CHAPTER 8

Implementing the Hague Choice of Court Convention: The Argument in Favor of “Cooperative Federalism”

David P. Stewart

1 Introduction

A previous contribution to the 25th Sokol Colloquium described in some detail the provisions of the 2005 Hague Convention on Choice of Court Agreements and indicated why ratification of that treaty by the United States is broadly supported by the international law community, in particular by transnational practitioners.¹ The following discussion addresses the most important issues that ratification of this Convention poses, focusing on how the Convention might be implemented in U.S. law.

The premise of the current chapter is that the method chosen for implementing the Convention carries special significance not only for the success of this particular treaty regime itself but also as a precedent for U.S. ratification of and adherence to other private international law treaties in the future.

Two main alternatives have been proposed for implementing the Choice of Court Agreements Convention: on the one hand by means of federal legislation alone, and on the other through a combination of complementary

state and federal legislation. Both approaches have advantages and disadvantages, and both have garnered strong supporters as well as critics. However, because the strictly federal approach to implementation has also given rise to substantial federalism concerns, it is highly likely to face considerable difficulty in the effort to obtain the Senate’s advice and consent to ratification. The alternative of joint federal-state implementation (sometimes called “cooperative federalism”) offers a workable (if not entirely elegant) option that could well mitigate that risk and, in addition, set a useful precedent for the future.

2 Implementing the Convention

Long-standing U.S. practice has been to treat international treaties and conventions as solemn, legally binding commitments and accordingly not to ratify such instruments—indeed, not to transmit them to the U.S. Senate for advice and consent to ratification—unless and until the modalities of implementation have been addressed and the ability of the United States to comply with its obligations under international law has been reasonably assured. The practical reason is straightforward: it can be difficult (at best) to expect other States party to treaties to comply with their obligations under international law if the United States cannot do so as well. This is true of both bilateral and multilateral treaties.

When the treaty in question directly implicates domestic law and procedure (as is the case with the Hague Choice of Court Agreements Convention, which will by definition operate in the context of civil litigation in state and federal courts), even greater care must be taken with regard to implementation. Here, two fundamental legal considerations are relevant. First, under the “Supremacy Clause” of the U.S. Constitution, duly ratified treaties become federal law and supersede all inconsistent state and local law (as well as previously enacted federal law to the extent of any inconsistency). As a result, ratification of a treaty can (and often does) have legislative effect and can

2 Cf. Art. 26 of the Vienna Convention on the Law of Treaties (VCLT), which is entitled “Pacta Sunt Servanda:” “Every treaty in force is binding on the parties to it and must be performed by them in good faith.”

3 Article VI, cl. 2, of the U.S. Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”