88TH ANNUAL MEETING OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

CHALLENGES TO TRANSNATIONAL GOVERNANCE

Remarks by Keith Loken[*]

I am pleased to be here today to discuss the Hague Convention on Choice of Court Agreements. The United States signed the Convention last January and intends to seek its ratification.

This would be a landmark convention for the United States in that it broadly addresses issues of the recognition and enforcement of judgments.

The basic elements of the Convention are deceptively simple: the chosen court must hear a covered dispute; a non-chosen court must decline to hear a covered dispute; and a judgment rendered by a chosen court must be recognized and enforced in the courts of other Contracting States. The Convention would have two important effects on existing domestic law in the United States: it would change the prevailing presumption that choice of forum clauses are considered to be non-exclusive; and it would prevent courts from applying the principle of *forum non conveniens*.

The State Department and the Justice Department have been consulting with various stakeholders regarding how the Convention might be implemented under United States law. The Convention contains numerous complexities, and we believe that legislation would assist courts in implementing it. A threshold question is whether such implementing legislation should be exclusively federal, or whether implementation should be achieved through a combination of federal legislation and a uniform state law, sometimes called "cooperative federalism." There are strongly held views on both sides. I understand that Professor Teitz will discuss the draft uniform law being developed by the Uniform Law Commission.

Under the auspices of the Department's Advisory Committee on Private International Law (ACPIL), a public meeting was held in July to consider a discussion draft containing national federal legislation. An ACPIL study group is continuing to consider that proposal. One guiding

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principle has been to adhere to the language in the Convention as much as possible and the discussion draft has been structured accordingly.

Regardless of how the "cooperative federalism" issue gets resolved, implementation of the Convention poses some interesting jurisdictional questions.

Under the Convention, cases would arrive in United States courts under two scenarios: when a court in the United States is the chosen court for purposes of resolving a dispute or at the stage of recognition and enforcement of a judgment rendered by the chosen court in another country. Bearing in mind that the Convention expressly does not affect domestic rules on subject matter jurisdiction or the internal allocation of jurisdiction among courts, when should, or must, our courts hear these cases?

At the federal level, one question is whether existing rules relating to federal question or diversity jurisdiction should continue to apply, or whether legislation might alter those rules. Also, it has been proposed within the ACPIL study group that the federal legislation include provisions on *in personam* jurisdiction. This would likely be most relevant with regard to the recognition and enforcement of judgments.

Another question is in what circumstances removal from state to federal court should be permitted. Where a state court has been chosen by the parties to hear a dispute, this may raise issues regarding respect for party autonomy. A related issue is the potential availability of federal court review of state court decisions.

At the state level, a significant question concerns acceptance of so-called no-contact cases, where the litigants and their disputes have no connection with the forum. We understand that the states have mixed views on this. Some might welcome such cases, while others might see them as an unwelcome drain on public resources. Under Article 19 of the Convention, a party may declare that its courts may refuse to hear such cases. If such a declaration were made, one would need to consider whether it provides sufficient clarity and certainty to litigants outside the United States considering choosing a court here. Another way of addressing these issues might be through the subject matter jurisdiction of state courts. I understand that Professor Teitz will discuss these issues in more detail.

The Convention sets forth several optional declarations for Contracting States to consider. Apart from the Article 19 question, at this time we are inclined to favor making a declaration under Article 22, whereby a Contracting State may declare that its courts will, on a reciprocal basis, recognize and enforce judgments rendered by a court designated in a non-exclusive choice of court agreement, as we believe this would be in furtherance of the purposes of the Convention.

These are some examples of the questions with which we are grappling as we consider how to move forward toward ratification of the Convention. We are committed to working through these issues, taking into account the views of stakeholders, and developing a legislative approach that will promote effective implementation of the Convention.

Thank you.