

## MEMO

Date: February 18, 2010

To: Drafting Committee on the Hague Convention on Choice of Court Agreements

From: Kathleen Patchel, Co-Reporter

Re: Issues for March Drafting Committee Meeting

### I. Issues Raised by the March 2010 Draft

As with previous drafts, the Reporters' Notes to the March 2010 draft flag issues for discussion by the drafting committee. This memo provides a list of each of the more important of those issues and the location in the March 2010 draft where each issue is discussed.

#### (1) Section 2 – Definitions.

(A) Definitions of “International case” and “Record” (Sections 2(8) and 2(12)). The Style Committee has suggested that the definition of “international case” and the definition of “record” be deleted from Section 2 under the rule that a definition only used in one section should be defined in that section rather than in the definitional section. They suggest that the definition of “international case” be move to Section 4 (Scope) in which it is used, and that the substance of the definition of “record” be incorporated into the definition of “choice of court agreement.” The draft federal statute has replicated our draft act with regard to the current draft's treatment of these definitions, and, thus, compliance with the Style Committee's suggestion would create a difference in language and approach from that of the draft federal statute. This issue is discussed in Reporters' Notes 14 and 17 to Section 2.

(B) Definition of “recognition.” The Style Committee has suggested that the term “recognition” be defined. This issue is discussed after Reporters' Note 18 to Section 2.

(C) Definition of “court.” The draft federal statute defines the term “court” while our draft does not. This issue is discussed after Reporters' Note 18 to Section 2.

(D) Definition of “judgment” (Section 2(9)). This definition may be inconsistent with the meaning of that term as used in the draft federal statute and in the Convention. This issue is discussed after Reporters' Note 18 to Section 2.

(2) Section 4 – Scope. Should the bracketed language in Section 4(a), which is found in the draft federal statute, be added? This issue is discussed in Reporters' Note 1.

(3) Section 10 – Recognition of Judgment of Chosen Court. At the October 2009 drafting committee meeting, the drafting committee decided to delete the provision expressly authorizing

stays and to deal with the issue in a comment. Does Reporters' Note 4 adequately capture the substance of the intended comment?

(4) Section 15 – Recognition of Judgment Rendered by Court Chosen in Non-Exclusive Choice of Court Agreement.

(A) Section 15(a). Does this subsection provide adequate guidance to courts in applying the recognition and enforcement provisions to non-exclusive choice of court agreement judgments? Would it be useful to provide more definite guidelines with regard to application of this subsection, for example, by specifically listing the sections that apply to non-exclusive choice of court agreements, or by a statement to the effect that sections apply to non-exclusive choice of court agreements except to the extent a particular section expressly states that it cannot be applied to non-exclusive choice of court agreements? (This issue is not discussed in the Reporters' Notes.)

(B) Section 15(c). What is the appropriate transition provision with regard to application of the Act to non-exclusive choice of court agreement judgments? This issue is discussed in Reporters' Note 4 to Section 15.

(5) Section 16(d) – Hague Conference form with regard to required information. What significance should this form be given under the Act? This issue is discussed in Reporters' Note 3 (the first note 3 – there is a misnumbering in the notes) to Section 16.

(6) Section 18 – Statute of Limitations. Should this provision be included in the Act? This issue is discussed in Reporters' Note 1 to Section 18.

## II. Other Issues

(1) To what extent should the Act apply in lieu of the federal statute under a conditional preemption approach?

The Study Committee Report recommended that the conditional preemption approach be used to retain the current federal law-state law balance to the extent that retention of the current approach was practicable.

Recognition standards and standards for enforcement of choice of court clauses currently are governed by state law in state courts. Thus, the Act should at a minimum apply to all state court proceedings. The more complex issue is the extent to which retention of the current state law – federal law balance would require the Act to be applied by federal courts sitting in diversity. The answer to this question may differ with regard to the Act's choice of court provisions and its recognition provisions.

(A) Recognition Provisions of the Act

With regard to recognition standards, federal courts sitting in diversity (and, because a recognition action does not give rise to a federal question, federal courts hearing recognition cases are almost always sitting in diversity) apply state law recognition standards as substantive rules under the *Erie* doctrine.<sup>1</sup> Therefore, if the current state law – federal law allocation is retained in implementation of the Convention, the provisions of the Act dealing with recognition of foreign judgments would apply in both state courts and federal courts hearing a recognition action pursuant to their diversity jurisdiction. Further, in order to retain the current diversity jurisdiction in this area, the mere fact the Act is implementing a convention should be insufficient of itself to create a federal question jurisdictional basis, just as currently the mere fact the request for recognition is of a foreign country judgment has been held not to create federal question jurisdiction under current recognition law.

## B. Choice of Court Provisions

With regard to enforcement of choice of court clauses, whether state or federal standards apply in federal courts sitting in diversity cases is determined in part by the way in which the issue is raised in the federal court, and in part by the federal circuit in which the case is heard. In *Stewart Organization Inc. v. Ricoh Corp.*,<sup>2</sup> the U.S. Supreme Court held that when enforcement of a forum selection clause is raised in the context of a motion to transfer 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 because the question is the application of a federal rule of procedure. If, however, the issue is

---

<sup>1</sup>State 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 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 with the state courts. 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).

<sup>2</sup>487 U.S. 22 (1988).

raised in the different context of a motion to dismiss the federal diversity action in favor of a non-federal court designated in the choice of court clause, then the answer is not clear. The U.S. Supreme Court has not spoken to that issue and the federal circuits are split as to whether the question should be characterized as one of federal procedure or one of substantive state contract law for purposes of the *Erie* doctrine.<sup>3</sup>

In short, in the choice of court area, there is a clear rule regarding the state law – federal law balance with regard to state court cases – state law standards apply. This balance will be retained if the Act is applied in state courts.

On the other hand, there is no clear current rule regarding the state law - federal law balance with regard to choice of court cases in federal courts sitting in diversity. In light of this lack of clarity, it would seem that at least three positions could be taken with regard to the application of the Act to federal courts sitting in diversity.

First, one could argue that, while the lack of clarity with regard to the diversity question is unfortunate, it will not cause sufficient problems for implementation of the Convention to justify addressing it, and thus the current divisions should be replicated. This would leave the Act applying in diversity cases in some states when the issue is raised as a motion to dismiss rather than a motion to transfer, and not applying to diversity cases in other states at all.

Second, one could argue that the bases for characterizing the choice of court issue as procedural for purposes of *Erie* in the current federal cases – that is, the court’s focus on the fact it is applying one of its own rules of procedure – is inapposite in the present situation and, thus, should not be controlling. For example, in the *Ricoh* case, the U.S. Supreme Court noted in finding the choice of court issue procedural in the 1404 motion to transfer context that 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.<sup>4</sup> This analysis seems at odds with the Convention-imposed obligation to enforce choice of court clauses unless one of the express exceptions applies, as well as the Convention’s antipathy to decisions about choice of court provisions based on discretionary considerations as to which is the better court to hear a case. Under this analysis, it could be argued that the choice of court clause enforcement obligation should be viewed as substantive for purposes of *Erie*, which would mean that state law – that is, the Act -- should apply.

Third, one could argue that the current balance of state and federal law should be replicated in the application of the Act only to the extent that there is a clear current consensus on what that balance is at the national level. As the only clear national consensus with regard to

---

<sup>3</sup>See, e.g. *Eisaman v. Cinema Grill Systems, Inc.*, 87 F. Supp. 2d 466, 448 & n. 2 (D. Md. 1999) (noting the circuit split and applying the Fourth Circuit rule that state law governs enforcement of choice of court provisions in diversity cases.)

<sup>4</sup>487 U.S. at 29-31.

the application of state law on the choice of court clause enforcement question is that state law applies in state courts, the Act's provisions regarding enforcement of choice of court clauses (as opposed to its provisions with regard to judgment recognition) should apply only in state courts.

(2) What mechanism should be used to insure state compliance with the Act, and thus good faith implementation of the Convention?

To the extent the Committee has discussed this issue in the past, it has operated on the tentative assumption that review of state applications of the Act through the normal judicial review process – that is, state court review through the highest level of the state courts, with the possibility then of U.S. Supreme Court certiorari review based on the question of whether the state's application of the statute is consistent with the requirements imposed on by the federal statute in order for state law to apply – would be the mechanism by which state compliance would be insured.

Other mechanisms, however, have been suggested in addition to or in lieu of this normal process of review. For example, some have suggested that, while court review will be adequate to ensure future state compliance, the question of the initial compliance of a given state's enactment of the Act with the uniform Act – the compliance that is the condition in order to avoid preemption – should be determined by a body other than the courts – for example, the State Department, the ULC, or a combination of the two. Others have suggested that one of these combinations also be involved on a continuing basis to insure future state compliance. Some in the federal statute advisory group have suggested that, while court review is the appropriate process, U.S. Supreme Court certiorari review is not an adequate mechanism for insuring effective compliance, and, thus, removal to federal court of any action filed in state court should be allowed, apparently without regard to whether the context is enforcement of the choice of court clause or recognition of a judgment, and without regard to whether the state court from which removal is allowed is the chosen court or a non-chosen court.

Does the Committee believe that the normal judicial review process is adequate with regard to determining (1) initial compliance and (2) subsequent compliance, or does the Committee wish to recommend other additional or different methods to ensure state compliance?

(3) Assuming the Act is ready to be presented to the ULC in July 2010, but the federal statute is not yet finalized, does the Committee see any value in going forward at the 2010 ULC Annual Meeting or does it believe the Act should not be presentment for promulgation until after the federal statute is completed?