Recent U.S. Developments Concerning the Hague Judgments Convention and COCA

Although the United States signed Hague Convention on Choice of Court Agreements (COCA) in 2009, it has yet to ratify it. In this post, I report on some recent developments that offer a basis for (cautious) optimism that the United States may soon take the necessary steps to ratify both COCA and the Hague Judgments Convention.

History

On January 19, 2009, the United States signed COCA. In the years that followed, the State Department had conversations with the Uniform Law Commission (ULC) about how COCA should be implemented. The ULC is a non-partisan, non-profit, unincorporated association comprised of volunteer attorneys appointed by each state of the United States plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Its mission is to promote uniformity in the law among these jurisdictions to the extent desirable and practicable.

Because the enforcement of foreign money judgments has been governed by state law in the United States since 1938, and because the ULC has promulgated widely adopted uniform state legislation on this topic, the ULC argued that COCA should be implemented—at least in part—through state law. In particular, the ULC proposed that the treaty be implemented through "cooperative federalism." Under this approach, there would be parallel federal legislation and state legislation implementing the treaty, with a reverse preemption provision in the federal legislation allowing state law to govern if the state had passed the appropriate act.

This proposal ultimately foundered due to disagreements between the State Department and the ULC as to whether federal courts sitting in diversity would apply the state or federal legislation. Stasis ensued. The State Department was reluctant to present the treaty to the Senate without the support of the ULC. And

the ULC was reluctant to endorse an implementation framework that displaced existing state law.

A Shift on COCA

On March 2, 2022, the United States signed the Hague Judgments Convention (HJC), a multilateral agreement that seeks to facilitate the recognition and enforcement of judgments more generally. Shortly thereafter, the ULC approved a Study Committee, chaired by Bill Henning and Diane Boyer-Vine, to consider how best to implement the HJC in the United States. The goal was to find a method of implementation that would minimize the disruption to state law while representing sound public policy. About a year after the Study Committee was created, it sought and received permission to revisit the question of how best to implement COCA. I served as the Reporter for the Study Committee.

Following more than eighteen months of discussion and reflection, the Study Committee recommended that the ULC revisit its earlier position on COCA implementation. Specifically, the Study Committee recommended that the ULC abandon the cooperative federalism approach and leave the method of implementing COCA to the discretion of the State Department. This recommendation, which included an endorsement of COCA, was made subject to several uncontroversial caveats relating to the preservation of state law. The recommendation was approved by the ULC's Executive Committee on July 18, 2024.

These developments should make it easier for the State Department to obtain the advice and consent of the Senate should it choose to push for ratification of COCA. Historically, the Senate has been sensitive to issues of federalism and sometimes hesitant to give its advice and consent for conventions that displace state law. The endorsement of the ULC, an organization formed by the states with a mission of preserving state law, will signal to the Senate that any disruption of state law is acceptable and in the public interest.

The Hague Judgments Convention

The Study Committee's initial charge was to consider the best method of implementing the Hague Judgments Convention (HJC). Whereas COCA seeks to

facilitate the recognition and enforcement of judgments rendered by courts selected in an exclusive choice-of-court agreement, the HJC seeks to facilitate the recognition and enforcement of other judgments. Because the enforcement of foreign money judgments in the United States has long been governed by state law, the Study Committee sought to identify a path to ratification that would preserve existing state law to the extent possible. It concluded that this path ran through Article 15 of the HJC.

Article 15 reads as follows:

> *Subject to Article 6 [dealing with judgments based on rights in rem in real property], this Convention does not prevent the recognition or enforcement of judgments under national law.*

This language makes clear that ratifying countries may be more generous when it comes to the recognition and enforcement of foreign judgments than the Convention requires. It follows that state law may continue to be used to recognize and enforce foreign judgments in the United States so long as applying that law produces outcomes consistent with the minimum standards laid down by the HJC.

With this insight in mind, the Study Committee recommended that the ULC "endorse ratification of the Hague Judgments Convention as long as the United States preserves the ability of litigants to seek recognition and enforcement of money judgments rendered in another country under existing state law . . . in cases where applying state law would produce results that are consistent with the requirements of the Convention." This recommendation was approved by the ULC's Executive Committee on July 18, 2024.

How might this work in practice? Imagine the following scenario. Immediately after the United States ratifies the HJC, Congress enacts a statute listing the minimum standards that must be met for a foreign judgment to be enforced via the HJC in the United States. Thereafter, judgment creditors would have a choice. On the one hand, they could seek recognition and enforcement under the federal statute. On the other hand, they could seek recognition and enforcement under state law. The benefit of this approach is that it preserves the ability of judgment creditors to rely on (what most observers describe as) a simple and efficient system of state law to recognize and enforce foreign judgments. The minimum

standards laid down in the federal statute ensure that the application of state law in such cases will not take the United States out of compliance with the HJC. And if the judgment creditors prefer to enforce under the federal statute, they are free to do so.

Next Steps

With the Study Committee having completed its work, the action will now shift to the State Department's Advisory Committee on Private International Law, which will hold its next meeting at Texas A&M University School of Law in Fort Worth, Texas on Thursday and Friday, October 24-25, 2024. At that meeting, the State Department will be seeking input and guidance with respect to efforts toward U.S. ratification of COCA, the HJC, and the Singapore Convention.