

2008

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Recommended Citation

Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accomodating Globalization*, 73 Mo. L. Rev. 1063 (2008)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/584

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The Crucial Role of the States And Private International Law Treaties: A Model for Accommodating Globalization

*Julian G. Ku**

I. INTRODUCTION

This brief essay highlights the central and important role that state governments play in the development and integration of private international law treaties into the United States legal system. States play this central role even though, as some of the papers in this symposium have concluded, there are few, if any, constitutional constraints on the ability of the federal government to sign, ratify, and implement treaties that would displace state law.

The primacy of states in the integration of private international law, this essay argues, points the way to a model of accommodation of other kinds of treaties affecting traditional areas of state control. The model of state government control over the integration of private international law offers a healthy, if modest, alternative to the sometimes reflexive nationalism pervading scholarship in this area that, in its most extreme form, has suggested that federalism is “largely irrelevant to the conduct of foreign affairs.”¹

II. THE UNITED STATES AND PRIVATE INTERNATIONAL LAW

As the U.S. Supreme Court has explained,

International law, in its widest and most comprehensive sense – includ[es] not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation by reason of acts, private or public, done within the dominions of another nation.²

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1. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149-50 (2d ed. 1996). For another example of such avowedly nationalistic conceptions of the treaty power, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

2. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

Private international law is thus concerned with relations between individuals of different states, as opposed to public international law, which is concerned with relations between the different states themselves. Beginning in the twentieth century, however, nations began to use the tools of public international law, especially treaties, in order to unify rules of private international law. The Hague Conference on Private International Law, for instance, was established to foster unification of rules governing conflicts of law, contracts, wills, domestic relations, and commercial transactions via international agreements. Thirty-nine treaties have been negotiated under the auspices of the Hague Conference. Similarly, the United Nations Commission on International Trade Law has sponsored nine such treaties, and the International Institute for the Unification of Private Law has sponsored eleven treaties.

The United States, however, is a party to only a small proportion of these private international law treaties. Of the roughly fifty-nine major conventions to which the United States could have acceded, it has only joined the following seven treaties: the United Nations Convention on the International Sale of Goods, the New York Convention for the Recognition and Enforcement of Judgments, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Intercountry Adoption, the Hague Convention on Service Abroad, and the Hague Convention on Taking Evidence Abroad, and the Hague Convention on the Legalization of Foreign Public Documents.

This short list is notable for what it leaves out. The United States is not a party to treaties governing private international law questions such as the recognition of foreign court judgments, marriages, divorces, trusts, wills, family support, and maintenance obligations, or foreign private law instruments such as wills, adoptions, and divorces. The United States is also not a party to commercial law treaties such as those codifying rules of e-commerce, standby-letters of credit, factoring, commercial finance, and other commercial law rules.

In most cases, the failure of the United States to join the private international law treaty systems leaves these matters to state law. For instance, there is no federal law governing the recognition of foreign judgments, nor is there a federal law creating national rules for resolving conflicts of laws. All of these matters, without a treaty, are entirely left to the states.

III. STATE IMPLEMENTATION OF PRIVATE INTERNATIONAL LAW TREATY OBLIGATIONS

Even in those cases where the federal government has joined a private international law treaty, states often play a major role in the implementation of those treaty obligations. In many cases, states will work to enact state-level legislation that implements private international law treaty obligations alongside federal implementing legislation. Second, and most intriguingly, states may sometimes implement international treaty obligations, whether or not the United States has signed or acceded to the treaty obligation.

A. Joint Federal-State Implementation of Private International Law Treaties

States often play a cooperative role in the implementation of treaties, even when such treaties are separately implemented by federal legislation. For example, the Hague Convention on the Civil Aspects of International Child Abduction³ was implemented by the federal International Child Abduction Remedies Act (ICARA).⁴ Yet a number of states have still adopted the Uniform Child Custody and Enforcement Act so that state law can enforce an order for the return of the child without reference to federal law.

Similarly, the Convention Abolishing the Requirement of Legalization for Foreign Public Documents⁵ appears to be a self-executing treaty requiring the United States to remove requirements of diplomatic and consular legalization of foreign public documents by domestic governmental authorities. Thus, the treaty appears to supersede various state practices that required a diplomatic or consular official to “legalize” foreign notarial acts of foreign governmental documents before a state authority would recognize such foreign documents.⁶ Despite the clarity of the treaty obligation, and its likely status as self-executing, most states have enacted legislation to ensure implementation either through adoption of the Uniform Law on Notarial Acts⁷ or separate legislation.⁸

In these circumstances, these seemingly redundant laws ensure that private international law treaty obligations will be carried out at the level of government that most commonly deals with such matters. In the case of recognition of notarial acts, for instance, local and state governments are much more likely to deal with recognition questions. For this reason, state-level implementation of international rules for recognition makes practical sense.

3. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501.

4. 42 U.S.C. §§ 11601-11611 (2000).

5. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 20 I.L.M. 1405.

6. See, e.g., Op. Cal. Att’y Gen., 21 I.L.M. 357 (1982) (concluding that Convention Abolishing the Requirement of Legalisation for Foreign Public Documents overrides California law).

7. UNIF. LAW ON NOTARIAL ACTS § 6, 14 U.L.A. 215 (2005).

8. ARIZ. REV. STAT. ANN. § 41-325; DEL. CODE ANN. tit. 29, § 4326; GUAM CODE ANN. tit. 5, § 33601; IOWA CODE ANN. § 9E.13; KAN. STAT. ANN. § 53-507; MINN. STAT. ANN. § 358.46; MONT. CODE ANN. § 1-5-608; NEB. REV. STAT. § 64-202; NEV. REV. STAT. 240.165; N.M. STAT. § 14-14-6; OKLA. STAT. tit. 49, § 117; OR. REV. STAT. § 194.555; WASH. REV. CODE § 42.44.150; WIS. STAT. § 706.07.

*B. Independent State Implementation of Private International Law
Treaties*

While state law can sometimes supplement federal implementing legislation or self-executing treaties, state law can also effectively *replace* federal implementing legislation or even federal acquiescence to the treaty itself. In these circumstances, the states become more than assistants, they become the primary governmental actors in the integration of these private international law norms.

The U.S. regime of non-federal state implementation is different from the regime adopted in nations with other federal systems. In some countries, like Canada, the implementation of international treaty obligations must be carried out by provincial legislation. For this reason, many private international law treaties explicitly allow member states to choose to implement their treaty obligations via their local or provincial governments. This allows nations to enter into such treaties in good faith, with the knowledge that some of their local or provincial governments may not ultimately implement the treaty obligations.

Although such an option is open to the United States, it has never invoked this clause when joining private international law treaties. Following the doctrine set forth in *Missouri v. Holland*, the federal government has assumed that there is no constitutional barrier to joining such treaties.⁹ But this does not mean that the U.S. has not effectively adopted a state-by-state method of treaty implementation, even if it has not openly admitted it is doing so.

The most prominent example of this de facto "Canadian" method of treaty implementation is U.S. participation in the Convention providing a Uniform Law on the Form of an International Will. The Washington Convention was convened under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) to enable "testators to make wills in a form that will be self-proving in all countries where the Convention is in force."¹⁰ In order to do this, the Washington Convention sets forth a form for an international will and requires all member states to enable use of this form and to recognize wills made in foreign countries that follow the Convention's form.

In the United States, the law governing the recognition of wills is generally a matter of state rather than federal law. Thus, prior to the U.S. decision to join the Convention, commentators in the U.S. debated whether or not the treaty would unduly interfere with the traditional state role in regulating the

9. For instance, in the Letter of Submittal for the Wills Convention, the President declared that there was "no constitutional impediment to bringing the Convention into force throughout the United States through use of the treaty power and federal implementing legislation." S. TREATY DOC. NO. 99-29, at 6 (1986).

10. *Id.* at 1.

recognition of wills.¹¹ Perhaps for this reason, the U.S. government developed an innovative "two-tier" approach to implementing the Washington Convention.¹²

Both the federal government and state governments planned to enact implementing legislation for the Washington Convention. The federal Government would enact an "International Will Act" to govern the creation of wills by American citizens abroad with the assistance of U.S. diplomatic and consular officials and to require all U.S. states to recognize foreign wills conforming to the Washington Convention. Meanwhile, U.S. states would independently adopt legislation both recognizing foreign wills conforming to the Convention and allowing U.S. testators to adopt wills conforming to the Convention.¹³ Such implementing legislation for the states was developed by the National Conference on Commissioners for Uniform State Laws.

The second part of this implementation strategy was partially successful. Since the Convention was submitted to the Senate in 1986, twenty states have enacted statutes implementing the Washington Convention. In those states, testators can make international wills, and foreign wills following the Conventions' form will also be recognized.

Oddly enough, though, the federal government has never fulfilled its duty to pass implementing legislation, even though the Senate gave its advice and consent in 1992. The President has withheld ratification of the treaty pending the adoption of federal legislation. Thus, over twenty years after the treaty's submittal to the Senate and sixteen years after the Senate's approval, the United States is still not a party to the Washington Convention.

The lack of federal legislation means that, effectively, the Wills Convention is only in effect in twenty of the fifty U.S. states. This is exactly the situation that the federal-state "Canada" clause is supposed to account for: partial implementation of an international treaty obligation.

Interestingly, this state of affairs is not unique to the Washington Convention. In other circumstances, states have adopted laws implementing private international law treaty norms even when the U.S. Senate has not yet given advice and consent. Thus, the Uniform Probate Code, adopted in eighteen states, also contains provisions "in harmony with" the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary

11. See Kurt H. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 Providing for the Form of an International Will*, 22 AM. J. COMP. L. 365, 375 (1974); Jerome J. Curtis, Jr., *The Convention on International Wills: A Reply to Kurt Nadelmann*, 23 AM. J. COMP. L. 119, 120 (1975) (explaining that drafters "knowingly undertook the subversion of the traditional role of the American states in enforcing their own rules").

12. See, e.g., Richard D. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 628 (1984) ("A great deal of thought led these experts to the conclusion that each state should be free to determine whether or not it would permit the making of international wills within its borders as an additional form of will.").

13. S. TREATY DOC. NO. 99-29, at 5-6.

Dispositions.¹⁴ The Uniform Trust Code, adopted in nineteen states, has a provision allowing a settlor to designate the governing law, and in the absence of such designation, providing choice of law rules is "consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition."¹⁵ And the Uniform Child Custody Jurisdiction and Enforcement Act, adopted in forty-six states, provides that a custody determination can be registered without any request for enforcement.¹⁶ As the official comment to this section notes, this provision is required by the Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures of the Protection of Children.

IV. WHY LEAVE PRIVATE INTERNATIONAL LAW TO THE STATES?

It is safe to say that state governments continue to play a central role in the integration of these private international law instruments into U.S. law. Indeed, as the previous section suggests, states are in some cases the only governmental entities that are adopting rules to conform to international treaties on private international law. Yet as the papers in this symposium have amply demonstrated, there is no serious constitutional obstacle to the use of the treaty power to federalize subjects of private international law. Indeed, the United States has concluded a number of treaties in this area, most notably the Convention on Contracts for the International Sale of Goods. Both scholars of private international law and attorneys for the Department of State have uniformly concluded that there is no constitutional obstacle to the regulation of private international law through treaty.¹⁷

Given the existence of federal power in this area, the question arises: why do the states remain primary players? There is no obvious answer to this question. While I have argued elsewhere that certain limitations arising from federalism, such as anti-commandeering, could limit the federal government's exercise of the treaty power,¹⁸ this would still not seriously constrain the implementation of private international law treaties.

Instead, it is more likely that a strong traditional allocation of federal-state powers, an allocation that is not constitutionally mandated, persists in the U.S. system due to traditional allocations of authority between the federal and state governments. This stickiness of state control over certain areas of

14. UNIF. PROBATE CODE § 2-1002, 8 U.L.A. 478 (1998); Eugene F. Scoles, *The Hague Convention on Succession*, 42 AM. J. COMP. L. 85 (1994).

15. UNIF. TRUST CODE § 107 cmt., 7C U.L.A. 436 (2006).

16. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 305(a), 9 U.L.A. 692 (1999).

17. See, e.g., Peter H. Pfund & George Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/pfund.html>.

18. See Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006).

law, even interstate contract law via the UCC, is an enduring feature of the U.S. system. It reflects notions of federal deference to local autonomy and local expertise as well. It is thus not surprising that the federal government is reluctant to displace the traditional allocation of regulatory power, even when it has the clear power to do so.¹⁹

V. IMPLICATIONS FOR TREATIES AND U.S. LAW GENERALLY

The continuing allocation of control over the implementation of private international law treaties to the states may also have broader implications for the integration of international norms into the U.S. system. It weakens the functional argument for nationalizing all issues of international concern that often animates international law scholarship in this area.

Instead, the evolved system for integrating private international law treaties represents a useful accommodation. The states can retain their traditional areas of control, while at the same time the United States can participate in the development of international law. The onset of globalization need not spell the end of the states. Instead, the states conversely are likely to become larger players on the international stage. Foreign nations must recognize, and probably already recognize, that many important legal questions of law are matters of state law.

Thus, a different rule for will recognition might be in effect in Missouri than New York. Some judgments, marriages, divorces, or adoptions may be recognized by some states and some may not. Conflicts rules may very well differ dramatically. This is already the reality, and I have seen no strong evidence that the U.S. system cannot survive, or even prosper under this institutional arrangement. Or that other kinds of treaties, even human rights treaties, may benefit from the same model. Indeed, it is arguable that the leading United Nations human rights treaties, which have been found to be non-self-executing, are thus essentially left to the state governments to implement.²⁰

This is not to say that states must play the same role in the implementation and integration of international human rights treaty obligations as they do in the areas of private international law. Different considerations may arise for different kinds of treaties. But at the very least, the story of the states and private international law treaties reminds us that nationalization is not always necessary, even when it is constitutionally authorized.

19. For a more detailed and elaborate version of this argument, see Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004).

20. See *id.* at 462.

