

MEMORANDUM

Date: December 7, 2007

To: Committee on Scope and Program,
National Conference of Commissioners on Uniform State Laws

From: Study Committee Regarding The Hague Convention of 30 June 2005 on Choice of Court Agreements

Re: Recommendation for Drafting Committee Regarding Implementing Legislation for The Hague Convention on Choice of Court Agreements

I. Introduction

Pursuant to the request of the Joint Editorial Board on International Law, a Study Committee with regard to The Hague Convention on Choice of Court Agreements was appointed at the 2007 NCCUSL Annual Meeting. The charge of the Study Committee, as outlined in the memo from the JEB, was as follows:

(A) to consider, in addition to other issues related to the Convention that it deems appropriate, the following:

(1) the merits of ratification of the Convention by the United States;

(2) the effect of the Convention on current U.S. law, with a particular emphasis on its effect on current state law governing the subject matter covered by the Convention;

(3) the appropriate means for implementing the Convention;

(4) whether, in light of the Convention, any current uniform laws may need to be amended, or new uniform laws may need to be drafted; and

(5) whether the United States should consider making any declarations and understandings in connection with Convention ratification; and

(B) to make recommendations to the Committee on Scope and Program as to whether NCCUSL should undertake any projects concerning the Convention, including the appropriate scope of any projects that should be undertaken.

The Study Committee met via conference call during the Fall of 2007 to prepare this Report. After a brief review of the Convention in Part II of this Report, the Study Committee's

conclusions with regard to each of the questions presented by the JEB proposal are addressed in Part III. The Study Committee's ultimate conclusion is that NCCUSL should undertake a drafting project to draft the implementing legislation for the Choice of Court Convention, as well as the declarations and understandings for that Convention. Part IV analyzes the Study Committee's proposed project in light of NCCUSL's Project Proposal Guidelines. Part V states the Study Committee's formal conclusion, including the scope of the proposed drafting project.

II. The Hague Convention of 30 June 2005 on Choice of Court Agreements

The Hague Convention of 30 June 2005 on Choice of Court Agreements ("Convention") provides rules for the enforcement of exclusive choice of forum clauses and for recognition and enforcement of the resulting judgments of the chosen forum. The Convention is the end product of a more than twelve-year process that began with a U.S. initiative, suggested by Harvard Law School Professor Arthur T. von Mehren, for the United States to conclude judgment-recognition conventions with other countries.¹ From this beginning, the project initially evolved into a proposed multilateral convention that would have established both international standards for personal jurisdiction and international rules for recognition and enforcement of the resulting judgments, undertaken by The Hague Conference on Private International Law. When that larger project was terminated because the participants were unable to reach consensus on acceptable bases for personal jurisdiction, The Hague Conference decided to focus on the more narrow issues of enforcement of exclusive choice of forum clauses and recognition and enforcement of the resulting judgments. The Choice of Court Convention is the final product of that effort.²

The primary purpose of the Convention is to ensure the effectiveness of exclusive choice of court agreements entered into between parties to international commercial transactions³. In order to carry out that purpose, the Convention establishes three basic rules. First, Article 5

¹U.S. efforts to obtain recognition agreements go back even further. The United States first made proposals on this issue in the 1970s.

²For discussion of the Convention and its background, see Trevor Hartley & Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements*, Explanatory Report; Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *Am. J. Comp. L.* 543 (2005). For discussion of the politics influencing the substance of the original convention, see Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled*, 52 *DePaul L. Rev.* 319 (2002) (noting that U.S. motivation was for more certain recognition and enforcement of judgments while other countries were motivated by a desire to curb certain U.S. bases of personal jurisdiction, such as general "doing business" jurisdiction).

³ The Convention only applies to international business transactions in which the parties have agreed between themselves as to the forum in which their disputes will be litigated. Article 2(1)(a) provides that the Convention does not apply to an exclusive choice of court agreement "to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party."

provides that, with only limited exceptions, a member country court chosen by the parties must exercise jurisdiction over the parties' dispute. Second, Article 6 provides that, again subject to certain exceptions, a court in a country party to the Convention other than the chosen court must refuse to hear the case. Third, Article 8 provides that courts in countries party to the Convention must recognize and enforce the judgment of the chosen court, again subject to certain exceptions.

Article 1 of the Convention provides that it applies "in international cases to exclusive choice of court agreements concluded in civil or commercial matters." The scope of the Convention thus is determined by three criteria. First, the case must be an international case. Article 1 defines "international case" differently depending on whether the issue is one of enforcement of the choice of court provision or one of recognition and enforcement of the resulting judgment. With regard to enforcement of the choice of court provision, a case is international unless the parties are resident in the same country and all elements relevant to the dispute other than the chosen court are connected only with that country. For purposes of recognition and enforcement, a case is international if the judgment is that of a foreign court. Second, the agreement must be an exclusive choice of court agreement as defined in Article 3 of the Convention. That definition includes a requirement limiting application of the Convention to situations when the parties have chosen courts of a country that is a party to the Convention as their exclusive forum, and also a requirement that the agreement either be in writing or in a form that renders the agreement accessible for subsequent reference. Article 3, however, establishes a presumption that a choice of court agreement is exclusive unless the parties expressly provide otherwise. Third, the matter in connection with which the choice of court agreement is made must be a "civil or commercial matter." Consumer matters, as well as other specific subject matters, such as domestic relations, wills, and insolvency, are expressly excluded from the scope of the Convention.⁴

In addition, the Convention contains a series of declarations that allow individual countries to expand or contract the scope of the Convention. Those provisions are discussed in section III (5) below.

III. Study Committee Recommendations

The Study Committee was asked to address a series of questions regarding the Convention, as well as to make an ultimate recommendation as to whether a drafting committee should be appointed. This section provides the Study Committee's recommendations with regard to the questions with which it was presented.

1. Merits of Ratification of the Convention by the United States

From the U.S. perspective, the most attractive part of the Convention appears to be the obligations it will impose on other member countries regarding recognition and enforcement of U.S. judgments. While foreign country judgments are routinely recognized and enforced in the

⁴Article 2.

United States, recognition and enforcement of U.S. judgments in other countries currently is problematic. Thus, the Convention will operate to provide a benefit to U.S. citizens that the United States already extends to the citizens of other countries.

The certainty provided by the requirement that exclusive choice of forum provisions be enforced also will benefit U.S. interests by providing a potentially attractive alternative to arbitration for determining the parties' disputes. If there is a high degree of certainty that the parties' choice of forum will be enforced, just as there is a high degree of certainty under current law that the choice of arbitration will be enforced, then U.S. contracting parties will have the option of selecting dispute resolution through court action rather than arbitration without giving up certainty and predictability.

The Convention requires that two countries adopt it before it goes into force.⁵ Mexico currently is the only country that has ratified the Convention. Nevertheless, a Convention providing certainty in recognition and enforcement of U.S. judgments in Mexico would be of considerable value. Further, it is likely that Canada also will ratify the Convention, particularly if the United States does so. Indeed, the U.S. State Department Office of Private International Law has indicated that, as with other multilateral conventions in which the United States has taken a lead in negotiations, ratification of the Choice of Court Convention by the United States may provide the impetus for other countries and the European Union to adopt the Convention.

The primary downside of the Convention is its potential impact on current U.S. domestic law. As discussed in section III(2) below, the areas of enforcement of exclusive choice of forum clauses and recognition and enforcement of foreign judgments currently are governed largely by state law in the United States. If the Convention were implemented either as a self-executing treaty or through federal implementing legislation, then, under the Supremacy Clause, state law in these areas would be preempted, at least to the extent of conflict with the Convention, and perhaps beyond, depending upon the intended scope of preemption. Because the current federal-state balance in these areas appears to work well as a matter of domestic law, and the Convention does not appear to create any additional federal interest in these areas beyond the federal interest in adequate implementation of the Convention, the Study Committee believes that a significant federalization of these areas is not warranted.

The Study Committee further believes, however, that the impact of the Convention on state law can be ameliorated to a large degree by an implementation method designed to preserve the current federal-state balance in this area to the extent possible. Because the Office of Private International Law has indicated its willingness to work with a NCCUSL drafting committee to bring about this implementation result, the Study Committee feels confident that the Convention can be implemented in a way that will avoid significant detrimental impact on the current federal-state domestic law balance in these areas. The Study Committee's suggestion as to an

⁵Article 31 provides that the Convention enters into force "on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession."

appropriate implementation method is discussed in section III(3).

Based on the above considerations, and with the understanding that the Convention would be implemented in a manner sympathetic to preservation of state law, the Study Committee believes that the United States should proceed with ratification of the Choice of Court Convention.

2. Effect of the Convention on Current U.S. Law

The Convention covers two distinct subject matter areas: (1) the enforcement of exclusive choice of forum clauses and (2) the recognition and enforcement of foreign country judgments. The United States currently is not a party to any conventions dealing with these areas – both areas currently are governed entirely by U.S. domestic law. A discussion of current U.S. law in these two areas, as well as illustrations of some of the issues raised by consideration of the Convention’s impact on current law, follows. A drafting committee will need to further research these issues; however this discussion illustrates some of the areas that will be affected by the Convention.

1. Choice of court agreements

Enforcement of choice of forum clauses currently is governed by both federal and state law. In federal question cases, federal courts have applied federal law.⁶ In diversity cases, the question is more complex. The U.S. Supreme Court has held that when the issue of enforcement of a choice of forum provision is raised in the context of a motion to transfer venue to another federal court under 28 U.S.C. §1404 based on the parties’ contractual choice of that other federal court as the appropriate forum, the issue is one of procedure for purposes of the *Erie* doctrine and thus is governed by section 1404 rather than by state law.⁷ The Supreme Court, however, has not spoken as to whether the issue is governed by federal or state law when it has been raised in the different context of a motion to dismiss in favor of a non-federal court designated in the choice of forum clause, and the federal circuits have split on this issue. Some circuits have found this question also to be one of federal procedure, while others have held it to be a question of substantive contract law governed by state law under the *Erie* doctrine.⁸ On the other hand, when the issue of enforcement of a forum selection clause is raised in state court, the issue

⁶*E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (establishing federal common law standards for enforcement of choice of forum clauses in admiralty jurisdiction).

⁷*Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). The *Ricoh* Court noted that in the section 1404 motion to transfer context the district court must weigh a number of factors, including the forum selection clause, but that the forum selection clause should not receive dispositive consideration. *Id.* at 29-31.

⁸*See, e.g.*, *Eisaman v. Cinema Grill Systems, Inc.*, 87 F. Supp. 2d 466, 448 & n. 2 (D. Md. 1999) (noting the split and applying Fourth Circuit rule that state law governs in diversity cases).

clearly is one of state law.⁹

Under both federal and state law, the enforceability of forum selection clauses is governed to a large extent by common law rather than by statute. There are, however, statutes in some states dealing with the general enforceability of choice of forum provisions,¹⁰ and others that deal with the issue in particular circumstances.¹¹ In addition, there are statutes that limit enforcement of choice of forum provisions with regard to particular subject matter areas.¹² The extent to which these various types of statutes, as well as the common law regarding enforcement of exclusive choice of forum clauses, will be affected by the Convention requires further study.¹³

NCCUSL currently does not have a uniform law dealing in general with the question of enforceability of choice of forum agreements. The Model Choice of Forum Act, adopted by NCCUSL in 1968, was such an Act. That Act, which was withdrawn by NCCUSL in 1975, was enacted only in three states,¹⁴ but its principles continue to influence the development of the common law in this area.¹⁵ NCCUSL also has dealt with the choice of forum question with

⁹It should be noted, however, that the trend of modern state court decisions is to adopt a standard similar to the federal standard for enforceability set out in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 10 (1972), under which forum selection clauses are *prima facie* valid and should be enforced unless enforcement is unreasonable or unfair under the circumstances.

¹⁰*E.g.*, N.H. Stat. Anno. §§508-A:1 et. seq. (codifying NCCUSL's Model Choice of Forum Act); N.Y.C.P.L.R. §501 (written agreement fixing place of trial will be enforced, subject to certain exceptions).

¹¹*E.g.* N.Y. Gen. Oblig. L. §5-1402 (choice of New York forum to be upheld in contracts for \$1 million or more when parties also select New York law).

¹²*E.g.*, Il. Rev. Stat. Ch. 121 ½, §703.1 (providing that choice of forum provisions in franchise agreements designating jurisdiction or venue in a forum outside Illinois are void with regard to any action otherwise enforceable within Illinois).

¹³Article 5(1) of the Convention allows the chosen court to refuse jurisdiction over the dispute when the choice of forum agreement is "null and void under the law of that State," and Article 5(3) of the Convention provides that jurisdictional rules related to subject matter jurisdiction or "the internal allocation of jurisdiction among the courts" of a party to the Convention are not affected by the requirement that the chosen court accept jurisdiction over the parties' dispute. In addition, Article 6 provides that proceedings filed in a court other than the chosen court need not be dismissed if "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized." The extent to which these, or other provisions of the Convention, may prevent preemption of these various types of statutes will need to be considered in determining the impact of the Convention on current U.S. law.

¹⁴Nebraska, New Hampshire, and North Dakota.

¹⁵For a recent example of its influence, see The American Law Institute, Principles of the Law of Software Contracts §1.14, Reporter's Notes (Discussion Draft, March 30, 2007) (stating that the test for when an agreed forum may be found unreasonable or unfair is taken from the

regard to particular subject matters, such as in the Uniform Consumer Credit Code and Article 2A of the Uniform Commercial Code. Both of these uniform acts contain rules governing choice of forum that are limited to consumer transactions, and thus should not be affected by the Convention, which excludes consumer transactions from its coverage.¹⁶ Other uniform acts, however, may contain choice of forum provisions that will be affected by the Convention. For example, the Uniform Computer Information Transactions Act contains a choice of forum provision not limited to consumer transactions.¹⁷

Further, because the Convention deals with exclusive choice of forum agreements across all subject matter areas (other than those subject matter areas excluded from coverage by Article 2 or by individual country declarations under Article 21), it may affect a number of uniform laws that currently do not contain express choice of forum provisions. For example, the Uniform Commercial Code has no general rule governing choice of forum clauses. During the drafting of Revised U.C.C. Article 1, the drafting committee considered whether to include a general choice of forum provision, but ultimately decided not to deal with the issue. The Convention would provide the rule that U.C.C. Article 1 did not for purposes of Uniform Commercial Code cases coming within its scope.

It also is clear that the Convention rules regarding choice of forum differ from current U.S. law in some respects. For example, under current U.S. law, a choice of forum agreement generally is presumed to be non-exclusive absent express language making it exclusive. Article 3(b) of the Convention reverses this presumption, providing that a choice of forum agreement selecting courts in one country “shall be deemed to be exclusive unless the parties have expressly provided otherwise.” A second example is the Convention’s treatment of *forum non conveniens*. *Forum non conveniens* is a traditional basis under U.S. law for a court to decline to exercise jurisdiction in favor of another forum based on considerations of convenience and fairness. Article 5(2) of the Convention rejects the *forum non conveniens* doctrine, providing that the court chosen in an exclusive choice of court agreement “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.” The extent to which there are other substantive differences between the Convention rules and current U.S. law is another area for consideration by a drafting committee.

2. Recognition and enforcement of foreign country judgments

Both the recognition and the enforcement of foreign country judgments currently is governed entirely by state law. A recognition action does not give rise to federal question jurisdiction, and thus actions for recognition of a foreign country judgment are purely state law actions.¹⁸ Similarly, federal courts sitting in diversity apply state law under the *Erie* doctrine to

Model Choice of Forum Act).

¹⁶Article 2(1)(a).

¹⁷UCITA, §110.

¹⁸State courts always have applied state law to the recognition and enforcement of foreign country judgments. Federal courts have applied state law to the recognition and enforcement of

the question of recognition and enforcement.¹⁹

NCCUSL's Uniform Foreign Money-Judgment Recognition Act of 1962 is a major source of state law with regard to recognition of foreign country money judgments. The UFMJRA applies to a "judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."²⁰ NCCUSL's 2005 revision of the UFMJRA, the Uniform Foreign-Country Money Judgments Recognition Act, has a comparable scope.²¹ The UFMJRA was enacted in thirty states, as well as the District of Columbia and the Virgin Islands; the 2005 revision is a targeted act of the Conference, which in the past year has been enacted in three states, and is under active consideration in one other. For cases not within the scope of the UFMJRA, and in states that have not enacted the UFMJRA or its revision, recognition is governed by state common law principles of comity.²² Because the UFMJRA and its revision codify the majority common law rules, there is considerable uniformity in state law with regard to the basic rules for recognition of foreign country judgments.²³

foreign country judgments since the 1938 decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which the U.S. Supreme Court rejected the concept of general federal common law. Prior to the *Erie* decision, the U.S. Supreme Court, in the case of *Hilton v. Guyot*, 159 U.S. 113 (1895), had adopted a federal common law rule regarding recognition, which was applicable in the federal courts until *Erie*. Federal courts post-*Erie* have not found the recognition area to be one in which sufficiently important federal interests are involved to create post-*Erie* federal common law. Even before *Erie*, however, state courts had refused to follow the federal common law rule, noting that because enforcement of foreign judgments is a question of private, and not public, international law, states were not required to follow the federal rule. *Johnson v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926). To the extent the U.S. Supreme Court has spoken on the issue, it apparently has agreed. In the 1912 case of *Aetna Life Insur. Co. v. Tremblay*, 223 U.S. 185 (1912), the U.S. Supreme Court dismissed an appeal taken from the refusal of Maine state courts to recognize a Canadian judgment on the ground no federal question was involved. See Willis L. M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 787 (1950) (noting the *Tremblay* case).

¹⁹*E.g.*, *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972). As in the choice of forum area, however, state law has been influenced by federal law. Just as the U.S. Supreme Court admiralty decision in *The Bremen* influenced state law standards for enforcement of choice of forum provisions, the pre-*Erie* U.S. Supreme Court decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), while not binding on state courts, influenced in important respects the standards state courts developed for recognition of foreign country judgments.

²⁰ UFMJRA §1.

²¹ UFCMJRA §3.

²² A few states also have agreements with at least one Canadian province regarding recognition and enforcement of each others' judgments.

²³ The most significant nonuniformity in current recognition law is with regard to the issue of reciprocity. The requirement of reciprocity has been rejected by most courts applying

The focus of the UFMJRA and its revision is on establishing minimum standards for the recognition of foreign country judgments, rather than on the means by which those judgments, once recognized, may be enforced. With regard to this latter question, the UFMJRA simply provides that the judgment will be “enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.”²⁴ The Revised Act provides that the foreign country judgment is “enforceable in the same manner and to the same extent as a judgment rendered in this state.”²⁵ Thus, both Acts refer to other state law to determine the question of enforceability. Similarly, neither Act touches on the means by which enforcement may be obtained. That question is governed by each state’s laws with regard to available enforcement procedures, such as attachment, garnishment, and judicial sale.

The rules of Chapter III of the Convention significantly overlap with the current state law rules regarding recognition and enforcement for judgments within the Convention’s scope. Article 8 establishes an obligation on the part of countries that are parties to the Convention to recognize and enforce the judgment of a court of another member country chosen by the parties in an exclusive choice of forum agreement. Article 8 further provides that “[r]ecognition or enforcement may be refused only on the grounds specified in this Convention.” The remainder of Chapter III establishes certain rules with regard to recognition and enforcement, as well as grounds for denying recognition and enforcement. Some of these rules seem consistent with current state law on recognition,²⁶ while others seem to differ from current state law rules,²⁷ and a few appear to be entirely novel in U.S. jurisprudence.²⁸

principles of comity, as well as by the UFMJRA and its revision. Seven states, however, currently have nonuniform amendments to the UFMJRA making lack of reciprocal recognition of U.S. judgments a ground for denying recognition of a foreign country judgment.

²⁴UFMJRA §3.

²⁵UFCMJRA § 7.

²⁶For example, Article 9(d) lists as one ground for denying recognition or enforcement that “the judgment was obtained by fraud in connection with a matter of procedure.” This seems comparable to the exception to recognition in UFMJRA §4(b)(2) that “the judgment was obtained by fraud” and UFCMJRA §4 (c)(2) that “the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.” The differences in language between the Convention and these sections, however, illustrate the fact that, even in areas where provisions appear to be similar, study is needed to determine if in fact a similar meaning is intended.

²⁷For example, Article 11 provides that recognition or enforcement may be refused to the extent “the judgment awards damages, including exemplary and punitive damages, that do not compensate a party for actual loss or harm suffered.” While the UFMJRA and its revision exclude monetary awards that constitute a fine or other penalty from coverage, and fines and penalties traditionally have been denied recognition under principles of comity, Article 11 seems to go beyond what traditionally is considered a fine or penalty under U.S. state law, as it potentially could include awards made to private individuals in civil cases.

²⁸For example, Article 12 extends the obligation for recognition and enforcement to “transactions judiciaries,” a type of transaction that does not exist in common law systems.

The Convention generally refers matters of procedure with regard to recognition and enforcement to the law of the country asked to recognize and enforce. Article 14 provides that “[t]he procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise.” Thus, to the extent of this referral, state law with regard to the procedure for recognition will not be preempted. The Convention, however, also contains certain procedural rules of its own – for example a requirement in Article 13 that certain documents be produced in order to obtain recognition and enforcement – and the Convention also requires that the court asked to recognize and enforce the judgment “act expeditiously.”²⁹ In addition, the Convention, unlike the UFMJRA and its revision, purports to set out the exclusive grounds for denying *enforcement* to a foreign judgment, as well as for denying its recognition.³⁰ Thus, the extent to which the Convention may eliminate grounds for denying enforcement (as opposed to recognition) available under current state law needs to be considered as well.³¹

²⁹Article 14.

³⁰Article 8 states that “[r]ecognition *or enforcement* may be refused only on the grounds specified in this Convention.” (Emphasis added). Recognition and enforcement are distinct concepts. The Convention Report states

“Recognition,” as understood by the Convention, means accepting the determination of the rights and obligations made by the court of origin. “Enforcement” means ensuring that the judgment-debtor obeys the order of the court of origin.

Trevor Hartley & Masato Dogauchi, Explanatory Report, Convention of 30 June 2005 on Choice of Court Agreements, §5, n. 29. The UFCMJRA’s comments make the following distinction:

Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. . . .
Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment.

UFCMJRA §4, cmt 2.

³¹Under current U.S. state law, the grounds for denying enforcement of a judgment are distinct from those for denying its recognition. An obvious example is that, while recognition of a judgment would not be denied based on the fact the judgment has been satisfied, enforcement obviously would be. Nowhere in Chapter III of the Convention is there an express exception from the duty of enforcement based on the fact the judgment already has been paid. Further, as a matter of U.S. Constitutional law, an enforcing court must have some basis for asserting jurisdiction either over the defendant or the defendant’s property. Chapter III, however, contains no exception to enforcement based on lack of jurisdiction in the enforcing court. Whether these situations can be made to fit within the exceptions that are provided in Chapter III is a question

As the above discussion illustrates, the Convention has the potential to preempt to a significant degree current state law rules in both the areas of enforcement of choice of forum agreements and the recognition and enforcement of judgments. The Convention, however, will have two additional effects on state law, touched upon obliquely in the previous discussion, that also support creation of a NCCUSL Drafting Committee.

First, the Convention in a number of important respects refers to the domestic law of the parties to the Convention, and that law in the United States currently is in large part state law. For example, Article 5 allows the chosen court to decline to hear the case if the agreement is void under the law of that State. Article 6 allows a court not chosen in the agreement to hear the case if the agreement is void under the law of the chosen state, if a party lacked capacity to enter the choice of court agreement under the law of the forum, if the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the forum, and if the choice of court agreement cannot reasonably be performed. Article 9 allows a state to deny recognition and enforcement of a judgment if, *inter alia*, the agreement was null and void under the law of the chosen court, if a party lacked capacity to contract under the law of the state asked to recognize the judgment, if the judgment was obtained by fraud, or if recognition or enforcement would be manifestly incompatible with public policy. All of these provisions require the court to look to either contract law principles or public policy, both of which under U.S. law are drawn in large part from state law. Consideration should be given to how these principles of state law will fit with the Convention. In addition, as mentioned above, the Convention relies in large part on a country's other law with regard to the procedure for recognition and enforcement. Another issue for consideration thus is how those procedures will mesh with the substantive rules of the Convention.

Second, the rules of the Convention will apply in large part with regard to choice of court agreements in connection with areas currently governed by state law, and, thus, consideration needs to be given to the extent to which the Convention will have an impact on that surrounding body of law. Because the Convention is designed to facilitate commercial transactions, it will be particularly important to consider how the Convention will interface with state commercial law, including uniform laws in the commercial law area. For example, as mentioned above, a number of choice of forum provisions contained in contracts governed substantively by articles of the Uniform Commercial Code will be covered by the Convention

3. Means for Implementing the Convention

The ultimate impact of the Convention on state law will be determined to an important extent by the means through which the Convention is implemented. If the Convention is implemented as either a self-executing treaty or through federal legislation, then state law will be preempted by either the Convention itself (if self-executing) or by the federal implementing

that requires further consideration. They underline the need to ensure this Convention is implemented in a manner that will coordinate its provisions with current state law regarding enforcement.

legislation. Under the Supremacy Clause, either a self-executing treaty or a federal law implementation would preempt state law within the scope of the Convention's intended coverage. To the extent the Convention is implemented through state legislation, preemption will not occur.

An additional consideration in determining the appropriate implementation method is the requirement that ratification of the Convention will impose on the United States to implement the Convention in good faith. Implementation of the Convention must satisfy this obligation not only at the time of implementation, but with regard to the future.

While state law implementation of the Convention removes concerns regarding preemption of existing state law, it can raise concerns regarding good faith compliance. State law implementation can create a lack of uniformity in implementation, creating the possibility that the Convention rules will vary from state to state. It also can create delay in implementation, as it takes time for the various state legislatures to consider and pass the legislation. Finally, state implementation can create concerns for future compliance. Under international law, the inability of a country to live up to its treaty obligations because of its own domestic law does not excuse it from those obligations. Thus, if a state were to change state law implementing legislation in the future in a way that no longer constituted good faith compliance, or to interpret its implementing legislation in a way that led to the same result, that action could be viewed by other parties to the Convention as a breach of its terms.

The Study Committee believes that the ultimate goal of implementing legislation for the Convention should be to replicate the existing federal-state balance with regard to regulation of the areas governed by the Convention to the extent possible. In determining the most appropriate method for reaching that goal, the Study Committee has taken the above principles into consideration. In light of these principles, as well as the current state of governing U.S. domestic law, the Study Committee recommends that the Convention be implemented through a combination of federal and state law implementation.

With regard to the Convention's rules concerning enforcement of exclusive forum selection clauses, the Study Committee believes federal law should provide the rules for federal courts in the situations where federal law currently controls, while state law should provide the rules in other situations. With regard to recognition and enforcement of judgments, the Study Committee believes that state law should continue to control.

The Study Committee believes the appropriate means for implementing the Convention's choice of forum rules for federal courts is through federal implementing legislation. Implementation of the choice of forum rules in situations governed by state law, as well as those in the recognition and enforcement area, present a more complicated issue because of the good faith compliance concerns discussed above. In light of those concerns, the Study Committee believes that the best way to implement the Convention in those areas currently covered by state law is through conditional preemption.

Conditional preemption is a hybrid technique combining federal and state implementation, using the threat of preemption to encourage states to enact designated legislation. The Study Committee believes the best conditional preemption approach in this situation would be one in which Congress would enact federal legislation to implement the Convention, with a provision that states could opt out of that legislation if they enacted a designated uniform act to implement the Convention. The Study Committee believes this conditional preemption approach provides the best balance between the desire to maintain the existing federal-state balance in this area and the need to insure good faith compliance with the Convention. The conditional preemption technique would both eliminate concerns about nonuniformity in the state implementing legislation initially adopted and insure future compliance by the states, as only state implementing legislation that complied with the conditions would prevent preemption by the alternative federal implementing legislation. The Study Committee contemplates that the drafting committee it proposes would be involved with the drafting of both the federal implementing legislation and the uniform state implementing legislation.

The Study Committee recognizes that the details of the method of implementation should be left to a drafting committee, and, thus, that a drafting committee may ultimately make a different determination. However, as an initial proposal to focus a drafting committee's deliberations, the Study Committee recommends that the Convention be implemented through a combination of federal and state law, with state law implementation focused on the conditional preemption technique.

4. Whether any current uniform law needs to be amended, or any new uniform laws need to be drafted.

(A) Current Uniform Laws

As discussed above, the Convention provides rules for enforcement of choice of forum provisions and recognition and enforcement of judgments that cut across subject matter areas. Thus, it will apply to choice of forum clauses within its scope in subject matter areas governed by various uniform laws. The vast majority of those uniform laws will be laws that do not themselves contain any provision dealing with enforcement of choice of forum clauses. With regard to these laws, the Convention's implementing legislation will simply take the place of the current combination of statutory and common law rules. Therefore, there seems no need to consider amendment of these laws in light of the Convention.

For a uniform law like UCITA that does contain a specific rule regarding choice of forum in non-consumer transactions, consideration might be given to whether any action should be taken to coordinate the uniform law and the Convention. The primary concern with this type of uniform law seems one of notice – alerting users of the uniform act to the existence of the Convention. That might be accomplished either in the text or in the Official Comments to the Uniform Act. Consideration of amendments to an act or revisions to comments could be accomplished by a Standby Committee with regard to the particular uniform law.

The only uniform laws whose primary purpose is affected by the Convention are the Uniform Foreign Money-Judgment Recognition Act of 1962 and its 2005 revision, the Uniform Foreign-Country Money Judgments Recognition Act. The revised Foreign Country Money Judgments Recognition Act will need to be coordinated with the Convention's implementing legislation. The Study Committee believes that coordination will not require significant amendment of the revised Act. That determination, however will need to be made in coordination with the Standby Committee for the UFCMJRA.

(B) New Uniform Laws

The Study Committee recommends that a drafting committee be appointed to draft uniform legislation to implement the Convention, as well as to draft appropriate declarations and understandings for the Convention. The drafting committee also should work with the State Department to coordinate federal and state implementing legislation.

(5) Whether the United States should consider making any declarations and understandings in connection with ratification of the Convention.

(A) Declarations³²

The scope of the Convention is subject to expansion or contraction based on declarations made by countries ratifying the Convention. Article 19 allows a country to declare that its courts may refuse to hear a dispute pursuant to an exclusive choice of forum clause when there is no connection between that country and the parties or the dispute other than the choice of its courts. Article 20 allows a country to declare it will refuse to recognize or enforce a judgment rendered in another country pursuant to an exclusive choice of forum clause when all of the relevant connections, including the parties' residence, are in the country asked to recognize and enforce. Article 21 allows countries to exclude specific subject matters from the Convention. Finally, Article 22 allows a country to expand coverage of the recognition and enforcement provisions of the Convention to cover judgments issued by courts of another member country pursuant to a *nonexclusive* choice of court agreement if the country issuing the judgment has made a reciprocal declaration with regard to judgments of that country.

Because these declarations will set the parameters of the Convention's application, the Study Committee believes that whether the United States should make any of these declarations is a subject for serious consideration. For example, Article 19 addresses the issue of the extent to which a country's courts must hear a dispute that has no relationship to that country. This raises questions of undue burden on a country's judicial system, as well as questions of notice and fairness to the parties. Some states in the United States have embraced the concept of choice of an unrelated forum in certain situations. New York law, for example, provides that the choice

³²A declaration is a unilateral statement contemplated by the terms of a treaty that allows a party to the treaty to choose among specified alternative or additional rules, or to decline to be bound by certain rules.

of a New York forum in a contract for \$1 million or more will be upheld when the parties also select New York law.³³ Most states, however, have not expressly adopted this concept, even for large transactions. Further, because the Convention does not allow application of *forum non conveniens* to deal with these questions on a case by case basis, a current potential safety valve under U.S. domestic law will not be available in these cases.

In addition, because these declarations will determine the ultimate scope of the Convention, the choice as to whether or not to make them will have a significant impact on the extent of potential preemption of current domestic law by the Convention. Article 22, for example, allows parties to the Convention to choose by mutual declarations to extend the scope of the recognition and enforcement provisions of the Convention to cover *all* judgments from a court chosen by the parties rather than only those that are pursuant to exclusive choice of forum provisions. Choice of this declaration thus could significantly enlarge the impact on current state law regarding recognition and enforcement of judgments.

Because these declarations raise significant policy issues and will affect the potential impact of the Convention on existing domestic law in these areas, the Study Committee believes that the United States must give serious consideration to whether it will make any of these declarations. The Study Committee further believes that, if a drafting committee is appointed with regard to the Convention, that Drafting Committee should provide input into the decisions regarding the U.S. declarations, including the wording of the declarations.

(B) Understandings³⁴

Some interpretive issues raised by the Convention's relationship to U.S. law may be able to be addressed by understandings made at the time of U.S. ratification. For example, it might be possible to deal with the problems created by inclusion of enforcement as well as recognition in Chapter III by an understanding that the Convention deals only with grounds for denial of enforcement based on non-recognition of the judgment, and not with those based on other factors, such as satisfaction of the judgment or failure to comply with the requirements of a particular means of enforcement. Similarly, the United States might want to use an understanding to address the constitutional question of the minimum contacts required before a forum can recognize and enforce a judgment against a defendant, perhaps by stating its understanding that the Convention's public policy exception to recognition and enforcement encompasses situations when recognition and enforcement would be unconstitutional. Indeed, the United States might consider an understanding stating more generally that certain of the rules stated in Chapter III of the Convention, including the grounds for refusal to recognition and enforcement a judgment, are interpreted as consistent with rules under current U.S. law with

³³ N.Y. Gen. Oblig. L. §5-1402.

³⁴ An understanding is a unilateral statement made by a country in connection with its ratification of a treaty stating its interpretation of what that treaty means in a particular respect. In order to be appropriate, an understanding must state an interpretation of the treaty that is acceptable to other parties to the treaty.

regard to recognition, and particularly with those in the revised UFCMJRA.

Because understandings will be useful in coordinating the Convention with current U.S. law, the Study Committee believes that the United States will need to give serious consideration to making certain understandings in connection with its ratification of the Convention. It further believes that any drafting committee appointed in connection with the Convention should be involved in developing and drafting the U.S. understandings.

IV. Application of NCCUSL Scope and Program Criteria

Ultimately, the Study Committee was asked to make a determination whether NCCUSL should undertake a project with regard to the Convention, including the appropriate scope for any project undertaken. The Study Committee's conclusion is that a drafting committee should be appointed to draft the implementing legislation for the Convention, as well as the declarations and understandings to be made by the United States in connection with ratification of the Convention. This section reviews the Study Committee's conclusion in light of NCCUSL's criteria for appointment of drafting committees.

A. Is the subject matter one appropriate for state legislation?

Section 1.2 of the NCCUSL Constitution states “[i]t is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.” Because NCCUSL's core mission is to serve its member states, the Conference has recognized that proposals for projects with an international aspect must demonstrate a nexus between the goals of the project and that core mission. The Conference has recognized this nexus may be established with regard to an international project if the proposed project is appropriate to prevent the preemption of existing or prospective state laws through adoption of a federal treaty.

As discussed above, the Convention covers two distinct subject matter areas: (1) the enforcement of exclusive choice of forum clauses and (2) the recognition and enforcement of foreign country judgments. Enforcement of exclusive choice of forum clauses currently is governed largely by federal standards in the federal courts, although some federal courts apply state law rules under *Erie* in diversity cases in certain situations. State law rules govern enforcement of exclusive choice of forum clauses in state courts. Recognition and enforcement of foreign country judgments currently is governed exclusively by state law, both in state and federal courts. The Convention potentially could preempt existing state law in both the areas of enforcement of choice of forum agreements and recognition and enforcement of foreign country judgments. Further, because this Convention is one which, like the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³⁵ cuts across subject matter areas, the Convention will have an impact on state law beyond its possible preemptive effect

³⁵United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958).

because it will create rules applicable in a variety of state law contexts, and will need to be assimilated into those surrounding bodies of state law. Finally, the Convention expressly refers to the other law of the parties to the Convention to govern a number of issues, and, in some instances, the fit of the Convention with that other law will need to be considered.

Given the potential impact of the Convention on existing state law, and the ability to ameliorate that impact through an implementation method sensitive to preservation of state law, the Study Committee believes that the subject matter of this proposed project is one appropriate for a NCCUSL drafting committee.

2. What have the states already done with regard to this subject?

As discussed above, both enforcement of choice of forum agreements and recognition and enforcement of foreign country judgments are subjects currently governed by state law – with choice of court agreements governed in part by state law, and recognition and enforcement of foreign country judgments governed entirely by state law.

3. Does the proposed project require changes in federal laws or regulations?

The Study Committee's suggested approach to implementation of the Convention is one that will involve enactment of federal as well as state legislation. Because, however, the Private International Law Section of the Office of the Legal Adviser has expressed its willingness to work with a drafting committee in developing an appropriate implementation scheme for the Convention, the Study Committee believes that the fact that federal as well as state legislation is contemplated by this project will not present a problem for a drafting committee in developing a proposal for implementation of the Convention in this largely state law area. The Study Committee's recommendation that the drafting committee work with the State Department to coordinate the federal and state implementing legislation will further facilitate successful implementation.

4. What organizations or interest groups are likely to have an interest in the subject matter?

The Private International Law Section of the Office of the Legal Adviser has indicated that the Convention is one of that Office's top priorities. In August 2006, the House of Delegates of the American Bar Association adopted a Resolution recommending that the United States promptly ratify and implement the Convention. The New York City Bar also has conducted a study of the Convention and issued a Report recommending its ratification. The insurance industry and the re-insurance industry supported the Convention during its negotiation and continue to support its ratification.

The primary concerns regarding the Convention expressed to the U.S. delegation during negotiation of the Convention were made by commercial information consumers, such as library

associations, who were concerned about ensuring informed consent with regard to choice of court agreements. So far, the State Department has not received any statements of opposition to ratification from those groups. It therefore appears that there is substantial support for moving forward toward ratification of the Convention and, as of this time, no expressed opposition.

In addition, the State Department has expressed its willingness to work with NCCUSL with regard to implementation of the Convention.

5. Are there resources available to support the development of the proposed project?

There are several sources of expertise on which a NCCUSL Drafting Committee might draw in carrying out this project. As mentioned above, both the ABA and the New York City Bar have studied the Convention. In addition, it is anticipated that members of the U.S. Delegation with regard to the Convention will be a valuable resource to the Drafting Committee. The co-reporters for this Study Committee, Louise Ellen Teitz and Kathleen Patchel, both were members of the U.S. Delegation. It is likely that other members of the U.S. Delegation would be willing to provide assistance as well. Finally, as mentioned above, the State Department has expressed its willingness to work with NCCUSL on this project.

V. Conclusion

The Study Committee recommends that NCCUSL appoint a drafting committee to draft the implementing legislation for the Convention. NCCUSL's criteria for appointment of drafting committees support this conclusion. The potential impact of the Convention on current state law regarding both enforcement of choice of forum clauses and recognition and enforcement of foreign country judgments, including its potential impact on various uniform laws, demonstrates that NCCUSL has an important interest in determining the way in which the Convention is implemented and makes its implementation an appropriate subject for NCCUSL to undertake. This is an area currently governed in large part by state law, and the extent to which it will continue to be in the state law domain if the Convention is ratified will be determined in large part by the way in which the Convention is implemented. Further, although implementation will involve enactment of federal as well as state legislation, the involvement of the U.S. Department of State Private International Law Section in the process should provide the means for facilitating enactment of the federal portions of the proposed implementation. Finally, there appears to be substantial support for enactment of the Convention, as well as resources to assist NCCUSL in drafting its implementing legislation.

Therefore, the Study Committee makes the following recommendation:

That a Drafting Committee be appointed with regard to The Hague Convention of 30 June 2005 on Choice of Court Agreements for the following purposes:

(A) To draft implementing legislation to implement the Convention in a manner that preserves,

to the extent possible, the current federal-state balance in the areas covered by the Convention;

(B) To draft appropriate Declarations and Understandings for the Convention in coordination with the U.S. Department of State Private International Law Section;

© To coordinate, to the extent it determines to be appropriate, implementing legislation for the Convention with other uniform laws; and

(D) To address any other questions relating to the Convention necessary to the above charge, including revisiting those questions addressed by the Study Committee in this Report.