in C of this section. A report on any significant developments to emerge from that meeting will be made at this point.

G. Cases under the Abduction Convention

Croll v. Croll, 229 F.3d 133 (2dCir.2000), cert. denied, 534 U.S. 949 (2001).

Janakakis-Koshun v. Janakakis, 6S.W. 3d 843 (Ky.Ct.App. 1999), cert. denied, 531 U.S. 811 (2000).

Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003), cert. denied, 540 U.S. 1068 (2003)

Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001)

Baxter v. Baxter, 423 F.3d 363 (3rd Cir. 2005)