

MEMORANDUM

To: Uniform Law Commissioners

From: Kathleen Patchel and Louise Ellen Teitz, Co-Reporters

Re: Issues for Annual Meeting July 2010

Date: June 11, 2010

The Uniform International Choice of Court Agreements Act Drafting Committee has been charged with drafting legislation to implement in the states an international convention, The Hague Choice of Court Agreements Convention, “in a manner that preserves, to the extent possible, the current federal-state balance in the areas covered by the Convention.” The Act attempts to integrate the Convention into state law as a comprehensive statute that provides transparent and easily accessible implementation of the Convention through the conditional preemption approach. The Drafting Committee met twice since the July 2009 Annual Meeting, in October 2009 and March 2010, and at both sessions considered revised drafts of the uniform law. The meetings were attended by Keith Loken, Assistant Legal Adviser for Private International Law, U.S. Department of State, as an Observer.

Throughout the drafting process, the Drafting Committee has considered two overarching issues that influence the structure of a uniform law and continue to impact the drafting: (1) the text of the international convention; and (2) the method of implementation as part of a conditional preemption approach. As discussed in more detail below, the Drafting Committee has been working with the Convention language and with the proposed federal implementing statute, the latter still being revised, and has tried to be consistent with both, as emphasized in the Reporters’ Notes.

Major Policy Issues

(1) Implementation of the Convention

As discussed above, the uniform law has been drafted as a comprehensive statute to implement the Convention through conditional preemption whereby states will be allowed to opt out of portions of the federal statute into an approved uniform law which fully implements the treaty in state law. This process for implementation requires that the uniform law (1) is consistent with the treaty itself, (2) fits within existing state law and reflects the needs of state legislation, and (3) remains consistent with the federal implementing statute. The US State Department has to date not decided the full details of an implementation process to be recommended. The ULC continues to work with the U.S. State Department to implement the Convention with the least disruption of the current federal-state balance in the areas of enforcement of choice of court agreements and recognition and enforcement of judgments.

In addition to the overall issue of conditional preemption, there is an additional issue of whether and to what extent the uniform law would apply in lieu of the federal statute, especially

in connection with federal courts sitting in diversity jurisdiction. The Reporter's Issues Memo for the March 2010 Drafting Committee provides extensive discussion of the issues, including the potential question raised for interpretation of the choice of court clause in federal and state court and suggests alternatives, but this issue remains tied to the ultimate approach taken by the U.S. State Department as to implementation and whether separate federal question jurisdiction is provided for federal courts hearing cases under the Convention.

(2) Consistency with Convention and draft federal statute

As mentioned above, the Drafting Committee recognizes the need to ensure that the uniform law is consistent with both the Convention and the draft federal statute. As in the earlier drafts, the detailed Reporters' Notes focus on this relationship and highlight where differences occur. The Drafting Committee considered changes necessary to fit with uniform law stylistic approaches in light of the international nature of this Act. For example, the Drafting Committee decided in Section 2(14), the definition of "preliminary question," a significant concept in the scope of the Convention, to follow the federal statute. Similarly, the Drafting Committee decided to use the phrase "Contracting State," rather than "member country", to follow the federal statute since the term is a standard term in treaty practice. The Reporters' Notes reflect these decisions. The Drafting Committee took the standard ULC definition of "state" but as discussed in Note 20 to Section 2, the Drafting Committee has not yet determined how to differentiate one of the individual US states from a foreign country since unlike the federal statute, the capitalization of the word is not a practicable solution.

(3) Issues dependent on US Declarations

The Drafting Committee spent considerable time addressing the issue of requiring state courts to hear unrelated cases (cases where the only connection with the state is that it is the chosen court under the agreement), especially in light of the requirement to dispense with the discretionary doctrine of *forum non conveniens* in cases covered by the Convention, as discussed in the Prefatory Note. The Drafting Committee has attempted to accommodate those states that might wish to hear these unrelated cases and those that might not or might be unable to do so because of state constitutional restrictions. The Drafting Committee has also been mindful of the need for transparency and predictability for transactional planning. In addition, this provision will be impacted by the U.S. government's decision whether to make a Declaration under Article 19 of the Convention that it may refuse to hear unrelated cases, and if so by the actual structure of the Declaration. The current draft offers two alternatives under Section 8 (d), one that is drafted in terms of subject matter jurisdiction and the other in terms of the U.S. making a Declaration under Article 19 of the Convention. A similar issue is raised by Article 20 of the Convention in connection with recognition of a judgment and highlighted in Section 11 (c) of the Act.

Another example of where the U.S. government's decision will impact the Act is in connection with the transition provisions for the effective date of different aspects of the Convention, including nonexclusive choice of court agreements, assuming the US makes a Declaration under Article 22 of the Convention. Section 14 (c) and the Reporters' Notes highlight the two possibilities, depending on the federal approach. Also the scope of the

Convention as applied in the US will be impacted by the definition of “international case” and whether it excludes cases only where all of the parties reside *exclusively* in the same Contracting State. Section 2(9) and the Reporters’ Notes provide extensive discussion of this issue.

(4) Additional issues for consideration in Act

The term “judicial settlement” or “transaction judiciaire” used in Article 12 of the Convention has been defined in Section 2 (11) and is the focus of Section 19 of the Act. As indicated in the Reporters’ Notes, there is some disagreement about the scope of the provision and whether it has preclusive effect. The Drafting Committee has been consulting with The Hague Conference Secretariat about the provisions.

Additional changes and issues are flagged in the Reporters’ Notes for discussion.

(5) Issues continuing after implementation

One of the issues the Drafting Committee has been considering is how to insure state compliance with the Act under the cooperative federalism approach and thus allow good faith implementation by the U.S. of the Convention. While this issue is addressed in more detail in the Issues Memo for the March 2010 Drafting Committee, the Drafting Committee has indicated that the ULC is able to provide both transparency and monitoring and is willing to work in cooperation with the federal government.

The Drafting Committee believes this is a comprehensive state statute that provides transparent and easily accessible implementation of the Convention but recognizes the need to fit within the indigenous state law. As indicated, the Drafting Committee has attempted to be consistent with both the language of the Convention and the draft federal statute as it has evolved.