

## **Sub-Committee Report Regarding Criteria for Determining Possible NCCUSL Involvement in International Legal Developments**

### Introduction:

Developments in the Law are taking on an increasingly international cast. One NCCUSL drafting committee, engaged in considering possible revisions of the Recognition of Foreign Judgments is facing the possibility that federal action, necessitated by international developments in the area, may result in preemption of the subject matter. UETA, a well-received conference act, has answered the question of electronic signatures for those states that have enacted it, but hovering over this legislation is a comparable federal act as well as an ongoing international conference that is presently considering legislation in the same arena. These examples, and there are many more, demonstrate the reality that the Conference's efforts are being increasingly impacted by global jurisprudential developments. Commissioner King Burnett, a past president of the Conference observed, such factors as globalization, increasingly sophisticated technological advancement and perhaps most significant, the explosion of information, have dramatically changed the Conference's legislative landscape from a comfortable back-drop of relatively minor global significance, to one with ever-increasing international implications. (see Burnett memo referenced *infra*).

What was once a relatively comfortable environment within which to promulgate new uniform laws, is now a rapidly expanding context within which Conference efforts will be viewed on a stage that extends far beyond our shores. Given these realities NCCUSL must address such inquiries as (a) to what extent should the conference be involved in these international developments, as well as (b) what criteria should be used in determining the course and scope of Conference participation. It is this latter consideration that will be addressed herein.

This Report will analyze the issue of determining appropriate criteria by considering the various levels of participation that are realistically practicable. As an aside, note that at present, there are a number of commissioners who are

involved, in varying degrees, in the activities of some of the projects that will be discussed herein.

The Report will first, summarize the materials that were made available to the sub-committee members, so as to assist in shaping their ideas and opinions. Next, the Report will outline some of the more traditional conclusions the sub-committee reached as to the method of evaluating if and to what extent Conference participation would be desirable and practicable.

Given, the realities of global expansion, it would seem appropriate to next provide examples of just how far reaching are the trends in the development of law. The reshaping of the nation/state, the inter-relationship of law and economic development, the activities of the Canadian Uniform Law Conference, on the international stage, and other relevant factors, will be discussed with a view toward suggesting, that among the criteria that the Conference should address are those related to an expansion of the Conference's role in the development of law on to a more international platform.

Finally the Report will provide for consideration, tentative criteria that could be applied in determining the practicability of greater involvement in the development of law on a significantly larger a stage than we have been willing to consider in the past.

#### Preliminary Considerations

The subcommittee was assigned the task of exploring possible criteria that might be considered when determining the possibility of participation by NCCUSL in various international law developments. In preparation for this assignment the sub-committee members were sent a memo outlining three international projects: UNITRAL's project on Electronic Commerce; UNIDROIT's consideration of the subject of Securities with Intermediaries, and the on-going negotiations at The Hague, with respect to a possible treaty relating to the Recognition of Foreign Money Judgments.

The committee was provided with additional materials, listed below. Upon review a telephone conference was scheduled, during which the members

engaged in a comprehensive discussion regarding the issues relating to criteria to determine possible Conference participation.

Among the additional documents provided to the sub-committee were the following:

1. A memo dated 12/04 authored by Commissioner Curtis Reitz. This document briefly discussed, *inter alia*, the issue of “Conference Participation in International Negotiations”. The memo notes that, as noted above, various commissioners are presently involved on an individual basis in a number of these negotiations. The memo also notes and briefly discusses “[s]everal projects on the horizon for 2005 [that] may be appropriate for formal Conference participation”.
2. A March 17, 2005 memo from Commissioners Burnett, Reitz and Trost (BRT Memo) to Conference President Fred Miller involving “International Law Development Efforts in Which We Have an Interest and Suggestions on How to Implement that Interest”. This memo notes that in light of the Preemption issue as it relates to International Treaties, the ILDC has recommended and the Executive Committee has approved, the naming of a “consultant” to assist in devising modalities of how the Conference could assure that state law implements convention production. Section IV of the memo discusses various Immediate International Projects in which the Conference has a present interest. These include the aforementioned Electronic Commerce Convention, the Hague Conference regarding Foreign Money Judgments and the UNIDROIT project on substantive law for Securities held by Intermediaries. Further noted are the numerous projects in the Family Law area that also should be prioritized for possible Conference participation. The memo next considers the importance of building international consensus through negotiation of principles of law. It further notes the impact that globalization and concomitant technological advances has had and continues to have on such issues as national choice of law and the perceived “further erosion of the principles of federalism” which the authors observe, leads to a “solve it now” mentality resulting in an opting for Federal rather than state law solutions.

Note, as will be demonstrated hereinafter, these latter issues, Globalization and Technological Advances were especially helpful and prominent in the sub-committee's determination of factors that might lead to NCCUSL participation.

3. An undated, memo authored by Commissioner King Burnett, which comprehensively addresses such issues as federalism and uniformity of private law, the evolution and present scope of the activities of NCCUSL, the recent and developing work of NCCUSL "beyond state uniform laws", private law in the European Union, the issue of enforcement of foreign judgments and "other international harmonization efforts of private law". Of special interest to the sub-committee's efforts was the discussion of current NCCUSL activities in the international arena. Commissioner Burnett observed "NCCUSL has long had an interest in international issues not only because trade, technology and mobility mandated closer coordination of private law, but also because state law is impacted by treaties which are preemptive of state law."

Of particular interest to the sub-committee are the opinions expressed in the memo regarding the similarities found between the European Union and its relationship with its member states and the Federalist system in the United States. It is suggested that NCCUSL's involvement in the development of law in the international arena "would be a natural" for the involvement of the Conference's expertise in the development of law.

#### Discussion and Preliminary Conclusions:

After the sub-committee was afforded the opportunity to review the foregoing materials, the members engaged in a telephone conference. Each participant was then asked to summarize the telephone conference interaction as well as each the member's individual thoughts and ideas. These "summary memos" served as one of the bases for various of the conclusions reached herein. . Following are the contributions of the committee members as expressed in the summary memos:

1. There was a general sense among the sub-committee members that NCCUSL should become actively involved in those international projects mentioned above (UNCITRAL, UNDRIT, *et al*) and should as well, consider a policy shift regarding participation as a whole. There were various reasons for this determination. However these conclusions could be summed up by the observation that in all three instances the international projects dealt with subject matter that directly related to Acts previously enacted by NCCUSL. In one instance there is an on- going drafting committee effort to up-date the Recognition of Foreign Money Judgment Act. In this instance the present drafting committee is aware of and sensitive to the international negotiations that obviously could have a significant impact on the drafting committee's efforts as a whole. In the case of Securities held through Intermediaries, it is clear that this effort would have a direct impact on UCC Article 8. And of course, UETA would be directly affected by the efforts of UNCITRAL in the area of electronic signatures.
2. In response to the chair's request for summary memos, Commissioner Harry Haynesworth provided a comprehensive memo entitled "Criteria for NCCUSL Involvement in International Legal Developments". This memo, which Commissioner Haynesworth had previously circulated to selected commissioners, has been extremely helpful and consequently its contents are summarized below:
  - i. The level of involvement may be encouraged because certain legal principles and concepts being considered or having been enacted in other countries, should be considered for incorporation into our existing acts. Awareness of this kind of international legislation would be brought to the appropriate committee(s) for consideration.
  - ii Another level of activity would result from the on-going conventions, such as those noted hereinabove. It has been suggested, that NCCUSL should perhaps actively participate in some capacity in the activities of these international meetings. Important to this involvement it is suggested that NCCUSL have an on-going working relationship with the Department of State,

so as to be kept apprised of the status of these various projects. This extent of Conference involvement would seemingly depend on the nature of the impact upon our present state legislation. For example presumably NCCUSL would desire to be directly and actively involved where the concern is potential Federal pre-emption of the subject matter (e.g. Recognition of Foreign Money Judgments). Obviously, it is presumed that to some degree the nature of Conference involvement will depend upon the inclinations of the international participants and to perhaps any procedural rules governing such participation. Commissioner Haynesworth emphasized that, "Where the implementation of any treaty or convention is through the states, the input of the Conference at the beginning stage of a project is crucial in order to assess and to influence how the state implementation will take place and the impact, if any, on existing Conference Uniform and Model Acts."

iii. The suggested third level of involvement is, according to the author "outside NCCUSL's traditional ordinary course of business". It involves lending our conference expertise to other countries et al. so as to assist with drafting efforts in areas where we have had previous drafting experience. The author notes that in this last area, we need to be mindful of the reaction of the states to the idea of dues being used to assist other countries to improve their electronic commerce as examples. The interest and need are there, particularly with the growing internationalization of business and law generally.

It would appear that Commissioner Haynesworth's suggested criteria for involvement in the first two levels of participation are somewhat self-evident. However, perhaps a more in-depth cost-benefit analysis might be in order to determine the extent of "third level" participation.

Although cost considerations, as such were not part of the sub-committee's charge, it bears noting that the sub-committee observed that in some instances Conference participation might only involve one or two people, thereby resulting in modest expenditures. Further, at least initially, NCCUSL's participation could be limited, thereby cutting down on potential costs. This sentiment found a degree of concurrence by various of the sub-committee

members, one of whom however was not as optimistic about the assumption that Conference participation could be accomplished with only a relatively insignificant level of expenditure. He suggested that the Conference "...pursue more modest initiatives, ones that will likely succeed and which will not cost much in order to build a record of success to build upon". It was then suggested that possible funding sources such as foundational and federal "funding for broader international efforts" be looked into, with the further conclusion that "...we should focus narrowly for now on cooperation with known organization[s] with which we have already built relationships, i.e. UNCITRAL, UNIDROIT and the NCCUSL equivalents in Canada and Mexico".

Commissioner Haynesworth's three level analyses, appears to track the sentiments expressed in the Burnett, Reitz, Trost, 3/17/05 memo.(BRT memo) In that memo, it was suggested that ... "support of the implementation of uniform or model laws by nations in accordance with their other laws and practices". Such an approach, opine the authors, is "in keeping not only with Conference process, but with the realities of international harmonization where different legal systems in different phases of development are leery of detailed legislation which fits awkwardly within their overall legal system." The BRT memo also suggests that worldwide evolution of "what is loosely called globalization" is another reason to reexamine with a view toward expanding, our criteria for involvement on the international stage with a view toward possibly expanding the scope of NCCUSL's involvement.

The suggestion that the impact of globalization should lead to a re-examination of the Conference's role with a view to a possible expansion of the scope of its endeavors, is somewhat challenging and a potentially significant departure from viewing its role as primarily focusing on state law. The question is implicitly asked, "How do we justify such a departure from traditional concerns?" Perhaps the justification is in the fact that world is so much more inter-dependant than it was at the time the Conference came into existence. Undoubtedly, the impact of globalization on legal developments generally and certainly upon state

law is inevitable. If only with a view of self-interest, (some would suggest self-preservation) we cannot afford to ignore these realities.

### The Expanding Nation/State and Resultant Legal Consequences

In part this re-examination is dictated by the over-all perceived shift away from our present governmental forms. One author, Anne-Marie Slaughter,<sup>i</sup> in an article entitled “The Real New World Order”, suggests that “whereas liberal internationalists see a need for international rules and institutions to solve state’s problems, a group calling themselves the *neo medievalists* proclaim the end of the nation-state or at the least as has been suggested by Jessica Mathews in her article in *Foreign Affairs* (Jan/Feb 97) a shift away from the state to a supra-statesub-state and non-state actors”. These “new players have multiple allegiances and global reach”. Slaughter suggests that the engine for this transformation is the information technology revolution. “The result is a world order in which global governance networks link Microsoft, the Roman “Catholic Church and Amnesty International to the European Union, the united Nations and Catalonia.”

In examining these shifts from traditional governmental forms the author concludes that “the state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executive and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today’s international problems, terrorism, organized crime, environmental degradation, money laundering, bank failure and securities fraud, create and sustain these relations”.

“This transformation has taken the label of *Transgovernmentalism*, in which the dominant institutions remain concentrated in North America and Western Europe but their impact is felt in every corner of the globe, in what is described as ‘an increasingly borderless world’. One phenomenon that this new order has spawned is that Judges are building a global community of law. National judges and international judges are networking, becoming increasingly aware of on another and of their stake in a common enterprise. For example the

Israeli Supreme Court and the German and Canadian constitutional courts have long researched U.S. Supreme Court precedents in reaching their own conclusion on question like freedom of speech, privacy rights and due process. It is interesting to note that one goal of this evolving system is a ‘global rule of law’ i.e. one rule for all, a unified legal system topped by a World Court. Under such a system national courts would interact with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.”

#### The Canadian Experience.

Another example of the expanded role of an organization mainly concerned about uniformity of law among governmental units within a Federalized system is the present level of activity of the Uniform Law Conference of Canada (ULCC) as noted in the Report of the Canadian Dept of Justice regarding its Activities and Priorities. The Report Observes that the “ULCC now participates actively in the implementation of international conventions in the realm of private international law (PIL)” and is the “key mechanism for facilitating implementation of PIL instruments via the development of uniform implementing legislation.”

The positive contribution that this results in, is further discussed in the Report where it is noted that “This year, relying upon the uniform implementing legislation developed at the ULCC, the Department of Justice expects to continue consultations with the Americas”

#### The Impact of Development of Law as it Relates to Global Commerce

Examples of how the world relies upon nation-wide cooperation are provided at length by Professor Jeffrey Sachs<sup>ii</sup>. One of the keystones to Poland’s establishment of a market economy after the fall of the communist state was the “key pillar” of “Institutional Harmonization—adopting step by step the economic laws, procedures and institutions of Western Europe in order to be a successful candidate for the EU”...For example and presumably of particular interest to the NCCUSL commissioners is the recommendation that Poland “...dust off the

commercial codes of the 1930s ...with a view toward the adoption of the more modern commercial laws that were the shared legal base of the European Community”.

In assisting in the revitalization of Spain, Bolivia and Poland, Sachs realized more than ever, how a country’s fate is crucially determined by its specific linkages to the rest of the world. Looking to Sachs’ experiences in India is another example of how the expertise of contributors such as the Conference, has helped national development throughout the World. In speaking of India’s transformation Sachs notes, “Who would have guessed twenty-five years ago that impoverished India would burst upon the world economy in the 1990s through high-tech information services? ...The technological possibilities of Internet-empowered software programming, offshore business processing, long distance data transcription and a host of other IT-based industries had not even reached the concept stage.”

Drawing on the philosophies of Emmanuel Kant, Marie-Jean-Antoine Condorcet, Adam Smith and Sir Francis Bacon, Sachs concludes that “...social progress should be universal, not restricted to a narrow corner of the world in Western Europe. All of the leading Enlightenment figures believed in the essential equality of humanity and the ability of societies in all parts of the world to share in economic progress are key”. As Sachs notes, “...drawing upon the visions of Adam Smith, global trade, or what we might now call *enlightened globalization*, would speed the process by the establishment of equality of opportunity through the *mutual communication of knowledge and of all sorts of improvements which an extensive commerce from all countries to all countries naturally or rather necessarily carries along with it.*” (emphasis added). See generally, Sachs, *The End of Poverty*, Penguin Press, 2005).

#### Law and Governance in a “Networked World Order”

Perhaps some of the most telling reasons for expanded conference involvement are discussed in Anne-Marie Slaughter’s article in the Summer 2004 Stanford Journal of International Law, entitled “*Sovereignty and Power in a Networked World Order*”. Slaughter observes that although such factors as

fundamental threats to our own security, the potential destabilization of an entire region, or the miasma of disease and crime, may well have their origins in conditions once thought to be within a State's exclusive domestic jurisdiction... *"States can no longer govern effectively by being left alone and be leaving other states alone. The converse proposition is equally true although perhaps even more startling... States can only govern effectively by actively cooperating with other states and be collectively reserving the power to intervene in other states' affairs. The world has indeed turned upside down: small wonder that the concept of sovereignty needs to be redefined."* (emphasis added)

One factor that lends itself to the application of the Conference's collective expertise, is the realization of the full impact of being in the midst of an age in which the most valued commodity is not goods but information. However, as Slaughter points out, "Scholars tend to assume automatically that more information is better, for a whole host of reasons. But in a world of information overload, that proposition is increasingly debatable." Perhaps ironically the author observes that, "politicians may be more concerned with the source of particular information—from a particular polity, constituted by the people of a specific nation, or abroad—as more important than the content. Model legislation, codes of best practices, even judicial decisions developed by or passed along through government networks may actually be problematic".

It is this context that the author asks the question, "What are the particular mechanisms by which all the talking and information exchange that is the lifeblood of many government networks translate into concrete action?" Who better to provide an answer than a group that for over one hundred years has exhibited an extraordinary and unique ability to understand, translate and ultimately create the best of what is the law in code-like form so as to enhance understanding and reduce the incredible information overload that otherwise might be needed to make sense of the legal principles involved?

How does the law develop in such a global context where expertise based upon talent, experience and proven product is a must? Perhaps another portion of the Slaughter article will shed some light and offer motivation:

“The United States offers more protection to freedom of speech than any other nation, in its constitutional peer group. That is a historical and cultural artifact shaped over centuries by Supreme Court decision interpreting the First Amendment and building upon one another. Suppose in a conference of constitutional judges from around the world, U.S. judges become aware of just how far out of line they are with prevailing doctrine on other countries. They might discover, for instance, that their fellow constitutional judges...virtually all agree that hate speech should not be permitted and should be treated as an exception to a liberal constitutional right of freedom of speech. Suppose further that the next First Amendment case before the U.S. Supreme Court involves hate speech. In the Court’s opinion, the Justices openly discuss the prevailing trends in global constitutional jurisprudence and announce that under U.S. Constitutional precedents, they have decided to continue to permit hate speech as a necessary concomitant, however deplorable of freedom of speech”.

“This result might be justified on grounds of years of precedent and legal conceptual evolution or a declaration that the U.S. historical and cultural trajectory has been sufficiently distinct from that of other nations as to warrant a different understanding of what freedom of speech must mean. Or they might invoke the specific text of the U.S. Constitution as opposed to the texts of other constitutions. In other words not only can we lead in a movement toward convergence of law, but in some instances our expertise may result in an articulated, rational informed divergence.”

### Summary

In order to develop viable criteria which will contribute to the adoption of a policy toward possibly greater involvement in international legal developments the Report has presented the following for consideration:

1. The Haynesworth, three-level proposal, which explores a relatively traditional approach and one that is easily derived from present Conference policy standards;

2. A summary of the international endeavors of the Uniform Law Conference of Canada, which certainly invites comparison with an organization quite similar in structure and mission as NCCUSL;
3. The work of Jeffrey Sachs in the world of international economic development, primarily as it relates to the relationship between the impoverished countries of the world and those that are more advanced. The Sachs material emphasizes the inevitability of the interrelationship between economics, ethical considerations and the law.
4. The comprehensive analysis of one of this country's foremost commentators on the state of global change, the impact of novel and challenging legal structures, and the inevitable role of law and that of those who make it, will have on the direction of this evolution.

#### Conclusions:

Such factors, those as limited as possible changes in the details of a particular state law because of international developments or those as far reaching as affecting the impact of globalization and ever changing nation-state structures in a world of ever expanding information<sup>iii</sup> and technological change, all dictate that NCCUSL become actively involved in international legal developments. This participation would seem to be appropriate under any of the following circumstances:

1. When there is reason to believe that such developments could directly or indirectly affect existing or proposed uniform laws
2. On those limited circumstances when a law, proposed on the international level, might be desirable as a uniform state law as well
3. When the contribution of the Conference's expertise as to the development of law e.g. its experience, process and procedures, would contribute to a more effective international product,
4. When, generally, the expertise of what is clearly a superbly talent-laden, dedicated, body of professionals, would most assuredly positively impact a given international project.

Policy considerations such as these necessitate a grounding in philosophical motivations. In this regard, from a utilitarian perspective (such as the application of cost-benefit theory implied in the philosophies of Jeremy Bentham and John Stuart Mill), NCCUSL's contributions to ongoing developments in international law would have desirable consequences. At the same time, deontological considerations (the idea that non-consequential factors, such as duty and purpose as developed in the philosophies of Emmanuel Kant and Aristotle) are inherent in the century long work of NCCUSL, would seem to dictate involvement for the betterment of law, culture and society in general. .

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<sup>iii</sup> Overload? As one scholar observed, the total amount of information available to the 17<sup>th</sup> English literate is equivalent to one mid-week copy of the NY Times.