

Alternative Provisions of Federal Legislation Requiring States to Adopt the Uniform Choice of Court Agreements Act

Set forth below are two alternative provisions for insertion in federal legislation in order to ensure implementation of the Hague Convention on Choice of Court Agreements throughout the United States. The drafts are based, loosely, on prior ULC experience with similar requirements, such as federal E-Sign legislation that requires states to adopt the Uniform Electronic Transactions Act (UETA) to avoid having state law pre-empted by the provisions of E-Sign [an approach sometimes termed as “opting out”], and the federal legislation that has been proposed implementing the Hague Family Maintenance Convention, requiring states to adopt the 2008 revision of the Uniform Interstate Family Support Act (UIFSA) or face the possible loss of federal child support funds [sometimes termed as “opting in”]. The “opt in” draft in this situation, however, would require that states adopt the Uniform Choice of Court Agreement Act by a future date certain or have the Uniform Act become applicable in the state by means of federal pre-emption.

The draft of the federal legislation that has been circulated to the Committee addresses these issues in Section 405, on page 21. The notes to that draft suggest that even if the “cooperative federalism” approach is employed and a state adopts the Uniform Act, there would be some provisions of the federal legislation that would still apply. This seems unduly complex and infeasible. A better approach would be to have the substantive provisions of the federal act govern matters in federal courts, the Uniform Act govern matters in state courts, and include in the federal legislation the requirement that states adopt the Uniform Act or be subject to pre-emption. The drafts below take that approach.

Opt-In Draft

SECTION 405. Relationship to State Law [**Consider a different title**]

- (a) In order to implement the Hague Convention on Choice of Court Agreements of June 30, 2005, each state shall adopt legislation substantially similar to the Uniform Choice of Court Agreement Act as approved by the National Conference of Commissioners on Uniform State Laws as of October 1, 2010 (“the Uniform Act”) no later than [two calendar years after the effective date of this Act].

- (b) If a state does not adopt legislation that meets the requirements of subsection (a), the Uniform Act shall be effective in that state until the state adopts legislation that meets the requirements of subsection (a).
- (c) If a state adopts legislation to implement the Hague Convention on Choice of Court Agreements, the [Secretary of State (?); Attorney General (?)] shall determine whether the state legislation is substantially similar to the Uniform Act so as to meet the requirements of subsection (a). If the state legislation is not substantially similar to the Uniform Act, the Uniform Act shall be effective in that state, but only to the extent of any inconsistency between the state legislation and the Uniform Act.

Drafting Notes

Since the Uniform Act is being drafted to implement the Convention in state courts, and it is assumed that the substantive provisions of the federal legislation will be tailored to implementing the Convention in federal courts, it should be the Uniform Act, and not the federal legislation, that becomes operative by pre-emption in the states that do not enact legislation substantially similar to the Uniform Act. This is similar to the method of implementation being proposed for the UN Convention on Independent Guarantees and Stand-by Letters of Credit: if the parties to an undertaking do not choose applicable law, the Official Text of UCC Article 5 becomes the applicable law, by means of a pre-emptive provision in the proposed federal implementing legislation.

The term “substantially similar” is used to recognize the reality that there almost surely will be some variance between the Uniform Act and individual state enactments in order to mesh the Act with existing state procedures, and to recognize that the Uniform Act gives states the right to choose alternative versions of at least one provision.

The version of the Uniform Act as of “October 1, 2010” is chosen because that is the date that is put on the final version of an act, the version that reflects the revisions that the ULC Style Committee makes after the Act has been finally approved at the July NCCUSL Annual Meeting, and that includes final comments and reporter’s notes.

An effective date of two years after the effective date of the federal legislation is chosen to provide state legislatures a reasonable opportunity to enact the Uniform Act before being subject to pre-emption. This still will give those states whose legislatures meet

only in odd-numbered years, or that have only truncated, budget-related sessions in even-numbered years, only one legislative session in which to enact the Uniform Act. The Committee may wish to make the period before possible pre-emption three years, but other factors, such as having the Convention implemented quickly so that the United States can ratify the Convention as soon as possible, may argue for a different result.

At the ACPIL meeting in July, there was discussion of having some federal official make the “substantially similar” determination. This determination would be made shortly after a state enacted the Uniform Act so there will be an early decision as to whether and to what extent a state’s version of the Uniform Act is pre-empted because of inconsistency with the Convention.

Opt-Out Draft

SECTION 405. Relationship to State Law [**Also consider a different title**]

- (a) In order to implement the Hague Convention on Choice of Court Agreements of June 30, 2005, the Uniform Choice of Court Agreement Act as approved by the National Conference of Commissioners on Uniform State Laws as of October 1, 2010 (“the Uniform Act”) shall apply in every state as of the effective date of this Act, except to the extent that a state has adopted or later adopts legislation that is substantially similar to the Uniform Act.
- (b) If a state adopts legislation to implement the Hague Convention on Choice of Court Agreements, the [Secretary of State (?); Attorney General (?)] shall determine whether the state legislation is substantially similar to the Uniform Act. If the state legislation is found to be substantially similar to the Uniform Act, that state legislation and not the Uniform Act shall be effective in the state.

(c) If the state legislation is not substantially similar to the Uniform Act, the Uniform Act shall be effective in that state, but only to the extent of any inconsistency between the state legislation and the Uniform Act.

Drafting Notes

This version, as noted in the introductory paragraphs, is based on the UETA/E-Sign model. It would seem that the only reason to adopt this model would be if the United States wants to be able to ratify the Convention as soon as possible and believes that it is necessary to have the Convention fully implemented in all the states before the U.S. can ratify the treaty.

Most of the drafting notes to the “Opt-in” draft also apply to this alternative.