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2011]

FEDERALISM AND U.S. PARTICIPATION IN INTERGOVERNMENTAL
EFFORTS TO UNIFY PRIVATE LAW

PETER H. PFUND*

IN his presentation, David Stewart has, in his usual elegant way, set the scene for my attempt to touch on what has become a newly sensitized issue related to U.S. participation in the intergovernmental private law unification process.

The United States was late in joining other western industrialized countries in efforts to unify private law. I believe there were two principal reasons for this:

- Since 1893, the Hague Conference on Private International Law had been a series of diplomatic conferences devoted to producing conventions geared to civil law setting out rather arcane rules for determining applicable law—not very interesting for the United States. Starting in the 1950s, however, when the Conference became a continuing institution with a Permanent Bureau, the organization began to produce what for us are more interesting conventions—setting out procedures and rules for such matters as the legalization of documents for use abroad,¹ the service of process abroad,² and the taking of evidence abroad.³
- The second reason was that private international law (PIL) conventions would impose changes in U.S. law and procedure mainly at the state level rather than in federal law, thus raising the question of federalism—whether and how federal law by treaty could or should effect changes to state law and procedure. We were not sure at that time how to do that.

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1. *See* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=41 (entered into force for United States on October 15, 1981).

2. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (entered into force for United States on Feb. 10, 1969).

3. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=82 (entered into force for the United States on Oct. 7, 1972).

In the early 1960s the importance of the potential benefits to U.S. interests from some of these newer conventions setting out procedures and also substantive legal requirements began to be seen to outweigh federalism concerns. Through U.S. participation—despite status as a non-Member State of the Hague Conference—as observer but also participant in work on some of these conventions, we realized that although our legal system differs considerably from that of other primarily civil code countries, we could benefit from such conventions and enhance U.S. business competitiveness through some of them. We also found that we could beneficially contribute to the intergovernmental negotiation of PIL conventions with our pragmatic approach to resolving problems.

Thus, by almost fifty years ago, the United States had become a Member State of the Hague Conference on Private International Law,⁴ the UN Commission on International Trade Law (UNCITRAL),⁵ and the International Institute for the Unification of Private Law (UNIDROIT).⁶ We were also participating in the PIL work of the Organization of American States.⁷ Our main purposes in participating in the work of these organizations were two-fold:

- To help produce conventions that would work and facilitate legal transactions or relationships sufficiently to merit our undertaking the arduous process of obtaining Senate advice and consent to U.S. ratification, and that could, one way or another, be effectively implemented throughout the United States to meet our treaty obligations.
- The other main purpose of our participation was and remains to this day to ensure, when the effort seeks to produce a convention to which the United States potentially would wish to become a party, that the convention as finally adopted does not include any requirement that for constitutional, legal, or

4. The United States became a Member State of the Hague Conference in 1964 by becoming a party to the 1951 Statute of the Hague Conference on Private International Law, which entered into force for the United States on October 15, 1964. *See* Statute of the Hague Conference on Private International Law, July 15, 1955, 15 U.S.T. 2228, 220 U.N.T.S. 121, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=29.

5. The United States has been a Member State of the U.N. Commission on International Trade Law since its establishment by U.N. General Assembly Resolution 2205 (XXI) of 17 December 1966.

6. The United States became a Member State of UNIDROIT by becoming a party to the 1940 Statute of the International Institute for the Unification of Private Law, which entered into force for the United States on March 13, 1964. *See* Statute of the International Institute for the Unification of Private Law, Mar. 15, 1940, 15 U.S.T. 2494.

7. The first such diplomatic Specialized Conference on Private International Law, hosted by the Organization of American States (OAS), took place in Panama City in 1975 and was known as CIDIP-I. The United States has participated in these Conferences (CIDIPs) as a Member State of the OAS.

political reasons would make it unacceptable to the United States.

How does the State Department find out what might necessitate legally or politically unacceptable changes to state law that governs private legal transactions and relationships in the United States? Through the Secretary of State's Advisory Committee on Private International Law and its several study groups on individual law unification projects. The Advisory Committee is made up of representatives of all the major U.S. national legal organizations and advises on over-arching policy matters. Each of the Advisory Committee's study groups consists of practicing attorneys, lobbyists, representatives of interested elements of the private sector, officials from interested federal government agencies, and leading law professors in the particular field—all offering their counsel and expertise without compensation. The study groups advise the Department on existing state law in the United States, what changes to it would be desirable and/or acceptable, and how best to seek or agree to such changes and craft the U.S. positions on issues arising or likely to arise in any law unification project. Moreover, the private sector and federal government members of U.S. delegations to sessions of the intergovernmental organizations preparing draft conventions, legal guides, good practice guides, or the like, and of the delegations to the diplomatic negotiations of the final texts, are drawn from the membership of the involved study groups.

One concern of ours during negotiation of the 1993 Hague Intercountry Adoption Convention⁸ was that the Convention, after the matching of a child with its prospective adoptive parents and bonding has occurred, did not require the final approval of the adoption by some authority in the national government before the adoption could be finalized. The possibility that the U.S. government at that late stage might fail to give its approval, for whatever reason, would not have been politically acceptable for the United States.

Another example in that negotiation was our opposition to the initially strongly held view by some countries that only *governmental* bodies or public authorities should be authorized to provide services for adoptions covered by the Convention. This requirement was initially seen by many delegations, and not only from countries of origin, as the only effective way to prevent intermediaries—lawyers and private adoption agencies—from abusing the adoption process and exploiting such adoptions on the backs of children for excessive financial gain. In the United States this requirement would have put many U.S. adoption agencies out of business—not a way to gain essential political support from U.S. adoption interests for U.S. ratification of the Convention. Happily, the Convention as

8. See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. No. 105-51 (1998), 1870 U.N.T.S. 182, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (entered into force for United States on Apr. 1, 2008).

adopted permits governmentally accredited and regulated private adoption agencies to provide services for Convention-covered adoptions and only for appropriate financial gain.

The U.S. record of becoming party to PIL conventions is modest. However, the sheer size of this country and the number of legal contacts and relationships abroad by Americans—for example, there are probably more adoptions annually to the United States from abroad than to all other countries combined—has given us considerable leverage in the negotiation of PIL conventions. Of course, that perceived importance of the United States also raises expectations that the United States will follow through and become a party—for example, becoming bound by the negotiated protections for children and for the birth and adoptive parents provided by the Intercountry Adoption Convention. Consequently, our continued effectiveness in the intergovernmental process of preparing and negotiating PIL conventions is dependent, at least in part, on a good record of acceptance of such conventions and their requirements by the United States. That is especially so if our concerns that such conventions not contain what for us would be unacceptable requirements have been met. If we are seen, however, as simply seeking respect for our concerns and imposition of elements of our legal system on others, and we do not also eventually become a party to the resulting conventions, our future leverage and effectiveness in the negotiating process will suffer. Therefore, quite apart from the benefits for U.S. interests that U.S. ratification promises, we need in this country a sound process for implementation of PIL conventions that continues to make U.S. ratification possible and even might facilitate ratification.

The Hague Legalization, Service, and Evidence Conventions were deemed self-executing and came into force in the United States without federal implementing legislation. That is true, as well, for the UN Convention on Contracts for the International Sale of Goods (CISG), which entered into force for the United States in 1988.⁹ Through the efforts notably of Professors John Honnold, University of Pennsylvania Law School, and Allan Farnsworth, Columbia University School of Law, the CISG provisions on the formation of the sales contract and the rights and obligations of the seller and buyer with regard to each other are very similar to the corresponding provisions of the Uniform Commercial Code.¹⁰

The 1980 Hague Convention on the Civil Aspects of International Child Abduction¹¹ is implemented by the federal International Child Ab-

9. See Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (entered into force for United States on Jan. 1, 1988).

10. See U.C.C. §§ 2-101 to -108 (2003) (Sales).

11. See Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *available at* <http://www.hcch>.

duction Remedies Act (ICARA),¹² which came into force for the United States with the Convention in 1988. The Convention provides for the prompt return of a child wrongfully removed by a parent from the country of the child's habitual residence to another country in breach of the other parent's custody rights. Among the provisions of ICARA is one offering applicants for return of a child from this country the option to invoke the Convention's return requirements in proceedings before either a federal or state court. This option was deemed important to give an applicant the ability to avoid being limited to the jurisdiction of a state court that might be viewed as unaccustomed to dealing with and providing for compliance with treaty obligations of the United States.

A convention to which we have recently become a party is the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Intercountry Adoption Convention), which entered into force for the United States in 2008 and to which eighty-three countries are now parties. Early in its negotiation it was clear that the Convention would need supplementation by implementing legislation in States Parties. The provisions of the Convention were deliberately left general in order to make it possible for countries with very different legal, political, and social systems to become parties. Filling in the details was to be left to implementing legislation and regulations in each State Party that would be designed to fit in with the situation in each country. The requirements of the U.S. federal implementing legislation—the Intercountry Adoption Act (IAA)¹³—are further supplemented by extensive federal regulations governing the accreditation of U.S. adoption service providers, the processing of incoming and outgoing cases, the preservation of adoption records, and the immigration of adoptees or prospective adoptees from abroad to the United States.¹⁴

The Intercountry Adoption Convention received Senate advice and consent in 2000, but entered into force for the United States in 2008 after enactment of the IAA and promulgation of the implementing regulations. What I earlier referred to as “the arduous U.S. process” required lasted from 1993 to 2008—*fifteen years!* The IAA includes compromises that were politically essential—among them the naming of the State Department, rather than the Department of Health and Human Services, as the U.S. Central Authority to oversee Convention adoptions and Convention implementation. Another compromise—procedural in nature—was essential to achieve the acquiescence of those in Congress initially opposed to U.S. ratification and implementation because the Convention does not

net/index_en.php?act=conventions.text&cid=24 (entered into force for United States on July 1, 1988).

12. See International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601-11610 (2006)).

13. See Intercountry Adoption Act of 2000, P.L. 106-279; 114 Stat. 825 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C. (2006)).

14. See 8 C.F.R. pts. 204, 300-14 (2011); 22 C.F.R. pts. 96-98 (2011).

bar incoming or outgoing adoptions by same-sex couples and by single persons—a bar that the U.S. delegation had successfully opposed so that each country could deal with this issue as it wished.

During the Presidency of George W. Bush, doubts newly arose about the merits of treaties generally—as a limitation on U.S. national sovereignty. There appeared to be little belief or understanding that treaties might provide benefits for U.S. interests outweighing the requirements they would impose on the United States. PIL conventions, perceived at the time as relatively optional in nature, were deemed to have little chance of being transmitted to the Senate and receiving the necessary approvals in Congress.

The Intercountry Adoption Convention, however, benefitted from an urgency occasioned by the wishes of many U.S. adoption interests that we become a party. They were concerned at the impatience of countries from which the United States—the world's major recipient of children from abroad in adoption—was adopting children with what was for them the hard-to-understand delay in U.S. ratification—ultimately fifteen years, as I stated earlier. As this delay neared its end, it prompted some countries of origin to threaten to end or suspend adoptions to the United States. Fortunately, the State Department and far-sighted elements of the U.S. adoption community had anticipated such a possible foreign reaction to our lengthy process and had pressed ahead with support for the IAA and the preparation of the implementing regulations.

So, where do we stand at this time, and what is the future of U.S. implementation of PIL treaties?

There is increased awareness in the United States of the need to achieve some way for the United States to be able effectively, and in an acceptable way, to benefit from and implement PIL conventions. There is also much closer coordination now than before between the State Department's Office of the Legal Adviser, the Justice Department's Office of Legal Counsel, and the Uniform Law Commission (ULC) on this matter.

This new level of cooperation has focused in particular on the 2005 Hague Convention on Choice of Court Agreements (the Choice of Court Convention)¹⁵—the net result of an originally much broader project of the Hague Conference to produce a convention on jurisdiction and the recognition and enforcement of judgments. The final Convention seeks to accord choice-of-court agreements and subsequent judgments effects similar to those accorded arbitration agreements and awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Arbitration Convention).¹⁶

15. See Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M.1294, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

16. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Con-

Subject to narrow exceptions, the Hague Convention applies to exclusive choice-of-court provisions only in business-to-business contracts, requiring courts in the chosen State Party to accept jurisdiction over the parties' dispute, and requiring the courts of other States Parties to decline jurisdiction. A resulting judgment is entitled to enforcement in States Parties.

The State Department is making preparations to move the Convention to the Senate for advice and consent to ratification. However, despite close State Department, Justice Department, and ULC contacts on implementation, the approach that will finally be taken to U.S. implementation remains unsettled at this time.

The ULC believes that the states should be free to enact a uniform law prepared by the ULC for implementation and that federal legislation imposed on the U.S. states might create problems through non-uniform application and interpretation of such legislation by state courts. Others believe that federal legislation is necessary for uniform application and interpretation of the Convention's requirements in the United States and for the United States to be able reliably to meet its treaty obligations.

The ULC's Draft Uniform International Choice of Court Agreements Act (the ULC Act), which received its second reading in Chicago this summer, offers uniform legislation designed to provide for full compliance with the Convention's obligations in states in which it is enacted without amendments.¹⁷ In states that pass the ULC Act without amendments, it would apply in lieu of federal implementing legislation. *Federal legislation*, still in its early drafting stage under the auspices of the State Department's Advisory Committee on Private International Law, would apply in states where the ULC Act has not been enacted. There is a *longer and a shorter version* of the federal act. Which version is adopted will depend on the decision of whether the Convention is self-executing or not—a decision not yet made. The longer and shorter versions have similar articles providing, in effect, that in states in which the ULC Act has been enacted with amendments, if any of its provisions as enacted are inconsistent with the requirements of the federal act, then the provisions of the federal act or the Convention will apply instead of the inconsistent provisions. Any role of the federal government to make this approach work is not yet certain.

I should mention again that the two drafts of federal legislation are still in an early stage, they are subject to change, and there is not even an official draft of any version of this legislation at present. I should also mention that some worry that using state and federal laws to implement

vention], *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (entered into force for United States on Dec. 29, 1970).

17. *See* UNIF. INT'L CHOICE OF COURT AGREEMENTS ACT (Draft for Approval 2010), *available at* http://www.law.upenn.edu/bll/archives/ulc/hccca/2010am_draft.htm (considered but not passed upon at the National Conference of Commissioners on Uniform State Laws (NCCUSL or ULC) meeting in its 119th year in Chicago, Illinois on July 9-16, 2010).

the Convention could confront lawyers and courts here and abroad with three different texts—the Convention, the federal implementing legislation, and the ULC-prepared legislation as enacted by each state—both in deciding whether to choose a U.S. court and when cases are to come before U.S. courts. They wonder whether this is really law unification, and some wonder whether foreign parties would choose U.S. courts in the first place if U.S. state law is to apply.

In light of the above, it is possible that the Choice of Court Convention will be implemented in the United States with either state or federal legislation applicable in some states, or both interacting in others. This creative approach would give as much freedom as possible to the states to provide for implementation of the Convention but would also ensure that implementation throughout the United States will meet U.S. treaty obligations as well as other criteria I will list in a moment. Should such an approach be chosen and provide effective and uniform implementation of the Choice of Court Convention in practice, this method may be used for other PIL conventions—even some that have not moved forward in the United States in the past.

As before, some conventions may be deemed self-executing, requiring no implementing legislation, and others will be implemented solely by federal legislation like the Intercountry Adoption Convention. A convention to be implemented by conforming amendments to already existing federal legislation is the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Child Support and Family Maintenance Convention),¹⁸ that received Senate consent in September of 2010, for which ULC-prepared conforming amendments to the Uniform Interstate Family Support Act (UIFSA),¹⁹ supplemented by federal legislation, are planned.

I am informed that there are now five key criteria that will form a kind of checklist of considerations, at least for the State Department, in determining how best to implement PIL treaties in the future:

- 1) The need to ensure that the United States can comply with U.S. treaty obligations to other treaty partners;
- 2) Whether potential treaty partners will view the United States as a reliable treaty partner;

18. See Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. TREATY DOC. NO. 110-21, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=131; Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, http://www.hcch.net/index_en.php?act=conventions.text&cid=133.

19. See UNIF. INTERSTATE FAMILY SUPPORT ACT (UIFSA) (amended 2008), 9 U.L.A. 256 (1996). In July 2008, the NCCUSL approved amendments to the UIFSA in order to integrate the appropriate provisions of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in preparation for the Senate's action, since taken, to authorize U.S. ratification of the Convention.

- 3) The historical allocation of federal and state interests;
- 4) The need to provide certainty in transactions and relationships; and
- 5) The need for transparency.

CONCLUSION

In concluding these remarks, what seems clear is that there will be far more cooperation than hitherto between the State Department, the Justice Department, and the states and private sector through the ULC on crafting the appropriate method for implementation of each PIL convention for which there is political support for U.S. ratification. This cooperation, avoidance of ideological rigidity with regard to the issue of federalism, plus a focus on the unique needs of each convention in terms of the criteria mentioned above, should make it possible for the United States to become a party to more PIL conventions than might otherwise have been possible, and in new and creative ways. That, in turn, will provide the United States more access to the benefits offered by such conventions. It also seems likely to preserve our leverage as a participant in future intergovernmental preparation and negotiation of treaties to unify private law.

