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Lawrence W. Newman & David Zaslowsky, Litigating International Commercial Disputes 1996 Edition

Eric E. Bergsten

BOOK REVIEW

Lawrence W. Newman & David Zaslowsky, *Litigating International Commercial Disputes 1996 Edition*

Reviewed by
Eric E. Bergsten

Increased international trade and investment bring with them increased litigation between parties from different countries. Sometimes the litigation is in this country, sometimes in another and sometimes it takes the form of arbitration. Whichever form it may take and wherever it may take place, international commercial litigation poses problems for the lawyers and for the parties that are in addition to, and to some degree different from, the problems that are posed in any litigation. Who has jurisdiction over the dispute? How is a law suit commenced against a foreign defendant, and even more so, against a foreign sovereign? How is evidence obtained that may be located in a foreign country? Will a foreign court help if requested to do so, and will our courts help a foreign court if so requested? Conversely, will the foreign court interfere with a law suit in this country and will our courts interfere in a law suit in the foreign country? Once there is a judgment in a United States' court, will it be executed in a foreign country? Will a United States' court execute the judgment of a foreign court?

To an American lawyer not experienced in international litigation it may seem that the answers could be found in our experience in interstate litigation. Seen from New York, the courts of New Jersey and Connecticut are foreign courts, as are the courts of Ontario or France. The difficulties are deceptively similar. The solution for the most pressing of those difficulties was adopted in 1787. A judgments convention, known as the

Full Faith and Credit Clause of the Constitution, provided that the judgments of the courts of those foreign states that were party to the "convention" would be enforced. The qualification that the foreign court had to have had jurisdiction before its judgment was worthy of full faith and credit had been understood from the beginning. At first the criteria for determining whether the foreign court (e.g., the New Jersey court) had had jurisdiction had to flow out of the Full Faith and Credit Clause itself,[1] but later the Due Process Clause of the Fourteenth Amendment was pressed into service. Use of the Due Process Clause had the advantage of permitting the defendant to argue at the outset of the process in the court of the "foreign" state that the Constitution prohibited the court from exercising jurisdiction, even if it had jurisdiction under its own local law. Since the criteria under the Due Process Clause for determining whether the assertion of jurisdiction was constitutionally valid were meant to assure that "requiring the defendant to appear in the courts of the state does not offend 'traditional notions of fair play and substantial justice'"[2] those criteria could as well be applied to determine whether the court in Ontario or France had had jurisdiction when an application was made to enforce a judgment of a court from those jurisdictions (p. 21).

But that is one of the problems. The courts of Ontario or of France are foreign to a New York court in a different sense than are the courts of New Jersey or of Connecticut. Their procedures, their conceptions of "traditional notions of fair play and substantial justice", their policy choices are not necessarily the same as those in this country. It is not self-evident that the rules developed for interstate litigation apply appropriately to international litigation. Therefore, special rules have had to be worked out - some of the time - while some of the time the rules for interstate adjudication serve for international adjudication as well. Even for the experts it is not always easy to figure it out.

Mr. Newman and Mr. Zaslowsky have undertaken to help us figure it out. Mr. Newman is Chairman of the Litigation Department of the New York office of Baker & McKenzie, while

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[1] D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850).

[2] (quoting International Shoe Co. V. Washington, 326 U.S. 310 at 316 (1945)).

Mr. Zaslowsky is a partner in that same Department. They both have substantial experience in international litigation, and they know how to explain the issues to non-specialists. That talent has been honed over the years in the many articles on domestic and international litigation that Mr. Newman and Mr. Zaslowsky have written with associates from Baker & McKenzie and others in the New York Law Journal.

While the articles in the New York Law Journal and the current book have much in common, there are two basic differences. First, the articles are short, episodic and often focused on a recent court decision of interest.[3] Secondly, the readers of the New York Law Journal are primarily practicing lawyers in the metropolitan area, many of whom are also litigators. The conception of the current book is different. It was written as an integrated whole and it "is intended to be both a manual or handbook and a reference work, through which salient issues in international commercial cases may be identified and dealt with" (p. xiii). The intended audience is, according to the authors' Preface, "practicing lawyers who do not specialize in international litigation, corporate counsel, foreign lawyers interested in obtaining an understanding of the considerations involved in participating in lawsuits in this country, judges and, of course, law students desiring a 'hornbook' that deals straightforwardly with the key subjects covered in courses on transnational litigation" (pp. xii-xiii). This is a book written by practitioners. They are not concerned with legal theory or with a "better rule"; only on occasion is there a criticism of the courts or of legislation.[4] They are concerned with the practical conduct

[3] A compilation of 46 articles written between 1982 and 1992 has been published as Lawrence W. Newman & Michael Burrows, THE PRACTICE OF INTERNATIONAL LITIGATION, Vol. 1 (1992). Considered as short chapters, they give a remarkably coherent picture of the issues. Nevertheless, their origin as topical articles in a daily publication remains evident.

[4] About as strong a criticism that they make is in respect to the First Circuit's holding in Application of Asta Medica, S.A., 981 F.2d 1 (1992). The court said that an applicant under 28 U.S.C.A. § 1782, the provision which authorizes federal courts to give assistance to foreign and international tribunals to secure evidence for use in the foreign tribunal, must make a showing that the information sought is "discoverable under foreign law." The authors suggest that "rather than reading into the statute a reciprocity requirement that Congress did not include, courts might consider exercising their discretionary powers to assure that orders for the production of evidence under Section 1782 do not create any unfairness" (p. 202).

of litigation, and that is a big enough subject. Messrs. Newman and Zaslowsky have succeeded amazingly well in writing a book that fits the needs of the somewhat diverse audience they have targeted.

One suspects that the audience most in the view of the authors were foreign lawyers. Two of the three Forewords are written by English jurists of note.[5] The first chapter gives an overview of litigation in the United States and compares it both with procedures found in England and Commonwealth countries and with procedures found in civil law countries. Throughout the book there are comparisons to procedures followed in other countries in regard to the issue in question.[6] Without that introduction and the constant references to foreign procedures, much of what follows would, I suspect, be difficult for a foreign audience to understand. It is a common experience when reading a book or article on an aspect of a foreign legal system that, even if the words are understood and the law in the foreign country concerned is somewhat familiar, the discussion cannot be understood because the author assumed certain knowledge that the reader did not have. The authors have attempted to reduce that problem for the foreign readers of this book. In doing so, they have often also explained to an American reader why the issue in question is not as easily solved as one might otherwise have expected.

Nevertheless, I suspect that many foreign lawyers who use this book will find that they lack the basic knowledge of American federalism that is necessary to understand many of the issues. As pointed out in chapter 1, "[t]here are in the United States 51 separate courts systems—a federal court system and a separate system in each of the 50 states" (p. 1)[7] The rest of the section, however, discusses only the basic organization of

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[5] Lord Slynn of Hadley, Lord of Appeal in Ordinary, and Professor Roy Goode of Oxford. The third Foreword was written by Professor Andreas F. Lowenfeld of New York University School of Law.

[6] For example, more space is given in chapter 2 to pre-judgment attachments in foreign countries than in the United States. The discussion serves the practical purpose of indicating the possibilities of such attachments in aid of litigation in the United States. It also serves to give some points of comparison with the law in the U.S.

[7] The statement slightly understates the number of court systems since it leaves out the District of Columbia, Puerto Rico, Guam and a few other associated territories.

the federal court system. In fact, the book is really about international commercial litigation in the federal courts, with a few nods to the state courts, especially those of New York.[8] As understandable and inevitable as that choice may be, especially in a book of only 240 pages of text, plus annexes, is the foreign lawyer (or non-specialist domestic lawyer or law student) to assume that the state courts other than those of New York do not conduct international commercial litigation?

But there is worse. The major difficulties do not come from the existence of 50+ state court systems, but from 50+ state legal systems with their rules of jurisdiction and procedure binding on the state courts and, to a constantly shifting and decidedly confusing extent, on the Federal District Courts that sit in those states. The problem is perhaps most acute in explaining the question of personal jurisdiction of the courts over foreign defendants, a subject treated in chapter 3. The authors start by pointing out clearly that "[p]ersonal jurisdiction over a foreign party may be obtained either under traditional bases [consent, presence, domicile and physical power] or under 'long-arm' statutes, primarily those enacted by the states" (p. 19). They survey, in a satisfactory manner, the more recent Supreme Court decisions delineating the outward limits of long-arm jurisdiction. What is not clear from the discussion at that point is that the jurisdiction in question is that of a court sitting in a particular state, even if the court is a federal court. If they are attentive, they will find it in the following discussion on the federal long-arm statute. Presumably American readers will already know that for most purposes determination of which Federal District Court has the authority to hear a case is a question of jurisdiction and not of venue; foreign readers could be excused for not.

It seems that what would be necessary would be a preliminary chapter on the American constitutional doctrines of federalism, a task that is far beyond the scope of this book. It is necessary simply to acknowledge that at least one segment of the intended audience may have a difficult time understanding aspects of it unless they have had an extensive exposure to the

[8] The table of statutes shows one citation to the statutes of Louisiana, Massachusetts, North Carolina, Pennsylvania, and Texas, two to Wisconsin, three to California and forty to New York.

American legal system elsewhere. Of course, with the large number of foreign law graduates coming the United States for an L.L.M., more and more of them will have had that exposure.

The fourteen chapters that constitute the heart of the book cover in brief form the major issues in international litigation. The fourteen appendices set forth the most important statutes, rules and treaties in the field. What is striking about both the textual discussion and the appendices is the extent of the fundamental changes in attitude and legal rule that have occurred during the last thirty years. There is hardly a chapter in this book that sets forth rules prevailing in the mid-1960's that could still be relied upon today.

The most striking change is the recognition that an effective structure for international litigation requires international agreement. Thirty years ago the United States was a party to no multilateral convention affecting international litigation. The appendices contain five multilateral conventions which the United States has joined since that time: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965),[9] Inter-American Convention on Letters Rogatory (1975) with Additional Protocol (1979),[10] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970),[11] Hague Convention Abolishing Requirement of Legalization for Foreign Public Documents (1961)[12] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).[13] The Inter-American Convention on International Commercial Arbitration (1975)[14] might have been added.

The negotiation of a multilateral convention and its adoption by individual States is not a guarantee that the convention will serve its intended purpose, especially if one of the purposes is to limit the manner in which the States have previously acted. So it has been with the Service Convention and the Evidence Convention in the United States. The Service Convention

[9] The United States joined in 1969.
[10] The United States joined in 1988.
[11] The United States joined in 1972.
[12] The United States joined in 1981.
[13] The United States joined in 1970.
[14] The United States joined in 1990.

had two fundamental purposes. The first was to facilitate service in foreign countries. The traditional method was to forward the request for service through diplomatic channels to a foreign court by means of a letter rogatory. A time consuming process at best, and one that too often resulted in silence. The letter rogatory was dispatched, but there was no assurance that there would ever be a return indicating that service had been made. The Service Convention simplifies the process by requiring a Contracting State to designate a Central Authority to which requests for service can be addressed.[15] The Central Authority either serves the document itself or arranges to have it served by an appropriate agency of the requested State. No longer does the requesting foreign party have to attempt to determine which agency would be appropriate. Nevertheless, service through the Central Authority may be time-consuming, running from about two months according to the Hague Conference on Private International Law[16] to six to eighteen months in some countries, according to "Department of Justice officials with personal experience in these matters" (p. 63).

The second purpose of the Service Convention was to restrict certain forms of service on foreign persons that raised questions in the State of the person served. Article 10, for example, says that "[p]rovided the State of destination does not object, the present Convention shall not interfere with—" the sending of judicial documents through the mails, or directly addressing judicial officers, officials or other competent persons of the State of destination. Some States considered the sending of judicial documents from a foreign State directly to a recipient in their State as being an infringement of their sovereignty, and it is no surprise that a number of Contracting States have made the objection anticipated by Article 10.[17] The consequence has been that service by mail to a State that is a party to the Service

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[15] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, February 10, 1969, art. 2, 20 U.S.T. 361, 658 U.N.T.S. 163.

[16] State Department Circular Concerning Hague Service Convention (May 1995), reprinted Appendix F (p. Appendix F).

[17] *Supra*, note 15, art.10. Countries that have objected to all or part of Article 10 include Botswana, the Czech Republic, Denmark, Egypt, Finland, Germany, Israel, Japan, Luxembourg, Norway, Seychelles, Sweden, Turkey and the United Kingdom.

Convention and that has made an Article 10 objection is an invalid service, even though it would have otherwise been proper under the Federal Rules of Civil Procedure. While the courts were split as to whether such a result was required by the Service Convention, new Rule 4(f) adopted in 1993 would seem to make it clear that service in a foreign State may not be made by means prohibited by international agreement, including by means to which the relevant State party to the Service Convention has objected (p. 64).

But what if the local means of service on a foreign defendant does not require service in the foreign country? It is obvious that service can be made in the forum State if the defendant is resident or doing business there. It is not so obvious that service can be made on a substituted party in the forum State and still be in conformity with the Convention. That was the issue faced by the Supreme Court in *Volkswagenwerk, A.G. v. Schlunk*.[18] The case involved a wrongful death action in the Illinois courts. After the original defendant, Volkswagen of America, Inc., denied that it had designed or sold the automobile, plaintiffs amended the complaint to add the German parent as a defendant. Service on the parent was made in accordance with Illinois law by serving the subsidiary. The German parent moved to quash service on the grounds that the plaintiff had not complied with the Service Convention.

Article 1 of the Service Convention provides that it applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." The Supreme Court held that the Convention did not apply since no service abroad was required.[19]

It is of particular interest that this decision by the Supreme Court, which does not seem to be in full compliance with the spirit of the Service Convention, was not criticized when it was discussed in The Hague by the Special Commission of States

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[18] 486 U.S. 694 (1988).

[19] The Fifth Circuit reached a similar result in regard to the Inter-American Convention on Letters Rogatory in Kreimerman v. Casa Veerkamp, 22 F.3d 634, (5th Cir. 1994), *cert. denied*, 115 S.Ct. 577 (1994). The court held that the Convention by the terms of Article 2 "shall apply to letters rogatory", and that it, therefore, did not apply where there was no occasion to use a letter rogatory.

party to the Convention.[20] The Special Commission accepted the principle that each state would have to decide under its own law whether service abroad was required. The Special Commission recognized the danger that substituted service on a person who had not been expressly designated as an agent to receive service or process might not give timely notice of the legal action to the person to be served. That would be especially true of a country that lacked "a 'safety net' such as that offered by the clause of the United States Constitution's Bill of Rights guaranteeing 'due process of law.'"[21] Therefore, such substituted service in some countries might cause concerns for the other States party to the Service Convention, but it did not cause the same concern when it happened in the United States.

Schlunk did not infringe upon any significant interest of any of the other States. Even so, it would be well to accept the practical advice of the authors that "notwithstanding *Schlunk*, counsel would be well advised to follow the requirements of the Hague Service Convention if there is a possibility that it will be necessary to enforce any eventual judgment outside the United States" (p. 62).

The interests of the other States party were infringed to a much greater degree when the Supreme Court held in *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*[22] that the Hague Evidence Convention was not the exclusive means of obtaining evidence located in the territory of a State party to the Convention. The long history of foreign resistance to the extensive evidence gathering proclivities of Americans, whether for private litigation or for public investigations, is well known. In part the resistance is based on the fact that the inquisitorial system of adjudication in civil law countries leaves no room for party investigation of the facts as it is practiced in this country (p. 139). "Further, even many common law nations are uncomfortable with the unusual freedom and responsibility accorded to the lit-

[20] Report on the work of the Special Commission of April 1989 on the operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1558 (1989).

[21] *Id.* at paragraph 13.

[22] 482 U.S. 522 (1987).

igants themselves under the Federal Rules of Civil Procedure" (p. 139).

It was to be expected that the Evidence Convention would be seen in many countries as a means both of facilitating the gathering of evidence in foreign countries in general and of limiting the means and scope of evidence gathering in foreign countries in the course of U.S. litigation. Another way of looking at the matter is, as stated by the authors, that "[t]he Hague Evidence Convention has its drawbacks in the form of restrictions on evidence-gathering methods" (p. 140) That seems to be the way the U.S. courts are looking at it as well since, again as remarked by the authors, the "likelihood . . . is that most courts will place the burden of persuasion on the party seeking to utilize the Hague Evidence Convention procedures, and discovery will proceed under the Federal Rules of Civil Procedure or local state rules" (p. 144).

It is interesting to note that the Hague Evidence Convention is of no particular importance to litigants who need to obtain evidence in the United States for use in foreign and international tribunals. In 1964, 28 U.S.C.A. § 1782 was amended to authorize the Federal District Court "of the district in which a person resides or is found [to] 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." The order may direct that the testimony or statement be given or the document produced before a person appointed by the court and the order may prescribe that the practice and procedure of the foreign country or the international tribunal be followed for the taking of the testimony or statement or for the production of the document or other thing. Since the statute does not limit the persons who might be appointed by the district court to citizens of the United States, it sometimes happens that the person appointed is from the foreign country in question. It could even happen that the foreign tribunal might itself come to the United States to take the evidence under the authority of the district court.

The legislative history of the 1964 amendment makes it clear that this unilateral extension of aid to foreign and international tribunals was done in part in the hope that it would encourage other countries to extend the same aid to litigation

taking place in this country. To a certain degree the Hague Evidence Convention is the response of other countries to our initiative. It is understandable that there should be a sense of disenchantment among U.S. litigators when the aid received under the Convention does not match up to the aid given under 28 U.S.C.A. § 1782.

The disparity between the evidence gathering possibilities under 28 U.S.C.A. § 1782 and the Hague Evidence Convention raises the question as to whether a U.S. court should order discovery as practiced under the Federal Rules of Civil Procedure when no similar discovery possibilities would have been possible in the country where the litigation was taking place. Apparently, the majority of the courts that have considered the issue have reached the conclusion that ordering discovery in such a situation threatened to "allow litigants to circumvent the restrictions imposed on discovery by foreign tribunals" with the result of impeding the development of international cooperation among courts (p. 196).[23] A second argument made by at least one Court of Appeals as grounds to deny relief under Section 1782 when similar discovery would not be available in the foreign country is that granting relief would place a United States party to the foreign litigation at a substantial disadvantage to the foreign party (p. 201).[24] The foreign party could get extensive discovery in the United States while the United States party could not get similar discovery of the foreign party (p. 201). Fairness between the parties precluded such a result.

The authors clearly do not agree with the analysis or the result. They cite at length the House of Lords decision in *South Carolina Ins. Co. v. "Seven Provinces"*[25] to the effect that third-party discovery in the U.S. did not constitute a violation of English process. The authors conclude, "[t]hus, the rationale . . . that, by limiting discovery, a court avoids affronting foreign tribunals, thus fostering 'international cooperation,' has not, at least with respect to England, found support in reported decisions from courts outside the United States" (p. 197). Fortunately, the Second Circuit has taken a "more liberal approach."

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[23] (Quoting In re the Court of the Commissioner of Patents For the Republic of South Africa, 88 F.R.D. 75 at 77 (E.D.Pa. 1980)).

[24] (Citing Application of Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992)).

[25] [1986] 3 All Eng. Rep. 487.

In *Malev Hungarian Airlines v. Technologies International,*[26] the court accepted that Section 1782 was intended to be as liberal as its literal wording indicated. No restrictions on the availability of relief had been established by Congress, and none should be read in by the courts. According to the Second Circuit, it was sufficient, in order to achieve fairness and efficiency, for the district court to use its power under the section to issue orders that "prescribe the practice and procedure . . . for taking the testimony or statement or producing the document or other thing."[27]

The adoption of multilateral conventions in aid of litigation has not come to an end. The most striking omission from the above list is any convention on the recognition and enforcement of foreign judgments. As the authors point out, "[t]he United States is not a signatory to any treaties providing for enforcement of judgments from other countries." What they do not say, but what is self-evident, is that the United States is not a signatory to any treaties providing for enforcement by foreign countries of judgments rendered by United States courts. A keystone of American federalism, the Full Faith and Credit Clause, has no counterpoint for the United States in the international world. Foreign judgments are enforced on the basis of unilaterally determined criteria and procedures. To add to the confusion, "there is no federal statute governing this area of law. Accordingly, one must look to the law of the particular state in which one is seeking to enforce a judgment" (p. 165). Similarly, foreign courts enforce judgments of United States courts on the basis of their unilaterally determined criteria and procedures. The authors describe the criteria and procedures of two important foreign countries, Germany and England (pp. 187-190).

The authors draw certain practical conclusions from the examples they have given:

> First, careful consideration should be given at the outset of a lawsuit as to where the judgment is likely to be enforced and the steps that should be taken to comply with the service requirements of that country. Second, default situations should be dealt with carefully, both by the plaintiff and the defendant. . . . Third,

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[26] 964 F.2d 97 (2nd Cir. 1992), *cert. denied*, 506 U.S. 861 (1992).

[27] Malev Hungarian Airlines v. Technologies International, 964 F.2d at 102.

> defendants should be cautious about making appearances, whether written or oral, in proceedings where they do not intend to contest the merits if their jurisdictional objects are denied. And, fourth, early consideration should be given to the opportunities that exist outside the United States to obtain prejudgment attachments to secure judgments that may ultimately be obtained in U.S. courts (pp. 190-191).

Excellent advice from two litigators to readers who might themselves be engaged in litigation. In a different book they might also have concluded that it would be highly beneficial for the United States to enter into a multilateral judgments with our major trading partners, just as the European Union has done for States within the EU and that are associated with it.[28] As the authors well know the negotiations of such a convention have begun at the Hague Conference on Private International Law, but the outcome of those negotiations is still far from certain.[29]

Unilateral action by the United States shows some promise of leading the way towards international cooperation in one additional area, international bankruptcy. Several of the bankruptcies in recent years have been spectacular, and have involved assets and creditors in a number of countries. Even where the bankruptcies are of less individual import, they are of momentous importance for the domestic creditors of a foreign bankrupt. Perhaps the most sensitive of the issues has to do with the question as to whether the assets of the bankrupt located in a particular country should be devoted first to the claims of creditors from that country, or whether all of the assets and liabilities of the bankrupt should be treated globally. There is little argument but that global treatment would be the most desirable, if it could be achieved. However, bankruptcy regimes and the underlying policies that they represent differ so

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[28] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 30, 1968, 1978 O.J. (L 304) 36, reprinted in 8 I.L.M. 229, (Brussels Convention). The Convention has been amended upon the accession of new member States to the European Community, now the European Union. A parallel convention between the state of the European Communities and the European Free Trade Association is the Convention on Jurisdiction and enforcement of Judgments in Civil and Commercial Matters, September 16, 1988, 1988 O.J. (L 319) 9, (Lugano Convention).

[29] The most recent documents are posted on the Web site of the State Department's Office of Private International Law, <http://www.his.com.>

greatly that all attempts to date to achieve agreement on such a regime have floundered. Whatever progress there has been to date has arisen out of the unilateral actions of a few individual States, with the United States one of the most significant.

Section 304 of the Bankruptcy Code allows representatives of estates in foreign bankruptcy proceedings to seek assistance from U.S. bankruptcy courts through an ancillary proceeding. Although the automatic stay provisions do not apply, since a section 304 proceeding is not a full bankruptcy proceeding in the United States, the court may issue a temporary restraining order, which would have much the same effect. The assets of the foreign estate located in the United States may be turned over to the foreign representative for distribution in the primary bankruptcy proceeding and the court may "order other appropriate relief."[30] While similar provisions often appear in statutes, the need for flexibility in this area is especially great. As noted in the legislative history, "[p]rinciples of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules."[31] The statute directs the court to

> be guided by what will best assure an economical and expeditions administration of such estate, consistent with –
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> (1) just treatment of all holders of claims against or interests in such estate;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings;
> (3) prevention of preferential or fraudulent dispositions of property of such estate;
> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
> (5) comity; and
> (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

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[30] 11 U.S.C.A. § 304(b)(3) (West 1993).

[31] 11 U.S.C.A. § 304, Historical and Statutory Notes, citing Senate Report No. 95-989 (West 1993).

Messrs. Newman and Zaslowsky inform us that, with the exception of the proscription to foster a fresh start, all of the other factors are subsumed in the notion of comity (p. 212). If the foreign proceedings are in keeping with U.S. notions of justice, and fairly treat U.S. creditors, deference is due to those proceedings.

Section 304 was not adopted solely out of an altruistic notion of deference to the primary proceedings in a foreign bankruptcy. One of the intentions of the drafters was the hope that foreign countries would be induced to adopt similar provisions, thereby easing the problems for the administration of the estate of a U.S. debtor with foreign assets and liabilities. To date few countries have followed suit. The authors cite a survey of twelve countries that showed that only England and Switzerland had adopted laws similar to section 304 (p. 215).

That situation may not last long. The United Nations Commission on International Trade Law (UNCITRAL) has undertaken, as a first step in this area, the preparation of model legislative provisions for cross-border insolvencies. The work has gone much faster than might have been expected, given the lack of success that has been achieved in this field in the past, and the expectations at the time of writing this review are the a final text will be adopted by the Commission at its annual session in May 1997.[32] Of course, adoption of model legislative provisions by UNCITRAL or any other international body does not assure their adoption by States. Nevertheless, the time seems ripe for progress in this field and the reaching of international agreement through UNCITRAL gives hope that the goal of the drafters of section 304 to foster reciprocal legislative activity in other countries may soon be achieved.

CONCLUSION

If the past thirty years have been years of great change in the rules and practice governing international commercial litigation, the next thirty years promise to be years of further

[32] Citing T. POWERS, SECTION 304: THE U.S. MODEL FOR RECOGNITION OF FOREIGN BANKRUPTCY PROCEEDINGS, INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCY, at 100-103 (1989). The countries involved in the survey were: Argentina, Brazil, Canada, Egypt, England, France, Germany, Israel, Italy, Japan, Mexico, and the Netherlands.

change. It is fortunate that the authors and publisher plan to update the current book annually. We can be sure that there will be sufficient new developments to warrant the new editions. This is one of the best guides through this difficult field; a book that is well written, that tells us where we are at the moment and that gives practical advice to the non-specialist for whom this book was written.

One volume, softbound, $50.00, annual editions. The book can be ordered by calling 1-800-328-9352.