

**From:** Albert L. Bloomsbury

**To:** International Section Executive Committee

**Re:** **Report on the Hague Convention Choice of Court Agreements (“Convention”) U.S. implementation related issues (i) in support of International Section’s endorsement of the comments on U.S. State Department Legal Advisor’s White Paper on U.S. implementation of the Convention and (ii) in support of a draft resolution of International Section to recommend NYSBA Executive Committee to promote U.S. ratification of the Convention and the enactment of the implementation legislation and to adopt such ratification and enactment as federal legislative priorities of NYSBA**

**Date:** May 7, 2012

Please see the above described report on the following pages. This report was prepared for discussions at the May 19, 2012 International Section Executive Committee meeting as well as for purposes of disseminating the information about the Convention and the activities of International Section on this issue within NYSBA. The report has been prepared in consultation with Michael Galligan and John Hanna, Jr.

An executive summary of the same report has been prepared as a separate document.

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## **Report on U.S. Implementation of the Hague Convention on Choice of Court Agreement at the Federal and New York State Levels**

### **Preface**

The Hague Convention on Choice of Courts Agreement (COCA or Convention) is an international convention on the jurisdiction of courts and the enforcement of foreign judgments in international commercial dispute resolution. It was adopted in June 2005 at the Hague Conference on Private International Law (HCCH) under the leadership of the United States and other nations. This Convention was negotiated and adopted for the promotion of trade through effective judicial cooperation across the world.

Following is the International Section's report based on its activities on this topic over the past 18 months by more than a dozen members. The highlight of the International Section's involvement was attendance of six Executive Committee members at the U.S. State Department Advisory Committee on Private International Law (ACPIL) March 5, 2012 public meeting in Washington, DC. the International Section provided two formal reports to ACPIL, and in addition the six Executive Committee members who were present at the March 5 meeting jointly submitted individual views on April 2 with respect to the follow-up questions of the meeting to further assist ACPIL. Followed by that, we were asked to express our views with respect to the White Paper (April 16, 2012) of the Legal Adviser to the U.S. Secretary of State regarding the framework of a proposed COCA ratification legislative package.

(In this report, "State" such as "Contracting States" that starts from capital "S" is a sovereign nation, and "state" with lowercase "s" is a component state of a sovereign nation such as a state within the United States. )

## **1. Overview of the Hague Convention on Choice of Court Agreement – why it is important for New York**

The Hague Convention on Choice of Court Agreements is a multilateral international convention that will give certainty to private parties' choice of court agreements in international business transactions and thus will help promote cross-border commerce once it takes effect.

### **a. The “Judgments Project” at HCCH – negotiating a multilateral treaty to set international common ground on jurisdiction and the recognition/enforcement of foreign judgments on international commercial disputes**

This convention was the result of many years of intensive international negotiations at the Hague Conference on Private International Law (HCCH) for the so called Judgments Project under the U.S. leadership since 1992. Initially, nations began their talks for an ambitious plan to adopt a comprehensive multilateral convention that would: (i) regulate the member States' exercise of jurisdiction over international commercial disputes; and (ii) guarantee the transferability of judgments among the nations. Because this type of convention would achieve the two goals under one instrument, it is dubbed a “double treaty.” This comprehensive double treaty would have given certainty and predictability for international commercial transactions and promote international trade and investment across the globe because international investors will be able to predict and indeed depend on which country would be the forum for which types of legal disputes.

However, this comprehensive treaty negotiation proved to be premature under the conditions at that time. The major obstacles were the significant differences in ideas about jurisdiction between the common law nations and civil law nations, and the uncertain impact on global cross-border legal issues on the rapidly developing e-commerce. In addition, it became clear that direct regulation of a sovereign nation's exercise of jurisdiction under a treaty would be a non-starter at the U.S. Senate because that would require a much deeper adjustment of the functions of U.S. domestic courts. Due to this difficulty, the nations decided to suspend this ambitious goal in 2002.

As a result, the nations agreed to scale back negotiations to limit the scope of the treaty to cover the exercise of jurisdiction and recognition of judgments based on party autonomy. One major consideration of the U.S. negotiators was to make the convention less intrusive to the American legal tradition and judicial system so that the eventual treaty text would be acceptable to the Senate and win the necessary two-thirds majority consent. The nations were able to agree on this limited scope convention, COCA, in June 2005.

Nevertheless, the U.S. government is seeking the opportunity to re-open the negotiation of a comprehensive jurisdiction and recognition and enforcement convention at the HCCH in a way that is less intrusive to the domestic laws on jurisdiction of courts. The U.S. government sent its delegates to HCCH's Expert Conference in April 2012 for this

purpose. The establishment of a worldwide coherent system of jurisdiction and enforcement of civil and commercial litigations remains a major U.S. international trade policy objective.

## **b. Scope and functioning of COCA**

The scope of COCA is limited to international business disputes. COCA excludes consumer related cases, employment cases, patent related cases, family law matters and real property matters and other areas that tend to be subject to public policy and the mandatory provisions of the jurisdiction of the location where the parties or property is located.

COCA's provisions are created in a way to preserve the domestic law and legacy judicial procedures at the maximum level while it imposes on Contracting States a minimum level of positive or negative obligations to exercise or not to exercise jurisdiction to hear a covered case and to enforce the resulting judgment from another country.

The Convention imposes on the Contracting States the following three obligations:

- (1) The Contracting State whose court or courts are chosen by the private parties' "exclusive choice of court agreement" (Article 3) must, in general, accept jurisdiction to hear the dispute (Article 5) provided that the issue is "international" (Article 1) and does not concern one of the excluded matters (Article 2).
- (2) The other Contracting States must decline to exercise the jurisdiction on the same matter (Article 6).
- (3) The other Contracting States must, in general, recognize and enforce the resulting judgment of the court of the chosen country (Article 8).

With respect to the exercise of the jurisdiction to hear the case ((1) above), private parties may in their agreement choose either one or more specific courts of a Specific Contracting State or the courts of a Contracting State in general. And the parties' choice of a specific court or courts is respected if this does not conflict with the Contracting State's internal allocation of jurisdiction among its domestic courts.

Therefore, if the parties choose a court of limited subject matter jurisdiction (such as U.S. federal court) and if the domestic law does not confer jurisdiction to this particular court for the dispute, the private parties' selection will be void.

With respect to the enforcement ((3) above), the Contracting State must recognize and enforce a foreign judgment in accordance with domestic law provisions (Article 14) subject to rules of the Convention such as about the limited basis of denial of recognition and enforcement (Article 9).

### **c. What COCA achieves for international commercial disputes**

In a sense, COCA provides transferability of judgments of a court of a Contracting State to other Contracting States in a similar manner as the New York Convention (1958) guarantees international recognition of foreign arbitral awards. For example, if Mexico and the United States are Contracting States of COCA, a Mexican judgment obtained as a result of parties' exclusive choice of court agreement should be enforced within the United States.

International dispute resolutions under the parties' exclusive choice of court agreement will become as important as under an international arbitration agreement if COCA is eventually accepted by as many countries as the New York Convention currently is (over 140 countries) and if the Contracting States' domestic judicial systems get used to handling COCA foreign judgments as comfortably and smoothly as foreign arbitral awards.

In sum, this Convention allows private party autonomy to choose the jurisdiction for dispute settlement under the parties' exclusive choice of court agreement, and the Contracting States of the Convention guarantee mutual enforcement of a judgment that was obtained from a court of another Contracting State as a result of such an agreement.

The Convention will take effect when two Contracting Parties (countries and regional integration organizations like the European Union (EU)) ratify it. Since Mexico already ratified the Convention, it is likely that at the time when the United States ratifies COCA it will become effective. Afterwards, each accession of new country (or the EU like organization) to the Convention will increase the number of Contracting States.

The EU has the competence to join the Convention on behalf of its member States, and the EU signed the Convention in April 2009. When the EU completes its ratification process, the Convention will be effective for all EU member states (except Denmark). It appears that EU's ratification hinges on whether or not the U.S. ratifies the Convention first (so far, there has been no action at European Parliament on the Convention three years after signing the Convention).

The U.S. State Department Legal Adviser advises that the rest of the world is watching the decision of the United States, and if the U.S. implements the Convention the rest will follow but if it fails the Convention's future will be uncertain. That could also doom the future of the more comprehensive treaty on jurisdiction and the recognition and enforcement of judgments (Judgments Project). Therefore the failure will leave the current chaos of international civil litigations as it is for a long time or even make it worse as the volume of international transactions, trade and investment further increases.

Sound, transparent and harmonious global rules for jurisdiction and the transferability of judgments will create a better business environment for the entire global economy, and increase jobs and wealth across the board. The success of the COCA's U.S. implementation will be critically important not just for New York's legal services

industry, which will benefit from an increased volume of international legal services based in New York City, but also for the future of overall global economic growth.

#### **d. U.S. ratification and domestic implementation of the Convention**

The United States signed the convention in January 2009 on the last day of the Bush administration, and the task for ratification and the preparation of domestic laws to implement the convention was left to the current Obama Administration. The U.S. State Department has been preparing the ratification package over the last three years, and its Legal Adviser and the Office of Private International Law (PIL) are in charge.

It is expected that the Senate's consent to ratification will be conditioned on the full Congress's adoption of a federal implementing statute, because the State Department decided that it is desirable to enact a domestic statute to implement the Convention as domestic law to create certainty and orderliness in the implementation process (although the Convention may be self-executing).

Because the Convention will affect both the federal and state courts, Congress's legislation (Choice of Court Agreements Convention Implementation Act, "Implementation Act" hereunder) is expected to include a provision to approve a specific version of uniform state law (Uniform International Choice of Court Act, or "Uniform Act" hereunder) and to give each state an option whether (i) to adopt that Uniform Act as state statute, or (ii) to take no further action and utilize the federal statute (Implementation Act itself).

## **2. Provisions of the Convention and the US Implementation Plan**

### **a. Explanation of COCA provisions**

#### ***(i) Preamble***

The preamble clarifies that this Convention is intended to promote trade through enhanced judicial cooperation among the nations. It also clarifies that the nations negotiated and agreed to adopt the Convention because they believed that judicial cooperation can be achieved through uniform rules on jurisdiction and on recognition and enforcement of foreign judgment on civil and commercial matters. They agreed that it is important to set up an international legal regime that provides certainty and ensures the effectiveness of private parties' exclusive choice of court agreements and that also governs the recognition and enforcement of foreign judgments resulting from such agreements.

#### ***(ii) Chapter I, Scope & Definitions – Articles 1, 2, 3 and 4***

Article 1 provides the scope of the Convention. It applies to “international” civil or commercial cases that are not excluded under Article 2. The definition of “international” is different for each of Chapter II and Chapter III.

For Chapter II, which deals with the jurisdiction of a court to hear the dispute, a case is international unless the parties and the facts of the disputes are all connected to one single Contracting State. Therefore a legal issue of two U.S. residents with respect to their global distribution agreement is “international” but the same parties' agreement related to the U.S. domestic market is not.

For Chapter III, which deals with recognition and enforcement, a case is international when a court is requested to recognize and enforce a judgment from another country. The Chapter III definition is broader, and it can cover a judgment on a dispute that is not international for purposes of Chapter II (See below for the option in Article 20 to limit the international enforcement of domestic litigants' domestic legal issues adjudicated in a foreign court).

Article 2 lists exclusions from the scope of the Convention. The first group of exclusions is based on the types of agreements: consumer contracts and employment contracts. The second group is based on subject matters that tend to be subject to a specific locality's mandatory rules for a variety of reasons. There are 16 of them and they can be categorized as follows: family law related issues; insolvency; transportation; environmental claims; competition; personal injury; immovable property; non-copyright intellectual properties (e.g. patent and trademark), and the liabilities of public registries.

The Convention also does not apply to arbitration related matters. However, where the excluded matters are included as a preliminary issue in a dispute, the Convention covers the disputes even though such matters, standing alone, would preclude the application of the Convention.

Article 3 defines the term “exclusive choice of court agreement”. If an agreement designates solely one or more courts within one single country that is a Contracting State, as the courts to be used in the event of a dispute, it is considered as an “exclusive” choice of court agreement. Article 4 provide additional definitions including the determination of residency.

### ***(iii) Chapter II, Jurisdiction – Articles 5, 6 and 7***

Article 5 is the heart of the Convention: it imposes a positive obligation upon the chosen court to hear a case based on the parties’ exclusive choice of court agreement. The chosen court must hear the case unless the court lacks subject matter jurisdiction under the domestic law that allocates subject matter jurisdiction among the courts within the same country (Article 5(1) and (3)). Further, Article 5(2) forbids the use of a theory like *forum non conveniens* to decline to hear the case. Article 5(3). Article 6 forbids courts of Contracting States of the Convention that are other than chosen courts (non-chosen courts) to hear the case.

If the parties designate a court that lacks subject matter jurisdiction, that choice would be void under Article 5(3). However based on Articles 5(3) and 8(5), it is possible for the domestic law to mandate a transfer of the case to a proper court within the Contracting State in such a case, and the judgment of the transferee court will be entitled to enforcement in different Contracting States as if made by the chosen court under Chapter III.

Article 7 provides rules for interim measures of protection.

### ***(iv) Chapter III, Recognition and Enforcement – Articles 8, 9, 10, 11, 13, and 14***

The Articles 8, 9 and 14 work together to provide a basic framework of recognition and enforcement. Article 8 requires a court of a Contracting State (“requested court”) to enforce a judgment from another Contracting State that was obtained as a result of parties’ exclusive choice of agreement, without a review of the merits by the requested court. Article 9 lists exclusive bases for refusal to recognize and enforce. Article 14 provides that the Contracting State should use domestic law rules to enforce a foreign judgment except to the extent that the Convention provides, such as Article 9’s exclusive listing of reasons for rejection.

Article 10 offers the procedures for handling preliminary questions: Article 11 allows the refusal of enforcing exemplary or punitive types of damages. Article 13 provides the types of documents required to request recognition and enforcement.

**(v) Chapter IV, General Clauses – Articles 19, 20, 21, 22, 23, 25, 26, and 28**

The Convention allows the Contracting States to file various types of declarations to modify the application of the Convention in a number of significant ways. These provisions allow flexibility for the Contracting States, which may be helpful to increase the number of countries adopting the COCA regime rapidly.

Article 19 allows the Contracting State to decline to hear the cases that are unconnected to the jurisdiction by filing a declaration (Article 19 declaration). Unconnected cases are those whose parties and facts are not connected to the forum jurisdiction. The U.S. plans to make an Article 19 declaration with respect to state courts but not the federal courts as discussed in detail below, and its implementation plan includes specific proposed declaration language. An Article 20 declaration will allow a Contracting State to refuse to enforce a foreign judgment regarding the domestic dispute of its own residents. Article 21 allows a Contracting State to file a declaration to exclude certain matters from the application of the Convention. The U.S. State Department indicated that U.S. does not plan to make any declaration under Article 20 or 21. Making a Article 22 declaration will expand the application of the Convention to a forum choice agreements other than “exclusive” choice of forum agreements (as defined under Article 3) based on a reciprocal basis, and the U.S. plans to make an Article 22 declaration.

Article 23 provide the Convention’s overreaching principle of interpretation based on its international character and the need for uniform interpretation. This is a common provision found in other private international law conventions such as the UN Convention on Contracts for the International Sale of Goods (CISG). This requires the courts to interpret the Convention language in an “autonomous” manner, i.e. using its own definitions, the case law of other Contracting States and the purposes and objectives of the Convention. This case clarified that the domestic court should not rely on domestic law case law interpreting the same or similar words found in a domestic statute not based on the Convention or American English dictionary definitions when interpreting terms defined within the Convention itself (See *Abbott v Abbott*, 130 S. Ct. 1983, 1991 (2010)).

Articles 25 and 28 deal with special issues for a country like the United States that has a non-unified legal system (a federal-State). Article 25 provides that, depending on the purpose and context, the language of the Convention that refers to the Contracting State should be reinterpreted, as appropriate, as applying at the component state level. However, Article 25(2) clarifies that the Convention does not apply to the recognition of judgments within the boundaries of a single nation (e.g., New York’s recognition of a New Jersey judgment). Article 28 allows a federal-State nation to file a declaration to limit the territorial scope of the application of the Convention. The U.S. does not intend to file an Article 28 declaration.

Article 26 provides very complex rules for the relationship of the Convention with other treaties. In general, COCA takes a subordinate position in relation to other treaties with respect to jurisdiction and the recognition and enforcement of foreign judgments. Since the U.S. is not a party to any such treaty at this stage, there will not be an immediate issue with respect to Article 26. Article 26(5) provides that if a Contracting State enters into another treaty in this field and files a declaration, that Contracting State is no longer bound by COCA and other Contracting States are not obliged to recognize a judgment from that State to the extent of a conflict between the two treaties. This provision could have implication to the United States if, for instance, the U.S. and other nations negotiate and enter into a more comprehensive international convention dealing with the jurisdiction of the courts or the recognition and enforcement of foreign judgments.

## **b. A description of the Federal Implementation Act and state Uniform Act**

As discussed further in detail below, a U.S. domestic implementation plan has been developed by the State Department, which is expected to generate the following two instruments, (i) the federal Implementation Act and (ii) state Uniform Act that can be implemented by the states on an optional basis. If a state does not implement the Uniform Act, the federal Implementation Act will apply to the state courts of that state.

### ***(i) Federal Implementation Act***

This federal act is tentatively called “Choice of Court Agreements Convention Implementation Act” under the draft. It is made up of four chapters: (1) Chapter 1, findings, definitions and scope; (2) Chapter 2, jurisdiction and related matters; (3) Chapter 3, recognition and enforcement; and (4) Chapter 4, general provisions. The discussions below are, unless otherwise noted, based on the draft text as of February 2012 that was prepared by the U.S. State Department Office of Private International Law (PIL) for the discussions at the Advisory Committee on Private International Law (ACPIL) Study Group meeting on March 5.

#### ***(A) Chapter 1***

Chapter 1 (§§ 101 – 109) provides congressional findings of legislative purpose as well as detailed provisions that mirror the Convention’s provisions for the scope and definitions. §103 lists the Congressional findings.

The second finding is the one that clarifies the main purpose of the congressional legislation and Convention, i.e. the promotion of international trade and investment. It is expected that by providing assurance that private parties’ exclusive choice of court agreements will be effective and honored, commercial players all over the world will have more confidence that international commercial judgments will be recognized and

enforced around the world as a result. Thus, Congress anticipates in this enactment that “those assurances will enhance certainty in commercial contracts and thus promote international trade and investment.” This mirrors the Preamble of the Convention.

The third finding is a provision that mirrors Article 23, regarding the international origin of the provisions and the need for uniform interpretation among the Contracting States. It is similar to the language of the Congressional declaration in 42 U.S.C. § 11601, found in the implementation legislation for the Hague Child Abduction Convention (Convention of 25 October 1980 on the Civil Aspects of International Child Abduction), which was given legal effect to guide the interpretation of Convention’s terms by the U.S. Supreme Court in *Abbott v Abbott*, 130 S. Ct. 1983 (2010). Under this principle, the U.S. domestic courts must pay due respect to foreign court’s judgments, the U.S. State Department’s interpretation, the treaty’s purposes and objectives as well as specific definitions of the terms under the treaty itself.

The fourth item of the findings provides the basic framework of the relationship between the federal Implementation Act and the state Uniform Act in implementing the Convention domestically at the federal and state levels, which has been described as “coordinated federalism”. Based on this framework, the Uniform Act will be approved by Congress following a recommendation of the U.S. State Department. Although the Uniform Act is meant to be recommended for adoption by all states, it is an optional instrument. In essence, any state enactment of the Uniform Act will be effective only because it is supported by Congressional action that endorses the State Department’s opinion that this Uniform Act will implement the Convention at the state level in the state that has adopted it. However, in the case of any state that does not adopt this Uniform Act, the federal Implementation Act will directly apply to the state courts. Both approaches are meant to result in the same practical results in the implementation of the Convention (see the discussion below for § 405).

## *(B) Chapter 2*

Chapter 2 (§§ 201-207) provides rules on exercise or non-exercise of jurisdiction that mirror Chapter 2 of the Convention as well as the important U.S. domestic provisions that determine the scope of federal vs. state court jurisdictions.

§ 202 allows state courts to “opt out” of the obligation to hear unconnected cases (i.e. those cases with no factual and personal connection to the state) in accordance with the expected United States’ Article 19 declaration. However this section also clarifies that federal courts cannot refuse to hear unconnected cases under the Article 19 declaration.

§ 204 provides that the federal Implementation Act itself does not create independent federal question jurisdiction with regard to an action or proceeding under the Convention (contrary to the normal rule under 28 U.S.C. § 1331) so that the party must find federal jurisdiction independently of the Act (note that the language does not say independently of “Convention”). With respect to the recognition and enforcement of a foreign judgment,

under an earlier version of the draft Implementation Act, partial diversity was sufficient to create federal jurisdiction, but later, the Legal Adviser's White Paper (April 16, 2012) explained that this provision was removed for reasons of simplification and that parties will need full diversity to bring an enforcement action at a federal court. Thus, two foreign parties will need to choose a state court rather than a federal court of the United States as a chosen court (there is no federal diversity jurisdiction for two foreigners' disputes) unless there is an independent ground of "arising under" jurisdiction (federal question jurisdiction) such as the parties' contract being governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

§ 205 provides that parties who entered into a choice of court agreement are deemed to consent to the personal jurisdiction of the chosen court. § 206 allows removal from a state court to the federal court in the case where the federal jurisdiction would be found if the case is directly brought before a federal court by the plaintiff. §207 clarifies that this Act does not create a separate private cause of action.

### *(C) Chapter 3*

Chapter 3 (§§ 301-312) provides rules on recognition and enforcement of Convention foreign judgments that mirror Chapter 3 of the Convention.

§ 301 provides important rules that mirror Article 8 of the Convention, which require the requested court to enforce the judgment from another Contracting State under the Convention except for the specific reasons that are listed under Article 9 of the Convention (which is adopted in Act § 303(a)).

§ 302 mirrors the provisions of Article 8(5) that requires the enforcing court to treat a judgment obtained from a transferred court (under Article 5(3)) in the same way as the one that was obtained under the private parties' choice of court agreement. This provision is useful when the parties erroneously chose a specific court within a country that does not have proper subject matter jurisdiction and the matter is transferred to a proper court within the same country.

§ 304 provide rules regarding the preliminary questions that mirror Article 10. § 307 provides the rules on the necessary documents to enforce the judgment at the enforcing court.

§ 308 mirrors Article 14, which clarifies that the enforcing court use the domestic law of that court except as provided by the Act. Therefore, the preexisting domestic law of the forum is generally preserved and utilized to the extent that it does not stand in the way of enforcing a foreign judgment under the provisions of Article 8 and 9 (Act §§ 301 and 303(a)).

§ 309 provides the rules to authorize the court to enforce the foreign judgment based on *in rem* jurisdiction (jurisdiction based on the existence of defendant's property within the

jurisdiction). § 311 gives rules on statute of limitations, which is not included in the Convention and which is a domestic rule add-on. The Assistant Legal Adviser for Private International Law indicated on March 5, 2012 that his Office was still considering whether to change the language of the draft federal Implementation Act to explicitly include a provision within Chapter 3 to prohibit the use of *forum non conveniens* to avoid enforcement beyond the reasons provided under Article 9 (and Act § 303(a)). The New York State Bar Association International Section has formally recommended the inclusion of such a provision.

#### *(D) Chapter 4*

Chapter 4 ((§§ 401-405) provides miscellaneous rules, but they include a very important provision regarding the federal preemption of state law (§ 405), especially in the case of a state enactment of the Uniform Act.

§ 405(b) provides that if a state adopts the Congress-approved Uniform Act, that state statute will apply to state courts, instead of the federal implementation Act. One controversial issue at the March 5 ACPIL meeting was whether the Uniform Act also applies to federal courts located in a state that has adopted the Uniform Act; strong opposition against the proposal to require federal courts to use the state statute for implementation of the Convention laws voiced by several stakeholders, including the New York State Bar Association International Section representatives. The State Department Legal Adviser concluded in his White Paper (April 16, 2012) that the federal court should apply the federal Implementation Act, not the state Uniform Act.

§ 405(c) provides that state statutory language that differs from the Uniform Act is preempted by the Federal Implementation Act. It also provides that any interpretation of state statute enactment that “leads to a different result” with regard to a particular issue from that which would obtain under the federal Implementation Act will be preempted (§ 405(c)(2)). As we understand, this is a result of long and tortuous debates between the State Department Legal Adviser and the Uniform Law Commissioners over the past three years. Under this understanding, if enacted based on the language of the Uniform Act, at least in principle, cannot generate a different result from the case if the state did not make such an enactment and instead applied the Federal Implementation Act. (This of course raises the question why a state needs to adopt a state statute modeled after the Uniform Act at all rather than simply using the Federal Act to implement the Convention.)

#### ***(ii) Uniform State Act prepared by Uniform State Law Commissioners in consultation with Legal Adviser to the Secretary of State***

The National Conference of Commissioners on Uniform State Laws adopted the most recent version of the draft text of the Uniform International Choice of Court Agreements Act (“Uniform Act”) at their meeting in July 2011. This Uniform Act is made up of 30 sections without chapters, and the document includes very detailed commentaries. Most

of the sections mirror the language of the Convention and the Federal Implementation Act. Following are notable sections in the Uniform Act.

Section 2 (Implementation of Convention), simply states that this state statute implements the Convention in the state without any findings as seen in the federal Implementation Act § 103. Section 9, duty of chosen court to exercise jurisdiction, mirrors Article 5. The following Section 10 provides four optional formulas to implement an Article 19 declaration to exclude jurisdiction to hear unrelated cases. Section 13, recognition and enforcement, mirrors Article 8 of the Convention; Section 15 mirrors Article 9 of the Convention regarding the exclusive bases for denial. Section 20 is a parallel provision of Article 14, but the language diverges. Section 22 provides a statute of limitations that is not found in the Convention. Section 25, the uniformity section, uses different language from the Convention's Article 23 and § 103 of the Federal Implementation Act, but the Commissioners' report gives guidance that is consistent with the Convention and case law with respect to the similar provisions found in different conventions (per the Supreme Court ruling in *Abbott v Abbott*).

### **c. Current law**

#### ***(i) Jurisdiction to hear civil litigations***

Within the United States, the federal courts have limited jurisdiction while the state courts are courts of general jurisdiction. Within each state, the state legislature may create special courts that have limited jurisdiction. For the state of New York, the Supreme Courts of each country are considered as courts of general jurisdiction with original jurisdiction, while the city or municipal courts are limited jurisdiction courts because of the monetary limits. Surrogate Courts are limited jurisdiction courts because they can hear only certain types of cases (although in the matters appointed to them, they have concurrent jurisdiction with the Supreme Court). This distinction is relevant for COCA Article 5(3) as the parties' choice of court agreement cannot override the sovereign's internal allocation of judicial powers among different courts based on subject matters.

Being a court of general jurisdiction, however, does not mean that a court will hear any case. A general jurisdiction court will not hear a civil case where the defendant is not subject to the court's personal jurisdiction. New York General Obligations Law (GOL) § 5-1402 provides that notwithstanding other law, a plaintiff can maintain a lawsuit against a foreign person under a choice of forum agreement who has submitted to the jurisdiction of the New York state courts if the agreement satisfies two conditions: choice of New York law and the amount in dispute being over \$1 million. Thus this GOL provision can be viewed as a special rule allowing a waiver of any objection for lack of personal jurisdiction in order to give certainty to the choice of court agreement of any two foreign parties in particular.

The federal courts are limited jurisdiction courts, and the federal district court's jurisdiction must be found under specific federal statute. Diversity and federal question

jurisdictions are the principal forms of two types of federal jurisdiction (28 U.S.C. §§ 1332 and 1331 respectively). In addition, federal question jurisdiction under 28 U.S.C. §1331, a federal question jurisdiction can be conferred by specific federal statutes. Under the case law, it is difficult to displace federal question jurisdiction when there is a legal issue that arises under federal law, which includes the Constitution, treaties of the United States, federal statutes and other federal law (federal common law). See *Mims v Arrow Financial Services*, 132 S.Ct. 740 (2012).

Under the relevant case law, where the federal court has federal jurisdiction, this normally does not displace state court's jurisdiction. A general assumption of concurrent jurisdiction applies in this case. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

### ***(ii) Recognition and enforcement***

Although the federal government has the general power to regulate international commerce and the power to handle foreign relationships with one voice under the Constitution (including the power to conclude an international treaty), for historical reasons, the state courts handling foreign judgment enforcement during much of the past century. As courts of general jurisdiction, the state courts have general jurisdiction to enforce a foreign judgment. In contrast, the federal courts have only limited jurisdiction to handle cases, including an enforcement action. Congress did not directly intervene in the matter of foreign judgment recognition until 2010 when it enacted unanimously the SPEECH Act of 2010 (Public Law 111-223) to regulate the recognition and enforcement of foreign libel judgments under a uniform federal standard by creating a new chapter 181 within Title 28 (28 U.S.C. § 4102).

It is explained that this anomaly started and was accelerated by the state court's activism, thereby overlooking the late 19<sup>th</sup> century U.S. Supreme Court decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), which clarified that matters related to foreign judgment recognition matter were federal question issues. In the early 20<sup>th</sup> century, the New York Court of Appeals in *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926)) disagreed with the U.S. Supreme Court's view and effectively brought such issues under state law. This move was further accelerated by the U.S. Supreme Court's landmark decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which generally abolished federal common law, and required that federal courts sitting in diversity to use state civil procedures laws of the state where the court is located, which would include state law about foreign judgment enforcement. Therefore over the seven decades from the 1940s to 2000s, the foreign judgment enforcement matters were left for state courts without Congress' intervention.

### ***(iii) Problem resulting from state law's primary role in the foreign judgment enforcement area***

Inconsistent results in the area of the recognition and enforcement of judgments from state to state was recognized as a major problem when Congress unanimously enacted the SPEECH Act to counter the “libel tourism” under which plaintiffs did forum shopping to chose libel suit friendly jurisdiction (i.e. the U.K.) and tried to enforce the judgment at the “weak” U.S. jurisdictions. Congress found that the realistic possibility of successful enforcement of such foreign suits had a chilling effect on U.S. freedom of speech under the U.S. constitution and that the only way to deal with this problem was the exercise of the federal power to set a minimum standards. See Senate Report 111–224; House Report 111–154.

In the SPEECH Act, Congress demonstrated that it can act unanimously to protect an important national interest in the area of foreign judgment enforcement. At the Congressional hearing on November 15, 2011 at the House Subcommittee on Courts, Commercial and Administrative Law, John Bellinger, former Legal Adviser to the Secretary of State Condoleezza Rice, who appeared on behalf of the American Chamber of Commerce, stressed the need for a comprehensive reform to sort out the confused state of the law regarding foreign judgment enforcement in order to promote American business in the areas of international commerce and investment. Together with another witness, Professor Linda Silberman, New York University professor of law, Mr. Bellinger urged that the SPEECH Act, COCA and a possible future fundamental reform of foreign judgment recognition under federal law be considered closely connected to each other as part of a program to rationalize the cross-border legal regime of our country, which will be essential for the promotion of American economic interest.

When enacting Chapter 2 of Federal Arbitration Act to implement New York Convention (1958) for the recognition of international arbitration agreements and awards, Congress did not create the federal court’s exclusive jurisdiction for enforcing arbitration agreements or awards under the Convention. See *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior University*, 489 US 468, 477 (1989). Instead, Congress merely gave federal subject matter jurisdiction and removal authority to the federal district court, to all the cases that arise under the Convention. Therefore the parties can request either a federal or state court to enforce an international arbitration agreement or an award. When the case is brought before a state court, the defendant has a choice whether to request a removal to the federal court. 9. U.S.C. §205. Therefore, when at least one party wants to have the matter decided before a federal court, it is possible to secure federal court’s oversight of the arbitration under the Convention.

Federal inaction over the last seven decades, rather than a lack of the federal power under the Constitution, has been the real reason why many people incorrectly came to assume that issues of foreign judgment enforcement are primarily a state law matter. But recently changes in the world and the rapidly progressing globalization have offered an opportunity to reevaluate the wisdom of the fragmentation of law caused by the state courts’ primary role in this area. In 2010, the Congress for the first time recognized this situation as a cause of weakness when the it enacted the SPEECH Act of 2010.

#### **d. Proposed implementation plan of COCA in the United States at federal and state levels**

COCA is a first step to create a more coherent global regime for jurisdiction of the courts and a treaty-based system of mutual transferability of judgments across the borders among nations. This effort is comparable to the adoption of 1958 New York Convention for the mutual recognition and enforcement of international arbitration agreements and arbitral awards across the borders. The New York Convention's success over the past five decades is shown by the number of countries that have adopted the convention, now over 140. In the case of the United States, it was the Congress' wise policy choice to give federal question jurisdiction to the federal district courts for both cases about the enforcement of arbitral agreements and about awards, which has contributed to the popularity of the New York Convention among businesses.

If Congress does not confer a similar federal question jurisdiction to COCA foreign judgment enforcement action and enforcement of the choice of court agreement, that may be regarded as a defect of the COCA regime by practitioners and global business communities. Although there have been some concessions from the Judicial Conference of the United States (following a recommendation of the Uniform State Law Commissioners) that a federal diversity jurisdiction may be conferred based on a partial diversity since June of 2011, the distance between the two sides was large on March 5 and this discussion consumed much of the time at the ACPIL hearing that day. Later, the State Department Legal Adviser concluded in his White Paper (April 16) that no federal question jurisdiction would be conferred (the above mentioned partial diversity proposal was withdrawn in an apparent effort to secure a concession from Uniform Law Commissions with respect to the use of federal Implementation Act in federal courts).

##### ***(i) Federal Implementation Act and its role***

Based on the detailed provisions of COCA, which give sufficiently clear guidance how the Contracting States' domestic courts should act or not to act, there is a strong prospect that the U.S. Supreme Court will hold that the Convention's provisions are self-executing and the federal Implementation Act is a mere precaution, were such an issue ever to reach the Court. In *Medellin v Texas*, 552 U.S. 491 (2008), the Supreme Court explained that Congress may enact a federal implementation statute out of precaution even if a treaty is self-executing; such action may be a wise policy choice if Congress clarifies certain open issues under the domestic statute. In this case, the treaty and the federal statute complement each other to further national policy as manifested by the Executive Branch's negotiation of the treaty, by confirming that the policy was fully endorsed and clarified by both houses of Congress.

From a practical perspective, when Congress enacts implementation legislation, it is less likely that the Supreme Court will have the occasion to hold whether or not the Convention is self-executing. The Supreme Court in *Abbott v Abbott* gave us a clue how COCA would be interpreted as *Abbott* interpreted the treaty terms of another Hague

Convention that was implemented with the help of domestic statute of Congress. In that case, the debate centered on the interpretation of the treaty language itself rather than the interpretation of the language that was reduced to the statute from the original treaty language. The focus was not on Congressional legislative intent but rather the Convention's negotiating history, the other Contracting States (foreign nation)'s case law as well as the U.S. State Department's interpretation.

Based on the *Abbott* case, it is reasonable to conclude that once Congress has implemented an international treaty as domestic law, the treaty provisions still constitute a part of domestic law even if the statute does not mirror the treaty provisions article by article. The proposed federal Implementation Act, however, offers much more detailed guidance for the operative provisions of the Convention for the purpose of clarity. The Act also gives the states an option to enact a state statute that adopts the text of the congressionally-approved Uniform Act. However the federal Implementation Act will clarify that any state enactment that creates any different result from the federal Implementation Act will be preempted. The Act provides that where the state does not enact such state statute, the Federal Implementation Act applies to the state court procedures. Furthermore, if the *Abbott* case is to give a guidance, the courts will focus on interpreting the texts of the Convention itself rather than the texts of either the federal or state statutes that implement the Convention, and this legislative technique will leave small scope for divergent case law emerging among different jurisdictions within the United States.

However, this different formality may still leave minor but persistent difference in terms of substantive difference due to the procedural rules that make the U.S. Supreme Court's intervention less frequent. Recollecting the history of foreign judgment enforcement by U.S. courts between 1920s through 2010, one could consider that there is a small risk that the COCA regime will turn out to be fragmented state law regime as compared with the regime for New York Convention arbitral awards.

Nonetheless, such a risk can be mitigated if enough parties use this system and if attention is paid to the development of the case law and if Congress is open to amend domestic law from time to time to improve the quality of the international judgment enforcement system. The above risk may also be overstated because when a state applies a state statute that is authorized by Congress, any questions regarding the interpretation of the statute is actually a dispute about the meaning of the Convention and state judges are bound by the Convention and the federal statute under the Supremacy Clause in the same manner as when the state judges apply any other federal statute. Because Article 23 of the Convention mandates US domestic judges to consider case law from other Contracting States, interpretation of any language in the state statute that originated from the Convention must be interpreted in this way, and the legacy state law will be preempted by the Convention and the federal statute in any case (in *Abbott*, it was assumed that Texas law on parental custody was preempted by the Convention and there was no argument on this point except for one brief comment during the Supreme Court oral argument by a Supreme Court justice).

***(ii) Why the Uniform State Law Commissioners prepared a Uniform Act and whether New York should adopt this Uniform Law or utilize Federal Implementation Act.***

After extensive negotiations between the State Department Legal Adviser and the Uniform State Law Commissioners over the last three years, the Uniform Act no longer contains an offensive provision that might have been interpreted as contradicting the federal statute or even giving states a carte blanche to deviate from the federal policy. As explained above, the two options will not leave much practical difference except that the state enactment of “its own” statute can make the statutory structures unnecessarily complicated and may pose additional procedural burdens to litigants who try to enforce a foreign judgment in the United States. Since the provisions of the Convention itself are sufficiently detailed and can “self-execute,” with or without the detailed statutory provisions, adding two layers of comprehensive federal and state statutes to the Convention really is not necessary.

Only a few simple paragraphs in a Congressional statute would probably have been sufficient to achieve the main goals of the Convention. Congress could take this policy choice and let the courts decide open issues as in the case of the implementation of the New York Convention of 1958 for the recognition and enforcement of international arbitration agreement and arbitral awards. Note that Chapter 2 of the Federal Arbitration Act, which implemented this Convention, has only seven new operative sections (9 U.S.C. §§ 201-207), and the open issues are decided based on the preexisting FAA Chapter 1, the “domestic” FAA provisions, in accordance with 9 U.S.C. § 208: “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”

In the case of the COCA Convention, however the State Department Legal Adviser has a view that a more detailed federal statute would be desirable. The Legal Adviser tried diligently to make sure that the dual statutory scheme would not generate different results despite the different formalities under the two options. Because the two options are meant to achieve the same results under two different approaches of formality, as noted above, it is not supposed to create any noticeable difference.

For instance, if a state decides to take advantage of the U.S. Article 19 declaration, which will allow each state to decide to what extent it will agree to entertain unconnected cases, two options will be able to achieve the same result using different legislative techniques. When a state does not enact a state statute based on the Uniform Act, it may still enact a short statute if it wishes to exclude unconnected cases that otherwise must be heard under the Convention. Under the Uniform Act, the states are required to choose one of the four options within the Uniform Act itself.

The reason why there are two options at all, it seems, are mainly political or symbolic ones, with a view to making the prospects of Senate ratification easier. This “coordinated federalism” scheme is a gesture to show respect to the states’ right of autonomy, especially with respect to the inner functioning of state judiciary systems.

### ***(iii) Impact on existing state law***

Due to the convention's "minimalist" approach utilizing the preexisting domestic procedures, the ratification of the Convention and its implementation as U.S. domestic law should preserve legacy state law provisions to the extent that they do not contradict the treaty provisions. The objective of the Convention is limited (i) to force states to accept or refuse to exercise jurisdiction to hear a dispute based on the parties choice of court agreement, and (ii) to recognize and enforce a foreign judgment from another Contracting State or Member (i.e. EU member states other than Denmark if the EU ratifies it) with only limited exceptions. The Convention will not change the existing state enforcement of foreign judgment procedure drastically under the Convention, because the Convention only modifies the criteria under which state courts may refuse to recognize a judgment from a foreign country and a few technical requirements such as the types of documents that must be presented.

#### ***(A) Jurisdiction to hear the case under the Convention's choice of court agreements***

If the Convention is ratified with the proposed federal Implementation Act and New York does not adopt Uniform Act as its own implementing act, a New York court must hear unconnected cases but that is not a drastic departure from New York's liberal jurisdictional law to hear unconnected cases under GOL § 5-1402. To limit the unconnected cases in line with the current §5-1402 (requirement of choice of New York law as governing law and the \$1 million dispute amount), the New York state legislature could pass a one-paragraph statute (possibly a new paragraph in § 5-1402 saying that "when the case is brought under the [COCA] Convention, the requirements of preceding paragraph [disputes amounts and choice of New York law ] also apply" with respect to such unconnected cases. The current existing CPLR's provisions for recognition and enforcement of foreign country judgments will be modified without action by New York's legislature by force of the Federal Implementation Act, to the extent that the New York's current procedure impose more onerous conditions than the Convention's requirements, such as documents required and the conditions for refusal to recognize and enforce a foreign judgment. To avoid traps for the unwary, however, it might be advisable to incorporate these requirements with the CPLR.

#### ***(B) Enforcement of the Convention foreign judgments***

As compared with COCA Chapter III, the NY Foreign-Country Money Judgments Act ("FCMJA", i.e. New York's enactment of Uniform Foreign-Country Money Judgment Recognition Act (2005) § 4(c)(5), as CPLR § 5304(b)(6)) arguably is narrower in scope because COCA covers a broader range of cases, not only money judgments. However, since the CPLR has existing provisions for, and New York state court have experience in, enforcing the domestic sister states' and foreign country court's judgments, the new requirement to recognize and enforce certain foreign country judgments under the Convention will not force our state courts to bear any significant burden. The small cost

would be an initial learning curve for handling new type of procedures, getting accustomed to new types of Hague Convention compliant documentation, and a becoming familiarized with a new practice of making decisions on preliminary issues that will form a exclusive reason for denying enforcement of a foreign judgment (e.g. determining foreign choice of court agreement is null and void under foreign law).

The COCA will affect New York law in a rather modest way to accommodate the scope of recognition and enforcement of a foreign judgment under the Convention in exchange for a better possibility that New York court judgments will be recognized abroad.

#### **(iv) Conclusion**

There is no need to waste precious legislative resources and political capital enacting a New York state statute based on Uniform Act because the practical result will be virtually the same, regardless of whether the federal Implementation Act or a Uniform Act based state implementation statute governs COCA implementation by New York State courts. The only arguments for enacting a state statute would be (1) to ensure that the provisions of the Federal implementation act become part of the New York CPLR and (2) to enact rules that would more effectively enforce Convention judgments such as including a provision that would bar the defense of *forum non conveniens* in enforcement proceedings or otherwise would make New York State COCA related procedures for international cases more efficient to attract international legal services to New York.

### **3. International Section's involvement in the COCA project**

#### **a. Activities since October 2010**

The International Section has been actively working on this project since October 2010 with close collaboration with the U.S. State Department's Office of Private International Law ("PIL"). More than a dozen members have been involved in this project over the past 18 months, including a non-US academician who regularly attends HCCH expert meetings in The Hague. We submitted various comments formally and informally on a number of technical points to the ACPIL Study Group that has been developing domestic implementation legislation at the federal and state levels. The ACPIL conducts public hearing for the State Department Legal Adviser and PIL to receive comments and views from the principal stockholders in matters before PIL; any member of the public is able to state his or her views on the issue. Of course, final decisions about the draft text are made by State Department officials under the direction of the U.S. State Department Legal Adviser.

#### **b. Since June 2011: contact with ACPIL and stakeholders**

The basic approach of the International Section has been to provide discreet comments on technical issues that will assist the ratification of the Convention and will improve the utility of the Convention by private parties, especially those outside the United States, in order to promote forums within the United States, especially New York. NYSBA International Section's members are broadly spread all over the world (we have international chapters in over 60 different countries) and we consider the interest of wide range of constituents. We initially limited our comments to the technical issues that had not been previously discussed by the Study Group. Eventually we were asked by officials of the PIL to provide comments on the major issues regarding the federal question jurisdiction of the actions and proceedings arising under the Convention, an issue that had divided the stakeholders. In response to an invitation to offer our views, the International Section provided a paper to PIL in January 2012 in support of conferring broad federal question jurisdiction to federal courts, both for proceedings to enforce convention choice of court agreements and proceedings to enforce Convention judgments.

We were subsequently invited to state our views at a March 5, 2012 ACPIL public hearing in Washington, D.C., in which six members of the Executive Committee of the International Section.

#### **c. March 5, 2012 ACPIL meeting and the major issues**

We were aware that the discussions at the ACPIL Study Group were polarized on the question of federalism when we started to directly get involved in the process in June

2011. The strategy that had been developed by the State Department to insure a successful Senate ratification process smooth was to involve the stakeholders in the process from the beginning. The concept of “coordinated federalism” was adopted which would allow the federal and state judicial systems to work in harmony to implement COCA.

Under this concept, Congress will approve a specific uniform state law (Uniform Act) to implement the Convention at the state level and each state is free to choose whether to adopt that Uniform Act or to let the federal statute (federal Implementation Act) directly apply to state court processes for litigation to which the Convention applies and actions to enforce foreign judgments obtained in accordance with the Convention (“Convention judgment enforcement action”). In theory, Congress can approve a state Uniform Act statute to implement the Convention as long as the approved state statute is not offensive to U.S. constitutional norms and thus still allow the federal government to speak on Convention issues in relation to other nations with one voice. However, as we understand, at the beginning of the debates, there was no agreement between those who wanted to preserve the state court’s traditional roles in foreign judgment enforcement and those who wanted to have one federal law apply to all Convention proceedings Federal or state. There was a correspondingly deep disagreement as to the proper level of federal oversight over state courts when implementing an international convention.

However, as we understood at the ACPIL public meeting on March 5, 2012, the Legal Adviser of the U.S. State Department indicated that the final compromise text of domestic implementation legislation was within reach since the most contentious issue of federal-state coordination had been resolved by then. The necessary federal control on critical issues, in the view of the Legal Adviser, was achieved under the draft legislation text that was circulated for that meeting.

One remaining major open issue at the Study Group at that time was the issue of the scope of the original jurisdiction of a federal district court for the cases that are brought before a court of the United States for enforcement of Convention judgment enforcement actions. We learned at the meeting that the Legal Adviser had concluded, in the interests of winning the necessary votes on the U.S. Senate Foreign Relations Committee to report out the Convention to the Senate floor, that the federal statute would not confer federal question jurisdiction on a Convention judgment enforcement action that does not otherwise have the basis for federal district court’s jurisdiction (either diversity jurisdiction or federal question jurisdiction on the basis of a federal statute, treaty or the like, other than the Convention). Additionally, we realized at the opening of the meeting that any discussion for conferring federal question jurisdiction for the litigation brought under the Convention’s choice of court agreement was off the table. Therefore the International Section’s recommendations on these issues in our January 2012 submission were not accepted.

Another topic that took up a good deal of the discussions was the issue whether or not the federal court that handles a Convention litigation and enforcement action should apply

the state statute (adopted Uniform Act in the state in which the federal court sits) or the federal statute that implemented the convention (federal Implementation Act).

Despite the importance of COCA as a pillar of US international trade policy, there were few discussions at that meeting that directly discussed the economic impact of the Convention, especially if the implementation of the convention was carried out in a way that would be confusing to the international litigants. A potential negative impact from such a poor quality of implementation would be a loss of legal services to other major international commercial centers such as London, Singapore and Hong Kong assuming that future wide acceptance of the Convention among many nations (in the case of the UK, through the ratification by the EU) will bring these global financial centers also under the benefit of the Convention. Under this scenario, this Convention would, for example, allow two U.S. companies to choose a forum in London for future disputes on global distribution rights and the winning party could then enforce the London judgment in the United States. Therefore, if the U.S. enters into this Convention with less efficient implementation procedures, the US legal services industry could lose ground. To avoid such a result, the U.S. federal and state legislatures must act swiftly to improve the efficiency of their court procedures for international dispute resolutions. Under free trade, a country that cannot offer superior services in one specific industry will lose out in this field if similarly developed countries offer similar services more efficiently.

#### **d. Post March 5, 2012 ACPIL meeting**

Subsequent to the March 5 meeting, the six NYSBA International members jointly offered individual views to PIL on April 2 regarding the four open technical issues that remained at the end of the March 5 meeting. These views were subsequently adopted as International Section's position at April 11, 2012 Executive Committee meeting of the Section.

Those four issues concern whether to support: (1) explicit prohibition of the use of *forum non conveniens* theory in respect of convention enforcement actions, (2) rejection of parallel litigation judgments that are obtained from a court of a non-Contracting State of the Convention, (3) implementation of the Article 26(5) provision that would spare a nation from its COCA obligations when another COCA Contracting State enters into a different treaty on jurisdiction and/or the enforcement of judgments, and (4) exclusivity of the Convention procedures when enforcing an exclusive choice of court agreement or a foreign judgment to which the Convention applies. We offered our specific views on the items (1), (2) and (4); however we did not offer any particular views with respect to (3) because the issue was complex and we were not able to reach a consensus.

On April 3, 2012, one of our members attended another ACPIL meeting on the broader issue of the reopening of negotiations for a comprehensive treaty on the jurisdiction of courts and the recognition and enforcement of judgments (HCCH Judgments Project), which was interrupted in 2002 as explained earlier. This meeting offered additional background information as to why the U.S. State Department Legal Adviser considers the

COCA and Judgments Project as key foreign policy initiatives to promote U.S. foreign trade. On April 14, 2012, we receive word from a PIL official who had attended the HCCH Expert Conference that the Expert Group had agreed to recommend to the HCCH Council the reopening of comprehensive jurisdiction and judgment enforcement treaty negotiations, in line with the U.S. proposals.

On April 16, 2012, we received news from an American Law Institute (ALI) member that the State Department Legal Adviser was interested in hearing our views by early May on a White Paper authored by the Legal Adviser himself on the same date with regard to his final proposals for the implementation and ratification package. The White Paper (April 16) outlines the Legal Adviser's conclusion of the framework of ratification and U.S. implementation mechanism of COCA. This White Paper contained two major modifications from the draft Implementation Act discussed on March 5: (1) the use of federal Implementation Act instead of the state statute (Uniform Act) by the federal courts seized by Convention actions, and (2) reversal of the former plan for enforcement actions in the federal courts. The White Paper does not discuss whether or not the Legal Adviser had considered the four questions raised by an PIL official at the end of March 5 meeting when making his decision or whether these issues are for future discussion.

Based on information since April 16, the acceptance of the White Paper by other stakeholders is anything but certain.

#### **e. Our view of what is to come at the State Department and Legislatures**

Based on the presentation of the State Department Legal Adviser on March 5, and the April 16 White Paper, the priority for the Legal Adviser at this moment seems to be to hammer out a compromise text on a framework basis, which will be acceptable to the Senate. On March 5, the Legal Adviser demanded that every stakeholder make concessions so that the ultimate ratification package will be supported by a broad range of stakeholders with the formal endorsement of the Secretary of State.

Therefore, if NYSBA is to officially support the ratification of the Convention based on the State Department package, we should express our view that the White Paper framework is a tolerable or acceptable compromise, while expressing our reservations. Based on the way the Legal Adviser communicated with the stakeholders, our views on the federal question jurisdiction will not be likely to affect the Legal Adviser's position in the White Paper. However there may still be a scope for having our views reflected with respect to some minor but important technical issues.

We cannot predict for sure what will happen after the Legal Adviser will have heard the major stakeholders' views. Any further discussions at the State Department can move very fast or may be stalled for lack of consensus. We are "chasing a moving target" and thus must be able to change our strategy flexibly if NYSBA is to provide useful input on

various technical points in the final package that the Legal Adviser and the Secretary of State Clinton may put forward.

We were told by some officials that the view of NYSBA will have more weight with Congress than certain other organizations. Therefore, it is recommended that International Section and other sections work together to propose to recognize the COCA federal legislation as NYSBA's federal legislative priority, assuming that the State Department proceed on the basis of the White Paper. If the package reaches Congress, it is important that members of Congress will see that NYSBA as a whole supports ratification of COCA, not just the enactment of the Implementation Act. (Note that the proposal of this federal statute is quite different from the normal domestic federal legislative process, because the main text, the Convention, is given, the implementation framework has been prepared by ACPIL and Legal Adviser, and the main Congressional Action will be to vote up or down on the entire package).

#### **4. In-depth analysis of the COCA Convention**

##### **a. The United States' long-term international policy goal of global judicial cooperation under a treaty to promote global trade**

This convention was negotiated in accordance with the United States' major international trade policy of improving international trade and investment by increasing the transferability of judgments among nations. The initial goal for the treaty's negotiators was for the nations to agree on a comprehensive treaty regulating allocation of jurisdiction over international commercial lawsuits among the nations and guaranteeing mutual recognition and enforcement of such judgments around the world (i.e. a "double treaty" as explained above). The negotiations for such a multilateral treaty started at the Hague Conference on Private International Law (HCCH) in 1997. However, it soon became clear that this goal was too ambitious under the circumstances of that time, mainly due to different views between the United States and the European Union (EU) regarding the treaty's mandatory provisions on the jurisdiction of courts.

##### **b. Failure of comprehensive treaty on global jurisdiction, and the resulted scaled back treaty the Hague Convention on Choice of Court Agreements (COCA)**

The United States' negotiators decided that following the EU's preference to include mandatory jurisdictional provisions would be a non-starter based on the U.S. political environment, especially the difficulty in obtaining the necessary two-thirds consent of the Senate for ratification of such a treaty. They believed that such a system would be perceived as intruding too directly into the U.S. rules about the jurisdiction of domestic courts. In 2002, the negotiators scaled back the scope of the negotiation to aim at a limited scope convention for mutual recognition of foreign judgments based on the acceptance of jurisdiction under agreement of the parties (exclusive choice of court agreement). The U.S. negotiators judged that requiring the United States courts to accept jurisdiction based on the free choice of private parties would be less intrusive on U.S. courts and thus more acceptable to key U.S. constituencies. Moreover, the United States' promise to enforce foreign judgments where the foreign court's jurisdiction was obtained under party autonomy would promote the enforceability of U.S. judgment abroad under reciprocity. Thus, the international negotiators were able to agree on a limited scope Convention on Choice of Court Agreements, premised on a foreign court's jurisdiction conferred by the autonomous choice of the parties.

##### **c. Two levels of free choices, the sovereign's and private parties', under the COCA regime**

The main feature of this Convention has therefore two levels of free choice, (1) that of the sovereign nations whether to enter into this Convention and to what extent they

should be bound by various provisions of the convention under permitted declarations, and (2) that of the private parties (party autonomy). By design, the treaty negotiators chose provisions that would be least intrusive to the sovereignty of nations. The only major positive obligations upon the Contracting States are (1) to honor the parties' choice of forum, both in positive and negative ways, with respect to acceptance of jurisdiction over international disputes and (2) to honor the parties' choice of forum in the context of the enforcement of judgments. Otherwise, the Contracting States are free to use their own legacy procedural rules to enforce the Convention. For the United States, this means that, in theory, this Convention can work with the least disturbance to the preexisting federal-state balance of powers.

The COCA therefore regulates the jurisdictions of U.S. courts and foreign judgment recognition and enforcement at the most basic and minimal level in order to promote long-term international U.S. trade policy. As noted above, the United States is currently trying to reopen negotiations for a more comprehensive international jurisdiction and recognition/enforcement treaty at HCCH. U.S. ratification of COCA will be essential for the United States to move forward in achieving bi-partisan international policy goals for trade promotion through streamlined judicial cooperation across the world.

#### **d. The legal mechanism of domestic implementation of COCA under US jurisprudence – the question of self-executing vs. non-self-executing treaty**

Under this Convention, each Contracting State is responsible for enforcing this Convention under its domestic law within the guidelines of the Convention. In essence, COCA assumes that pre-existing domestic law will be utilized to enforce the State parties' obligations under public international law within the framework of the Convention's provisions.

Because the provisions of the Convention are sufficiently detailed and they mandate the State parties, through their courts, to affirmatively do something or refrain from something specifically, it is likely that a U.S. domestic court would regard most provisions of the Convention enforceable without the help of a domestic implementing statute (i.e. self-executing). However, some provisions of the Convention handle complex issues and it is desirable that the domestic statute clarify various issues that are likely to arise when implementing the Convention within the domestic legal framework. The U.S. State Department therefore determined to implement this Convention as domestic law by enacting implementing legislation at the federal and state levels. The domestic law authority in this area is *Medellin v Texas* Supreme Court case, 552 U.S. 491 (2008), which clarified that an international treaty may or may not be self-executing depending of the texts of the convention and the contexts, and also clarified that Congress may enact a domestic statute out of caution, even if the treaty's provisions are self-executing, because they will allow the parties to understand what legal obligations were created by the treaty provisions themselves.

However, based on *Medellin*, the determination of whether or not an international treaty's provisions are self-executing and create legal obligations under U.S. domestic law will be determined on case-by-case basis under multiple criteria; no one can assume for sure whether COCA is a self-executing treaty until the Supreme Court has the occasion to make a decision. Thus, the U.S. State Department and Congress have reason to take the safer course of assuming that COCA is not a self-executing convention and providing detailed statutory provisions to implement the Convention as domestic law.

#### **e. Impact of COCA's self-execution**

When we analyze the appropriateness of the US domestic implementation statutes, both at the federal and state levels, it is useful to consider the two scenarios.

##### ***(i) If COCA is a self-executing treaty***

Under the Supremacy Clause of the US Constitution, the treaty's provisions are supreme law of the land, and they preempt state law. As for the federal statute, the treaty provisions and congressional statutes have equal authority under the Supremacy Clause so that the general maxim of the law, the latter law supersedes the former law, applies. However under case law, the courts have been reluctant to declare earlier treaty provisions void merely because later congressional statute appears to conflict with the earlier treaty provision, because that would cause the United States to be in breach of its treaty obligations and therefore also in breach of public international law, possibly causing serious international relationship problems. The U.S. Supreme Court's Justice Stevens wrote in *Medellin* that such a breach of U.S. public international law obligations would jeopardize the honor of the nation. For this reason, the court will look at the provisions of seemingly conflicting federal statute and treaty provisions in an effort to harmonize them as much as possible.

Because COCA assumes that the domestic law provisions of a Contracting State will be utilized to discharge a State party's international law obligations (for instance see Article 14 and its treaty negotiation report), it is natural that the federal and state courts of the United States are responsible for implementing this Convention according to the preexisting legal framework of U.S. federalism unless the Convention itself mandates otherwise.

The last controversy to be discussed at the March 5 ACPIL discussions was the provision that would potentially mandate federal courts to apply state statutes (based on the enacted version of the Uniform Act), when a federal court is sitting in a state that has adopted the Uniform Act. The rebuttal was that the state Uniform Act will be enacted under Congress' approval and there will be no substantial difference between the federal Implementation Act and state Uniform Act provisions. (This discussion ended inconclusively. Under the White Paper (April 16) of the State Department Legal Adviser, this point was settled in favor of the use of the federal statute.) However if the

Convention is self-executing, the state statute that stands as an obstacle to the Convention itself will be preempted by the Convention (without regard to the federal statute). From the practical purposes, this difference may not be as serious as it appears since the state statute is merely an implementation of the underlying treaty provisions that directly bind the state courts under the Supremacy Clause. And some litigants may simply consider those issues that will arise in interpreting such a state statute as a federal question because ultimately the question is about the interpretation of the treaty itself, not a state statute as state law.

One of the four questions that a PIL official raised during the March 5 ACPIL, i.e. Item 3, whether to include a federal statutory provision to implement the language of Article 26 (relationship with other conventions), reflects the impact of whether COCA is self-executing. It was explained that not every article of the Convention needs to be “transcribed” into the domestic implementation statute because this PIL official concluded that many of the rules of the Convention are self-executing. He suggested the possibility of omitting the provisions of this Article 26 outside federal statute. Under this approach, a court can handle questions that directly arise from the Convention. Leaving some articles of COCA without any corresponding statutory language would make it clear that the State Department considered the Convention as self-executing and yet decided to recommend Congress for good order but not out of a belief that the COCA was not self-executing.

With respect to the international uniformity of interpretation provision of Article 23 of the Convention, the participants at June 15, 2011 ACPIL meeting were invited to offer ideas as to whether or not to include a federal statute section to implement this provision. NYSBA International Section offered a sample text of such a statute section. The State Department official decided not to adopt our suggestion to include the statutory provision in the “operative” provisions of the statute but rather did include it within the “preamble”, i.e. Congressional findings of section 103, non-operative provision. This is still worthwhile, since the U.S. Supreme Court interpreted a similar provision about the international origin and uniform interpretation of the Hague Child Abduction Convention in the domestic statute preamble. The Supreme Court gave the preamble language legal effect when the court interpreted the underlying convention and the statute.

We should note that Convention itself anticipates the use of legacy domestic laws to enforce choice of court agreements and foreign judgment enforcement under the Convention. The six members of the International Section Executive Committee stated that state laws that allow a more advantageous remedy to a foreign judgment creditor should survive preemption because such state law provisions decisions do not actually “conflict” with the Convention (citing the U.S. Supreme Court’s *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (cited in *AT&T* at 1753). We suggested that New York’s CPLR §5225 and state case law such as *Koehler v Bank of Bermuda Ltd.*, 12 N.Y. 4d 533, N.Y.S.2d 763 (2009) should survive for this very reason. Under the New York case law, CPLR §5225 allows a handover order against a garnishee who controls the asset of

the defendant located outside New York to enforce a “foreign” judgment when a New York state court has obtained personal jurisdiction over the garnishee.

COCA requires Contracting States to enforce foreign judgments according to its domestic law rules, subject to the Convention’s special rules (Article 14), which set minimum standards such as the limited bases for refusal to enforce a foreign judgment under Article 9 of the Convention.

With respect to the relationship between COCA and the existing Uniform Foreign-country Money Judgment Recognition Act (UFMJRA), it must be pointed out that COCA has a broader scope than UFMJRA because COCA covers non-monetary foreign judgments. There could be a possible conflict in the case of a foreign-country money judgment enforcement that UFMJRA has been traditionally governing. Following the above analysis, for the type of foreign country’s judgment that is subject to UFMJRA, to the extent that UFMJRA permits more advantageous conditions for enforcement, judgment creditors should be able to use UFMJRA.

***(ii) If COCA is a non-self-executing treaty***

If the Convention is not self-executing, some of the analysis above needs to be adjusted. However in the end, this should not cause major concerns. Under *Medellin v Texas*, both the federal and state governments are jointly responsible to discharge the United States’ international obligations under public international law in the case of a non-self-executing treaty (*Medellin* case found that the UN Charter’s International Court of Justice (ICJ) Statute was non-self-executing so that the ICJ judgment against the United States, which declared that Texas state court’s exercise of criminal jurisdiction against various Mexicans was an illegal violation of the Vienna Consular Convention, cannot be directly enforced against the state of Texas). A state’s violation of an international treaty, of course, will render the United States’ itself in violation of its international obligations. The *Medellin* court clarified that only Congress can take action to mandate state courts to follow an ICJ judgment if a state does not comply with U.S. treaty obligation.

In the case of COCA, it is expected that the Uniform Act will be adopted by several states based on the congressionally approved model and that the federal Implementation Act will be explicitly applicable to the remaining states. Therefore, a *Medellin*-like situation should not develop here. The proposed federal statute clarifies that any differences in language between the federal statute (federal Implementation Act) and the Uniform Act or its enactment in a particular state will be resolved in favor of the federal statute (Implementation Act §405(c)). As in the case of state arbitration law that is subject to the provisions of the Federal Arbitration Act (FAA) Chapter 2, implementing the New York Convention (1958) for enforcement and recognition of international arbitral awards, any state statute that stands as an obstacle to the overall federal policy must be preempted (see U.S. Supreme Court *AT&T* case in 2011, *supra*). The State Department Legal Adviser was satisfied by the solution of federal preemption language (out of precaution)

within the federal Implementation Act, which leaves no scope for any state statute that differs from the federal statute.

One potential area where the self-executing vs. non-self-executing nature of the Convention may have practical relevance is when one of the parties tries to establish federal question jurisdiction against the opponent's objection when a case under COCA is brought before a federal district court or a case is removed to a federal district court. As compared to a self-executing treaty scenario, it would be more difficult to claim federal question jurisdiction under a non-self-executing treaty when a party raises some legal issue that hinges on the interpretation or application of the Convention and a state court blatantly deviates from the course of action required by the Convention. Although the chances of such an extraordinary situations are probably very low, under the extreme situation, the Convention's self-executing nature, if recognized by the federal court itself, may open an opportunity to have those legal issues removed to the federal court system on a theory that some residual "arising under" jurisdiction (federal question jurisdiction) made available notwithstanding the jurisdictional limitations imposed by the federal implementation statute itself (Implementation Act § 204(a)).

#### **f. Importance of federal question jurisdiction directly under COCA**

We continue to believe that the ability of the federal court to review any legal issues concerning the interpretation of the Convention itself under the normal "arising under" jurisdiction (federal question jurisdiction) of 28 U.S.C. § 1331 will serve better to secure that the U.S. implements COCA in more effective and coherent manner. The International Section argued in its January 2012 submission that all actions brought under the Convention (both litigation and enforcement actions) should be eligible for federal question jurisdiction, among other reasons because the U.S. Supreme Court's certiorari jurisdiction is exercised only sparingly and any mishandling of Convention-related questions by state courts will not be corrected effectively if the Act does not confer independent federal question jurisdiction.

The State Department PIL and Legal Adviser ultimately did not adopt this view. Therefore, assuming that the proposed federal Implementation Act provisions remains the same in the final text of the ratification package and adopted by Congress, state bar associations across the country will have to monitor COCA Convention state court cases diligently to detect any signs of diverging case law as quickly as possible. (An opponent of our views claimed that even if issues had to be addressed only under the federal courts, the federal case law can still split among different circuit.)

#### **g. Party autonomy limited by sovereign's freedom that is allowed under the Convention**

There is a question as to how flexible COCA is, in terms of the scope of the sovereign's obligations as well as that of private party autonomy. Various issues in implementing the

Convention arise with respect to the proper balancing of the two different types of freedoms, the sovereign nations' freedom to limit the scope of its obligations vs. the ability of private parties' to utilize the courts of a jurisdiction that has no connections to the parties or disputes.

The Convention clarifies that private parties' choice of court agreements will not be honored if the specifically chosen court lacks jurisdiction under domestic allocation of jurisdiction among courts within the country based on the subject matter of the dispute (Article 5(3)). Thus, party autonomy cannot override the sovereign's public policy by choosing an improper court within the chosen country. The drafters of the convention used an example based on the United States courts to illustrate how this principle of Article 5(3) applies. If the parties choose to handle their dispute in a federal court in the State of New York, but the dispute does not include facts that trigger federal jurisdiction (neither federal question jurisdiction nor the diversity jurisdiction), the parties' choice of specific courts would fail. However, the negotiators of the Convention decided to allow the Contracting States (nations) to provide, under domestic law, for a mandatory transfer of a case to another court within the same country that would have subject matter jurisdiction over the type of dispute (e.g. a court of general jurisdiction). Such a provision would be especially important in the United States, so that, in the example just cited, the case could be transferred to the New York state courts.

Generally speaking, a Contracting State of COCA is responsible for accepting jurisdiction over a dispute when the private parties choose to use the judicial system of that country. Adopting "saving" legislation to transfer a case within the country's courts is consistent with the spirit of the Convention. However, since this exceeds the minimum duty of a Contracting State under the Convention, specific domestic legislation is needed. If the U.S. Congress decides that this saving statute is desirable to maintain the good reputation of the United States within the international trade community, it must enact a federal law to require a federal court to transfer a Convention litigation to a state court if the federal court finds that it lacks the subject matter jurisdiction due to the lack of diversity or federal question.

#### **h. COCA's own provisions regarding territorial units of non-unified State**

COCA includes a federal-State clause (Article 25), which allows maximum flexibility both for the sovereign states and for the promotion of party autonomy. Any provisions of the Convention that refers to the obligations of a court of a Contracting State can be interpreted as either the obligations of a federal court or a state court depending on the context based on the "as appropriate" language of the Convention Article 25.

In applying COCA, the Convention's language with respect to (Contracting) State can be interpreted as the entire Contracting State or the territorial unit at issue (for instance, the state of New York) (Article 25(1)). Article 25(2) clarifies that the enforcement of judgment from one territorial unit of a Contracting State in another territorial unit of the same Contracting State is not subject to COCA. Therefore, even though a technical literal

reading of COCA would suggest that a California judgment is subject to COCA when it is sought to be recognized in New York, this is not the case.

Notably, the proposed Implementation Act does not contain any provision that has been transcribed from the language of Article 25, and therefore Article 25 must be self-executing at a U.S. domestic court. The International Section submitted a comment to PIL in August 2011 requesting the Implementation Act to clarify the operation of Article 25 in certain cases, but the new version of the draft text (February 2012) does not reflect this comment. It is therefore assumed that the future courts will generate a federal common law based on their interpretation of Article 25.

The issue arises for instance, when the parties agree to use “courts of the United States” or “an American court” (when the context is clear that the parties intended to use a court within the United States), a plaintiff may bring a case under COCA in the U.S. Virgin Island as well as New York; and worse, the other party can file a counter suit at another jurisdiction like Guam or Alaska. There is no clear rule to regulate parallel litigations either within COCA itself, the Implementation Act, or elsewhere in existing federal law. Under Articles 5 and 6, none of the courts of several U.S. states or territories seized with the same matter must give up jurisdiction over the case. So courts will have to interpret Article 25 and existing US domestic common law, and other countries’ precedents (especially Canada) under Article 23 innovatively to solve such problems.

COCA also includes a more drastic measure that would allow a Contracting State to apply COCA only to one or several territorial unit within the Contracting State if it makes a declaration under Article 28 (the so called “Canada provision” is common to many Hague conventions). A Contracting State can add or remove a territorial units at any time after ratification by filing successive declarations with the depositary for Convention ratifications and accessions from time to time. This allows maximum flexibility in accordance with the political environment of a particular Contracting State.

The United States, we understand, will not make an Article 28 Declaration, even with respect to territorial units other than states (such as the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands). In theory, however, once the Convention is ratified by the United States, a future U.S. administrations could remove unwilling states from the scope of the territorial application of COCA. Another possibility is that if the ratification process this time fails due to the lack of the Senate’s consent, a state like New York, which thrives on international trade may campaign to have COCA ratified with a condition to limit its application to the state of New York only or several states that want the Convention to be ratified for their benefit.

NYSBA submitted a comment in August 2011 regarding the impact of a foreign nation’s Article 28 declaration (for instance China enters into COCA with respect to only Hong Kong and not the Mainland). Based on the updated draft Implementation Act text in February, this issue has not been considered by the PIL. We assume that in the future, domestic courts will need to consider complex issues based on their interpretation of Articles 25 and 28 on the basis that the Convention is self-executing under U.S. law.

In summary, COCA allows Contracting States with non-unified legal systems to act flexibly, and in conjunction with other provisions, COCA is designed to permit territorial units of a Contracting State (such as U.S. states) to preserve their existing legal orders and traditions to the maximum level.

#### **i. Articles 19 and 25 and autonomy of states of the U.S. under the Convention**

The U.S. State Department takes a view that Article 25's flexibility also applies if the United States makes a declaration, on behalf of certain U.S. states, to reduce the scope of U.S. international obligations under Article 19 (exclusion of unrelated cases). It is the intent of the U.S. State Department that the United States will make a declaration under Article 19 to exclude the obligation of a chosen court to accept a case under a choice of court agreement where the case and parties to the dispute have no connection to the jurisdiction.

Notably, under the proposed federal statute (Implementation Act § 202(b)), this exclusion will only apply to the state courts but not to the federal courts. Under this planned Article 19 reservation, state legislatures are free to enact a state statute to exclude unrelated cases without the risk of preemption under the Supremacy Clause or causing a violation of U.S. international obligations under public international law.

However, the draft federal statute makes it clear (Implementation Act § 202(c)) that the State Department does not intend to expand Article 19's "freedom" to exclude unconnected cases in the federal courts. In other words, federal courts will remain as a last resort to discharge U.S. international obligations under the Convention, in the Convention. Therefore, even if we must concede the point that the Implementation Act does not give an independent basis for federal question jurisdiction for cases under the Convention (Implementation Act § 204(a)), the federal district court should still have jurisdiction in this particular case to hear an "unconnected case" even if the federal court is sitting in a state that has made an actual declaration, in order to secure the coherent implementation of national policy favoring cross-border recognition judgments as a tool to encourage international trade and commerce.

This need is highlighted in the following problem: if an exclusive choice of court agreement chooses "courts of New York" and if New York state has enacted a statute to decline to hear unrelated cases under the authority given by the Article 19 declaration, and if it is further assumed that the case does not involve diversity (e.g. a dispute of two foreigners) and there is no federal question in the underlying claims, then the parties cannot bring the case to New York federal district court either, even through the Article 19 implementing federal Act (§ 202(c)) section tells that federal court cannot decline to hear non-related cases. It would represent a more effective implementation of U.S. policy objections were the federal Implementation Act to allow the federal courts to have jurisdiction over such "orphan" situations.

When a state opts out of this class of litigation, the state cannot complain that the federal government would be “taking over” the traditional state government’s sovereign power or its business because the state voluntarily declined to exercise jurisdiction. If the Congress were to give federal courts the authority to hear these cases despite the fact that the federal district court does not otherwise have jurisdiction as a matter of national policy under the Convention, the state has no reason to object to this move as a “federal encroachment.” The federal court can remedy the fact that the state is not willing to share the burden of this “unfunded federal mandate” and it makes logical sense that the new obligation created under the national policy be borne by the federal government.

#### **j. Article 19 declaration’s practical impact on the state of New York**

As discussed above, Article 19 of the Convention allows each Contracting State to make a declaration to exclude unrelated cases from its the obligation to accept jurisdiction to hear cases under private parties’ exclusive choice of court agreements. In the case of the United States, the State Department plans to make such a declaration specifying that that the US declaration only applies to state courts.

Based on the implementation plan (federal implementation Act and the Uniform Act), each state will be given a choice as to how to exercise the power to exclude all or some unrelated cases. For this purpose, unrelated cases are those cases in which neither the parties nor the facts of the case has connection with the particular state (not the entire United States).

Therefore, for instance, a New York state court could exclude the case of a dispute between residents of Mexico and Canada with respect to a sale of movable goods located in Florida when the parties exclusive choice of court agreement designate courts in “the state of New York”, because none of the parties or facts are connected to state of New York (the Florida property is within the United States but for the application of Article 19 declaration with respect to state of New York, this does not help). However, if the same case is brought to the federal district court for the Southern District of New York, the federal District Court must hear the case (this fact pattern gives federal question jurisdiction based on the application of the UN Convention on the Contracts for International Sale of Goods (CISG)), because Article 19 declaration does not apply to the federal courts. But if the goods are “security” under the CISG definition and therefore not governed by the CISG according to its terms, choice of courts agreement would fail because there would be no federal question jurisdiction or diversity jurisdiction.

If New York does not adopt the Uniform Act, according to the proposed federal Implementation Act §202, New York would need to enact a short statute if it wanted to exclude unrelated cases wholly or partially or on certain conditions. If New York adopts Uniform Act, it must choose one of the options allowed under §10.

New York currently accepts jurisdiction to hear unconnected cases based on two conditions (choice of New York law as governing law and the minimum dispute amount

of \$1 million, GOL §5-1402). Assuming that New York does not adopt the Uniform Act, it is recommended that New York State legislature either (a) enacts a short statute to mirror GOL §5-1402 provision (technically a jurisdiction limiting exclusion statute) implementing COCA article 19 declaration provision and Implementation Act §202(b), or more preferably (b) not enact any such statute so that the COCA parties can enjoy even broader New York forum jurisdiction without regard to the choice of law of New York law or the amount at stake in the dispute.

## 5. Conclusions

We agree with the Legal Adviser of the State Department that the drafting of the proposed federal and state statutes to implement COCA is close to the final stage, and if there is a closure it should not be far away. It is true that both “sides” within the group of stockholders have made a lot of concessions and a grand compromise may be within reach. However, it is also possible that the stakeholders will not be able to overcome their final differences and the Legal Adviser may decide to abandon the project and shelve the Convention “for the next generation,” as he also suggested to the participants on the March 5 ACPIL meeting.

On April 3, the Legal Adviser talked about a “transition” within the State Department that will take place regardless of whether President Obama is re-elected. It is well known that the Secretary of State intends to leave her office after the end of the first term of President Obama. We cannot speculate whether or not the Legal Adviser will continue to serve for the new Secretary of State, but we should assume that the change of the Secretary is likely to change the priorities of the State Department.

The Legal Adviser has indicated on a number of occasions that a private international law treaty like COCA does not traditionally receive a high level of attention from the Secretary of State, that the current Secretary is an exception and that this has created a unique opportunity for COCA. A very tiny portion of State Department resources is allocated to private international law, while the traditional focus of the State Department has always been on the traditional diplomacy and public international law issues such as the arms control, war and peace, national security and humanitarian aid. Therefore there is a substantial reason to believe that the window of opportunity to ratify the COCA Convention will be closed soon.

If the Legal Adviser thinks that there is a good chance for winning the Senate approval, he will continue to devote his energy and attention to COCA and its US domestic implementation, but if not, his priority will quickly shift to other matters. Any occurrence of an international crisis, like a new war or catastrophic disaster in any corners of the world, will consume the Legal Adviser’s energy to urgent public international law issues. Even the result of new discussions at The Hague on the reopening of the HCCH Judgments Project can take away his attention from COCA if the COCA stakeholder’s final impasse does not quickly melt away.

Considering the ever-changing moving target to achieve the ratification of COCA, NYSBA must take a pragmatic approach and be prepared to act nimbly and flexibly.

There are no serious remaining deal-breaking issues in substance in our view. However the perception of a large gap among the stakeholders may still kill the deal. From the International Section’s view, the following are remaining negotiable issues that will affect the final text of the package:

1. Preservation of more favorable state law procedures while accepting the exclusivity of the Convention measures for enforcement of convention judgment (Item 4 of March 5 Four Questions)
2. Enacting a saving federal statute to mandate a transfer of a case from a federal court to a state court of general jurisdiction when the parties improperly choose a federal court or the federal court otherwise finds that it lacks subject matter jurisdiction
3. Possible elimination of federal statutory provision (Implementation Act §204) to explicitly deny federal question jurisdiction for the Convention-based litigation and enforcement actions
4. Safeguard against possible enforcement of non-Contracting State judgments that violates parties' choice of court agreement by providing uniform federal rules for denial of such judgments within the U.S. (both the federal and state courts) in line of the precedent of the SPEECH Act of 2010 (Pub Law 111-223), i.e. 28 U.S.C. § 4102. (Item 2 of March 5 Four Questions)
5. *Forum non conveniens* prohibition for enforcement actions (Item 1 of March 5 Four Questions)
6. Whether the federal statute should provide provisions for article 26(5) declarations in anticipation of future jurisdiction or judgment enforcement treaties (Item 3 of March 5 Four Questions)
7. Article 19 exclusion of state court jurisdiction for unrelated case (cf. Implementation Act §202(a) and (b)) – Should congress provide federal court jurisdiction when states excludes a class of cases as an exception, to preserve the choice of the United States as a dispute resolution forum?

NYSBA should consider what would be the best strategy if the Secretary of State signs off the package and the issue moves to Congress. While the ratification package is being developed solely within the State Department, the discussions mainly concern technical legal issues. However once the matter is before Congress, practical bread and butter issues affecting the legal service industry of State of New York and general economic issues of U.S. job creation (or shipping out U.S. jobs abroad) that affect other industries and international trade will become more important. New York City's economy is supported by the global financial industry and other knowledge-intensive service industries that support, or that are supported by, the global legal industry, which in turn supports these other service industries.

This will be a good opportunity to remind the members of Congress that COCA was negotiated as a trade promotion treaty, not merely for the sake of answering legal scholars' and judges' concerns regarding narrow judicial administration matters.

It is important to stress that the quality of US implementation will affect the future of New York jobs and prosperity because, under a regime of free transferability of judgments across borders, the discipline of free trade will work to eliminate the weak players in the world. Depending on how this will be handled, New York will emerge as a winner or loser in this global competition. New York will have to directly compete with

London and Singapore if the territorial scope of the COCA Convention eventually expands to cover these global financial centers.

The United States' early ratification will earn us extra time to prepare ourselves for the eventual full global competition of legal services within the inevitable trend of globalization in the 21<sup>st</sup> century.

The U.S. government negotiators took a leadership role in negotiating this Convention with this policy goal in mind. The fact that the U.S. signed the Convention in 2009 as a second nation ahead of the EU shows the significant national interest is at stake. The United States should continue to play a leadership role in harmonizing global rules for jurisdiction of courts and the enforcement of foreign judgments in international commercial litigations in order to promote its national economic policy goals and contribute to the creation of a business-friendly environment for cross-border trade and investment. Ratification of the Convention should be the first and most important step to achieve this important national goal.

## RESOLUTION OF THE NYSBA INTERNATIONAL SECTION

RECOMMENDING THAT NYSBA ENDORSE US RATIFICATION OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS AND ENACTMENT OF US IMPLEMENTATION LEGISLATION AND ADOPT THE SAME AS NYSBA FEDERAL LEGISLATIVE PRIORITIES

WHEREAS, on June 30, 2005, the Final Act of the Twentieth Session of the Hague Conference on Private International Law ("HCCH") was signed on behalf of the Member States of the HCCH in the Peace Palace at The Hague, and this Final Act included a new multilateral treaty, the Convention on Choice of Court Agreements (the "Convention");

WHEREAS, the Convention is designed to become the "litigation counterpart" to the New York Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") which is now adopted by some 144 States Parties, so that the Convention would provide a parallel regime of judgment recognition when parties exclusively agree on the courts of a state party for resolution of their disputes;

WHEREAS, the Convention represents the fruits of many years of negotiations among the nations participating in HCCH to develop an instrument on the recognition and enforcement of foreign judgments;

WHEREAS, the United States took a leadership role in negotiating the Convention in order to promote the United States' national interest, especially to increase the likelihood that a judgment of federal and state court of the United States on commercial matters will be recognized and enforced abroad;

WHEREAS, the Convention is intended to provide assurance that exclusive choice of court agreements concluded in civil or commercial matters will be effective, and that resulting judgments will be recognized and enforced;

WHEREAS, those assurances will enhance certainty in commercial contracts and promote international trade and investment;

WHEREAS, the United States signed the Convention on January 19, 2009;

WHEREAS, Mexico has already ratified the Convention and, upon ratification of a second country, the Convention will come into force;

WHEREAS, the U.S. State Department, whose position on the Convention has been developed by the Legal Advisor of the State Department, believes that the

Convention should be ratified on the condition that a detailed federal Implementation Act be adopted by Congress;

WHEREAS, the U.S. Supreme Court has clarified in *Abbott v Abbott*, 130 S.Ct. 1983 (2010) that the views of the State Department bear special importance in interpreting international treaties;

WHEREAS, the State Department proposes to recommend to the President that he propose to Congress that the Convention be implemented at the federal level under a federal Implementation Act called the “Choice of Court Agreements Convention Implementation Act” (the “Federal Act”);

WHEREAS, the State Department proposes to recommend to the President that he recommend to Congress that the several states of the United States be afforded the opportunity to implement the Convention at the state level pursuant to the principle of “coordinated federalism,” with the options of either (1) enacting a state statute that adopts a Congressionally-approved version of the Uniform International Choice of Court Act (the “Uniform Act”) or (2) accepting application of the federal Implementation Act to the state courts, subject to the strict condition in either case that state enactments of the Uniform Act and courts that generate different results from those under the federal Implementation Act will be explicitly preempted (the said “Federal Act” and “Uniform Act” being referred to hereafter as the “implementation legislation”);

WHEREAS, U.S. State Department is considering whether to recommend to the President of the United States that he formally request the U.S. Senate to give its advice and consent to U.S. ratification and also request the U.S. Congress to enact the aforementioned implementation legislation subject to the terms and conditions set forth in the April 16, 2012 “White Paper” of the Honorable Harold Koh, Legal Adviser to the Secretary of State;

WHEREAS, the Final Report of the New York State Bar Association (NYSBA)’s Task Force on New York Law in International Matters, which was adopted by the New York State Bar Association’s House of Delegates on June 25, 2011, asks NYSBA to further study the issues with a view to recommending U.S. ratification of the Convention;

WHEREAS, the International Section of the New York State Bar Association (International Section) has been working on issues related to the Convention since October 2010; has submitted several papers on technical issues to the State Department Assistant Legal Adviser for Private International Law; and participated in public meetings of the Secretary of State’s Advisory Committee on Private International Law regarding the effective implementation of the Convention by the United States;

WHEREAS, the International Section strongly believes that securing ratification is very important to build an international regime for the recognition and enforcement

of judgments and to thereby promote cross-border trade and investment by strengthening the legal foundation for the enforcement of commercial and financial undertakings and commitments;

WHEREAS, the International Section believes also that widespread ratification of the Convention will promote the world-wide rule of law and encourage more comprehensive efforts to build a worldwide system for recognition and enforcement of court judgments;

WHEREAS, the International Section has adopted as Long-term Missions to serve as “Custodian of New York law as an International Standard” and to “Monitor of International Law-Making Activities at the United Nations”;

WHEREAS, the development of international private international law treaties at HCCH complements the efforts of UNCITRAL (to which the New York State Bar Association is an active non-Government Observer) to establish the global rule of law in the areas of international trade and commerce; and

WHEREAS, the International Section believes that proper implementation of the Convention within the United States will be able to attract more international legal services from around the world to New York and solidify the position of New York as a preferred forum for international dispute resolution and the position of New York law as a preferred governing law for international transactions;

NOW THEREFORE, the Executive Committee of the International Section hereby resolves:

To recommend as a special matter to the Officers and Executive Committee of NYSBA that NYSBA endorse U.S. ratification of the Convention by the President of the United States with the advice and consent of the U.S. Senate and the enactment of the implementation legislation, subject to the terms and conditions of the White Paper, and to adopt such ratification and enactment as federal legislative priorities of NYSBA;

To authorize the officers of the International Section to actively disseminate information about the importance of the Convention, including the Section’s technical studies and its efforts to support ratification of the Convention, and take all such steps as shall be necessary or advisable to assist NYSBA to promote the ratification of the Convention and the enactment of U.S. implementation legislation, subject to the terms and conditions of the White Paper, in connection therewith during the current 112th Congress, or if such a process is delayed beyond the current terms of Congress and President, to assist NYSBA to continue working for the ratification of the Convention and the enactment of the implementation legislation as soon as possible in the future; and

To urge all the Committees and Chapters of the Section to do everything in their power to assist NYSBA in the accomplishment of this goal.

May 19, 2012

## **Executive Summary of a Report on Hague Convention on Choice of Courts Agreements**

**By Albert Bloomsbury**  
**May 7, 2012**

### **a. Hague Convention on Choice of Courts Agreements**

The Hague Convention on Choice of Courts Agreement (the “Convention”) is an international convention on the jurisdiction of courts and the enforcement of foreign judgments in international commercial dispute resolution. It was adopted in June 2005 at the Hague Conference on Private International Law (HCCH) under the leadership of the United States and other nations. The Convention was negotiated and adopted for the promotion of trade through effective judicial cooperation across the world.

This Convention was the result of many years of intensive international negotiations at HCCH. Initially, nations began their talks under an ambitious plan to adopt a comprehensive multilateral convention that would: (i) regulate the convention States Members’ exercise of jurisdiction over international commercial disputes; and (ii) guarantee the transferability of judgments among the States. However, this comprehensive treaty negotiation proved to be premature under the conditions at that time. The major obstacles were the significant differences in ideas about jurisdiction between the common law nations and civil law nations. In addition, it became clear that direct regulation of a sovereign nation’s exercise of jurisdiction under a treaty would be an obstacle to securing the necessary advice and consent of the U.S. Senate to U.S. ratification because that would require a much deeper adjustment of the functions of U.S. domestic courts than the Senate was likely to accept.

As a result, the nations agreed to scale back negotiations to limit the scope of the treaty to cover the exercise of jurisdiction and recognition of judgments based on party autonomy. One major consideration of the U.S. negotiators was to make any such agreement less intrusive to the American legal tradition and judicial system so that the eventual treaty text would be acceptable to the Senate and win the necessary two-thirds majority consent. The State parties were able to agree on, the Convention, with this more limited scope, in June 2005.

### **b. What the Convention achieves for international commercial disputes**

In a sense, the Convention provides recognition of judgments of a court of a Contracting State by other Contracting States in a manner that is similar to the way the New York Convention (1958) guarantees international recognition of foreign arbitral awards by courts of the States that are parties to the New York Convention. Under the right conditions, international recognition of adjudications by domestic courts of international commercial disputes under parties’ exclusive choice of court agreements pursuant to the Convention could become as important as international recognition of arbitral awards

under parties' arbitration agreements pursuant to the New York Convention, which is currently accepted by over 140 countries.

This Convention allows private party autonomy to choose an exclusive jurisdiction for dispute settlement under parties' exclusive choice of court agreements. The Contracting States guarantee mutual enforcement of judgments that were obtained from courts of other Contracting States as a result of such agreements.

The Convention will take effect when two Contracting Parties (countries and regional integration organizations like the European Union (EU)) ratify it. Since Mexico has already ratified the Convention, it should become effective by virtue of U.S. ratification if the United States is the next signatory to ratify the Convention. Afterwards, each ratification by a signatory to the Convention and accession by a non-signatory will expand the territorial scope of the Convention.

Sound, transparent and harmonious global rules for jurisdiction and the transferability of judgments should create a better business environment for the entire global economy and increase jobs and wealth across the board. The success of the Convention's U.S. implementation will be critically important not just for New York's legal services industry, which will benefit from an increased volume of international legal services based in New York City, but also for the future of overall global economic growth. (See below Item e. for further discussions on this point.)

### **c. Scope and functioning of the Convention**

The scope of the Convention is limited to international business disputes. The Convention excludes consumer related cases, employment cases, patent related cases, family law matters and real property matters and other areas that tend to be subject to public policy and the mandatory provisions of the jurisdiction where the parties or property is located.

The Convention provisions are created with a view to preserving domestic law and legacy judicial procedures to the greatest extent possible and to imposing on Contracting States a minimum level of obligations to exercise or not to exercise jurisdiction to hear a covered case and to enforce the resulting judgment from another country that is a party to the Convention.

The Convention imposes on the Contracting States the following three obligations:

- (1) The Contracting State whose court or courts are chosen by the private parties' "exclusive choice of court agreement" (Article 3) must, in general, accept jurisdiction to hear the dispute (Article 5), provided that the issue is "international" (Article 1) and does not concern one of the excluded matters (Article 2).
- (2) The other Contracting States must decline to exercise the jurisdiction on the same matter (Article 6).

- (3) The other Contracting States must, in general, recognize and enforce the resulting judgment of the court of the chosen country (Article 8).

With respect to the exercise of the jurisdiction to hear the case ((1) above), private parties may, in their agreement, choose either one or more specific courts of a Contracting State or the courts of a Contracting State in general. The parties' choice of a specific court or courts is respected if this does not conflict with the Contracting State's internal allocation of jurisdiction among its domestic courts.

#### **d. U.S. ratification and domestic implementation of the Convention**

The United States signed the Convention in January 2009 on the last day of the Bush administration. The task for ratification and the preparation of domestic laws to implement the Convention was left to the current Obama Administration. The U.S. State Department has been preparing the ratification package over the last three years, under the direction of the Secretary of State's Legal Adviser and the Office of Private International Law (PIL).

It is expected that the Senate's consent to ratification will be conditioned on Congress's adoption of a federal implementing statute, because the State Department believes it is desirable to enact a domestic statute to implement the Convention as domestic law itself to create certainty and orderliness in the implementation process (even though the Convention may be otherwise self-executing).

Because the Convention will affect both the federal and state courts, Congress's legislation (the Choice of Court Agreements Convention Implementation Act, referred to as the "Implementation Act" hereafter) is expected to include a provision that approves a specific version of a new uniform state law (Uniform International Choice of Court Act, or "Uniform Act" hereafter) and to give each state an option whether (i) to adopt the Uniform Act as state statute, or (ii) to take no further action and simply permit the Implementation Act to apply to state court proceedings.

The Legal Adviser of the State Department has indicated that the drafting of the proposed federal and state statutes to implement the Convention is close to the final stage. The Legal Adviser has indicated that a private international law treaty like the Convention does not traditionally receive a high level of attention from the Secretary of State, that the current Secretary is an exception, and that this has created a unique opportunity to achieve ratification of the Convention.

If the Legal Adviser thinks that there is a good chance for winning Senate approval, he will continue to devote his energy and attention to the Convention and its US domestic implementation. In our view there are no serious remaining deal-breaking issues in substance. However the perception that there is still a large gap among the stakeholders may still kill "the deal," and in this case, U.S. ratification of the Convention may be delayed a very long time as other priorities crowd it off the international policy agenda

and therefore the viability of the Convention itself will become uncertain as other nations and the EU will not likely to join the Convention without the United States' first ratifying it.

**e. Long-term impact of the Convention in the global trade to New York and the U.S. economy**

The quality of U.S. implementation of the Convention will affect the future of New York as a center of global legal services because, under a regime of free transferability of judgments across borders, the discipline of free trade will work to eliminate the weak players in the competition for global legal services. The United States' early ratification of the Convention will earn New York extra time to prepare itself for the eventual full global competition of legal services, with the inevitable trend of globalization in the 21<sup>st</sup> century and the territorial expansion of the Convention over the coming years.

U.S. government negotiators took a leadership role in negotiating this Convention with this policy goal in mind. The fact that the United States signed the Convention in 2009 as the second signatory nation, ahead of the EU, shows that a significant national interest is at stake. The United States should continue to play a leadership role in harmonizing global rules for jurisdiction of courts and the enforcement of foreign judgments in international commercial litigation. That will promote its national economic policy goals and contribute to the creation of a business-friendly environment for cross-border trade and investment in all areas of the world. Ratification of the Convention should be the first and most important step to achieve this important national goal.

**f. NYSBA International's involvement in U.S. ratification issues**

The International Section has been actively working on this project since October 2010 with close collaboration with the U.S. State Department's Office of Private International Law ("PIL") under Legal Advisor of the State Department. More than a dozen members have been involved in this project over the past 18 months. We submitted various comments formally and informally on a number of technical points to the PIL Office. On March 5, 2012, six members of the Executive Committee of the International Section attended a public hearing on this issue in Washington, D.C. Subsequently, the same six members submitted two separate papers in their individual capacities to assist the deliberations of the Legal Adviser and PIL Office. Most recently, they submitted a joint comment regarding the Legal Adviser's April 16, 2012 White Paper, which describes a compromise on the framework issues for domestic implementation legislation for the Convention. They expressed the view that the framework outlined in the White Paper was a "tolerable" compromise, notwithstanding its failure to accept the International Section's view on conferring maximum federal question jurisdiction over actions arising under the Convention, because they believed it was important to secure ratification of the Convention as soon as possible and that the implementation legislation could possibly be amended later on based on experience with the proposed implementation framework.

It is recommended that the International Section Executive Committee follow the above view and that it adopt a resolution to request the NYSBA Executive Committee to promote U.S. ratification of the Convention and congressional enactment of appropriate U.S. implementation legislation during the current terms of the President and the Congress and to adopt the same as NYSBA federal legislative priorities.



## **Implementation of the Hague Convention on Choice of Court Agreements in the United States**

### **I. The COCA and its Implementation Process**

On June 30, 2005, the Final Act of the Twentieth Session of the Hague Conference on Private International Law was signed on behalf of the Member States of the Conference in the Peace Palace at The Hague. The Final Act includes a new multilateral treaty, the Convention on Choice of Court Agreements (COCA) (Attachment 1). The COCA is designed to become the “litigation counterpart” to the New York Arbitration Convention, a highly successful regime for recognition of arbitral awards that is now adopted by some 144 States Parties. The COCA would supplement that arbitration-recognition regime with a parallel regime of judgment recognition when parties exclusively agree on a particular court for resolution of their disputes. Like the New York Convention, the COCA establishes rules for enforcing private party agreements regarding the forum for the resolution of disputes, and rules for recognizing and enforcing the decisions issued by the chosen forum.

On January 19, 2009, after interagency discussion, the outgoing Legal Adviser of the U.S. State Department, John Bellinger, signed the COCA on behalf of the United States. The United States was the first country to sign the Convention (although Mexico had earlier acceded to the COCA), culminating nearly two decades of activity by the Office of the Legal Adviser. The negotiations that ultimately led to the Convention on Choice of Court Agreements began in 1992 with a request from the United States for the negotiation of a broad convention on jurisdiction and the recognition and enforcement of foreign court judgments. That effort resulted in a Preliminary Draft Convention in October 1999, which was further revised during a Diplomatic Conference in June 2001. But the 2001 text left many problems unresolved, leading the U.S. and other countries to redirect their efforts toward a convention of more limited focus.

At the outset of the Obama Administration, the Secretary of State, Hillary Rodham Clinton, directed the Legal Adviser to explore all avenues for securing implementation of the COCA under U.S. domestic law, with a goal toward securing advice and consent and domestic implementation of the COCA as soon as possible,

and ideally before January 2013 (four years after the treaty was signed for the United States). Since then, the Legal Adviser and his staff have devoted thousands of hours to carrying out the Secretary's directives.

Some of the most salient steps include:

- Consulting DOJ's Office of Legal Counsel (OLC) on the constitutionality of specific proposals and the Office of Foreign Litigation (OFL) on the implementation of the Convention.
- Holding several meetings of the Department of State's Advisory Committee on Private International Law to obtain the views of academics, practitioners, and groups such as the Uniform Law Commission, the American Law Institute, the New York State Bar Association, the New York City Bar Association, and the Maritime Law Association.
- Participating in a Working Group of the American Society of International Law (ASIL), chaired by Professor Edward Swaine of The George Washington Law School, to discuss contested implementation issues.
- Participating as an observer in the Drafting Committee established by the Uniform Law Commission to draft a uniform act to implement the Convention.
- Conducting outreach to the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States and the Conference of Chief Justices.

## II. Principles Governing Implementation

In determining how to implement private international law conventions, the State Department is regularly guided by several goals:

Assurance that the implementation approach taken by the United States will result in U.S.

compliance with its international obligations

Taking into account the historical allocation of relevant federal and state interests

Providing certainty in transactions

Promoting transparency

Taking into account the views of potential treaty partners regarding implementation

The Hague Convention on Choice of Court Agreements applies generally to commercial contracts of an international character. It is based on three pillars: (1) a court chosen by the parties to resolve disputes shall hear the case; (2) a court not chosen by the parties shall decline to hear the case; and (3) the judgment of the chosen court shall be recognized and enforced in other Contracting States.

The Convention's particular context reinforces the significance of several of the above-mentioned factors. First, beyond the obvious need to ensure that the United States fulfills its international obligations, U.S. implementation must be sufficient to persuade potential treaty partners to themselves ratify the Convention; without wide-scale adoption, the objective of ensuring that U.S. judgments can be enforced abroad will be frustrated. Second, the Convention will be of little use if choice of court agreements are not used in commercial transactions. Given the availability of the New York Convention, U.S. implementation must be sufficient to persuade transacting parties that choice-of-court provisions afford certainty and clarity that compares with or is superior to the arbitration alternative.

### III. Proposed Implementing Legislation

We have sought to develop proposed legislation to facilitate implementation of the Convention in the United States, without prejudice to the prerogatives of the Congress in this regard.

#### A. The Cooperative Federalism Approach

In addressing the issue of implementing legislation, some have argued forcefully that the Convention, as a treaty, should be implemented -- like the New York Convention (which is implemented by the Federal Arbitration Act) -- exclusively through federal law. It is said that this method would best serve the goals above. Adherents of that approach say that it would be more readily understood by foreign litigants and would promote greater consistency in the interpretation and application of the Convention by courts in the United States. Other have advocated equally forcefully for a "cooperative federalism" approach involving parallel federal and state legislation, allowing states to opt out of the federal statute (Version #6 of the proposed federal implementing legislation is at Attachment 2) and instead implement the Convention through adoption of a uniform act developed by the Uniform Law Commission (the current draft of the Uniform International Choice of Court Agreements Act is at Attachment 3). Adherents of that approach explained that the recognition and enforcement of foreign judgments have generally been governed by state law. They also believe that having relevant state law would facilitate the effective implementation of the Convention in state courts. It was argued that a "two statutes" approach would be consistent with the historical allocation of federal and state interests in this area and also promote certainty and transparency without unduly sacrificing the other goals.

Faced with this threshold question, and after considerable debate and taking into account the goals identified above, it was agreed to proceed with the second, cooperative federalism approach. This constituted a very significant concession by those who would have favored the traditional approach of implementation through federal legislation only. It was broadly agreed that if this approach were pursued,

care must be taken to ensure sufficient uniformity between the federal and state legislation, both of which should ensure U.S. treaty compliance so that potential treaty partners and private parties would benefit from Convention ratification (i.e., that taking into account the historical federal/state balance did not undermine our other objectives). Because it was agreed that whether one is governed by federal or state law should make no difference in the outcome of the case, considerable effort was devoted to conforming the draft federal and draft uniform state texts to make them as nearly identical as possible. The result is that two texts (Attachments 2 and 3) have been developed that are substantively the same and in many respects identical; differences occur only insofar as they are required because of the differing federal and state contexts. That cooperative federalism approach has been, for the past couple of years, the basis of discussions on implementation.

In addition, because there was recognition that some mechanism – beyond promulgation of the uniform law – was necessary to ensure compliance with our treaty obligations, the draft federal statute contains a preemption provision. The federal statute will of course apply in those states that elect not to adopt the uniform law. In addition, however, if 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. By so doing, our hope has been that the cooperative federalism approach might maximize the goals above.

## B. Remaining Issues

With this basic design choice in place, several questions of continuing debate remain:

1. Scope of Federal Jurisdiction: One debated question has been the scope of federal court jurisdiction in cases brought under the Convention. Significantly, the Convention itself does not dictate the answer, for the Convention (Article 5(3)) permits Contracting States to maintain their domestic rules regarding jurisdiction. Some argue that foreign judgments should be treated no differently than foreign arbitral awards. Noting the parallel between this Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, they have advocated for the approach taken in the Federal Arbitration Act (which implements the New York Convention): express federal question jurisdiction in actions brought either to enforce agreements to arbitrate or to have arbitral awards recognized and enforced. Federal Arbitration Act section 203, 9 U.S.C. 203.

The other view is that there should be no change in existing law regarding federal court jurisdiction. Proponents of that view assert that the Federal Arbitration Act approach is not an appropriate model because the hostility that courts historically displayed toward arbitration does not exist with regard to the

recognition and enforcement of foreign judgments. The Judicial Conference of the United States and the Conference of Chief Justices each indicated a preference that existing law concerning the scope of federal question jurisdiction not be changed – that is, to make clear that federal question jurisdiction is not created merely because the actions are brought pursuant to the Convention’s implementing legislation.

As a possible compromise, it was discussed whether, for actions to have foreign judgments recognized and enforced, there might be diversity jurisdiction initially but supplemented by rights of removal to federal court if certain treaty defenses were raised. That avenue proved unpromising for several reasons. It did not satisfy the proponents of federal question jurisdiction. It was also difficult – and, it seemed, arbitrary – to identify those defenses that would qualify for removal and those that would not. In addition, the judicial groups did not favor this approach.

As an alternative, it was proposed to pursue a “minimal diversity” approach: while not establishing federal question jurisdiction, greater access to federal courts would be allowed through the creation of statutory standards that require minimal diversity of citizenship, rather than complete diversity. Such standards are found, for example, in the Class Action Fairness Act (CAFA), 28 U.S.C. 1332(d). This compromise met with general agreement, although disagreement remains over an even more rarely invoked question: whether minimal diversity jurisdiction in this context should be accompanied by the more lenient removal rules (permitting removal by a defendant that is a citizen of the forum state) that apply to CAFA class actions under 28 U.S.C. 1453. After further deliberation, however, for reasons detailed below, *we now propose to restore the normal diversity rules for federal court jurisdiction, with the normal rules on removal*. This approach will limit federal court jurisdiction to cases involving complete diversity, and has the virtue of reducing complexity.

2. Applicable Law in Federal Court: The tentative adoption of a minimal diversity approach brought into focus late in our discussions another question that had not previously been squarely addressed: *In a state that elects to adopt the uniform act, which law applies in federal court – that state law or the federal implementing law?* Again, there are sharply differing views. Some maintain that an essential ingredient of cooperative federalism is to have state law apply in that case. Proponents of that view argue that this would be consistent with normal diversity rules. But others, noting that this is not a typical *Erie* situation (because a treaty is being implemented, a federal statute establishes substantive law to apply, and the application of federal common law is not at issue), assert that the Constitution does not demand application of state law in these circumstances; to the contrary, they assert, in implementing a treaty, a federal court should apply the federal implementing law.

After careful consideration, we concluded that the Constitution does not mandate either option in this case. The resolution of this question is rather a matter

of national policy, to be addressed in terms of the values established for private international law conventions generally (enumerated above) and this Convention in particular. More important, we do not think this is a major point affecting how the COCA will be implemented. As a matter of substance, applying federal law rather than state law should never produce different outcomes – since the federal statute and the uniform state act have been carefully drafted to make them as identical as possible, and since divergent state law will yield to federal law whenever it would produce a different result – leaving only administrative differences between the two approaches.

For the following reasons we have concluded that, on balance, the policy interests of the U.S. government are best served by having federal courts apply federal law, while leaving administration of uniform law issues to state courts:

- (1) As a matter of principle, where a federal statute has been developed to implement a treaty, federal courts should apply it;
- (2) Applying only federal law would greatly simplify the task for federal courts, which will have the straightforward task of construing a federal statute. Under the application-of-state law approach, the federal courts would otherwise have to determine (a) what state law provides (quite possibly, in circumstances in which a state's courts have not yet produced a definite view), (b) for preemption purposes, whether that law would produce a result different from that which would obtain under the federal statute, and (c) in preemption cases, how to apply federal law only to the extent necessary. We believe that this challenge would introduce uncertainty and confusion into the process, jeopardizing Goals 3 and 4 above;
- (3) Applying federal law would promote the development of jurisprudence on interpretation of that law, which should provide a sounder basis for comparison when questions of preemption of state law arise in state court and therefore contribute over time to greater uniformity in treaty implementation; and
- (4) Ultimately federal courts will be looking to federal law in either event – since under the application-of-state-law approach, in case of a difference in interpretation, the federal law would preempt. Our proposed approach, however, makes the reliance on federal law more direct, more transparent, more easily administered, and better positioned to appeal to potential treaty partners and transacting parties. It is the approach that would be most understandable to treaty partners and foreign litigants, and that would most likely promote use of the COCA in the future.

We acknowledge that it is unusual to have different bodies of law apply in the same state, depending on whether one is in state court or federal court. However, there is clear precedent for the application of federal substantive law in diversity

cases. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (application of the Federal Arbitration Act). Moreover, we see no legitimate concern here regarding possible forum shopping, because litigants should find substantively identical law under either the uniform state act or the federal statute. Therefore there should be little incentive to seek a federal forum merely to have federal law applied. Most fundamentally, it must be acknowledged that this is an unusual situation: the proposed use of parallel federal and state law to implement the Convention is unprecedented. By making that choice in the name of cooperative federalism, we have generated complexity, and it seems unwise to us to multiply it further, particularly for the federal judges seeking to implement an unfamiliar treaty.

At the same time, we recognize that for some – particularly those who have advocated and to this point secured, with the goodwill of other participants, a cooperative federalism approach – it would be preferable not to apply federal law in federal court in states that have adopted the uniform act. *In order to acknowledge this preference, and to reduce yet further any potential concerns about forum shopping, we now propose to restore the normal diversity rules for federal court jurisdiction, with the normal rules on removal.* This approach also has the virtue of reducing complexity, which as noted is also a virtue of applying the federal statute under all circumstances in federal courts.

One specific issue that has been debated concerning the applicable law in federal court is the statute of limitations for bringing actions to recognize or enforce a foreign judgment. The uniform state act and the federal legislation both contain a 15-year limitations period – the same period found in the Uniform Foreign Country Money Judgment Recognition Act of 2005, which has been adopted by a number of states.<sup>1</sup> The question has been what limitations period should apply in state court in those states that do not adopt the uniform act. Some have resisted the notion of having the statute of limitations in the federal law apply in state court. Others have argued that, in furtherance of the goals of certainty and transparency, it is essential to have a uniform limitations period.

As a compromise, the following was proposed. For states that have already enacted the 15-year rule as part of the Uniform Foreign Country Money Judgment Recognition Act of 2005, they could continue to apply that rule in state court. For other states, the 15-year limitations period in the federal law would apply as the default rule unless a state enacts, after the effective date of the federal law, a non-conforming statute of limitations. This approach promotes certainty and

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<sup>1</sup> The Convention does not specify a statute of limitations. The limitations period in both the uniform state act and the federal legislation both provide that an action must be brought within the earlier of (1) the time during which the judgment is effective between the parties in the country of origin or (2) 15 years from the date that the judgment became effective in the country of origin.

transparency while affording states a measure of autonomy. We doubt that many states would affirmatively want a non-conforming limitations period.

Under that approach, the next question was whether, if a state enacts a non-conforming limitations period, that period should apply equally in federal court in that state. Given our conclusion that federal courts should apply federal law, it may seem anomalous to apply a state statute of limitations in federal court. However, we think this approach is justified in this instance because having different limitation periods in state and federal court in the same state could mean different results in a given case, and thus promote forum shopping – something that otherwise should be avoided because the federal and state laws are substantively the same. We therefore propose that a non-conforming statute of limitations enacted by a state after the effective date of the federal law apply equally in state or federal court in that state.

#### IV. Next Steps

With strongly held positions on each side of the federalism issues at stake here, it has at times been extraordinarily difficult to find common ground. However, our understanding is that the prevailing view among domestic stakeholders is that implementation of the Convention through a mechanism that they may view as imperfect, because of the policy differences described above, is preferable to having the United States take no action on the treaty.

Upon careful reflection, we believe that the package identified above represents the best means of reconciling the various positions, and the approach that best serves the five policy goals enumerated above. We recognize that it may be that no constituency will be entirely pleased by all of the features presented above. However, unless a way forward is found for domestic implementation, we do not foresee how U.S. ratification of the Convention can be possible for many years to come. That would waste twenty years of effort by many American lawyers, not to mention our treaty partners, and U.S. persons would be deprived of the Convention's benefits. Those benefits include the enforcement of choice of court agreements and, most importantly, obtaining the recognition and enforcement in foreign courts of U.S. judgments.

DOJ's Office of Legal Counsel has reviewed the constitutionality of specific aspects of the proposal, and OLC agrees that the proposed cooperative federalism approach is consistent with the requirements of Equal Protection and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Attachments:

1. The Hague Convention on Choice of Court Agreements
2. Draft federal implementing legislation, Version #6, February 28, 2012
3. Draft Uniform International Choice of Court Agreements Act, July 2011

## **Joint Comment**

regarding

### **White Paper on Implementation of the Hague Convention on Choice of Court Agreements in the United States**

*Submitted Individually by Several Members of  
New York State Bar Association International Section Executive Committee<sup>2</sup>*

**To: Hon. Harold Hongju Koh, Legal Adviser of the Department of State;  
Mr. Keith Loken, Assistant Legal Adviser for Private International Law,  
U.S. State Department**

**From: Albert L. Bloomsbury, Michael Galligan, John Hanna, Jr., Andre R. Jaglom,  
Thomas N. Pieper, and Jay Safer.**

**Date: April 27, 2012**

We have reviewed the "White Paper" of Mr. Harold Koh, Legal Adviser of the Department of State, entitled, "Implementation of the Hague Convention on Choice of Court Agreements in the United States," which he forwarded to Mr. Peter Trooboff by letter dated April 16, 2012, with a request that Mr. Trooboff forward the same to us.

We strongly support ratification of the Hague Convention on Choice of Court Agreements. Securing ratification is very important because building an international regime for the recognition and enforcement of judgments is an important tool for promoting cross-border trade and investment by strengthening the legal foundation for the enforcement of commercial and financial undertakings and commitments. Even more importantly, widespread ratification of the Convention will promote the world-wide rule of law itself and hopefully encourage more comprehensive efforts to build a worldwide system for recognition and enforcement of court judgments.

We were of course among the adherents to the view that a federal implementation statute analogous to the provisions of the Federal Arbitration Act Chapter 2 that

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<sup>2</sup> This submission has not yet been submitted for approval to the NYSBA International Section Executive Committee and thus does not represent the position of the International Section or of NYSBA.

implemented the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (together with a grant of federal court jurisdiction in the case of enforcement actions) would be preferable and indeed that is still our view. Moreover, we believe that permitting federal courts to exercise "arising under" jurisdiction in actions to enforce the provisions of the convention would be much more effective in persuading private contracting parties to select U.S. jurisdictions in their choice of court agreements and are disappointed that the proposed compromise of minimal diversity was not adopted.

However, we feel that the proposed legislation is a tolerable compromise that we can support assuming there are no further changes on the key issues addressed in the White Paper, if its adoption will secure consent to ratification of the Convention by the U.S. Senate. We are able to do so because, as indicated by the White Paper, it is understood that federal courts will apply the federal statute (and not have to defer to the state statutes) and that, by terms of the federal implementing statute itself, the state statutes must conform to the Federal statute (except for any permitted "carve-out" under Article 19 of the Convention).

We understand that the White Paper outlines the major modifications to the implementation statute since the March 5, 2012 ACPIL meeting. It appears, however, not to take account of the four technical questions that were raised at the end of that meeting. We have previously submitted our views on those questions, which were subsequently approved by the Executive Committee of the International Section of the New York State Bar Association, to the Assistant Legal Adviser for Private International Law, and we attach a copy of that submission, in an updated format reflecting its adoption by the Section, but without changes to the content. Assuming that the Legal Adviser moves ahead based on the framework of the White Paper, we would urge that our recommendations on these issues be incorporated into the final implementing legislation.

The Executive Committee of the International Section of the New York State Bar Association will next meet on May 19, 2012 and we will encourage the Section to endorse the position we have stated here.