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 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.[1] 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

[1]* 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.

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 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