

PROPOSED PRINCIPLES FOR UNITED STATES
IMPLEMENTATION OF THE NEW HAGUE
CONVENTION ON CHOICE OF
COURT AGREEMENTS

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I. INTRODUCTION

On January 19, 2009 in The Hague, State Department Legal Adviser John B. Bellinger, III, as nearly his last official act, signed the Hague Convention on Choice of Court Agreements for the United States (the “Hague Convention”).¹ As explained below, the Hague Convention will, in summary, accomplish for choice-of-court agreements and judgments resulting from those agreements what the New York Convention on Foreign Arbitral Awards achieved for arbitration agreements and resulting awards. The U.S. State Department is now studying implementing legislation that would be submitted to Congress together with a request for Senate advice and consent to ratification of the treaty. On April 1, the Minister of Justice of the Czech Republic, acting for the Presidency of the European Union, signed the Convention for the European Community, which has exclusive competence in this field. Mexico acceded to the Convention in late 2007 and Argentina, Australia, and Canada, among others, are also reported to be studying whether to ratify.

Professor Andreas Lowenfeld has played a key advisory role in every step of the Hague Conference negotiations, which, in turn, resulted in the negotiation of the new Hague Convention. Indeed, he had years earlier warned how difficult

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1. See Hague Conference on Private International Law, News & Events, US signs 2005 Choice of Court Convention, http://www.hcch.net/index_en.php?act=events.details&year=2009&varevent=157.

the negotiation would be and urged that our European counterparts were wrong in insisting on agreement to end what they called “doing business” jurisdiction (i.e., general jurisdiction²). In March 2009, Professor Lowenfeld was an active participant in a discussion at the annual meeting of the American Society of International Law concerning issues that arise in deciding how the United States should implement this treaty. In July 2009, he came to Washington to participate actively and with characteristic verve in a Study Group meeting that the State Department’s Assistant Legal Adviser on Private International Law, Keith Loken, convened to discuss draft implementing legislation.

Before turning to my topic, U.S. implementation of the new Hague Convention, I want to digress briefly to say that not only has Professor Lowenfeld voiced his opinion about the topic of this paper, but he has also been a constant presence in every decade of my professional career for over forty years. The timing of this Tribute is also fortuitous. In the spring of 2009, I moved offices within my firm because my new status as senior counsel contemplates that a more active practitioner move into my prior location. As a result, I had to clean out files and sort out my many books and publications. On my shelves I found many reprints from Professor Lowenfeld, most often with little notes attached saying, “Is this right?” or “Can we improve in some way?” or “How do we convince others?” These publications brought to mind just how many times Professor Lowenfeld has been present at critical junctures in my career and how vividly I recall his role. I will illustrate briefly:

In the summer of 1965, I was present as the kid in the room at the State Department—a summer intern—when then Deputy Legal Adviser Lowenfeld convened the first meeting at the Department with Bruno Ristau, Murray Belman, and a few others to discuss drafting of the proposed Foreign Sovereign

2. Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 296 (1994) (urging that general jurisdiction be included on the grey list in the proposed convention). For these purposes, general jurisdiction means, in the words of the Supreme Court, that “[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.” *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (Blackmun, J.).

Immunities Act (FSIA). As I shall mention in a moment, Professor Lowenfeld had formulated the correct legal idea, but saying it in simple statutory language proved challenging and has become a lesson for our implementation of the Hague Convention.

In the summer of 1968, when I was studying at the Hague Academy of International Law, I was having difficulty finding good explanations from a common-law perspective of some of the civil-law principles of private international law. Then I found Professor Lowenfeld's 1959 article with Henry de Vries in the *Iowa Law Review* comparing the approaches of different civil-law countries on jurisdiction in personal actions. I finally began to understand what the civil-law articles were saying.³

In the early 1970s as a young associate in Washington, I researched the Act of State doctrine and the Sabbatino Amendment that Professor Lowenfeld had so effectively interpreted and, some would say, defanged in his promptly published note. In truth, some think that he substantially eviscerated a statute with one law review note.⁴

I participated in lengthy debates in the 1980s within the American Law Institute (ALI) over the Restatement (Third) of the Foreign Relations Law of the United States, whose key provisions were so heavily based on Andy's general course at the Hague Academy in the early 1990s.⁵ In more recent years, I attended every one of the ALI advisory committee meetings that Professor Lowenfeld, with Professor Silberman's collaboration, led so ably and that resulted in the model federal statute on recognition and enforcement of foreign judgments.⁶

3. Henry P. deVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions — A Comparison of Civil Law Views*, 44 IOWA L. REV. 306 (1959) (using the practices of Switzerland, France, and Germany to illustrate how the courts of civil law countries approach issues of personal jurisdiction over a defendant, natural or legal, in a civil suit, and contrasting the evolution of the civil and common law on this subject to meet the needs of a mobile society).

4. Andreas F. Lowenfeld, *The Sabbatino Amendment — International Law Meets Civil Procedure*, 59 AM. J. INT'L L. 699 (1965).

5. Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RECUEIL DES COURS 9 (1994).

6. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE (Proposed Final Draft 2005).

Finally, as I prepared this past summer for the Hague Academy general course on private international law, I went back and reread some of Professor Lowenfeld's earliest writing in the conflicts field—even his 1972 Columbia Review article on the *tempora mutantur* rule in the wills and trust field.⁷

In short, I can claim with pride to being a “Lowenfeld groupie” who has learned greatly from each new exposure to the richness of his scholarship and analysis. In recent years I have gained the courage to argue with Andy from time to time. I always do so knowing that it will never be easy if he is persuaded that he is right, which is usually the case. Fortunately, these disagreements are never personal. Andy will shake his head at first and demand to know what could cause me to believe that my argument makes sense. However, he does listen and will honestly reconsider if my argument is compelling. In the end, he will try to find a way to reconcile his views with mine or any other critic. Professor Lowenfeld has always been a gifted mediator of intellectual differences with an uncanny ability to find a sound middle ground.

In this tribute, I will focus on what, from the perspective of the Bar, should be the objectives of the implementation of the Hague Convention for the United States and what are the principal challenges in carrying out those objectives. I address this subject from a practitioner's perspective. Yet, I concede that I also have some prejudices as a result of having assisted the State Department since the early 1990s as a member of the United States delegation to the Hague Conference on Private International Law. As discussed further here, when fully understood and if properly implemented, that Convention offers the promise of benefiting U.S. litigants and non-U.S. litigants who seek to understand and evaluate the potential effect of their agreements to litigate in specified courts and the enforceability of judgments resulting from such agreement. Further, the Convention will especially benefit those litigants who might otherwise not be in a position to afford extensive research by learned counsel on the issues to which they need accessible and practical answers.

7. Andreas F. Lowenfeld, “*Tempora Mutantur . . .*” *Wills and Trusts in the Conflicts Restatement*, 72 COLUM. L. REV. 382 (1972).

II. BACKGROUND ON THE HAGUE CONVENTION

The Hague Convention would afford to choice-of-court agreements and resulting judgments many of the same advantages of enforcement that arbitral agreements and awards enjoy under the successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which over 140 states have ratified.⁸ The United States implemented the 1958 Convention in 1970 by supplementing the provisions of Chapter 1 of Title 9 of the U.S. Code with a new Chapter 2 addressing scope, jurisdiction, venue, and removal and enforcement of foreign arbitral agreements and awards. Courts of the United States have extensively interpreted these provisions and the ALI is currently restating the law of international commercial arbitration, which will include consideration of these interpretative decisions.⁹

The new Hague Conference treaty generally applies to exclusive choice-of-court agreements in international contracts between businesses (excluding consumer and employment contracts). The Convention requires a court of a treaty party that is chosen by the parties to take jurisdiction over their dispute. The Convention also requires courts of a treaty party that is *not* designated by the parties to decline jurisdiction if either party files suit other than where agreed. Finally, the treaty requires U.S. courts to enforce a judgment resulting from a court designated by the parties. Narrow exceptions apply to all of these basic rules.¹⁰

I have argued that the focus of the Hague Conference negotiations was what I have called “middle class litigants.”¹¹ In

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

9. See Project to prepare RESTATEMENT THIRD OF U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20.

10. For detailed discussion of the provisions of the Convention, see RONALD A. BRAND & PAUL HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* (2008). Also see the Hague Conference’s bibliography on the Convention. HCCH.net, Publications, Convention of 30 June 2005 on Choice of Court Agreements, Bibliography, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=1&cid=98.

11. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 544 n.8 (noting my usage of this terminology in discussions among U.S. delegation members and in informal speeches to the Bar, as well as in print);

general, these are parties to U.S. litigation or U.S. parties to overseas litigation who want to determine efficiently and inexpensively their rights to enforce in the United States and abroad choice-of-court agreements and judgments resulting from such agreements. They are not usually my clients. Rather, they are small and medium businesses, including non-profit entities and individuals needing such information to decide promptly and without undue cost whether to resolve disputes by settlement or litigation. The late Arthur von Mehren, mentor to us all, including Professor Lowenfeld, emphasized throughout his lifetime the important informational function of any U.S. law or treaty in this field.¹² To fulfill this function and avoid high cost to the “middle class litigant,” the law or treaty and the implementation must be clear, simple, accessible, and sufficiently well-conceived and drafted that unnecessary litigation is avoided.

You will be thinking “Isn’t that what every law or every treaty that we implement seeks to accomplish?” Yes, and we thought that was what we were doing in the late 1960s and early 1970s when a group of government and private practitioners collaborated on drafting the Foreign Sovereign Immunity Act of 1976. In fact, Professor Lowenfeld said at that meeting in the summer of 1965 at the State Department that it was “simple” – we had only to write a statute that said that you could sue a foreign state when you could sue a private individual or a commercial corporation. I recall how others asked, “But how do we say that in a statute?” In the end, the State Department lawyers were relatively certain that they had answered most of the questions in the field of state immunity clearly and without ambiguity. We learned otherwise over the next several decades in which the U.S. courts have severely

Peter Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263 (John R. Barceló III & Keven M. Clermont eds., 2002).

12. Arthur T. von Mehren, *Adjudicatory Authority in Private International Law – A Comparative Study* 207-28 (2007) (discussing the importance of the “planning process,” party autonomy, and dispute resolution); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS 273, 279 (1994) (discussing the importance of litigants being able to “ascertain relatively quickly and easily the effects” that a judgment from one state would have in another contracting state to a multilateral treaty).

criticized the ambiguities in the FSIA's drafting. The cases under the FSIA have time and again shown where a few words drafted differently would have avoided many appellate cases, and several amendments have been necessary to clean up the oversights even before additional amendments responded to terrorism and other new problems.¹³

In short, the FSIA experience teaches us—and on this I believe even Professor Lowenfeld would agree—just how hard it is to draft legislation in the field of international law that accurately, fairly, and fully resolves issues. We also should recognize that even before we reach some of the state-federal issues raised by implementation, the Convention will require educating the U.S. Bar. For example, the Bar will need to understand the presumption under the Convention in favor of exclusivity of the choice under a choice-of-court agreement absent an express provision to the contrary.¹⁴ That is the opposite of prevailing U.S. law and requires practitioners to consider a change in standard form contracts if they wish to achieve non-exclusivity in a particular situation. Similarly, the Bar will need to appreciate the potential value of a Declaration by the United States under Article 22 that would make the treaty applicable to judgments based on non-exclusive choice-of-court agreements.

There is another preliminary factor to bear in mind—for reasons too complicated to explain except to say it was all about the European Union—the Hague Conference conducted by consensus the diplomatic conference leading to the Convention. There was no voting. As a result, there was considerable discussion and cooperation required to achieve agreement—sometimes much more than the elaborated issue deserved and to the frustration of the negotiators. This consensus approach was significant because if we had voting, the

13. We still have a key question of foreign official immunity which seems almost certain to be considered soon by the Supreme Court. See Curtis Bradley, *Foreign Officials and Sovereign Immunity in U.S. Courts*, ASIL INSIGHT, Mar. 17, 2009, available at <http://www.asil.org/insights090317.cfm> (explaining the stark Circuit split that now exists on this subject); the Supreme Court will now resolve the issue, *Samantar v. Yousuf*, 552 F.3d 371 (4th Cir. 2009), cert. granted, 130 S. Ct. 49 (U.S. Sept. 30, 2009) (No. 08-1555).

14. Convention on Choice of Court Agreements, art. 3(b), June 30, 2005, 44 I.L.M. 1294, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98

European and other participating countries would have insisted on resolving in the treaty text many issues that were left to national law under the Convention.

In his article on the Convention, the Chair Andreas Bucher explains this circumstance and gives as an example the issue of determining the relevant time period for applying the international test under Article 1(2).¹⁵ That provision makes clear that a matter is purely internal to states parties—*i.e.*, it is not international—because the parties and the subject matter are linked to the same state except for the choice of the court of another state. You will quickly see that there are two potentially relevant time periods for applying this standard—the date of the making of the agreement or the date of the filing of the cause of action based on the agreement. Alternatively, the issue could be resolved by developing some combination of the two tests, either as alternatives or applied cumulatively. Professor Bucher says it was “wisely decided to say nothing” and leave this issue to local law. He also says, “It is a perfect example of the price paid to decide by consensus.”¹⁶

As the foregoing brief discussion makes clear, there are many issues left open by the Convention that we *could*—emphasis on *could*—try to resolve in the U.S. implementing legislation. The key judgment is whether we *should* try to do so in the name of simplicity and clarification, or whether we should leave them to the courts. I offer no simple basis for resolving this question in particular instances. As noted below, I do have some thoughts on the overall perspective that we should adopt in approaching the question.

There is one other important perspective of non-U.S. nations that we should keep in mind. I have reported that the EU and other nations have signed, or are considering signing, the Convention and that their ratification of this treaty would foster the international cooperation that the drafters envisioned. It is likely, however, that many of the other signatory countries will not proceed with ratification of this Convention until after U.S. implementation. It will be important to them whether the United States has implemented the Convention in a fashion that they view as consistent with the overall purposes

15. Andreas Bucher, *La Convention de La Haye sur les accords d'élection de for*, 16 *REVUE SUISSE DE DROIT INTERNATIONAL ET EUROPÉEN* 29, 31 (2006).

16. *Id.* (quotations by Professor Bucher informally translated by author).

of the Convention. I believe that includes making the enforcement process under the Convention—of both choice-of-court agreements and resulting judgments—straightforward and, in particular, without needless complexity.

Turning then to the issue of how the United States should implement the Convention, my personal view is that this decision on how to address particular issues in the implementing legislation cannot be answered in the abstract. Rather, this key question needs to be resolved issue-by-issue. I have tried to identify five principles that should govern this undertaking.

III. PRINCIPLES TO GUIDE IMPLEMENTATION

I propose that a good overall policy on this subject would be: *First, do no harm*. The drafters need *not* address those issues that are being resolved day-in and day-out by courts, usually under state law, and that do not require a special solution for purposes of implementation. A good example might be those rules of state law relating to garnishment and other aspects of execution on a judgment against particular assets. We can implement this Convention without trying to rewrite well-established state law or creating federal law on state law issues that are working well. On the other hand, I would, in general, try to furnish a rule for those issues that will simply lead to litigation and expense because, again, I want to service “middle-class litigants” and not turn this statute into a lawyer’s relief act. We need to listen carefully to litigators from the states and draw on their experience in deciding which issues would benefit from a uniform federal rule.

The second principle that I would follow would be: In general, try not to change the Convention language even if we could have written the provision somewhat more clearly—unless:

- a genuine ambiguity exists whose clarification would potentially avoid more domestic litigation;
- the issue was expressly and clearly covered in the Hartley-Dogauchi Explanatory Report to the Convention,¹⁷ not the Convention, and including the

17. TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON THE 2005 HAGUE CHOICE OF COURT AGREEMENTS CONVENTION (Permanent Bureau of the Conference ed., Hague Conference on Private International Law

point in the implementing legislation would avoid wrangling over whether the text of the Report is controlling (assuming, of course, that there is no reason to question the Report to which the U.S. delegation devoted considerable effort); or

- the Convention has used an expression that would be hard for the U.S. courts to understand and that could be clarified by using more familiar language for our lawyers without creating a new ambiguity.

What about the proposed approach to implementation that the Uniform Law Commissioners (ULC) of the National Conference of Commissioners of Uniform State Laws and the co-rapporteur of their Drafting Committee have advocated—“cooperative federalism?” In brief, the ULC have expressed concern with the potential “disharmony” in state law that could result from U.S. adherence to new private international law conventions if they are implemented solely through federal legislation. Further, they point out that the Convention addresses state law issues, since recognition and enforcement of judgments has generally been determined by state law. As a result, they would implement the Convention through a ULC Model Law combined with federal legislation. Under this approach, the states would be required by the federal law to adopt the ULC model as state law; if they do not do so, then the federal legislation would preempt existing state law to the extent inconsistent and become state law.¹⁸

Whatever else can be said from a theoretical perspective about this debate, some points are clear—“cooperative federalism” will never be as easy to understand for non-U.S. parties as federal legislation alone. That does not mean that this ap-

Publications, 2007), available at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=98

18. See generally Memorandum from Kathleen Patchel, Co-Reporter, National Conference of Commissioners on Uniform State Laws, to Participants in Oct. 7, 2007 Informational Meeting Regarding Treaty Implementation (Sept. 28, 2007), available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=318>; Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIVATE INT'L L. 287 (2006); Peter Trooboff, *Convention on Choice of Court Agreements — Task of Implementation Now Rests with State and Justice, along with Uniform Law Commissioners*, THE NAT'L L. J., July 27, 2009, available at <http://www.hcch.net/catalogue/00547.pdf>.

proach is unworkable or undesirable if other important values require that it be followed. I do believe that the greater complexity of “cooperative federalism” puts a burden on the advocates of “cooperative federalism” to make a compelling case and to show this approach can be accomplished without needless ambiguity and increased cost to litigants.

Thus, my third principle is that, if the United States decides for legal or political reasons to take the “cooperative federalism” approach, then we need to ensure a clear and easily understandable structure. We cannot ask middle-class litigants in this country or from elsewhere in the world to regard this Convention as a step forward if our implementing legislation creates new complexities and spawns litigation over interpretative issues, however interesting they may be to law professors. I say this recognizing full well that non-U.S. litigants currently have to deal with U.S. federalism issues in deciding where to bring suit to enforce choice-of-court agreements or judgments resulting from such agreements. They already have to determine which law will apply and in which court they will file. While that is true, I think it is reasonable for non-U.S. litigants to hope that the Convention will make matters simpler. These litigants can reasonably expect that the U.S. implementing legislation will seek, to the extent feasible, to avoid the time and expense that would attend an enforcement proceeding—whether for an agreement or a judgment within its scope.

If ever there were a project where the devil is in the details, it is this one. As a fourth principle, I believe that this need for clarification argues strongly for having pen-to-paper on the federal legislation as soon as possible so that the issues are surfaced and discussed. Based on informal consultations, it seems clear that there are many issues that will require attention that will only come to light as you think through issues of jurisdiction, venue, removal, transfer, and other points. It is, therefore, fortunate that the State Department has begun drafting federal legislation and presented its first ideas at a Study Group meeting on July 27, 2009.¹⁹

19. See Notice of Meeting of Study Group on the Hague Convention on Choice of Court Agreements, 74 Fed. Reg. 30660 (June 26, 2009) (a draft of the federal statute should become available from the State Department in the coming months).

As a fifth and final principle: We would be well-advised to consult broadly internally and externally as the drafting process moves forward. Within the United States, that means involving not only the law professors, but also the litigators; particularly those with hands-on experience in enforcement proceedings. Consultation with the Bar would provide the first opportunity to educate American practitioners on such issues as the presumption on exclusivity. At the same time, we can discuss the possibility, if the United States makes a Declaration under Article 22, of having more than one jurisdiction designated in an agreement which would be effective, at least for enforcement purposes, after the Convention enters into effect. In addition, such consultation will help to resolve the issue of what role federal and state law should play in the implementation of the Convention. In brief, the State Department will need to decide whether to adopt a "cooperative federalism" model or a federal statute model for implementation and, regardless of the choice, how to have federal and state law fit together seamlessly.

This consultative process will also encourage addressing some of the important substantive points that the implementing legislation *must*, in my judgment, cover. For example, parties seeking to enforce judgments under the Convention need not establish an independent basis of personal jurisdiction for Fifth or Fourteenth Amendment purposes to enforce a choice-of-court agreement or a judgment under the Convention. In the case of an agreement, the defendant has consented to the jurisdiction of the court so that no further showing of presence should be necessary. In the case of a judgment, the suggested approach assumes that the party seeking enforcement asserts that there are assets of the defendant in the jurisdiction. In this regard, the plaintiff would be relying on the famous footnote 36 in *Shaffer v. Heitner*.²⁰ Further study and debate are necessary over whether the proposed legislation should go further. For example, should the implementing statute allow an action to enforce a judgment based on a

20. *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.").

choice-of-court agreement if assets of the defendant were present but have been removed, or the plaintiff elaborates with particularity why such assets are anticipated to come into the jurisdiction at a future date? Would these bases for proceeding on a judgment within the scope of the Convention against a defendant satisfy the due process requirement for minimum contacts and reasonableness under the Fifth and Fourteen Amendments?

IV. CONCLUSION

There are other issues that the implementing legislation *could* usefully resolve. Some may be more than the Congress is prepared to address in implementing this particular treaty, even if such clarification would be helpful to litigants. For example, there is an urgent need to clarify the law left in an unsatisfactory state by *Grupo Mexicano de Desarrollo et al. v. Alliance Bond Fund*,²¹ which refused injunctive relief to prevent a defendant from removing assets from the jurisdiction in order to satisfy a future judgment. Building on Justice Ginsburg's cogent dissent in that decision concerning what equity powers the courts should have (and which she thought they did have²²), new legislation could provide expressly in what circumstances and with what safeguards courts of the United States may issue a protective order, either by way of attachment of assets or injunction of the defendant to secure property in anticipation of a judgment. As Justice Ginsburg carefully elaborated in her *Grupo Mexicano* dissent, U.S. practice can, in this instance, learn much from the English experience with *Mareva* injunctions, which respond to the potential abuse of legal process and escape from obligations by judgment debtors who can in a globalized economy transfer financial assets instantly.

Recent experience in the United States with fraudulent schemes that utilized non-U.S. bank accounts has only enhanced awareness of the problem and, I believe, should have increased the willingness of thoughtful legislators to address it

21. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

22. *Id.* at 335-36 (Ginsberg, J. dissenting).

promptly.²³ The new legislation could also address the personal jurisdiction issue for U.S. courts' enforcement of foreign-country judgments that are not within the scope of the Convention. My personal preference would be to begin discussion of these options and not be too cautious, at least at the outset. Even if these issues prove too difficult to address in the implementing legislation for the Hague Convention, the dialogue would help to identify what work the State and Justice Departments might carry out in this field after implementation of the Hague Convention.

Externally, we might want to encourage a collaborative process on the implementation with the EU and with a few other common countries. That approach would surely surface more issues and potentially help coordinate how we resolve some issues that will inevitably arise. Obviously, I am not asking for EU collaboration on those issues that concern U.S. Constitutional issues such as the federal-state question just discussed. However, there are many issues that all states parties to the Convention will need to address and that will benefit from a somewhat uniform approach. For example, the staff of the European Commission prepared an Impact Assessment on the Hague Convention in connection with its signature by the European Union. As Professor Ronald Brand has pointed out, that Assessment includes a troubling discussion of Article 21 and a questionable interpretation of that provision under its Policy Option 7.²⁴ The analysis of the Commission staff appears to broaden the intended scope of matters that may be excluded under the Convention by a Declaration under Article 21. If accepted, this view could considerably undermine the value of the Convention for the United States and other prospective states parties. Further, the position of the EC staff appears to overlook what the European insurance industry explained during the Hague Conference negotiations would be its strong support for the Convention in order to persuade

23. See generally Peter D. Trooboff, *Provisional and Protection Measures In International Litigation: Mareva and Grupo Mexicano*, 94 AM. SOC'Y INT'L L. 60 (2000) (discussing *Grupo Mexicano* and the contrast with the U.K. practice).

24. See *Commission Staff Working Document Accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements*, at 46-7, COM (2008) 538 final (Sept. 5, 2008) (elaborating on Policy Option 7).

U.S. state insurance regulators to reduce required deposits in the United States.

In the end, United States implementation of the Hague Convention should move forward promptly and those involved in this effort should avoid having the best become the enemy of the good. We will not achieve a perfect system even if we take several years with the drafting. Given the role of the United States in promoting the Hague Conference's work from which the new Convention evolved, U.S. interests would be well-served by demonstrating that we will carry forward reasonably promptly with bringing this treaty into effect for the United States. As we move ahead with the legislative drafting, I am confident that Professor Lowenfeld's admonitions about the difficulty of our assignment and his thoughtful advice will continue to be of considerable value to the State Department and those assisting its work.

