CHAPTER 7

Implementing Legislation for the Hague Choice of Court Convention

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This is my twenty-first year of involvement in efforts by the United States to secure at the Hague Conference on Private International Law and implement in the United States a treaty obligating the courts of our treaty partners to recognize and enforcement judgments of courts of the United States and imposing a reciprocal obligation on our courts. I have worked on this project with Legal Advisers of the Department of State during three Administrations. I have collaborated with four Assistant Legal Advisers for Private International Law. I have participated in negotiations at the Hague Conference on Private International Law under the direction of three Secretary Generals of that organization. And I have written about and spoken many times on the Hague negotiations and on the 2005 Hague Convention on Choice of Court Agreements (COCA) and on its implementation. Many others participating in this Colloquium have played a vital role in every aspect of United States participation in the Hague Conference and in these same efforts to achieve implementation of the 2005 Convention.

On this occasion I would like to step back and look at the path that led to the present situation regarding the implementing legislation for the COCA. Others will cover details regarding one aspect or another of COCA's provisions and its implementation. My purpose is to summarize and try to explain the broad arc of our experience in attempting to implement the treaty and the choices that now remain open to the Administration. I hope to answer in a straightforward fashion the question that anyone not heavily steeped in this subject might reasonably ask nine years after completion of the Convention—“How did this seemingly easy effort become so difficult and so contentious?” He or she might ask for an answer that focuses on the main issues and does not have too many footnotes. I shall try to accommodate that question and that request.

In the course of rising to this challenge, I will try also to respond to the points advanced by two other Colloquium participants, Professor Kathleen Patchel and Professor David P. Stewart, as well as others associated with

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the Uniform Law Commissioners (“ULC”). To avoid repetition and remain reasonably concise I will not attempt to describe in any detail “cooperative federalism.” Professor Stewart has done so in his lengthy contribution and my purpose is not to respond to each and every one of his points, although I do set out in the margin some concerns with his analysis. I will, however, set out some alternatives perspectives on the arguments that those supporting the ULC position tend to advance in support of adopting “cooperative federalism” in implementing COCA.

When we began in 1992 at the Hague Conference to negotiate a convention on international jurisdiction and recognition and enforcement of judg-

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2 Professor David Stewart asserts that there is precedent in the field of family law for “cooperative federalism.” As noted in my text, family law is generally reserved to state law and no one has ever disputed the appropriateness of implementation of treaties in that field by explicit revision of state law rather than by a self-executing treaty. He also refers to “electronic commerce” as another precedent. In fact, the expert committee appointed by the Uniform Law Commission (ULC) to make recommendations on the implementation of the United Nations Convention on the Use of Electronic Communications in International Contracts (“E-Commerce Convention”) consistently recommended to the Commission leadership implementation through only federal law—not “cooperative federalism” with separate state legislation. After lengthy debate that recommendation was adopted (see, e.g., discussion of implementation of the U.N. Convention through only federal legislation in Uniform Law Commission, Guidelines for Participation in the Negotiation and Implementation of Private International Law Conventions 8 (approved by the ULC Executive Committee January 2012; citing the E-Commerce Convention under the section titled “Implementation by Federal Legislation without State Legislation” and endorsing that approach when “state legislation is neither feasible nor practical.”)) For more on how negatively electronic commerce specialists view “cooperative federalism” as a technique for implementation of treaties in their field, see Amelia Boss, “The United States Perspective on the Convention on the Use of Electronic Communications in Electronic Contracts,” in The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Analysis (with W. Kilian, eds.) (Kluwer Law International 2008) 263, 283-87. Further, Professor Stewart refers six times to “federal-only” implementation or enforcement of the Convention when, in fact, every informed commentator has advocated that state courts have concurrent jurisdiction to hear enforcement actions under the Convention. Commentators have also recognized that, as discussed in my text, state law would play a vital role in implementation and interpretation of the Choice of Court Agreements Convention on a wide range of exclusively state-law issues (e.g., “null and void” and capacity). Indeed, some of us have urged ULC work on state legislation that would facilitate the Convention's operation (e.g., provisions on attachment of assets to establish personal jurisdiction in enforcing money judgments). Finally, Professor Stewart cites as “one advocate’s perspective” and without any analysis the detailed critique on legal and policy grounds of attempting to implement the Convention through “cooperative federalism,” S. Burbank, A Tea Party in The Hague?, 18 Sw. J. Int’l Law, 629 (2012).