Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements[1]

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I. Introduction

The Hague Convention on Choice of Court Agreements ("the Convention" or "COCA") is aimed at ensuring the effectiveness of choice of court agreements (also known as forum selection clauses) between parties to international commercial transactions, as well as the enforceability of judgments resulting from such agreements.[2] The Convention provides greater certainty to companies and individuals doing business across borders and thus helps facilitate international trade and investment.

The Convention enjoys universal support in the United States, but its transmittal to the Senate for advice and consent to ratification has been held up by disagreements over whether it should be implemented by federal law or by a combination of federal and state law. This is unfortunate, as the Convention was originally a U.S.-led project, and the longer the impasse continues, not only are U.S. companies denied the benefits of the Convention, but the less credibility the United States will have in negotiating future private international law treaties.

This memorandum proposes to resolve the impasse by, as a general matter, implementing Chapter II of the Convention (addressing the enforcement of choice of court agreements) through a cooperative

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1. The ABA Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements was tasked by the Chair of the American Bar Association Section of International Law (ABA-SIL) with proposing a framework for implementation of the Convention in the United States. The views expressed in this Memorandum are solely those of the individual members of the Working Group and do not represent the views of their respective law firms or law schools, the American Bar Association (ABA), its Section of International Law or any other ABA entity. The Working Group includes Glenn P. Hendrix, Atlanta, Georgia (Chair); Ronald J. Bettauer, Washington D.C.; Robert B. Brodegaard, New York, New York; Theodore J. Folkman, Boston, Massachusetts; Guy S. Lipe, Houston, Texas; Edward M. Mullins, Miami, Florida; Steven M. Richman, Princeton, New Jersey; David P. Stewart, Washington D.C.; Louise Ellen Teitz, Providence, Rhode Island; and Peter Winship, Dallas, Texas.

2. Hague Convention on Choice of Court Agreements (June 30, 2005) [hereinafter COCA].

federalism approach and Chapter III (addressing the enforcement of judgments) through federal law. The compromise proposal gives something to both sides in the current impasse. It yields to federal law one aspect of the recognition and enforcement of judgments (those within the scope of COCA), but it also expands the role of state law in the area of enforcement of choice of court (forum selection) agreements, because at present, most federal courts sitting in diversity apply federal law in determining the enforceability of forum selection clauses. Under the Working Group proposal, the state uniform act would be applied at the dispute stage in both federal and state courts, if enacted by the state in which the court sits.

This resolution does not simply represent a political compromise. As explained below, there are principled bases for distinguishing between the respective roles of state and federal law with respect to Chapters II and III of the Convention.

A. The Hague Convention on Choice of Court Agreements

The Convention is the litigation counterpart to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). It was approved by the members of the Hague Conference on Private International Law in 2005. The following year, the American Bar Association ("ABA") urged the United States government "promptly to sign, ratify and implement" the Convention.[3] The report accompanying the 2006 ABA resolution observed that:

> The U.S., not a party to any bilateral or multilateral convention on the enforcement of foreign judgments, sought to find a means for private parties to enforce foreign judgments outside of the U.S. without re-litigation and to "level the playing field" for litigants in the U.S. U.S. litigants trying to enforce U.S. judgments abroad have a more difficult time than those seeking to enforce foreign judgments in the U.S. The Convention from a U.S. perspective is focused directly on the exporting of U.S. judgments, making them more enforceable across borders. The Convention would enforce forum selection clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. The Convention has the potential to offer increased certainty for consensual commercial transactions.[4]

The Convention was signed by the United States in January 2009, but has been treated as non-self-executing and thus requires implementing legislation. It has not been transmitted to the Senate for advice and consent due to a dispute over whether domestic implementation of the Convention should occur exclusively through federal law or through a combination of federal and state legislation.

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3. ABA Resolution No. 123A, 1 (Aug. 7, 2006).
4. *Id.* at 2.

In addressing the federalism issue, it is helpful to focus on the two primary areas covered by the Convention: (1) jurisdiction over the merits of the dispute (the "dispute stage") and (2) recognition and enforcement of judgments (the "recognition stage"). Generally speaking:

- Chapter II of the Convention covers the dispute stage, providing for the enforcement of a choice of court (forum selection) clause in a commercial "business to business" contract, obligating the chosen court to exercise jurisdiction and hear the matter when a dispute arises, and requiring non-chosen courts to refrain from hearing the dispute;
- Chapter III of the Convention covers the recognition stage, requiring recognition and enforcement of any resulting judgment rendered by the chosen court.[5]

B. Brief Summary of the ABA-SIL Working Group Proposal

The ABA Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements (the "Working Group") was tasked by the Chair of the ABA Section of International Law with proposing a resolution to the present impasse that would allow the Convention to be implemented in the United States.

The Working Group proposes the following:

- Chapter II of the Convention would be implemented through what has been termed "cooperative federalism," involving parallel federal and state legislation, allowing states to opt out of the federal statute and instead implement the Convention through adoption of a uniform act developed by the Uniform Law Commission ("ULC") in close consultation with the U.S. State Department. The uniform state law would address the enforcement of the choice of court clause, the obligation of the chosen court to hear the case, and the requirement that non-chosen courts refrain from hearing the case. The federal implementing law would not establish federal court jurisdiction at the dispute stage, absent diversity or some basis for federal question jurisdiction independent of COCA. In actions brought in federal court in a state that has enacted the uniform state act, the state law would be applied (unless preempted as contrary to federal law or the Convention). In states that have not enacted the uniform state act, the federal implementing legislation would be applied in both state and federal courts.
- Chapter III of the Convention would be implemented by the federal legislation, with no parallel state uniform implementing legislation. The federal law would provide for federal court jurisdiction, concurrent with state court jurisdiction, in all cases involving the recognition and enforcement of a foreign judgment governed by the Convention (i.e., not only where diversity is satisfied).

5. The general rules stated for both Chapters II and III are subject to certain enumerated exceptions.

II. Other Approaches to Federal-State Implementation of the Convention

Before turning to the merits of the Working Group proposal, we will briefly outline other approaches that have been advocated in connection with the implementation of the Convention:

A. The Federal-Only Approach

This approach would federalize both the dispute stage (Chapter II) and the recognition stage (Chapter III). Congress would enact implementing legislation analogous to Chapter 2 of the Federal Arbitration Act ("FAA"), which implements the New York Convention in the United States, and which addresses both the arbitration agreement-enforcement stage of court proceedings (when a district court is considering an action or motion to compel or stay a lawsuit pending arbitration) and the recognition and enforcement of arbitral awards. The federal statute would expressly provide for federal court jurisdiction, concurrent with state court jurisdiction, in all cases at both the dispute stage and the recognition stage, not just where diversity is satisfied.

B. The State Department's April 16, 2012 "White Paper" Approach

In a "White Paper" issued on April 16, 2012, the State Department's Legal Adviser outlined a "cooperative federalism" approach, whereby Congress would enact a federal statute implementing the Convention, but states could opt out of the federal law and instead be governed by that state's enactment of a uniform act developed by the ULC.[6] The uniform state act would address both the dispute stage and the recognition stage. The federal implementing law and the uniform state act would be functionally identical, with variations occurring only to the extent required by the differing federal and state contexts. The White Paper contemplated federal preemption under the following circumstances

> [I]f states adopt the uniform law but vary its text substantively, or if courts interpret state law so as to produce different results from those that would obtain under the federal law, state law will to that extent be preempted by the federal statute. The result is that substantive differences in application of state or federal law should be minimal, while at the same time permitting state courts to apply state law wherever possible.[7]

The White Paper specified that federal courts would apply the federal statute—at both the dispute stage and the recognition stage—even in a

6. *See* U.S. Department of State, Implementation of the Hague Convention on Choice of Court Agreements in the United States (Apr. 16, 2012).

7. *Id.* at 3-4.

diversity action, and regardless of whether the court was located in a state that has adopted the state uniform act.

C. The ULC's Cooperative Federalism Approach

As we understand it, the ULC approach is essentially the same as the State Department's April 16, 2012 White Paper approach, but with the critical difference that the federal court would apply the uniform state law, if enacted by that state.[8] The ULC objected to this aspect of the White Paper, stating that it would "significantly diminish[ ] the effect of state substantive law in litigation since state legislation enacted to implement the Convention would apply only if the litigation were heard in state courts in the enacting state and not if the litigation were in federal courts located in that state."[9]

The Conference of Chief Justices ("CCJ") appears to be aligned with the ULC. In 2010, the CCJ adopted a resolution "urg[ing] the United States Congress to enact Convention-implementing legislation that takes a 'cooperative federalism' approach that would avoid unilateral, compulsory preemption of relevant state jurisprudence and would encourage states to adopt a uniform international choice of court agreements act that is consistent with federal guidelines."[10] In July 2012, the CCJ declined to support the State Department's April 16, 2012 White Paper approach, apparently on the same ground that the ULC rejected it.[11]

III. Momentum Seems to Favor Federal-Only Implementation of the Convention

There seem to be no near-term prospects for ratification of the Convention by the United States, absent agreement among the key stakeholders regarding its implementation. Taking a longer view, some members of the Working Group believe that momentum favors eventual federal-only implementation of the Convention for the reasons set forth below.[12]

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8. For more on the ULC's perspective on cooperative federalism, *see* Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 Minn. L. Rev. 2253, 2271 (2015); William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 Elon L. Rev. 39 (2011).

9. Letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, U.S. Department of State, 2 (May 22, 2012).

10. Conference of Chief Justices, Resolution 10-A-02, Urging the United States Government to Respect State Policies and Principles of Federalism with Regard to Enacting Legislation to Implement the Hague Convention on Choice of Court Agreements (July 28, 2010).

11. *See* National Center for State Courts, Hague Convention on Choice of Courts, *available at* http://www.ncsc.org/Services-and-Experts/Government-Relations/International/Hague-Convention-on-Choice-of-Courts.aspx.

12. Some of the conclusions expressed in Section III. of this Memorandum are not shared by all members of the Working Group.

A. The U.S. State Department's Approach as of January 19, 2013

In its most recent public pronouncement on the implementation of the Convention, issued on January 19, 2013, the State Department had shifted from advocating a cooperative federalism approach, at either the dispute stage or the recognition stage, to favoring federal-only implementation (while also stating that it remained open to "new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support").[13]

The position of the State Department's Legal Adviser in that regard evolved as the impasse over the White Paper continued with the ULC. In responding to the State Department's White Paper in a May 22, 2012 letter, the ULC indicated that it could "actively support [the State Department's] proposed compromise . . . if there is removal from the compromise of the portion which applies the provisions of the federal implementing legislation when an action is brought in a federal court."[14]

The State Department responded that "the ULC's response – rejection of the proposal on applicable law in federal court and acceptance of the other aspects of the proposal – represents no compromise, as those other aspects reflect positions already advocated by the ULC."[15] The State Department emphasized that the White Paper approach represented a compromise package; that without the applicable law element, the rest of the package could not stand; and that if a cooperative federalism approach were pursued without the applicable law element, a new package would have to be developed that addressed the concerns of the various stakeholders in different ways.[16] The Legal Adviser further stated:

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13. U.S. Department of State, Memorandum of the Legal Adviser regarding United States Implementation of the Hague Convention on Choice of Court Agreements (Jan. 19, 2013), *available at* http://www.state.gov/s/l/releases/2013/206657.htm.

14. Letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, U.S. Department of State, *supra* note 9, at 5.

15. Letter from Harold Hongju Koh, Legal Adviser, U.S. Department of State, to Michael Houghton, President, ULC, 2 (July 2, 2012).

16. In full, this paragraph of the Legal Adviser's letter stated: "Second, and as important, we think after extended discussion with all stakeholders — that our proposed approach is the only possible compromise among stakeholders with strongly divergent views and interests that recognizes the various concerns and also has a basis in precedent. We recognize that the ULC has important interests at stake, but as you know, other constituencies do as well. As you are aware, a number of individuals and groups, many involved in international litigation practice, have argued strongly that the COCA should be implemented in the same manner as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, i.e., with express original federal court jurisdiction (concurrent with state court jurisdiction). Such stakeholders have questioned the need for parallel state implementing legislation at all. They see the adoption of a cooperative federalism approach, and the absence of original federal jurisdiction, as major concessions. The prevailing response of the stakeholders we consulted was that they were prepared to make those concessions in the context of the compromise proposed in our paper if necessary to enable the United States to ratify the COCA, although a

> [W]e think that the approach outlined in [the White Paper] is a principled one that balances federal and state interests. As discussed in the paper, U.S. policy interests are best served by having federal courts apply federal law in this situation, for several reasons:
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> (1) As a matter of principle, where a federal statute has been developed to implement a treaty, federal courts should apply it.
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> (2) Applying federal law would simplify the task for federal courts, which would not need to interpret state law or analyze whether state law should be preempted.
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> (3) Applying federal law would promote the development of jurisprudence on interpretation of that law, which is key to determining whether federal law should preempt state law in a given case. That would promote greater uniformity in treaty implementation.
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> (4) Applying federal law would make the implementation process more direct, more transparent, and more attractive to potential treaty partners and foreign litigants.[17]

The ULC held to its position, maintaining that the State Department proposal would represent a "radical departure from the long-standing doctrine of *Erie v. Tompkins*," and stating that:

> [T]he proposed compromise would establish an unacceptable precedent for the future implementation of any convention for which implementation by coordinated federal and state substantive legislation is contemplated. The ULC is currently collaborating with the State Department on such a project at this very moment, as the ULC is drafting revisions to the Uniform Child Custody Jurisdiction and Enforcement Act to implement the Hague Convention on the Protection of Children. While no decisions have yet been made concerning the relationship between federal and state law in the implementation of this Convention, it seems clear that if the Convention cannot be implemented by "conditional spending" — federal legislation that, as with the Hague Family Maintenance Convention and the 2008 amendments to the Uniform Interstate Family Support Act, requires states to enact the implementing uniform legislation or risk losing access to substantial related federal funding — the Protection of Children Convention will have to be implemented by

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common theme was that too much had already been given away. Also, we have recently been advised that the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States has considered our proposed approach and can accept it. We note that the ULC's response—rejection of the proposal on applicable law in federal court and acceptance of the other aspects of the proposal—represents no compromise, as those other aspects reflect positions already advocated by the ULC. Absent some flexibility, we see no way forward." *Id.* at 1-2.

17. Letter from Harold Hongju Koh, Legal Adviser, U.S. Department of State, to Michael Houghton, President, ULC, *supra* note 15, at 1.

> coordinated federal and state legislation. If your proposal for implementation of the Choice of Court Convention were applied in the case of the Protection of Children Convention, the consequences would be even more disruptive to the federal/state balance. Thus the ULC is concerned that the proposed compromise implementation methodology for the Choice of Court Convention, in addition to being unnecessary in the particular situation, will have significant and unpredictable implications for the implementation of other private international law conventions in the future. The result could be that, even if in the future a particular convention is implemented by coordinated federal and state legislation, the effect of that state legislation will be limited to actions brought in state courts.[18]

The ULC and the State Department did not come to an agreement, and in a memorandum dated January 19, 2013, the Legal Adviser stated that "[a]s of this date, my judgment is that the federal-only approach is the most promising available path that would achieve simplicity, uniformity and predictability in the implementation of the Convention."[19] The Legal Adviser indicated that "the Department should focus its energies upon the federal-only approach in order to complete this important implementation effort," while remaining open to "new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support."[20]

B. The Practicing Bar Largely Favors Federal Implementation

Lawyers representing American companies that are engaged in international business tend to favor federal-only implementation of the Convention. This was reflected, for instance, in the responses to requests for comments from members of the ABA Section of International Law in 2011 and 2012. The following bullets in a letter from the International Commercial Disputes Committee of the Association of the Bar of the City of New York capture the recurring themes in many of the comments:

- The enforcement of international choice-of-court agreements and judgments is a matter of international and foreign commerce that is most appropriately governed by federal law which, in turn, federal courts have a paramount interest in applying.
- The New York Convention allocation of federal and state court jurisdiction has worked exceptionally well in practice, and therefore serves as a useful model for the implementation of the Convention.

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18. Letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, U.S. Department of State, 2 (Sept. 4, 2012).
19. Memorandum of the Legal Adviser Regarding U.S. Implementation of the Hague Convention on Choice of Courts Agreements, *supra* note 13.
20. *Id.*

- Federal courts construing the New York Convention have developed expertise and created a body of precedent (*e.g.*, with respect to challenges to the enforcement of arbitration awards on jurisdiction, due process and public policy grounds) that will provide guidance and promote uniformity in addressing similar issues that will arise under the Choice-of-Court Convention.
- The stated goal of the Choice-of-Court Convention to level the playing field as between international arbitration and court proceedings simply cannot be achieved unless the same federal court enforcement regime is provided for Convention judgments as is available under the New York Convention for international arbitration awards. Indeed, it is hard for those of our Committee members who are engaged in private practice to imagine advising clients to switch from arbitration to litigation if litigation judgments do not enjoy the same federal court enforcement benefits as are afforded international arbitration awards.[21]

The State Department's Legal Adviser received the same feedback directly from practitioners and various bar groups.[22]

C. Recognition of Foreign Judgments Has Already Been Partly Federalized

The current federal/state balance on the issue of recognition and enforcement of foreign judgments is not immutable. The exclusive competence of state law with respect to the recognition and enforcement of foreign judgments began only in 1938.[23] And although state law retains its primacy in this area, Congress passed federal legislation in 2010—the SPEECH Act—which prohibits the recognition and enforcement of foreign defamation judgments that do not comport with U.S. Constitutional notions of free speech.[24]

D. Parallels with the Implementation of the New York Convention

The Choice of Court Convention bears some similarities to the 1958 New York Convention on the recognition and enforcement of arbitral agreements and awards. That convention is consistently heralded as one of the most

21. Letter from Bruno Kimmelman, Chair, International Commercial Disputes Committee of the Association of the Bar of the City of New York (Oct. 21, 2011).

22. *See* Memorandum of the Legal Adviser Regarding U.S. Implementation of the Hague Convention on Choice of Courts Agreements, *supra* note 13.

23. *See* American Law Institute, Recognition & Enforcement of Foreign Judgments: Analysis & Proposed Federal Statute 2 (2006). As best we can determine, the earliest federal case to look to state law in an action to recognize and enforce a foreign judgment was *Compania Mexicana Rediodifusora Franteriza v. Spann*, 41 F. Supp. 907, 909 (D. Tex. 1941) (citing *Erie* to rely on Texas public policy in enforcing Mexican judgment).

24. *See* Pub. L. 111-223 (Aug. 10, 2010), codified at 28 U.S.C. §§ 4101-05.

successful private international law treaties, and its implementation through Chapter 2 of the FAA helped ensure its successful operation in the United States.

Yet the prospects for U.S. ratification of the New York Convention were initially grim, for some of the same reasons discussed above. Indeed, the American delegation to the drafting conference for the New York Convention "recommend[ed] strongly that the United States not sign or adhere to the convention."[25] Thus, the United States was not among the twenty-four countries that signed the New York Convention in 1958. In fact, the Convention was not ratified in the United States until 1970, when it became the thirty-seventh country to join the treaty.[26]

As with COCA, the primary holdup to ratification of the New York Convention was concern that its implementation would intrude upon states' rights. The U.S. delegation to the drafting conference for the New York Convention concluded that its ratification "would raise problems of Federal-State relations," adding that "[t]his is a matter of particular concern because arbitration historically has been preeminently a field for State action."[27] The delegation's report continued by stating:

> Adherence to the convention would be looked upon as a sudden Federal intrusion in an area in which it hitherto had failed to exercise its constitutional legislative authority to the full limits. The fact that this intrusion would be accomplished by the treaty power and would affect arbitrations otherwise lying outside Federal jurisdiction seemingly might imply that the motive was more to curtail State rights than to facilitate foreign trade arbitrations.[28]

Nevertheless, during the twelve years between 1958 and 1970, momentum built in support of the New York Convention, especially in the business community. Federalism concerns notwithstanding, the Convention was implemented through federal legislation (specifically, Chapter 2 of the FAA). As noted in the legislative history to FAA Chapter 2:

> Although the United States participated in the Conference, the Convention was not signed on behalf of our government at that time because the American delegation felt that certain provisions were in conflict with some of our domestic laws. According to the administration, however, as a result of increasing support for the

25. *1958 Report of the U.S. Delegation to the U.N. Conference on International Commercial Arbitration*, 19 AM. REV. INT'L ARB. 91, 115 (2008).

26. United Nations Commission on International Trade Law, Chronological Table of Actions: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status_chronological.html.

27. *1958 Report of the U.S. Delegation to the U.N. Conference on International Commercial Arbitration*, *supra* note 25, at 116.

28. *Id.*; *see also* Leonard V. Quigley, *Accession by the United States to the United Nations Conference on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

> convention (both within and without the Government), the United States decided in favor of accession. . .. In the committee's view, the provisions of [the federal implementing legislation] will serve the best interests of Americans doing business abroad.[29]
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> The Convention on Choice of Court Agreements had less momentum out of the gate than the New York Convention. By 2007, two years after COCA was approved by the Hague Conference, only Mexico had joined.[30] Most observers believe that COCA's momentum stalled as the world waited to see whether the United States would ratify. It was largely due to U.S. efforts that the Hague Conference undertook to work on the Convention, and the rest of the world naturally looked to the United States to lead the way in implementing it.

Yet the rest of the world is no longer waiting on the United States. The European Union ("EU") approved the Convention in June 2015.[31] With the Convention having taken effect between twenty-seven EU member countries and Mexico on October 1, 2015, a "bandwagon effect" can be expected, with "a wave of new signings and ratifications throughout the world."[32] Singapore has already jumped on the bandwagon, signing the Convention earlier this year.

As COCA gains momentum, and as happened with the New York Convention, the U.S. business community can be expected to push for ratification through federal legislation. Indeed, the U.S. Chamber has already endorsed federal-only implementation.[33]

IV. The ABA-SIL Working Group Proposal

The Working Group includes both members who favor federal-only implementation and members who lean toward cooperative federalism. Nevertheless, all members of the Working Group recognize the value of the Convention and seek to take up the challenge in the Legal Adviser's January 19, 2013 memorandum for "new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support."[34] To that end, the Working Group is

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29. H.R. Rep. No. 91-1181, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3601-602.

30. Hague Conference on Private International Law, Status Table: Convention of 30 June 2005 on Choice of Court Agreements, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

31. *Id.*

32. Rob Palmer & Michael Weatherby, *The Hague Convention: The Next Big Thing in International Dispute Resolution?* (Apr. 2015), *available at* https://www.ashurst.com/doc.aspx?id_Content=11824.

33. *See* U.S. Chamber Institute for Legal Reform, TAMING TORT TOURISM, at 30 (Sept. 2013).

34. *See* Memorandum of the Legal Adviser Regarding U.S. Implementation of the Hague Convention on Choice of Courts Agreements, *supra* note 13. Likewise, the ULC has indicated

united behind this compromise proposal to apply cooperative federalism principles at the dispute stage and federal law at the recognition stage.

We advocate this compromise in part out of respect for the ULC's role as an important stakeholder in the process. We recognize as well that the CCJ supports the ULC's position.

Aside from such considerations, even those members of the Working Group who favor federal-only implementation recognize that there are principled bases for distinguishing between the dispute and recognition stages, and that the case is less strong for federalizing the dispute stage than the recognition stage, for the following reasons:

- There is an obvious role for state law in implementing Article 19 of COCA, which provides that "[a] State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute."[35] The State Department has indicated that upon acceding to the Convention, it would make an Article 19 declaration with respect to state courts (but not the federal courts). Thus, the Article 19 election will be made by each U.S. state. Section 10 of the ULC's Choice of Court Agreements Convention Implementation Act sets forth four alternative versions of provisions that might be adopted by a U.S. state in exercising the option under Article 19.[36]
- To the extent that there is existing legislation in this country specifically addressing the enforceability of forum selection clauses, it has been enacted by state legislatures, not Congress.[37] More importantly, the dispute stage of a proceeding potentially implicates issues of state law that are outside of the Convention, including whether there was actual or valid consent to a choice of court

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that it is "committed to working closely with [the U.S. State Department] and others who are interested in the successful U.S. ratification of this Convention to develop an alternative proposal for implementing the Convention that might attract more widespread support." Letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, U.S. Department of State, *supra* note 18, at 3.

35. COCA, *supra* note 2, art. 19.

36. Uniform Choice of Court Agreements Convention Implementation Act, Section 10 (July 18, 2012), *available at* http://www.uniformlaws.org/shared/docs/choice_of_court/2012am_ccaia_approvedtext.pdf; *see also* Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUSTON J. INT'L L. 1, 24 (2010) (observing that this provision allows "each state to make its own determination of whether it wants its courts to hear cases without a connection to its state when the parties to the dispute have designated a court in that state in an exclusive choice of court agreement").

37. *See, e.g.*, Neb. Rev. Stat. § 25-413 et seq.; N.H. Rev. Stat. § 508-A:1 et seq.; N.D. Cent. Code § 28-04.1; N.Y. Gen. Obligation Law, §§ 5-1401, 1402; N.C. Gen. Stat. § 23-B; Montana Code § 28-2-708. While the federal venue transfer statute, 28 U.S.C. § 1404(a), potentially implicates the enforcement of forum selection clauses, its direct focus is on non-contractual transfers of cases from one U.S. federal district court to another based on generalized considerations of convenience and fairness, and the statute has no application to transfers to a court in a different country.

agreement.[38] Given that a court at the dispute stage will already be focused on issues of state law (including, for instance, the generally recognized grounds for invalidating an agreement, such as lack of assent, fraud, mistake, misrepresentation, duress, undue influence, unconscionability, and lack of capacity, none of which will be governed by federal law), there is some logic to having state law govern the entire dispute stage. Insofar as courts and practitioners look to state law with respect to so many of the issues regarding the enforceability of forum selection clauses, implementation through a uniform state act might afford practitioners and others affected by the Convention better notice of its terms and hopefully help ensure that general state contract formation/validity principles that are outside of the Convention are aligned and integrated with the legislation implementing the Convention.[39]

- Given that COCA's requirements at the dispute stage mandate that state courts accept jurisdiction over certain cases and preclude them from adjudicating others, the manner in which the Convention is implemented is understandably a sensitive issue for state judiciaries

38. The Convention addresses only the formal validity of choice of court agreements, not their substantive validity. With regard to formal validity, the agreement must be a writing or equivalent, but additional formal requirements, such as bold print or type face, are not permitted. COCA, *supra* note 2, art. 3(c); *see* Hague Conference on Private International Law, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, ¶110, at 53 (2013). The Convention leaves to domestic law (which, in the U.S., means state, rather than federal law) questions of substantive validity, but sets forth choice of law rules governing certain aspects of that decision. Specifically, questions of whether an agreement is null and void are to be made under "the law of the chosen court." COCA, *supra* note 2, art. 5(1). Thus, if a choice of court agreement designated, say, a Georgia court as the forum, the validity of the agreement would be determined under the whole law of Georgia, regardless of whether that determination is made by the Georgia court or by any non-chosen court. The Convention does not set forth standards for determining whether a party lacked the capacity to conclude the agreement and specifically provides that the non-chosen court may decide questions of capacity under its law. *See id.* art. 6(b). "Since there are no federal choice of law rules for contracts, the determination, even by a federal court, will be according to the state in which the federal court is located. This would suggest that individual state law on issues such as fraud, misrepresentation making a contract void, duress, and undue influence would be available as defenses to a choice of court agreement, as would the challenge to formation for lack of agreement." Memorandum from Louise Ellen Teitz to ULC Drafting Committee on the Hague Convention on Choice of Court Agreements regarding "Effect of the Hague Choice of Court Convention on Jurisdiction and Enforcement of the Choice of Court Agreements," 5-6 (June 10, 2008).

39. The notice issue is especially pertinent because COCA will not preempt existing state laws regarding the enforceability of forum selection clauses in cases that are not deemed "international" under the Convention. *See* COCA, *supra* note 2, arts. 1(2)-(3). For purposes of COCA's dispute stage, a case is an "international case" unless the parties are residents of the same Contracting State and the dispute is connected only with that State. *See id.* art. 1(2). Moreover, the Convention does not cover choice of court agreements in consumer and employment contracts, among other exclusions. *See id.* art. 2.

and legislatures.[40] Although Congress likely has the constitutional authority to implement the Convention exclusively through federal legislation under the treaty power (and more specifically, under its powers to regulate foreign commerce, in conjunction with the Necessary and Proper Clause), allowing states the option of implementing the dispute stage of the Convention through a uniform state act would afford greater respect to these sensitivities.

- Finally, there is a less compelling federal interest in how American courts treat forum selection clauses between private parties than in how American courts treat judgments issued by the courts of foreign sovereigns. Accordingly, there is a weaker case for federalizing the dispute stage than the recognition stage.

The ULC's meticulous drafting process results in exceptionally high quality legislative product. The Working Group proposal would put much of that legislative product—in the form of a shorter version of the Choice of Court Agreements Convention Implementation Act—to good use. A substantial portion of the ULC's Choice of Court Agreements Convention Implementation Act could be transformed into a state uniform act for purposes of implementing the Working Group's proposal. Based on our preliminary review, all or parts of the following provisions of the uniform act might be included: Articles 1—12, 25—30, and 32.[41]

Because the state uniform act would apply in both federal and state courts at the dispute stage, this proposal avoids what the ULC has described as "an unacceptable precedent" – namely, if a diversity action covered by the Convention is commenced in or removed to a federal court located in a state that has enacted the uniform state act, the provisions of the federal implementing legislation, and not those of the state implementing legislation, would control.[42] Under the Working Group proposal (but unlike the State Department's White Paper proposal), the state uniform act would apply in that situation.[43]

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40. *See* David P. Stewart, *Implementing the Hague Choice of Courts Convention: The Argument in Favor of "Cooperative Federalism,"* in PAUL B. STEPHAN (ed.), FOREIGN COURT JUDGMENTS & THE U.S. LEGAL SYSTEM, 160-61 (2014). For instance, in a matter covered by the Convention, COCA would preclude a state court from declining jurisdiction based on *forum non conveniens*. *See* COCA, *supra* note 2, art. 5(2).

41. Uniform Choice of Court Agreements Convention Implementation Act, *supra* note 36.

42. Letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, U.S. Department of State, *supra* note 18, at 1-2.

43. Although the State Department has taken the position that the federal implementing statute *should* apply in federal diversity actions, it has not maintained that the Constitution or any other authority *mandates* that outcome. *See, e.g.*, Implementation of the Hague Convention on Choice of Court Agreements in the United States, *supra* note 6, at 5. While there are legitimate federal interests at stake, they are not so compelling—at least in the very specific context of enforcing private choice of court agreements—as to thwart the compromise proposed in this memorandum. Setting aside COCA, there are "substantial arguments" to be made on both sides of the question whether state or federal law should apply to the enforceability of forum selection clauses in diversity cases (in those instances that 28 U.S.C.

V. Federal-State Balance

The Working Group proposal would readjust the federal-state balance, but not in one direction. Rather, it would expand the role of federal law in one area and of state law in another.

The proposal would federalize one distinct type of foreign judgment. The Convention's scope is limited. It does not apply to exclusive choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party, or contracts of employment, or any of the following matters, among others: claims for personal injury brought by or on behalf of natural persons; maintenance obligations; other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; wills and succession; rights *in rem* in immovable property, and tenancies of immovable property; tort or delict claims for damage to tangible property that do not arise from a contractual relationship; the carriage of passengers and goods; and the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs.[44] Thus, COCA covers only a "small area of judgments"—those that result from exclusive choice of court agreements in

§ 1404 does not apply). GARY B. BORN & PETER B. RUTLEDGE, INT'L CIVIL LITIGATION IN U.S. COURTS (5th ed.) at 531-32 (2011). Most federal courts have applied federal law, but "often without appearing to consider the basis for doing so." *Id.* at 539. Some federal courts have held that *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) states a rule of substantive federal common law that is applicable both in federal and state courts. *See, e.g.*, cases cited at *id.* at 541, but that view has been criticized. *See, e.g., id.* ("There is little reasoned support for this view"); Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 559 (1993) ("Quite clearly, no uniquely federal interest exists when a federal court sitting in diversity determines the enforceability of a forum selection clause in a contract between private parties"). Other federal courts have applied federal law on the basis that the enforcement of forum selection clauses implicates "procedure," "venue," and judicial docket control issues, but this view "does not address the equally clear 'substantive' attributes of forum selection clauses, which are contractual undertakings that are bargained for and that significantly affect the parties economic interests." BORN & RUTLEDGE at 540. A number of federal courts, albeit a distinct minority, have held that state law governs, both in diversity actions and in state courts. *See, e.g., General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356, 57 (3d Cir. 1986) ("We must correct the assumption that federal courts are bound as a matter of federal common law to apply *The Bremen* standard to forum selection clauses [in diversity cases]. The construction of contracts is usually a matter of state, not federal, common law."); *see also* Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1927 (2009) ("While most circuits that have directly confronted the question have applied federal law, the Third, Fourth, and Eighth Circuits have applied state law in their analyses of whether a forum selection clause should be enforced through a motion to dismiss."). As a practical matter, application of either federal and state law typically yields the same outcome. *See* Heiser at 603 ("Nearly all states endorse the *Bremen* doctrine or something like it. Consequently, enforcement of a reasonable forum selection clause in most state courts is fairly certain.").

44. For a complete list of exclusions from the scope of the Convention, see COCA, Art. 2.

business-to-business contracts.[45] State law—including, where enacted, the ULC's Uniform Foreign Money Judgments Recognition Act and Uniform Foreign Country-Money Judgments Recognition Act—would continue to govern other types of foreign judgments.[46] Setting aside the treaty power, Congress' power to regulate foreign commerce arguably provides greater authority for federalizing the particular subset of foreign judgments covered by COCA than other types of foreign judgments (including those that might be governed by some future treaty).[47]

At the dispute stage, the Working Group proposal would expand the role of state law. At present, most federal courts apply federal law—generally the test outlined by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore*[48]—in determining the enforceability of forum selection clauses, even in actions based on diversity of citizenship (except that, as discussed above, state contract law principles are applied in determining whether there was actual or valid consent to the contract).[49] Under the Working Group proposal, however, federal courts would apply the state uniform act, if enacted by the state in which the court sits, at the dispute stage. Thus, the Working Group proposal would cede to the uniform state act ground that most federal courts hold to be occupied by federal law.[50] Furthermore, as already discussed, Chapter 2 of the FAA addresses both the award-enforcement stage *and* the arbitration agreement-enforcement stage of court proceedings. The latter is the direct equivalent to COCA's dispute stage. If the FAA Chapter 2 precedent were applied to the implementation of COCA—as many advocate—the dispute stage would also be federalized. Finally, unlike the State Department's April 16, 2012 White Paper approach, the Working Group proposal would not set the precedent of federal courts sitting in diversity disregarding a state's enactment of the

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45. National Conference of Commissioners on Uniform State Laws, Draft Uniform International Choice of Court Agreements Act, Prefatory Note, at 4 (July 2010), *available at* http://www.uniformlaws.org/shared/docs/choice_of_court/uicocaa_amdraft_jul10.pdf.

46. Uniform Choice of Court Agreements Convention Implementation Act, Prefatory Note, *supra* note 45, at 4-5; *see also id.* at 4-5 ("[T]here is only a limited area of overlap" between the Convention and the ULC's uniform laws on the enforcement of foreign judgments).

47. U.S. Const., Art. 1, § 8, Cl. 3.

48. 407 U.S. 1 (1972).

49. *See* Memorandum from Louise Ellen Teitz to ULC Drafting Committee on the Hague Convention on Choice of Court Agreements, *supra* note 38, at 5-6 ("[W]hen the litigation is in federal court based on diversity of citizenship, courts tend to treat [the enforceability of forum selection clauses] as 'procedural' for *Erie* purposes and look to federal law on both choice of forum clauses and on venue"); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 665 (2015) ("As to enforceability [of forum selection clauses], most diversity cases look to federal law"); BORN & RUTLEDGE, *supra* note 43, at 531-32 (observing that while the Supreme Court has not addressed the question whether federal or state law applies to the enforceability of forum clauses in diversity cases, most lower federal courts have applied federal law). It bears emphasizing, however, that the law in this area is unsettled, and although most courts sitting in diversity have applied federal law, some have applied state law. *See* discussion at *infra.*, n. 36.

50. *Id.*

uniform state act—something that the ULC has previously presented as a make-or-break issue.

The aspects of the Convention that would be implemented through cooperative federalism—all of those dealing with the enforcement of choice of court agreements—are significant. Indeed, COCA's dispute stage provisions have been described as the "the heart of the Convention."[51]

Beyond the implementation of COCA, there is larger debate in some quarters over whether the states should have a greater or lesser role in implementing international treaties. No side in that debate can declare victory with the Working Group proposal, which enlarges the role of state law in one area and federal law in another. The appropriate federal-state balance in implementing international treaties will vary treaty by treaty—one size fits one. For *this* particular treaty, the Working Group proposal strikes an appropriate balance.

The true "winners" under the Working Group proposal are American businesses engaged in international commerce, which will be afforded a more efficient and predictable legal regime for resolving cross-border disputes, including more certain enforcement of forum selection clauses and the ability to "export" U.S. court judgments and enforce those judgments where assets are located. Those benefits are significant and are needed now.

VI. Conclusion

For some members of the Working Group, the proposal outlined in this memorandum represents the best possible approach to implementing COCA, combining some of the key advantages of the various other COCA implementation proposals that have been advocated to date. For other Working Group members who, on the one hand, would have preferred a greater role for federal law, or on the other, would have preferred to incorporate more elements of cooperative federalism, the Working Group proposal is perhaps only the "next-best" approach to implementation. Regardless, all members of the Working Group have coalesced around this compromise as a principled, workable and appropriate means of implementation, recognizing that after a ten-year delay in ratifying a treaty with universal support and no political opposition from any quarter, it is time for all concerned parties to play a constructive role in getting the

51. Hannah Ambrose & Vanessa Naish, *The Hague Convention on Choice of Court Agreements: A Reciprocal Enforcement Regime to Rival to the New York Convention 1958?* LEXOLOGY (Oct. 1, 2015); *see also* David P. Stewart, *Implementing the Hague Choice of Courts Convention: The Argument in Favor of "Cooperative Federalism,"* in STEPHAN, *supra* note 40, at 162 (The Convention's requirements that "the court(s) chosen by the contracting parties to accept their dispute and precluding non-chosen courts from doing so" lie "at the heart of the treaty"); Christophe Bernasconi, *What to Expect from the Choice of Court Convention*, INT'L FIN. L. REV. (Sept. 22, 2014) (comments by the Secretary General of the Hague Conference describing COCA's "primary objective" as giving "legal certainty and predictability to the contracting parties regarding where to litigate a dispute that arises under their contract").

Convention across the finish line. We urge all stakeholders to consider the ABA-SIL Working Group proposal as a means of moving forward.