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INTERNATIONAL LAW

Last year in The Hague, a Conference on Private International Law deliberated on a new treaty which aims to set the jurisdictional rules for nearly all commercial and civil litigation. JAMES LOVE reports.

The Hague Conference treaty aims for jurisdictional revolution

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IN A WORLD WHERE EVERYONE IS struggling to understand how to address the jurisdictional issues raised by the internet, this proposed treaty would impose a bold set of rules that would profoundly change the internet. Not only that — as drafted, it would extend the reach of every country's intellectual property laws, including those that have nothing to do with the internet. In a nutshell, the Hague Conference treaty would strangle the internet with a suffocating blanket of overlapping jurisdictional claims, expose every web-page publisher to liabilities for libel, defamation and other speech offences from virtually any country, effectively strip internet service providers (ISPs) of protections from litigation over the content they carry, give businesses who sell or distribute goods and services the right to dictate via contracts the countries in which disputes will be resolved and rights defended, and narrow the grounds under which countries can protect individual consumer rights.

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The proposed treaty provides a mechanism to greatly undermine national policies on the 'first sale' doctrine, potentially ending royalty-free video rentals for corporate entities with overseas assets, and it opens the door for cross-border enforcement of a wide range of intellectual property claims, including new and novel rights that do not have broad international acceptance. It will lead to a great reduction in freedom, shrink the public domain, and diminish national sovereignty, and not many people know anything about the treaty.

This proposed Hague treaty stands the traditional globalisation approach on its head. It does not impose global rules on substantive laws — countries are free to enact very different national laws on commercial matters. The only treaty obligation is that member countries follow rules on jurisdiction and agree to enforce foreign judgments. Rather than a WTO or WIPO type approach of harmonisation of substantive policies, every country can march to its own drummer. The treaty is about enforcing everyone's laws, regardless of their content, and enforcing private contracts on which national courts will resolve disputes. It is a treaty framework that made some sense in a world of trade in pre-internet goods and services that lend themselves to easy interpretation of jurisdiction based upon physical activity. It is a treaty that makes little sense when applied to information published on the internet, and more generally for intellectual property claims, where one should not leap into cross-border enforcement without thinking.

The Hague Conference

The Hague Conference on Private International Law is a little-known organisation that held its first meetings in 1893, but did not have a permanent status until 1951, and since then has adopted 34 international conventions, mostly on very narrow and often obscure topics, such as the taking of evidence abroad, the form of testamentary depositions, wills, traffic accidents, and several dealing with children.

In 1965, the Hague Conference adopted a Convention on the choice of court for civil litigation, but it was only endorsed by one country — Israel. The current treaty is a renewed effort to deal with that issue, and also the enforcement of judgments and other items. The scope is extremely wide — nearly all civil and commercial litigation. It is, without doubt, the most ambitious project undertaken by the Convention, and the secretariat and the member country delegates are anxious to establish the Conference as a major league actor in the rapidly changing global political economy.

Despite its grand ambition, the Hague Conference secretariat is tiny — about a dozen according to a FAQ on its web page. The small size and low profile of the Hague Conference has allowed this treaty, which has enormous significance, to go virtually undetected, even though it is has been in discussions since 1992.

Convention politics

The official version of this particular convention on jurisdiction and enforcement of foreign judgments is that in 1992 the US began seeking ways to obtain more equitable treatment of the enforcement of judgments from commercial and civil litigation, and was willing to cut back on some aspects of US 'long arm' jurisdiction to do so. In the beginning none of the negotiators were thinking about the internet and the treaty seemed to have limited interest to most persons. By 1996 it was obvious to some that the internet in general and e-commerce in particular would pose special problems for the Convention.

By 1999 there was considerable attention given by business interests to how the convention could be drafted to resolve a number of jurisdiction problems they faced. In particular the Hague Secretariat began suggesting the Convention could be used to replace overlapping national laws on consumer protection and privacy with industry-led alternative dispute resolution systems — a top priority for the biggest e-commerce firms.

Meanwhile Europe was developing its own rules for jurisdiction that made some sense in an environment where you had entities like the European Parliament and the European Commission to force harmonisation of substantive law. Europe was also alarmed and jealous of the US leadership in the development of the internet. European negotiators pushed hard to impose a treaty based upon the EU's Brussels Convention, not only to preserve the European approach, but to lead, for once, in an important area for the internet.

The European negotiators were also

unhappy with the generally free and unruly nature of the internet, and saw the convention as a mechanism to rein-in hate speech, libel and defamatory speech, 'piracy' of intellectual property, the publishing of government secrets and documents on the internet (the David Shayler case), and other unsettling aspects of the internet.

The business community, meanwhile, was unhappy with the EU approach to providing consumer protection, including privacy rights, and fearful that the Convention could expose them to lawsuits from several different countries for violating consumer protection and privacy laws.

Elsewhere, Napster had mobilised the music and movie businesses, and they increasingly saw the need for stronger cross-border enforcement of copyrights, including the need for injunctive relief aimed at ISPs, and the strong law and order (you can run but you can't hide) nature of the Hague Convention was very appealing to an industry afraid of losing control over its own business models.

Awareness grows

In 2000 some elements of civil society became aware of the Convention — in particular, BEUC (the European consumer groups), the Trans Atlantic Consumer Dialogue (TACD), including both US and EU members, the American Library Association, the Free Software movement, and some US free speech groups, such as the ACLU, which began to follow the Convention. That year the Consumer Project on Technology (CPT) made the Hague Convention its top e-commerce priority, and by September 2000 the US government added Manon Ress from the non-profit organisation Essential Information on the US delegation (which already had several private sector members representing business interests).

For the past two years, in a series of meetings leading up to the June 2001 Diplomatic Conference, there were efforts to sort out the impact of the convention on e-commerce and on intellectual property. The US in particular was quite open in consulting with civil society and the public in general, and Australia asked for public consultations too, but it would appear that no other countries did.

However, while civil society concerns were presented at virtually every negotiating meeting over the past year, last June's diplomatic conference was a powerful illustration of the power of the business lobbies.

The EU seemed to be undertaking a strategy of pushing for a 'disconnect' for regional agreements, and in particular for its own EU Directive on Jurisdiction to take precedence in EU-to-EU transactions, leaving intact the stronger EU consumer protection measures for EU-to-EU transactions, while bowing to US government pressure to gut consumer protection provisions from the 1999 draft of the convention. This was a major victory for the big e-commerce firms.

One element of this was essentially an expansion of the definition of business-to-business transactions, and to greatly strengthen the role of contracts in the convention — making, for example, 'choice of court' clauses mandatory in almost everything that does not involve personal or household use (and sometimes even then), even when these are 'non-negotiated' contracts, such as shrink-wrap or click-on contracts.

Despite repeated efforts by civil society to fix this, and to limit the enforcement of such clauses where the contracts had been "obtained by an abuse of economic power or other unfair means", the delegates refused (at least in this draft).

So, too, there was a complete unwillingness to address the importance of speech-related torts, despite the fact that the membership in the Hague Conference now includes China, Egypt and many other countries that engage in harassment of dissent, and which can easily create repressive civil actions to stop dissent. The EU delegates would not even consider adding favourable speech language from the European convention on human rights.

A major objective of CPT, TACD, the Library community and the Free Software movement was to take intellectual property out of the Convention — a move initially supported by the trademark and patent societies due to the ham-handed way that patents and trademarks had been addressed in the 1999 secretariat draft of the convention, and also the subject of a WIPO-sponsored meeting in Geneva in January 2001. In February 2001, in Ottawa, the US government actually circulated a paper to the delegates that said the US would not sign the Convention if intellectual property was included. AOL/Time Warner, Disney, the MPAA, RIAA, publisher groups and other content owners went ballistic, and by the June meeting the US position had changed. Now intellectual property has been included in the convention, in a form stronger than ever. Also noteworthy was the new bracketed language:

"[In this Article, other registered industrial property rights (but not copyright or neighbouring rights, even when registration or deposit is possible) shall be treated in the same way as patents and marks.]"

"Other registered industrial property rights" will cover a lot of ground.

For more information, and in particular to better understand how the convention works, see the following websites:

www.cptech.org/ecom/jurisdiction/hague.html

http://lists.essential.org/pipermail/hague-jur-commercial-law/2001-June/000048.html

www.gnu.org/philosophy/hague.html

www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=94

http://lists.essential.org/pipermail/hague-jur-commercial-law/ .

To find out which countries and agencies are engaged in the Hague negotiations, see: *www.hcch.net/e/members/members.html*. Australia became a Member of the Hague Conference on: 1 November 1973, and is a party to nine Hague Conventions. ❑