

Conflict of Laws Conventions and Their Reception in National Legal Systems:

Report for the United States

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I. INTRODUCTION

The reception of conflicts conventions in the United States is complicated by the fact that most private international law – the body of rules governing jurisdiction, choice of law, and recognition and enforcement of foreign judgments¹ – is state, rather than federal, law. That conflicts law has not been federalized, despite the substantial resulting complexity and fragmentation of the field,² is due in part to the Supreme Court’s 1938 decision in *Erie v. Tompkins*.³ The Court held in that case that federal courts lacked the authority to formulate general principles of federal law, thereby stunting the development of federal principles that might otherwise have emerged in the conflicts area.⁴ It is also due to the fact that Congress has for the most part refrained from exercising its power to federalize the law governing interstate conflicts.⁵ Thus, most of the law governing conflicts both at the

¹ I adopt this traditional U.S. definition of the field of conflict of laws for the purposes of this report. See EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 3 (4th ed. 2004).

² See generally Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 *TEX. L. REV.* 1715 (1992) (arguing for incremental federalization of U.S. choice of law).

³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In that case, the Court held that a federal court sitting in diversity must apply the substantive law of the state in which it sits. The opinion includes a discussion of federalism and the statement that “there is no federal general common law.”

⁴ The authority of federal courts to generate federal common law has subsequently been recognized (a) where Congress has delegated lawmaking power to the courts and (b) where “uniquely federal interests” require a federal rule of decision. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

⁵ U.S. Const. Art. IV, § 1 states in full that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

interstate level and also at the international level remains state rather than federal law. Equally important to the reception of conflicts conventions in the United States, many of those conventions affect substantive areas that remain within the purview of state regulation. These include family law, contract law, and probate law, as well as the rules of procedure applicable in state courts.

These structural considerations are relevant to the implementation of private international law conventions in two primary respects. First, while the power to negotiate and enter into international conflicts treaties lies at the federal level,⁶ the law that such conventions will ultimately displace is generally state law. This helps explain the traditional reluctance on the part of the federal government to participate in the development of such treaties: doing so would federalize law that had not yet been federalized internally, and that might reflect substantial differences among the states.⁷ Second, as a practical matter, the success of such conventions depends on their proper implementation not only at the federal level but in each of the several states.

II. U.S. MEMBERSHIP IN CONFLICTS CONVENTIONS

The United States was a relative latecomer to the process of private international law treaty-making, due to the federalism concerns discussed above.⁸ It joined the Hague Conference in 1964,⁹ and since that time has become a member of all the major organizations involved in the development of conflict of laws conventions and in efforts to harmonize or unify the private law applicable in cross-border contexts.¹⁰

The United States sent a delegation of observers to the Hague Conference's Ninth Session, at which the Apostille Convention was considered, as it was not yet a member of the

⁶ Article II, Section 2 of the U.S. Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;" Article I, Section 10 provides that "no State shall enter into any Treaty."

⁷ Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *LAW & CONTEMP. PROBL.* 103, 128 (1994) ("[U]nilateralism is not only an apt description of our procedural lawmaking history prior to 1964. It was also the preferred normative stance of many Americans, whether out of the general belief that foreign entanglements should be avoided or a more focused concern that, in matters of private international law, the federal government lacked the power to, or at least should not, preempt state lawmaking institutions.").

⁸ Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" With Comments*, 30 *L. & CONTEMP. PROBS.* 291 (1965).

⁹ It joined the International Institute for the Unification of Private Law (UNIDROIT) at the same time. For general history: Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 *INT'L L.* 505 (1985).

¹⁰ This report will focus on the former task: developing conflicts conventions.

Conference. It has been an active participant in the negotiation of the conventions it has ratified since joining the Conference. The United States has also participated in each of the Inter-American Conferences on Private International Law (CIDIP) sponsored by the Organization of American States.

The United States has ratified the following Hague and Inter-American Conventions:

1. Convention Abolishing the Requirement of Legalization for Foreign Public Documents¹¹
2. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹²
3. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters¹³
4. Convention on the Civil Aspects of International Child Abduction¹⁴
5. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
6. Inter-American Convention on Letters Rogatory (with Additional Protocol)¹⁵
7. Inter-American Convention on International Commercial Arbitration¹⁶

The United States has signed but not ratified the following Hague Conventions:

1. Convention on the Law Applicable to Trusts and on Their Recognition
2. Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary
3. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

¹¹ 527 U.N.T.S. 189; T.I.A.S. 10072. The Convention entered into force in the United States on October 15, 1981.

¹² 20 U.S.T. 1361; 658 U.N.T.S. 163, T.I.A.S. No. 6638.

¹³ 23 U.S.T. 2555; T.I.A.S. 7444; 847 UNTS 231.

¹⁴ TIAS 11670. Ratified by the Senate in 1986. 132 Cong. Rec. S15, 773-74 (October 9, 1986).

¹⁵ OAS Treaty Text B-36; Senate Treaty Doc. 98-27; 98th Congress, 2d Session.

¹⁶ The Convention entered into force in the United States on October 27, 1990.

The United States is also a party to other conventions with conflict of laws components. These include the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Convention on the Limitation Period in the International Sale of Goods, and the New York Convention on the Recognition and Enforcement of Arbitral Awards. It has also ratified some more specialized treaties in particular areas of commercial law, such as the Unidroit Convention on International Interests in Mobile Equipment¹⁷ and its associated Protocol on Matters Specific to Aircraft Equipment. In addition, it is party to a large number of bilateral conventions that contain conflicts provisions, particularly in the area of arbitration and finance. This Report will focus on the Hague and Inter-American Conventions.

III. CONFLICTS BETWEEN CONVENTIONS AND DOMESTIC LAW

A. Constitutional Structure

1. Supremacy over state law

The “supremacy clause” of the United States Constitution states that

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.¹⁸

Once a treaty takes internal effect, the supremacy clause places it above state law, both constitutional and statutory. The clause further ensures that treaties obtain a status of equal dignity with the Constitution and U.S. federal law; however, it does not create a hierarchy of authority among those forms of law.¹⁹ The courts have nevertheless “regularly and

¹⁷ S. Treaty Doc. No. 108-10 (2003).

¹⁸ U.S. CONST. Art. VI cl. 2.

¹⁹ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.”).

uniformly recognized the supremacy of the [federal] Constitution over a treaty.”²⁰ Because the treaty power itself arises from the distribution of powers articulated in the Constitution, a treaty can not “authorize what the constitution forbids.”²¹ As between ordinary federal legislation and treaties, inconsistencies are resolved according to the principles set forth in subpart B below.

2. The self-execution problem

As noted above, in considering the internal rather than international effect of U.S. treaty obligations, U.S. courts distinguish between self-executing treaties and non-self executing treaties.²² The former take effect internally – and therefore may be enforced in domestic courts – immediately upon ratification by the United States;²³ the latter, by contrast, must first be implemented through domestic legislative enactment.²⁴ Whether a treaty is self-executing or not is a matter of intent (though *whose* intent remains the subject of considerable debate among commentators).²⁵ If the treaty-maker had the intent to create judicially enforceable private rights, then the treaty is assumed to be self-executing. As one early decision noted, in such cases the treaty addresses itself to the judicial branch rather than the political branch, supporting the conclusion of immediate enforceability in domestic courts.²⁶

Private international law conventions typically do contain rules intended for direct enforcement in courts, and not merely promises of an executory nature. Like the Warsaw Convention, a treaty often pointed to as the paradigm of a self-executing treaty, they “have traction only in the context of private disputes ..., in which litigation is the presumed

²⁰ Reid v. Covert, 354 U.S. 1, 17 (1957); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987).

²¹ Geofroy v. Riggs, 133 U.S. 258, 267 (date). See also Michael P. Van Alstine, Federal Common Law in an Age of Treaties, 89 CORNELL L. REV. 892, 950 (2004) (noting that “an exercise of the treaty power is [not] detached from the express limitations of the Constitution,” and that treaties are therefore subject to individual rights articulated in the Constitution as well as doctrines of federalism and separation of powers).

²² Both types of treaty bind the United States in the international arena; the distinction is critical only when it comes to the internal status of the treaty, and its enforceability in domestic courts.

²³ See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (“[A treaty is] to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision”).

²⁴ On the debate regarding self-executing treaties, see generally Van Alstine, supra note 21, at 907-17.

²⁵ See Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT’L L. 695, 705-08 (1995).

²⁶ Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

dispute resolution mechanism.”²⁷ As a category, then, they would be viewed as self-executing; and courts interpreting individual conflicts conventions have indeed reached that conclusion.²⁸

A recent decision by the U.S. Supreme Court, *Medellin v. Texas*,²⁹ highlights (and arguably heightens) the uncertainties in determining whether a treaty is self-executing or not. In that case, the Court examined the Vienna Convention on Consular Relations, the Optional Protocol concerning the settlement of disputes thereunder, and the U.N. Charter in order to decide whether a judgment of the International Court of Justice was directly enforceable in a U.S. state court. In the portion of its opinion addressing the self-execution analysis, the Court placed central emphasis on the text of the relevant treaty itself: “[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect;”³⁰ “Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”³¹

In a lengthy dissenting opinion, Justice Breyer rejected this focus on the text of treaties. He noted that many treaties held to be self-executing lack a clear indication to that effect, pointing out that the treaty-making process involves many countries whose own internal laws regarding domestic implementation differ substantially, and might thereby preclude clear textual statements.³² In determining whether a treaty is self-executing, he states, factors beyond the treaty’s text must be considered, including subject matter: “[D]oes it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts.”³³ While he concedes that a multi-factor analysis does not create a “magic

²⁷ Paul Stephan, Private Remedies for Treaty Violations After Sanchez-Llamas, 11 LEWIS & CLARK L. REV. 65, 78 (2007).

²⁸ See generally Van Alstine, supra note 21, at 921-27 (discussing self-executing treaties in the area of private international law, among others).

²⁹ 128 S.Ct. 1346 (2008).

³⁰ Id. at 1364.

³¹ Id. at 1366.

³² Id. at 1380-81 (Breyer, J., dissenting).

³³ Id. at 1382.

formula,” he argues that such an evaluation helps “constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado.”³⁴

The import of the *Medellin* decision is not yet fully clear.³⁵ If the decision is read to mean that a treaty is not self-executing unless it contains a clear statement to that effect, then the opinion calls into doubt the status of private international law conventions along with many other treaties. However, the majority opinion stops short of requiring that a treaty actually declare itself to be self-executing; it simply puts primary emphasis on a treaty’s textual provisions. In the case of most conflicts conventions, those textual provisions clearly do reflect a determination that the treaties are intended to have domestic effect, since their goal is to create rights enforceable in disputes between private parties. It is therefore this Reporter’s view that the *Medellin* decision should not be read to affect the status of private international law treaties.

B. Principles of Construction Relevant to Hierarchy

As noted above, the supremacy clause of the federal Constitution does not establish a hierarchy of authority between treaties and ordinary federal legislation. To the extent possible, U.S. courts will interpret both treaties and federal statutes in order to avoid direct conflict between them. Pursuant to the so-called “Charming Betsy” presumption, courts in the United States will not construe a statute in a manner that would violate international law if any other construction is possible.³⁶ Similarly, courts attempt to interpret treaty obligations in a manner that preserves pre- or co-existing statutes.³⁷

³⁴ *Id.* at 1382-83.

³⁵ For recent discussion of the decision, see generally Agora: *Medellin*, 102 AM. J. INT’L L. 529 (2008).

³⁶ The presumption derives from the decision of the Supreme Court in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also RESTATEMENT, *supra* note 20, at § 114.

³⁷ See, e.g., *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 49 (D.C.D.C. 1984) (“Treaties should be construed so as to effect their purposes, and to be as consistent, insofar as possible, with coexisting statutes” (internal citations omitted)).

If a direct conflict between a treaty and federal law is unavoidable, however, U.S. courts follow the “last in time” rule.³⁸ This principle applies in both directions: thus, while a treaty will supplant a pre-existing federal statute, a later-adopted statute can also supplant a treaty. Courts do however require a strong showing of Congressional intent to abrogate treaty law in the latter case.³⁹

IV. IMPLEMENTATION OF CONFLICTS CONVENTIONS

A. Introduction

As noted above, multilateral conflicts conventions are generally viewed as self-executing.⁴⁰ They can therefore be enforced in domestic courts upon ratification, with no additional implementing process, as the CISG illustrates.⁴¹ In most cases, however, in order to ensure uniform and effective implementation within the fifty states, private international law conventions are incorporated into some form of domestic legislation. This may occur either at the federal level (through enactment of a federal statute or rules of procedure applicable in federal courts) or at the state level.

1. *Implementation through federal legislation*

In some cases, conflicts conventions are implemented by enactment of a federal statute. This approach is clearly appropriate if the subject matter in question was already governed by federal law at the time of a convention’s ratification.⁴² Other factors may also militate

³⁸ See *Alvarez v. U.S.*, 216 U.S. 167, 175 (1910) (“[A]n act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject.”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“...if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing”); *Reid v. Covert* at 18 (“...an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and [when] a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”). See also RESTATEMENT, *supra* note 20, at § 115.

³⁹ See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Van Alstine*, *supra* note 21, at 920-21.

⁴⁰ See *Van Alstine*, *supra* note 21, at 922-25 (discussing the fields in which self-executing treaties have particular influence, and identifying the CISG and the Hague Service, Evidence and Abduction Conventions as self-executing).

⁴¹ This creates, as one commentator has noted, the risk of “obscurity of law,” in that courts and practitioners, particularly at the state level, may not have ready access to the convention itself or supplementary information regarding its implementation. Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 *LOY. L. REV.* 301, 319-20 (2005).

⁴² As in the case of arbitration, discussed below.

in favor of implementation at the federal level, which, in general, provides the highest possible level of uniformity and predictability. For instance, if the treaty in question refers to the internal law of member states in connection with particular obligations or exceptions, it may be desirable to use federal legislation in order to make that law as accessible and as clear to treaty partners as possible. In addition, a particular conflicts convention may impinge only slightly on substantive matters, and therefore its implementation through federal law would be unlikely to override strong policy interests of the states. Finally, the costs of implementation and subsequent administration are likely to be lower with a single federal statute than with a state-by-state implementation process.⁴³

2. *Implementation through federal rulemaking*

For conventions dealing with aspects of judicial process, implementation is often achieved by means of additions or amendments to the rules of civil procedure. Procedural law is sometimes the subject of ordinary Congressional legislation. The 1964 reforms in the area of international judicial assistance were achieved by statutory enactment,⁴⁴ for instance; and Congress has in recent decades become more actively engaged in procedural reform generally (as evidenced, for instance, by the recent overhaul of the class action process). More frequently, however, the promulgation of rules of civil procedure is delegated to the judiciary.

The Rules Enabling Act of 1934 authorized the U.S. Supreme Court to promulgate rules of practice and procedure for all cases heard in the federal district and appellate courts.⁴⁵ In this process, internal committees of the Judicial Conference of the United States, and then the Judicial Conference itself, consider proposed amendments.⁴⁶ If they are approved, the Supreme Court then orders their promulgation. The Supreme Court subsequently transmits the rules to Congress, and the rules will then take effect, no earlier than six months

⁴³ For a full discussion of the comparative benefits of federal implementation, in connection with the Hague Choice of Court Convention, see Stephen Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, Univ. of Pennsylvania Law School Public Law and Legal Theory Research Paper Series, Research Paper No. 06-27 (2006), at 7-8.

⁴⁴ The 1964 amendments to the Judicial Code unilaterally established rules governing outgoing judicial assistance.

⁴⁵ 28 U.S.C. § 2072.

⁴⁶ 28 U.S.C. § 2073.

following such transmittal, “unless otherwise provided by law.”⁴⁷ The latter clause reserves Congress’ right to approve or reject the rules. It is a passive right, however, and so rules can, and most frequently do, become effective with no actual review or approval by Congress.

When this form of rulemaking is used in areas already governed by conflicts conventions, it creates a certain disconnect in the implementation process, as the parties charged with treaty-making power generally play no role in federal rulemaking.⁴⁸ This is particularly troubling in light of the Rules Enabling Act’s “supersession clause,” which provides that once a rule has taken effect, “all laws in conflict with it shall be of no further force or effect.”⁴⁹ While commentators dispute the import of this clause,⁵⁰ it at least raises the troubling possibility that a provision adopted through the federal judicial rulemaking process could trump a pre-existing treaty obligation.⁵¹

3. *Implementation through state legislation*

When conflicts conventions address substantive areas governed by state law, U.S. lawmakers may choose to implement legislation at the state level. (Again, because private international law conventions are self-executing, they are enforceable in domestic courts without such implementation; nevertheless, it is generally used to promote the uniform application of the conventions.) Sometimes state implementation will occur parallel with federal implementation. The Federal Arbitration Act, for instance, applies only to proceedings in federal court. Following ratification of the New York Convention, however, some states acted independently, enacting laws intended to implement it in local proceedings as well.⁵²

⁴⁷ 28 U.S.C. § 2074.

⁴⁸ This has led some commentators to suggest that the promulgation of rules with foreign relations impact should be left to Congress, see e.g. George K. Walker, *The Federal Rules of Civil Procedure in the Context of Transnational Law*, 57 *LAW & CONTEMP. PROBS.* 183, 207-08 (Summer 1994), or at least involve greater participation beyond the judicial branch, see e.g. Burbank, *Reluctant Partner*, supra note 7.

⁴⁹ As amended, the relevant provision now reads: “Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b).

⁵⁰ Compare Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 *DUKE L.J.* 281 (1999) and Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 *DUKE L.J.* 1012 (1989).

⁵¹ Stephen B. Burbank, *The World in Our Courts*, 89 *MICH. L. REV.* 1456, 1486-88 (1991).

⁵² See Reitz, supra note 41, at 320 n. 60.

The choice to adopt implementing measures at the state level can fragment the task of interpreting and applying treaty law, defeating the very uniformity that is often the purpose of these conventions. To mitigate that risk, the process of state implementation of federal treaties is often conducted under the auspices of the National Conference of Commissioners on Uniform State Laws (NCCUSL).⁵³ This organization was created in 1892 in order to promote uniformity of laws in U.S. states.⁵⁴ It is active in commercial law, family law and conflicts of law, among other areas, and works by promulgating either model laws or uniform laws for consideration by the individual states. While the adoption of such a law by NCCUSL cannot guarantee full and uniform enactment in every state,⁵⁵ it improves the likelihood of such a result. In certain respects, however, the relationship between NCCUSL and those responsible for negotiating U.S. private international law treaties can be somewhat fraught. The Uniform Law Commission identifies as one of its goals “help[ing] fend off federal preemption.”⁵⁶ Because a federal treaty pre-empts state law just as a federal statute would, treaty-making in areas such as family law or contracts law may be viewed as a form of creeping encroachment by the federal government on areas of state concern.

B. Implementation of Specific Conventions

This discussion will be divided into separate parts addressing the three categories of private international law conventions in force for the United States: (1) those addressing questions of international litigation procedure; (2) those in the area of family law; and (3) those addressing the recognition and enforcement of foreign awards.

1. *International litigation procedure*

⁵³ For a description of the activities of the NCCUSL, and its involvement, often through the U.S. Department of State, in international activities, see Reitz, *supra* note 41. See also Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance With International Law*, 82 N.C. L. REV. 457, 499-507 (2004).

⁵⁴ See National Conference of Commissioners on Uniform State Laws, *About NCCUSL, History*, at www.nccusl.org.

⁵⁵ See William J. Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U.PA. J. INT'L L. 657, 702-03 (discussing the history of the NCCUSL's efforts in harmonizing diverse state law).

⁵⁶ National Conference of Commissioners on Uniform State Laws, *About NCCUSL, Frequently Asked Questions*, at www.nccusl.org.

a. General

U.S. lawmakers considering the question of how to improve the procedural aspects of cross-border litigation initially favored a unilateral approach. This approach was embodied in a series of amendments to the Federal Rules of Civil Procedure carried out in 1963,⁵⁷ as well as in a 1964 statute intended to modernize and liberalize judicial assistance with respect to litigation underway in foreign countries.⁵⁸ It was hoped that such unilateral liberalization of U.S. procedural rules would spur reciprocal action on the part of other countries.⁵⁹ In 1964, however, the United States joined the Hague Conference, and attention shifted to multilateral conventions as the vehicle for procedural reform.

b. *The Hague Apostille Convention*

The Apostille Convention, a self-executing treaty,⁶⁰ entered into force for the United States on October 15, 1981, following U.S. accession. The United States has designated the U.S. Department of State; the clerks of U.S. federal, district, territory, and specialized courts; and the Secretaries of State of the respective states as entities authorized to issue *apostilles*.⁶¹

In 1991, the Federal Rules of Civil Procedure were amended to change the process by which federal courts authenticate records received from other states party to the Convention. Federal Rule 44(a)(2) now states that “final certification [by diplomatic officers] is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.”

⁵⁷ For a discussion of this Commission and its work, see Burbank, *The Reluctant Partner*, supra note 7, at 107-11.

⁵⁸ See discussion in Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 904 (1989).

⁵⁹ William C. Harvey, *The United States and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, 11 HARV. INT'L L. J. 476, 483 (1970). But see Burbank, *The Reluctant Partner*, supra note 7, at 113 (noting that some of the amendments may have increased the flexibility of litigants involved in international litigation, but did not necessarily take adequate account of foreign interests).

⁶⁰ See T.I.A.S. 10072 (proclamation of President Ronald Reagan, noting that the treaty would enter into force following accession); Opinion of George Deukmejian, Attorney General of the State of California, No. 81-1213 (March 19, 1982), available in 21 I.L.M. 357 (1982).

⁶¹ See list of Designated Competent Authorities, available at www.hcch.net.

The Convention has not been implemented in any regular fashion at the state level. In 1982 NCCUSL adopted the Uniform Law on Notarial Acts.⁶² Section 6(b) of that Law explicitly incorporates the mandate of the Hague Convention, providing that “[a]n ‘Apostille’ in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.” The comments to the uniform law, noting that *apostilles* as used in the Convention are “no more than a standard form for authentication,” further encourage recognition of *apostilles* issued by non-member states as well.⁶³ However, the Uniform Law has been adopted by only ten U.S. states and the District of Columbia. Another model law, the Model Notary Act promulgated by the National Notary Association in 2002, also reflects the United States’ accession to the Hague Convention. That Act addresses the authentication of U.S. documents for use in other countries, and requires evidence of the authenticity of the official seal and signature of local notaries to be in the form of *apostille* prescribed by the Convention when the document in question will be issued for use in another member state.⁶⁴ Like the Uniform Law on Notarial Acts, the Model Law has been adopted in only a handful of states.

Due to the lack of widespread adoption of these uniform and model laws, many states still have in place legislation that does not specifically refer to the Convention, leading to the possibility of confusion or failure to recognize conforming *apostilles*.⁶⁵ There is little evidence, however, that U.S. state or federal courts are not fulfilling U.S. obligations under the Convention, and the handful of reported cases citing it give proper effect to its provisions.

c. *The Hague Service Convention*

The Hague Service Convention, uniformly interpreted by U.S. courts as a self-executing treaty,⁶⁶ entered into force on February 10, 1969. Six years prior to its entry into force, the Federal Rules of Civil Procedure had been amended to address the issue of service upon

⁶² Available at www.nccusl.org, Final Acts and Legislation.

⁶³ *Id.*, Comments to Section 6.

⁶⁴ Model Notary Act § 10-1(2), § 10-3, available at www.nationalnotary.org.

⁶⁵ See T. David Hoyle, Seal of Disapproval: International Implications of South Carolina’s Notary Statute, 3 S.C.J. Int’l & Bus. 1 (2006).

⁶⁶ See, e.g., *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983).

parties in foreign countries. The amended rule clarified that authority to effectuate foreign service must be found in a relevant federal statute, or in a state statute or rule of court in the state in which the district court sits. It then outlined a number of alternative methods deemed sufficient to effectuate service so authorized. These included service by the method prescribed under the law of the foreign country in question; service by means of letter rogatory; service by personal delivery; and service by certain types of mail.⁶⁷ At the time of the Convention's entry into force, then, the Federal Rules permitted certain methods of service that were not recognized by some of the other countries party to the Convention. The Convention empowered such countries to foreclose the use of those methods by making formal objections, requiring service by Convention methods alone.

In 1993, the Federal Rules of Civil Procedure were amended to include Rule 4(f)(1), which states that “[S]ervice ... may be effected in a place not within any judicial district of the United States: (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague [Service Convention].”⁶⁸

The leading case interpreting the Service Convention, *Volkswagenwerk A.G. v. Schlunk*,⁶⁹ was decided by the Supreme Court in 1988. That case involved an attempt by a U.S. plaintiff to serve process on defendant Volkswagen AG, a German corporation, through service in Illinois on its domestic subsidiary as its agent. Defendant moved to quash service, asserting that it could be served only in accordance with the Hague Convention procedure.⁷⁰ The case was initiated in Illinois state court and therefore concerned the interaction between the Hague Convention and state procedural law. The Court began by recognizing that the Hague Service Convention was mandatory, confirming that “[b]y virtue of the Supremacy Clause, ... the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”⁷¹ It then turned to the question of the Convention's scope as articulated in Article 1 (providing that the Convention shall apply “where there is occasion to transmit a judicial ... document for service abroad”). Because the Convention did not specify the circumstances in which there

⁶⁷ See Advisory Committee Notes to Rule 4, 1963 Amendment, Subdivision (i).

⁶⁸ Rule 4(h) extends this provision, apart from the section on personal delivery, to service on corporations.

⁶⁹ 486 U.S. 694 (1988).

⁷⁰ 486 U.S. at 697.

⁷¹ 486 U.S. at 699.

was such an occasion, the Court concluded, that question must be decided by the law of the forum state.⁷² In other words, “[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.”⁷³ In the case at bar, it found, Illinois law did not require the transmittal of documents abroad – because it permitted “substitute service” on the domestic agent, service could be completed entirely within Illinois, meaning that the Convention simply did not apply.⁷⁴

The *Schlunk* decision has drawn much criticism. A concurring opinion in the case noted the implausibility of the majority’s reading, finding it doubtful “that the Convention’s framers intended to leave each contracting nation, and each of the 50 States within our nation, free to decide for itself under what circumstances, if any, the Convention would control.”⁷⁵ As one commentator later put it, “[t]o yield construction of an international treaty to the statutes and procedural rules of the fifty states obviously promotes neither uniformity nor confidence in American judicial administration by signatories.”⁷⁶ The lack of certainty flowing from the *Schlunk* decision is exacerbated by the disparity in state laws regarding service of process, which differ widely; some provide that service anywhere outside the state – including in foreign countries – must be effected by the same means as service within the state.⁷⁷

Nevertheless, although the cramped interpretation of the Convention in *Schlunk* has narrowed the treaty’s scope of application, service of process in general raises fewer concerns than the Evidence Convention, discussed below. While U.S. procedures remain more liberal than those stated in the Convention itself, there is no disagreement about the underlying goal (affording notice in connection with opportunity to be heard). In addition, the internal rules of many states do generally require the transmission of documents abroad in order to effectuate service on a foreign defendant, and therefore trigger application of the

⁷² 486 U.S. at 700.

⁷³ *Id.*

⁷⁴ 486 U.S. at 706.

⁷⁵ 486 U.S. at 708 (Brennan, J., concurring in the judgment).

⁷⁶ Weis, *supra* note 58, at 912. See also *Borschow Hosp. & Medical Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 477 (D. Puerto Rico 1992) (“[s]tate law may ... triumph over the Convention by making its application unnecessary.”).

⁷⁷ See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 827 (4th ed. 2007).

Convention procedures.⁷⁸ Finally, as courts have repeatedly recognized, litigants have an incentive to comply with the Convention procedures in order to maximize the likelihood that a resulting judgment will be enforced in other countries.

One potential inconsistency between the Convention and internal law relates to the waiver of service mechanism permitted by Federal Rule 4(d). Under that Rule, a plaintiff may – by mail – notify the defendant of the commencement of the action (attaching a copy of the complaint and other information) and request a waiver of formal service of a summons. This mechanism is intended to reduce the cost of service, particularly on defendants located abroad, where translation and other additional formalities may be required.⁷⁹ A defendant located within the United States who fails to comply with such a request will then bear the costs associated with subsequent service, unless it can show good cause for that failure.⁸⁰ While this cost-shifting feature does not apply to defendants located in other countries, the broader question is whether this mechanism violates the Convention’s prohibition of service by mail, at least with respect to countries that have lodged a reservation under Article 10.⁸¹

d. *The Inter-American Service Convention*

Both the Convention on Letters Rogatory and its associated Protocol entered into force for the United States on August 27, 1988. The United States lodged two reservations: first, it stated that letters rogatory issued for the purpose of taking evidence would be excluded; second, that the United States would accept obligations under the treaty only with respect to countries that ratified or acceded to the Protocol as well as the Convention.

⁷⁸ See, e.g., *Kott v. Superior Court*, 53 Cal. Rptr. 2d 215 (2d Dist. Cal. 2002) (stating that the only exception under California law is service by publication where the party’s address is not discoverable).

⁷⁹ Advisory Committee Notes to Rule 4, 1993 Amendments.

⁸⁰ Fed. R. Civ. Proc. 4(d)(2).

⁸¹ The Advisory Committee Notes articulate the “hop[e] that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail...” Advisory Committee Notes to Rule 4, 1993 Amendments. See *Burbank, Reluctant Partner*, supra note 7, at 117 (noting the lack of differentiation between formal service and such a waiver request, and questioning the authority of a foreign litigant to waive the sovereignty objections of its home country).

One of the leading U.S. cases under the Inter-American Service Convention is *Kreimerman v. Casa Veerkamp, S.A. de C.V.*⁸² That case involved a motion by a Mexican defendant to dismiss a libel action in part on the basis of improper service. The Fifth Circuit Court of Appeals addressed both the scope of the Convention and its pre-emptive effect, seeking to determine “whether the language, history, and purpose of the Convention indicate that it was devised to supplant all other means of effecting service on a defendant residing in a signatory nation other than the forum nation.”⁸³ The court, comparing the Convention’s title and preamble with those of the Hague Service Convention, concluded that the Inter-American Convention’s scope was narrower: it applied not to *all* service abroad, but merely to service accomplished through the particular mechanism of letters rogatory.⁸⁴ Thus, it concluded, the Convention did not supplant other possible methods of serving process in member states, but “merely provides a mechanism for transmitting and delivering letters rogatory when and if parties elect to use that mechanism.”⁸⁵ Following this interpretation, U.S. courts have held that the Convention permits alternative means of service.

Although Article 10 of the Convention provides only that letters rogatory must be executed in accordance with the laws and procedures of the receiving state, several reported cases suggest that comity plays an additional role in determining the ultimate validity of foreign service of process. The *Kreimerman* decision itself had reserved this question, stating that “[w]hether [plaintiff’s] attempt to serve process under the [local] Long-Arm Statute contravened any other law besides the Convention is ... not before us.”⁸⁶ Several later cases took up this question of the relationship between the Convention and the general doctrine of comity.

In one representative case, a federal district court concluded that even though the Convention did not make service by means of letters rogatory mandatory, principles of comity might nevertheless require service by that method. That case involved service by a U.S. company on a Brazilian corporation, effected by means of a Federal Express mailing

⁸² 22 F.3d 634 (5th Cir. 1994).

⁸³ 22 F.3d at 638.

⁸⁴ 22 F.3d at 640.

⁸⁵ 22 F.3d at 642. Accord *Laino v. Cuprum S.A. de C.V.*, 663 N.Y.S.2d 275, 279 (2d Dep’t N.Y. 1997).

⁸⁶ 22 F.3d at 644.

to the Brazilian company's headquarters.⁸⁷ An expert testifying for the defendant stated that such service was ineffective under Brazilian law. While the court cited the *Kreimerman* opinion, it stated that the Fifth Circuit had left open the question "whether service under the state's long-arm statute violated principles of comity," noting that, in that case, the defendants had not introduced any evidence concerning local law.⁸⁸ In light of the testimony regarding Brazilian law, the court held, "in the interest of international comity, the attempted service ... will be quashed,"⁸⁹ giving the plaintiff additional time to effect service by means of letters rogatory. In a similar case, a New York state court went even further, dismissing a complaint for lack of personal jurisdiction based on invalid service of process.⁹⁰ The court stated that "[t]he non-mandatory nature of the Inter-American Convention does not mean ... that otherwise applicable principles of international comity are displaced, so that United States courts must condone service of process on persons within signatory nations by means that violate those nations' laws."⁹¹ It therefore concluded that "the principle of comity counseled granting the motion to dismiss so as not to condone service of the process of the New York courts in Brazil by means offensive to Brazilian law."⁹²

This line of cases therefore has the interesting effect of converting the Convention into one with quasi-mandatory effect, at least in jurisdictions whose internal law mandates service by means of letters rogatory.

e. *The Hague Evidence Convention*⁹³

The Hague Evidence Convention, which the Supreme Court has characterized as a self-executing treaty, entered into force for the United States on October 7, 1972. No

⁸⁷ *Lake Charles Cane LaCassine Mill, LLC v. Smar Int'l Corp.*, 2007 WL 1695722 (W.D. La. 2007).

⁸⁸ 2007 WL 1695722 at *2.

⁸⁹ 2007 WL 1695722 at *2. *Accord Tucker v. Interarms*, 186 F.R.D. 450, 452 (N.D. Ohio 1999) ("[E]ven if other means of obtaining service of process are technically allowed, principles of comity encourage the Court to insist that [plaintiff] follow Brazilian law and obtain letters rogatory to ensure service of process upon [defendant].").

⁹⁰ *Morgenthau v. Avion Resources Ltd.*, 849 N.Y.S.2d 223 (N.Y. App. Div. 1st Dep't 2007).

⁹¹ 849 N.Y.S.2d at 229.

⁹² *Id.* *Accord Lykes Lines Ltd. LLC v. Bringer Corp.*, 2007 WL 766170 (S.D.N.Y. 2007).

⁹³ Some portions of the following discussion of the Evidence Convention were originally published in Hannah L. Buxbaum, *Improving Transatlantic Cooperation in the Taking of Evidence*, in *INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES* 343, 345-46 (A. Nuyts & N. Watté eds., 2005).

implementing legislation was prepared, and, with minor exceptions, the Federal Rules of Civil Procedure were not changed to effectuate the purposes of the Hague Evidence Convention.⁹⁴

Unlike in the area of service of process, there are substantial differences between U.S. procedure and the procedure of virtually all other states party to the Convention regarding discovery practice. The Federal Rules of Civil Procedure, as well as the procedural rules followed in state courts, provide a number of avenues by which a litigant may obtain discovery, including document requests; written interrogatories; and depositions of both parties and non-party witnesses.⁹⁵ A party may also demand on-site inspection of property or things relevant to the litigation.⁹⁶ Both parties and non-parties may be required to produce documents in their possession or control, regardless of where the documents are located.⁹⁷ Similarly, witnesses can be deposed wherever there is subpoena power over them.⁹⁸ These procedures are available not only for merits discovery but also for discovery sought in order to establish personal jurisdiction over a foreign entity;⁹⁹ additionally, and importantly, they are available pre-trial. Compulsory process is available if parties fail to comply with discovery requests, and continued noncompliance can lead to a variety of sanctions, including default judgment.¹⁰⁰

Thus, while the Hague Convention procedures did liberalize then-existing mechanisms for the cross-border taking of evidence, they remained substantially more restrictive than U.S. procedural rules. Furthermore, many countries that adopted the Convention essentially opted out of some of its more liberal provisions, most critically through the Article 23 reservations regarding pre-trial discovery. For these reasons, many litigants before U.S.

⁹⁴ Rule 28, for instance, which addresses persons before whom depositions may be taken, was amended to incorporate Convention terminology. See Advisory Committee Notes, 1993 Amendments to Rule 28.

⁹⁵ Federal Rules of Civil Procedure [hereinafter "FRCP"] 34 (production of documents), 33 (interrogatories to parties), 30 (depositions upon oral examination).

⁹⁶ FRCP 34(a).

⁹⁷ FRCP 34 (production by parties), 45 (non-parties). For a discussion of the "control" test, see *Dietrich v. Bauer et al.*, 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. 2000).

⁹⁸ FRCP 28(b), 29, 30(a).

⁹⁹ See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982).

¹⁰⁰ FRCP 37. See, e.g., *Amer. Home Assurance Co. v. Société Commerciale Toutelectric*, 128 Cal. Rptr. 2d 430 (Ct. App. Calif. 2002) (upholding a default judgment entered against a French corporation as a result of its failure to comply with various discovery orders).

courts continued to seek discovery under domestic rules even after the United States acceded to the Hague Evidence Convention.

U.S. courts were divided on whether Convention procedures were mandatory or merely optional in transnational cases,¹⁰¹ and in 1987, the U.S. Supreme Court addressed this question in *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*¹⁰² The Court held that Convention procedures were optional, and, further, that principles of international comity required not first resort to the Convention, but instead a “particularized analysis” in each case of whether evidence should be gathered under its procedures or under U.S. state or federal procedural rules.¹⁰³ The Court indicated that the choice between Hague Convention procedures and domestic procedures must be made on a case by case basis, and specifically instructed lower courts to consider the special burdens that discovery may impose on foreign parties.¹⁰⁴ Nevertheless, the Court did not encourage litigants to use those procedures, noting at one point that “[i]n many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.”¹⁰⁵ Perhaps picking up on such cues, practice in lower courts reflects a continued preference for application of U.S. state or federal procedural rules.¹⁰⁶ For this reason, transatlantic evidence gathering in U.S. civil litigation proceeds largely outside the Hague Convention framework. This is true of outgoing assistance as well, since U.S. law provides that foreign judicial authorities, as well as the litigants before foreign tribunals themselves, may request the assistance of U.S. courts in the taking of evidence without using Convention procedures.¹⁰⁷

¹⁰¹ Compare *Volkswagenwerk AG v. Superior Court*, 176 Cal. Rptr. 874 (Cal. App. 1981) (first resort to the Convention required) with *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985) (first resort not required).

¹⁰² *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

¹⁰³ *Id.* at 543-44. For commentary on this decision, see George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 *TULANE L. REV.* 525 (1989); David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 *AM. J. INT'L L.* 521 (1988).

¹⁰⁴ *Aérospatiale*, 482 U.S. at 546.

¹⁰⁵ *Aérospatiale*, 482 U.S. at 542. In a footnote to this observation, the Court did concede that “in other instances a litigant’s first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pretrial civil discovery.”

¹⁰⁶ See *Compendium of Reported Post-Aérospatiale Cases Citing the Hague Evidence Convention*, Annex 1 to the Response of the United States of America to the Special Commission Questionnaire, available at www.hcch.net.

¹⁰⁷ 28 U.S.C. § 1782.

From time to time, proposals have been put forward to amend the Federal Rules of Civil Procedure in order to require first resort to the Evidence Convention,¹⁰⁸ or to make the Convention the exclusive means of obtaining discovery in transnational cases.¹⁰⁹ The most sustained reform effort failed in the early 1990s, and since then the issue has remained dormant.

2. *Family law*

a. *Hague Abduction Convention*

The United States signed the Abduction Convention in 1981, and the U.S. Senate gave its advice and consent in 1986. Although the treaty was considered self-executing, federal legislation was prepared in order to secure uniform implementation of the Convention within the United States.¹¹⁰ On April 29, 1988, Congress enacted the International Child Abduction Remedies Act (ICARA),¹¹¹ and the Convention entered into force for the United States on July 1, 1988.

Prior to ICARA's enactment, the civil aspects of child abduction by non-custodial parents were regulated by the laws of the several states. These in turn were based on the Uniform Child Custody Jurisdiction Act (UCCJA), adopted by NCCUSL in 1968 and enacted in every state by 1981. That law established rules governing initial jurisdiction over child custody disputes, as well as the recognition and enforcement of custody decrees issued in other states and jurisdiction to modify such decrees. Its primary goal was the unification of state law governing jurisdiction over *interstate* custody disputes.¹¹² Section 23 of the UCCJA, however, extended its application to international custody disputes, stating that “[t]he provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees ... rendered by appropriate authorities of other

¹⁰⁸ See Weis, *supra* note 58, at 930-33

¹⁰⁹ Andreas Lowenfeld, Introduction: Discovering Discovery, *International Style*, 16 N.Y.U. J. INT'L L. & POL. 957, 959 (1984).

¹¹⁰ Peter H. Pfund, Remarks, 57 LAW & CONTEMP. PROBS. 159, 161 (Summer 1994).

¹¹¹ Pub. L. No. 100-300, 102 Stat. 437 (1988), codified at 42 U.S.C. §§ 11601-11610.

¹¹² See generally D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 556-60 (2004).

nations, if reasonable notice and opportunity to be heard were given to all affected persons.”¹¹³

Many of the Convention’s provisions differed substantially from those of the UCCJA. For example, the UCCJA included no time limit for the initiation of return proceedings, whereas under the Convention mandatory return is available only for one year following a child’s wrongful removal;¹¹⁴ the UCCJA applied only when an official custody order predated the abduction, whereas the Convention lacks that requirement. Moreover, the UCCJA differed from the Hague Convention with respect to the critical choice-of-law provision. Under the Hague Convention the law of the country in which the child has its “habitual residence” governs the determination whether the removal of the child was wrongful¹¹⁵ – and, implicitly, ultimate determinations regarding custody.¹¹⁶ The UCCJA, on the other hand, set forth four alternative bases of initial jurisdiction, establishing no clear hierarchy among them.¹¹⁷ At the time ICARA was enacted, it preempted inconsistent state legislation with regard to intercountry abduction. Because the remedies outlined in the Convention are non-exclusive,¹¹⁸ however, ICARA did not entirely displace pre-existing state laws based on the UCCJA.

In 1997, NCCUSL withdrew the UCCJA and adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Because the UCCJEA’s adoption followed the entry into force of the Hague Convention, its drafters were able to address the Convention’s effect. Section 302 provides that the Act’s enforcement remedies may be used to “enforce an order for the return of [a] child made under the Hague Convention...” The Act also includes one exception to the recognition and enforcement standard drawn

¹¹³ UCCJA Section 23. That provision was not included in the implementing legislation of all states, however, and was interpreted inconsistently in others. See Blair, *supra* note 112, at 557.

¹¹⁴ Hague Abduction Convention Article 12 (after the expiration of one year following the wrongful removal, return need not be ordered if the child is “settled in its new environment.”).

¹¹⁵ *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006).

¹¹⁶ See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005) (describing the “underlying premise of the Convention that the State of habitual residence of the child is the appropriate place to make any decision about custody and visitation.”).

¹¹⁷ UCCJA Section 3.

¹¹⁸ Convention Article 29; ICARA § 11603(h).

from the Hague Convention, reserving the right of U.S. courts to deny recognition of foreign custodial orders that “violat[e] fundamental principles of human rights.”¹¹⁹

Although the UCCJEA was intended to coordinate with the Hague Convention, the intersection of state law and ICARA remains complicated. First of all, the UCCJEA has not yet been adopted in all 50 U.S. states; in a handful, the UCCJA, which differs from the Hague Convention in the ways noted above, continues in force. More generally, the jurisprudence on intercountry abductions that has emerged both in the lower federal courts and in state courts reveals several problem areas.

ABSTENTION DOCTRINES

While child custody proceedings are subject to state court jurisdiction alone, ICARA creates concurrent jurisdiction in federal and state courts for claims regarding the return of a child under the Convention.¹²⁰ It is therefore possible for one parent to file an ICARA petition in federal court while a full custody proceeding initiated by the other parent is pending in state court. In such cases, some federal courts have invoked abstention doctrines – intended to preclude federal courts from interfering with state proceedings that involve strong state interests – in declining to exercise their jurisdiction over the ICARA claims.¹²¹ If jurisdiction is declined in that manner, the parent filing an ICARA petition may effectively lose its right to file in a federal court.¹²² Depending upon the state court’s handling of the return claim, this result may also frustrate the Convention’s intent that custody proceedings should be suspended pending determination of the removal claim,¹²³ and that such claims should be handled expeditiously.¹²⁴ Most federal courts addressing this issue, however, have determined that abstention is improper in cases brought under ICARA, especially when the Convention has not been raised in the state court proceedings. In one recent case, *Yang v. Tsui*, the Third Circuit Court of Appeals noted that “[i]t would

¹¹⁹ Section 105(c); cf. Hague Convention Section 20.

¹²⁰ 42 U.S.C. § 11603(a), (b).

¹²¹ See, e.g., *Grieve v. Tamerin*, 2000 WL 1240199 (E.D.N.Y. 2000) (federal court abstained where the parent had also filed his ICARA claim in the relevant state court); *Cerit v. Cerit*, 188 F.Supp.2d 1239 (D. Hawaii 2002) (same); *Bowden v. Sigg*, 1999 WL 33611672 (D. Utah 1999).

¹²² Carl Rowan Metz, *Application of the Younger Abstention Doctrine to International Child Abduction Claims*, 69 U. CHI. L. REV. 1929 (2002); Ion Hazzikostas, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421 (2004).

¹²³ Article 16.

¹²⁴ Article 11.

make the Hague Convention and ICARA meaningless if a federal court abstained in a Hague Convention Petition because child custody was being disputed in state court. ICARA explicitly provides the federal courts with jurisdiction to determine jurisdiction over custody disputes under the Hague Convention.”¹²⁵

INTERPRETING THE CONVENTION

General

ICARA, whose primary function is to establish the procedural framework for the consideration of return claims in U.S. courts, specifically invites courts to “decide [cases] in accordance with the Convention.”¹²⁶ Several cases have properly noted the need for uniform international interpretation of the Convention’s provisions, which must then remain autonomous of domestic legal concepts. The danger nevertheless remains that U.S. courts familiar with domestic law in family disputes may import local interpretive practices into their decisions under the Hague Convention, whether in an attempt to fill definitional gaps¹²⁷ or more generally as a matter of habit.¹²⁸

DEFINING “HABITUAL RESIDENCE”

The threshold issue in Convention cases is determining the child’s habitual residence. One issue on which U.S. courts have divided is whether a particular amount of time must have passed before a residence can be deemed habitual. In *Brooke v. Willis*,¹²⁹ a federal district court stated that “[p]lace of habitual residence is determined more by a state of being than by any specific period of time; technically, habitual residence can be established after only one day as long as there is some evidence that the child has become ‘settled’ into the location in question.” In other cases, including *Koch v. Koch*¹³⁰ and *Antunez-Fernandes v.*

¹²⁵ 416 F.3d 199, 204 (3d. Cir. 2005).

¹²⁶ 48 U.S.C. § 11603(d).

¹²⁷ See, e.g., *Roszkowski v. Roszkowski*, 644 A.2d 1150 (N.J. Super. Ct. 1993) (noting that “habitual residence” is not defined in the Convention and turning by analogy to the term “home state” as defined in New Jersey’s version of the UCCJA).

¹²⁸ See Silberman, *supra* note 116.

¹²⁹ 907 F.Supp. 57, 61 (S.D.N.Y. 1995).

¹³⁰ 450 F.3d 703, 714 (7th Cir. 2006).

Connors-Fernandes,¹³¹ courts have held that an “appreciable amount of time” or “an amount of time sufficient for acclimatization” must pass before a residence can become habitual. Another issue is the amount of weight to be accorded the long-term intentions of the parents. In *Mozes v. Mozes*, one leading case, a federal appeals court stated that “the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind.”¹³² In other cases, courts have emphasized the duration of the child’s stay over the claimed intentions of the parent. In *Shalit v. Coppe*,¹³³ for instance, the Ninth Circuit Court of Appeals stated that “[t]hree years is certainly enough time for [the child] to be considered ‘settled’ in Israel, regardless of [the parent’s] claimed intention to have him return permanently to Alaska at some point in the future.”¹³⁴

RIGHTS OF CUSTODY” UNDER THE CONVENTION

The Convention defines rights of custody – the breach of which determines the wrongfulness of a removal or retention – to include “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”¹³⁵ Several U.S. courts have inquired whether this definition encompasses the right of a non-custodial parent to prevent a child’s removal from a certain region. In *Croll v. Croll*¹³⁶ and *Gonzalez v. Gutierrez*,¹³⁷ the Second and Ninth Circuit Courts of Appeals, respectively, addressed cases in which the custodial parent had removed a child in violation of a *ne exeat* clause in a custody decree. Both courts held that the rights of the non-custodial parents under such decrees did not amount to “rights of custody.”¹³⁸ In *Furnes v. Reeves*¹³⁹ and

¹³¹ 259 F.Supp.2d 800 (N.D. Iowa 2003).

¹³² 239 F.3d 1067, 1075 (9th Cir. 2001).

¹³³ 182 F.3d 1124 (9th Cir. 1999).

¹³⁴ 182 F.3d 1124, 1128 n.5 (9th Cir. 1999).

¹³⁵ Article 5(a).

¹³⁶ 229 F.3d 133 (2d Cir. 2000).

¹³⁷ 311 F.3d 942 (9th Cir. 2002). See also *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003) (holding that a provision of Scottish law preventing the removal of a child from Scotland without permission of the non-custodial parent similarly did not create a right of custody in that parent).

¹³⁸ For discussion of these cases, see Silberman at 1069-71. See also *Abbott v. Abbott*, 495 F.Supp.2d 635 (W.D. Tex. 2007) (a later federal district court case following this holding); *Shalit v. Coppe*, 182 F.3d 1124 (9th Cir.) (agreement between parents that the child would live in Israel for three years did not create a “right of custody” because it was not approved by a U.S. or Israeli court).

¹³⁹ 362 F.3d 702 (11th Cir. 2004).

Lalo v. Malco,¹⁴⁰ by contrast, the 11th Circuit Court of Appeals and a federal district court held that rights under *ne exeat* clauses or laws did confer “rights of custody,” as understood in the Convention, on non-custodial parents.¹⁴¹

EXCEPTIONS TO THE RIGHT OF RETURN

Among the defenses to return set forth in the Convention is “grave risk that [the] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”¹⁴² If read overly broadly, this exception creates the danger that a court considering a petition for return will build into its analysis considerations that should be left for a full custody proceeding.¹⁴³ Most U.S. courts have read the exception quite narrowly. In *Silverman v. Silverman*,¹⁴⁴ for instance, the Eighth Circuit Court of Appeals stated that “[t]here are two types of grave risk that are appropriate under Article 13(b): sending a child to a ‘zone of war, famine, or disease,’ or in cases of serious abuse or neglect.”¹⁴⁵ Most courts agree that the exception must be read restrictively, and that determinations of which parent would be better for the child must be excluded from the analysis.¹⁴⁶ In some cases, however, courts have taken a more liberal approach to the exceptions. For example, in *Kofler v. Kofler*,¹⁴⁷ after determining that a wrongful removal had taken place, a federal district court nevertheless refused to order return. In concluding that the “grave risk” exception applied, it considered factors such as living arrangements in the home of the parent seeking return and the quality of the children’s relationship with that parent.

b. *Hague Intercountry Adoption Convention*

¹⁴⁰ 318 F.Supp.2d 1152 (S.D. Fla. 2004).

¹⁴¹ Other cases have also reached this result: see, e.g., *Lieberman v. Tabachnik*, 2008 WL 1744353 (D. Colo. 2008).

¹⁴² Article 13(b).

¹⁴³ Linda Silberman, *Hague Progress Report*, 57 *LAW & CONTEMP. PROBS.* 209, 267 (Summer 1994) (“Attempts to frustrate return under the guise of best interests, if allowed to succeed, could undermine the Convention and transform its procedural framework into one of substance.”).

¹⁴⁴ See, e.g., *Silverman v. Silverman*, 338 F.3d 886, 890 (8th Cir. 2003) (citing as examples of grave risk “sending a child to a ‘zone of war, famine, or disease’” and “cases of serious abuse or neglect.”).

¹⁴⁵ *Id.* at 900.

¹⁴⁶ See, e.g., *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000).

¹⁴⁷ 2007 WL 2081712 (W.D. Ark. 2007).

The Hague Adoption Convention is also self-executing in form, but, similarly, requires implementing legislation in order to ensure effective operation within the United States.¹⁴⁸ In 2000, Congress enacted the International Adoption Act,¹⁴⁹ which set forth the framework for accreditation and licensure as required by the Convention and identified the Department of State as the Central Authority for the United States.¹⁵⁰ The Act was followed by specific regulations.¹⁵¹ The Convention was ratified on December 12, 2007 and entered into force for the United States on April 1, 2008.

In the United States, the licensing and regulation of adoption agencies, as well as substantive law regarding adoption (for instance, rules regarding parental consent), are governed by state law.¹⁵² The International Adoption Act and its associated regulations, however, provide a separate system of accreditation for agencies engaged in intercountry adoption, and with respect to that subject matter therefore preempt inconsistent state law. One of the most contested points surrounding U.S. implementing legislation was the process by which the accreditation of intercountry adoption service providers would take place. The IAA permits the Central Authority to delegate the accreditation process not only to public entities (such as the agencies within each state that ordinarily license adoption service providers) but also to private (non-profit) entities.¹⁵³ While the text of the Convention permits such delegation, commentators have criticized this privatization of the rulemaking function.¹⁵⁴

¹⁴⁸ Peter H. Pfund, Briefing Paper: Hague Convention on Intercountry Adoption, 79 WOMEN LAW. J. 6, 8 (1993).

¹⁴⁹ Pub. L. No. 106-279 (2000), codified at 42 U.S.C. §§ 14901-14954 (2000).

¹⁵⁰ 42 U.S.C. § 14911. This was hotly debated, as many felt that the State Department's expertise in serving as the U.S. Central Authority under other Hague Conventions would not make up for its lack of expertise in the area of child welfare, and that the Department of Health and Human Services or the Immigration and Naturalization Service (whose functions were later reallocated through the Homeland Security Act of 2002) would be preferable.

¹⁵¹ See 71 Fed. Reg. 8131 (February 15, 2006) (containing the final regulations), codified at 22 C.F.R. pts. 96-98 (2006).

¹⁵² See Mary Eschelbach Hansen & Daniel Pollack, The Regulation of Intercountry Adoption, 45 Brandeis L.J. 105, 113 (2007-06).

¹⁵³ 42 U.S.C. § 14922(a)(2)(A).

¹⁵⁴ See, e.g., Anjanette Hamilton, Privatizing International Humanitarian Treaty Implementation: A Critical Analysis of State Department Regulations Implementing the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 58 ADMIN. L. REV. 1053 (2006).

Because the Convention entered into force only recently, there are no reported decisions interpreting it.

3. *Recognition of foreign arbitral awards*

a. General

The first chapter of the Federal Arbitration Act was enacted in 1925.¹⁵⁵ It governs the validity of agreements to arbitrate in contracts involving interstate or international commerce, as well as the recognition and enforcement of resulting awards.¹⁵⁶ It was intended at the time to reverse the traditional hostility that courts had shown to private agreements to arbitrate, and expressed a strong pro-arbitration policy.¹⁵⁷ Because it created substantive federal law with respect to inter-state arbitration agreements,¹⁵⁸ it displaced inconsistent state law as to them. At the time of its initial enactment, however, and for several decades thereafter, most states continued to apply local law hostile to arbitration to purely domestic agreements.¹⁵⁹

Both the New York Convention and the Panama Convention on arbitration were implemented through amendments to the Federal Arbitration Act.

b. *The New York Convention on the Recognition and Enforcement of Arbitral Awards*

The U.S. Senate gave its advice and consent to the New York Convention in 1968, but conditioned U.S. accession to the treaty on the development of implementing legislation.¹⁶⁰ In 1970, Congress amended the FAA, adding a new chapter that incorporated the text of the Convention and therefore applied to international arbitration agreements.¹⁶¹ The new

¹⁵⁵ The act was amended in 1988 in part to narrow the authority of courts, through the appeals process, to interfere with arbitration. Codified at 9 U.S.C. § 16 (1994).

¹⁵⁶ 9 U.S.C. §§ 2, 13. The recognition and enforcement of awards in state court proceedings remained governed by state procedural law.

¹⁵⁷ Scherk, 417 U.S. at 510-11 (citing legislative history).

¹⁵⁸ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

¹⁵⁹ See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17 (2002).

¹⁶⁰ *Id.* at 31.

¹⁶¹ Codified at 9 U.S.C. §§ 201-208.

provisions conferred original jurisdiction on the federal district courts in cases arising under the Convention,¹⁶² as well as removal rights for any such cases initially filed in state courts.¹⁶³

As the reporters have not been called on to discuss this particular convention, I will defer to the separate reports on the topic of arbitration.¹⁶⁴

c. *The Inter-American Convention on International Commercial Arbitration*

The Panama Convention was adopted by the Organization of American States on January 30, 1975. The United States signed the convention in 1978; in 1986, the Senate gave its advice and consent, subject to a reciprocity reservation.¹⁶⁵ In 1990, Congress enacted a statute adopting the Convention, which was codified as Chapter 3 of the Arbitration Act.¹⁶⁶ The Convention entered into force for the United States on October 27, 1990.

The implementing legislation incorporates by reference the provisions of Chapter 2 of the Arbitration Act, which, as discussed above, had implemented the New York Convention.¹⁶⁷ The statute also addresses specifically the relationship between the Panama Convention and the New York Convention, stating that if both conventions apply, then, “if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama] Convention and are member States of the Organization of American States, the [Panama] Convention shall apply;”¹⁶⁸ otherwise, the New York Convention shall apply.

¹⁶² 9 U.S.C. § 203.

¹⁶³ 9 U.S.C. § 205.

¹⁶⁴ For a detailed analysis of some of the problem areas in U.S. implementation of the New York Convention, see Karamanian, *supra* note 159, at 62 et seq.

¹⁶⁵ See JOHN P. BOWMAN, *THE PANAMA CONVENTION AND ITS IMPLEMENTATION UNDER THE FEDERAL ARBITRATION ACT* 1-2 n. 3 (2002).

¹⁶⁶ Pub. L. No. 101-369, 104 Stat. 448. Codified at 9 U.S.C. §§ 301 - 307.

¹⁶⁷ 9 U.S.C. § 302.

¹⁶⁸ 9 U.S.C. § 305.

In general, because the implementing legislation specifically incorporates by reference the provisions of the New York Convention, many of the cases applying the Panama Convention follow precedent established under those provisions.¹⁶⁹

¹⁶⁹ See Bowman, *supra* note 164, at 108 (noting that “courts generally take the exegetical short-cut of relying on analogy to court decisions interpreting the New York Convention, rather than engaging in more exhaustive, independent analysis.”). For an annotated list of federal cases applying the Panama Convention, see Robin Miller, *Construction and Application of Inter-American Convention on International Commercial Arbitration*, 1 A.L.R. FED. 2D 309 (2005, with updates).