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CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. UNCITRAL

Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks on October 15, 2018 at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 51st session. Mr. Simcock’s comments are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-sixth-committee-meeting-on-the-report-of-the-united-nations-commission-on-international-trade-law-on-the-work-of-its-fifty-first-session/>.

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The United States welcomes the Report of the 51st session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL’s Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

Regarding the work of UNCITRAL in this past year, we are delighted that UNCITRAL approved a Convention on International Settlement Agreements Resulting from Mediation, which we expect to become known as the “Singapore Convention on Mediation.” This Convention should help to promote the use of mediation internationally in the same way that the New York Convention has helped to promote the use of arbitration. We are pleased that UNCITRAL also approved the related Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which updates the Model Law

on International Commercial Conciliation. The revised Model Law may be utilized by states that do not become party to the Convention.

We are also pleased that UNCITRAL approved a Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments, with a Guide to Enactment. The Model Law will provide a framework for the cross-border recognition and enforcement of court judgments affecting insolvent companies, with the goal of eliminating duplicative litigation and facilitating the efficient gathering of assets by insolvency administrators, thereby promoting the reorganization of failing businesses, or the maximum recovery by creditors in the event of liquidation.

Finally, with respect to work completed, we are also pleased that UNCITRAL completed work on a Legislative Guide on Key Principles of a Business Registry. The legislative guide serves as a reference for governments as they reform laws to make it easier to start a business. We expect that legislative action based on this guide will facilitate access to credit, particularly for micro, small, and medium-sized enterprises.

We are also encouraged to see UNCITRAL continue to discuss various ways of improving its working methods and becoming even more efficient. At the 50th and 51st sessions, several valuable ideas were discussed, such as the goal of structuring the agenda in a way that permits states to deliberate on the overall work program before the session and the scheduling of the finalization of instruments and decisions on future work together to facilitate efficient travel of representatives from capitals.

We look forward to continuing our productive engagement with UNCITRAL this year. UNCITRAL instruments help support stable and predictable legal outcomes for our citizens and businesses, which is why the United States has taken steps to become party to four conventions negotiated at UNCITRAL, each of which has been transmitted to the U.S. Senate for its approval.

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2. UNCITRAL Working Group IV (Electronic Commerce)

At the 56th session of UNCITRAL Working Group IV (Electronic Commerce), the United States submitted a paper on contractual aspects of cloud computing. The paper is reproduced below. U.N. Doc. A/CN.9/WG.IV/WP.151.

* * * *

1. The United States of America expresses its appreciation to the Secretariat for its efforts in drafting A/CN.9/WG.IV/WP.148, entitled “Contractual aspects of cloud computing.” While the United States of America has not seen a need for a checklist of main issues of cloud computing contracts, it has heard other delegations express support for such a document. Given this support by other delegations, the delegation of the United States has not objected to work on a checklist.

2. The United States of America believes that UNCITRAL documents should not attempt to provide legal advice or seem to favour one type of transacting party over another. A neutral approach is called for by paragraph 15 of A/CN.9/902, the report of the Working Group’s fifty-fifth session, which states “After discussion, the Working Group decided to recommend to the

Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts. In light of its nature, the checklist should not offer best practice guidance or recommendations. The need for preparation of guidance materials or model contractual clauses could be considered at a later stage.” However, because WP.148 appears to provide legal advice and to favour one type of transacting party over another, the United States delegation cannot support the current draft and believes that it needs significant revision.

3. There are numerous examples of text that raise the aforementioned concerns. For the sake of brevity, this paper identifies some of the provisions of the draft checklist that appear to provide legal advice and that, moreover, appear to provide such guidance to only one party entering into a cloud computing contract (*i.e.*, the customer):

- Paragraph 43, which includes “The customer may lack any remedy under those contracts since the breach of professional best efforts provisions may be difficult to determine. To avoid such situations, the customer would be interested in including in the SLA quantitative and qualitative performance parameters with specific metrics, quality assurances and performance measurement methodology.”

- Paragraph 77, which includes “Where no option to negotiate exists, the customer may need at least to review any IP clauses to determine whether the provider offers sufficient guarantees and allows the customer appropriate tools to protect and enjoy its IP rights and avoid lock-in risks ...”

- Paragraph 100, which includes “Providers’ standard terms may contain the right of the provider to suspend services at its discretion at any time. The customer may wish to restrict such unconditional right by not permitting suspension except for clearly limited cases (e.g., in case of the fundamental breach of the contract by the customer, for example non-payment).”

- Paragraph 116, which includes “Customer data loss or misuse, personal data protection violations and IP rights infringement in particular could lead to potentially high liability of the customer to third parties or give rise to regulatory fines. Imposing a more stringent liability regime on the provider where those cases are due to the provider’s fault or negligence may be justified.”

4.^[SEP] The United States delegation will be prepared to raise and discuss additional concerns at the fifty-sixth session of Working Group IV.

5. Should the Working Group recommend continuation of work on a draft checklist of contractual issues relating to cloud computing contracts, and should the Commission accept that recommendation, the delegation of the United States would expect a neutral text that simply highlights the legal issues that may be present in such contracts, without appearing to assist one particular type of party to these contracts.

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3. Singapore Convention on Mediation

The United Nations Convention on International Settlement Agreements Resulting from Mediation was concluded at the 68th session of UNCITRAL Working Group II in 2018. The full text is available at http://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_I.pdf. The UN General Assembly adopted it in December.

B. FAMILY LAW

See Chapter 2.

C. INTERNATIONAL CIVIL LITIGATION***Micula v. Romania***

On July 13, 2018, the United States filed a statement of interest in the U.S. district court for the District of Columbia in *Micula v. Romania*, No. 17-02332. The brief responds to the court's request for the views of the State Department on whether it has ever received a note verbale or other notification from the Government of Romania regarding acceptable forms of service of process. The statement of interest provides the U.S. position that, under international law, service on a sovereign government cannot be properly completed by mail unless the sovereign has consented. The statement of interest is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. See *Digest 2017* at 593-604 for discussion of *Water Splash Inc. v. Menon*, discussed in the statement of interest below.

* * * *

A. Neither the Department of State nor the Department of Justice have found a copy of Romania's note verbale or evidence indicating receipt of the note.

With respect to the question posed by the court, "whether the Government of Romania has ever communicated to the United States Department of State specific requirements for service of process under Article 10(a) of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 261 ('Hague Service Convention'), when the Government of Romania is a named defendant in a civil suit" (ECF No. 23, at 1), the Department of State represents that it has not found any record of such a communication.

With respect to the 2015 template note verbale that is Exhibit B to Romania's Memorandum of Law to Show Cause (ECF No. 18), the components of the Department of State most likely to have received such a note directly or indirectly are:

- The Bureau of European and Eurasian Affairs;
- The Bureau of Consular Affairs;
- The Bureau of Administration (which maintains records of diplomatic correspondence between the Department of State and foreign embassies);
- The Office of the Legal Adviser; and,
- The U.S. Embassy in Bucharest, Romania.

None of these components has located a version of the Romanian note verbale based on the text of Exhibit B. However, the lack of issuance or receipt of a note verbale does not

constitute a waiver by Romania of an objection to service by mail upon the Government of Romania as discussed below.

Within the Department of Justice, the Civil Division's Office of Foreign Litigation, Office of International Judicial Assistance ("OIJA"), is not aware of the note or of this requirement for service on Romania. OIJA is the United States' Central Authority for purposes of service under the Hague Service Convention.

B. The United States does not consent to service of process upon itself by postal channels under Article 10 of the Hague Service Convention.

The United States submits additional views related to the Court's inquiry. In the view of the United States a sovereign foreign government's mere lack of objection pursuant to Article 10 of the Hague Service Convention has no relevance to the question of whether service of process by mail on an embassy is a legally permissible form of service on that sovereign. Such service by mail on a sovereign government, barring express consent, is not proper as a matter of customary international law.

The United States does not consent to service of process upon itself by postal mail, even in the absence of an objection pursuant to Article 10 of the Hague Service Convention. The United States recently affirmed this position before the Supreme Court of the United States in *Water Splash Inc. v. Menon*. While that case turned on whether an individual Canadian citizen could be properly served via mail with process issued out of a Texas state court (*see* 137 S. Ct. 1504, 1505 (2017)), the United States noted in an amicus curiae brief the distinction between service on an individual *citizen* as opposed to a *sovereign* government. *See* Brief of the United States as Amicus Curiae in Support of Petitioner, at 19 n. 6, Case No. 16-254, 2017 WL 382689, at *19 n. 6 (S. Ct. Jan. 24, 2017). The Solicitor General went on to state that the United States does not consent to service of process via mail upon itself:

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, provides the exclusive means of service for purposes of suing a foreign state in a U.S. court. *See* 28 U.S.C. 1608(a)(1)-(4); Fed. R. Civ. P. 4(j)(1). Section 1608(a) does not provide for service by a plaintiff on a foreign sovereign through postal channels without the foreign sovereign's consent. Similarly, service on the U.S. Government cannot be effected through Article 10, even though the United States does not object to Article 10 service by postal channels for private individuals or companies.

Id. (internal quotation marks and citation omitted). The United States affirmed this position through a public guidance document issued in January 2018. *See* U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention*, 2 (Jan. 12, 2018), <https://www.justice.gov/civil/page/file/1036571/download>.

In becoming parties to the Hague Service Convention, neither Romania nor the United States objected pursuant to Article 10(a) of that Convention and therefore the Convention does not limit the freedom to send judicial documents, by postal channels, from abroad to persons in either country. *See* Hague Service Convention, U.S. Central Authority page, available at: <https://www.hcch.net/en/states/authorities/details3/?aid=279>. However, otherwise applicable law would still apply to service by postal channels. As the Supreme Court recognized in *Water Splash*, "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second,

service by mail is authorized under otherwise-applicable law.” 137 S.Ct. at 1513 (citation omitted). With respect to foreign litigation against governments, as discussed above, service by mail on an embassy, barring consent, is not proper as a matter of customary international law. Thus, in litigation against the United States, both in Romania and in other foreign countries, the United States consistently objects to service by mail on its embassies, instead insisting on service through OIJA, if served via the Hague Service Convention or through other applicable service conventions, or through diplomatic channels.

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Cross References

Intercountry Adoption, **Ch. 2.B.1.**

Child Abduction, **Ch. 2.B.2**

Animal Science Products, Inc. v. Hebei Welcome Pharm. Co., **Ch. 5.A.1**

International comity (and anti-suit injunctions), **Ch. 5.C.1**

Simon v. Hungary (comity and forum non conveniens), **Ch. 10.A.2**

Philipp v. Germany (comity), **Ch. 10.A.2**

Scalin v. SNCF, **Ch. 10.A.2**