



Panel: Comparative Judicial Practice

Honorable Peter J. Messitte

Overview

International Judicial Cooperation – Authority

- 1) Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, See 28 U.S.C. § 1781 et seq.

28 U.S.C. § 1781 - Transmittal of letter rogatory or request

- (a) The Department of State has power, directly, or through suitable channels –
 - (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and
 - (2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.
- (b) This section does not preclude –
 - (1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

- (2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

28 U.S.C. § 1782 - 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 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.

- 2) ALU/Unidroit Principles and Rules of Transnational Civil Procedure: Proposed Final Draft (March 9, 2004)

Principle 31 - International Judicial Cooperation

The courts of a state that has adopted these Principles should provide assistance to the courts of any other state that is conducting a proceeding under these Principles, including the grant of a protective or provisional relief and assistance in the identification, preservation, and production of evidence.

- 3) UNCITRAL, Model Law on Cross-Border Insolvency; See 28 U.S.C., Ch. 15

Available at website of International Insolvency Institute (III) at
<www.iiiglobal.org>

ALI, Guidelines Applicable to Court-to-Court Communications in
Cross-Border Cases

Also available at III website.

- 4) Hague Convention on the Civil Aspects of International Child Abduction; See 42 U.S.C. § 11601 et seq. (International Child Abduction Remedies Act)

Conclusions and Recommendations of Special Commission (March 2001)

“ Direct judicial communications

- 5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.
- 5.6 Contracting States should actively encourage international judicial cooperation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases.

In Contracting States in which direct judicial communications are practiced, the following are commonly accepted safeguards:

- communications to be limited to logistical issues and the exchange of information;
- parties to be notified in advance of the nature of proposed communication;
- record to be kept of communications;

- confirmation of any agreement reached in writing;
- parties or their representatives to be present in certain cases, for example via conference call facilities

5.7 The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications.”

See also Report on Judicial Communications in Relation to International Child Protection

Available at website of Hague Conference on Private International Law:
<www.hcch.net/upload/wop/abd_pd08e2006.pdf>

5) Uniform Child Custody Jurisdiction Enforcement Act; See e.g. Md. Code Ann., Family Law, § 9.5-104 and § 9.5-109.

§ 9.5-104 - Child custody proceedings involving foreign countries.

- (a) Foreign country treated as state. – A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Subtitles 1 and 2 of this title.
- (b) Recognition and enforcement of child custody determination made by foreign country. – Except as otherwise provided in subsection (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this title must be recognized and enforced under Subtitle 3 of this title.

- (c) Applicability of title. – A court of this State need not apply this title if the child custody law of a foreign country violates fundamental principles of human rights. (2004, ch. 502, § 2)

§ 9.5-109 - Communication between courts.

- (a) “ Record ” defined. – In this section, “ record ” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (b) Communication between courts allowed. – A court of this State may communicate with a court in another state concerning a proceeding arising under this title.
- (c) Parties are allowed to participate in communications. – (1) The court may allow the parties to participate in the communication.
 - (2) If the parties are not able to participate in the communication, they shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
- (d) Communication regarding administrative matters. – (1) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. (2) A record need not be made of the communication.
- (e) Record. – (1) Except as otherwise provided in subsection (d) of this section and notwithstanding any other provision of law, a record

shall be made of a communication under this section.

(2) The parties shall be informed promptly of the communication and granted access to the record. (2004, ch. 502, § 2)

6) Is legislation or rulemaking necessary to allow for international judicial cooperation?

See e.g. *Maxwell Communications Corp. v. Societe Generale* (In re *Maxwell Communications Corp.*), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff' d*, 186 B.R. 807 (S.D.N.Y.), *aff' d* 93 F.3d 1036 (2d Cir. 1996)

See also *In Re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996)

Flaschen and Silverman, " Cross-Border Insolvency Cooperation Protocols," 33 *Tex. Int' l L.J.* 587 (1998)