



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

2011

The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions through Uniform State Laws

William H. Henning

Texas A&M University School of Law, bhenning@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>

 Part of the [Law Commons](#)

Recommended Citation

William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions through Uniform State Laws*, 2 *Elon L. Rev.* 39 (2011).

Available at: <https://scholarship.law.tamu.edu/facscholar/554>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

THE UNIFORM LAW COMMISSION AND COOPERATIVE
FEDERALISM: IMPLEMENTING PRIVATE INTERNATIONAL
LAW CONVENTIONS THROUGH UNIFORM STATE LAWS

WILLIAM H. HENNING*

I. INTRODUCTION

The Uniform Law Commission¹ (ULC) is a non-partisan, non-profit, unincorporated association comprised of commissions formed in each state of the United States and also the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Its mission is “to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”² In the 117 years of its existence, the ULC has produced hundreds of uniform laws and forwarded them to the legislatures of its member jurisdictions for enactment, often with striking and sometimes with universal success. Its premier product, produced in partnership with the American Law Institute (ALI), is the Uniform Commercial Code (UCC), but the laws

* Distinguished Professor of Law, University of Alabama School of Law. Professor Henning was formerly the Executive Director of the Uniform Law Commission and currently serves the ULC as an Alabama Commissioner. The opinions expressed in this article are not necessarily those of the ULC or any of its members. Much of the information provided by this article comes from the author’s participation in the events described herein, from conversations with other participants, and from his experience with the ULC. Professor Henning gratefully acknowledges the generosity of the University of Alabama Law School Foundation, which supports his scholarship.

¹ The formal name of the ULC is the National Conference of Commissioners on Uniform State Laws. UNIF. LAW COMM’N CONST., art. 1, § 1.1, 2009-2010 REF. BOOK 113 (2009), available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18#Article1> (last visited May 2, 2010).

² See UNIF. LAW COMM’N CONST., art. 1, § 1.2, 2009-2010 REF. BOOK 113 (2009), available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18#Article1> (last visited May 2, 2010).

it promulgates extend far beyond the area of commercial law.³ Among the many other areas in which the ULC is active, and of particular importance to the subject of this article, is family law.⁴ The ULC chooses its projects carefully, emphasizing acts that facilitate the interstate flow of commerce, acts that avoid conflicts when the laws of more than one state might apply to a particular situation, and acts that fill emergent needs, modernize antiquated concepts, or codify the common law.⁵

Lawmaking in the United States is the shared responsibility of the federal and state governments, and the areas in which the ULC has been most successful were once, almost exclusively, the domain of the states. However, one result of the expansion of the federal government's reach that began even before the New Deal and continues in the early years of the 21st century has been an inevitable encroachment on these areas. In a continental nation bound together by modern methods of communication and transportation, where people and transactions move easily across borders, there are undeniable advantages to federal legislation: it can be drafted and enacted quickly, and it achieves uniformity because under the Constitution it is the supreme law of the land.⁶ In the areas of law traditionally reserved for the states, however, these advantages are usually outweighed by a number of disadvantages. Congress tends to enact sweeping legislation and then turn over to regulatory agencies the task of fleshing out the details, but neither Congress nor the agencies have institutional expertise in these areas. Moreover, federal legislation is "one-size-fits-all" whereas the states in adopting a law promulgated by the ULC can maintain a core of uniformity while adapting the law to idiosyncratic local needs. The following quote from another article by your author, although written

³ Other major acts in the commercial law area include the Uniform Electronic Transactions Act and the Uniform Fraudulent Transfer Act. *See, e.g.*, UNIF. ELEC. TRANSACTIONS ACT, 9 U.L.A. 67 (1999); UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 2 (1984).

⁴ *See, e.g.*, UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2002); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1997); UNIF. INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 159 (2008); UNIF. CHILD ABDUCTION PREVENTION ACT, 9 U.L.A. 1 (2006). Among the other areas in which the ULC is active are trust and estate law, the law governing unincorporated business entities, and real property law.

⁵ *See* STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS AND PROCEDURES § 1 (2001), UNIF. LAW COMM'N, 2009-2010 REFERENCE BOOK 133-34 (2009) available at <http://www.nccusl.org/nccusl/aboutus-constitution.asp#policy>.

⁶ U.S. CONST., art. VI, § 1, cl. 2 (Supremacy Clause).

with regard only to commercial law, is more broadly applicable and expresses other concerns:

[C]onsider what will happen if commercial law emanates from the federal government. The process is almost certain to be political, and only well-funded interest groups are likely to have access to the decision-makers. The drafting will typically be done by staffers, perhaps in cooperation with interest groups, and it is unlikely that there will be an extensive effort to make certain that each word works and that the provisions of an act do not have inadvertent and unanticipated negative consequences. . . . By contrast with the federal process, the process by which [Uniform Commercial] Code amendments and revisions are produced involves multiple years of careful work by a dedicated committee . . . none of whose members have a political stake in the outcome; at least one dedicated reporter who is a top scholar in the field; . . . an open process where the only price of admission is the travel costs involved in attending meetings and where there is a full opportunity to explain one's needs to the committee and other observers; and multiple exposures at annual meetings . . . where many members have a deep knowledge of commercial law and long experience as judges, practitioners, and academics.⁷

Increasingly in recent years, the ULC has become involved at the federal level; sometimes by trying to persuade Congress or an agency that state action is preferable to federal action and sometimes by working with Congress or an agency so that, to the extent practicable, federal law is consistent with state law. Without the ULC, it is likely that the balance in our federal system would have swung even further towards the federal government than it has.

So what does any of this have to do with private international law? The following quote from the ULC's Statement of Policy on International Activities expresses the problem well:

With the movement toward globalization, the federal government increasingly participates in the promulgation of private international law conventions that, upon ratification, become preemptive federal law. This disrupts the law in areas such as commercial and family law that historically have been regulated at the state level and that have been the subject of numerous uniform and model laws promulgated by the Conference. The states have a profound interest in, to the extent practicable, having international conventions mesh with their existing laws, influencing the law's development in other countries so that it is compatible with American legal concepts, and harmonizing their own laws with the laws of other countries. This will facilitate transactions and movement across borders and will provide the citizens of the states a familiar and appropriate legal framework as they participate in the global community. For the same reasons it benefits our citizens and businesses to have uniform state laws, so

⁷ William H. Henning, *Amended Article 2: What Went Wrong?* 11 DUQ. BUS. L.J. 131, 141 (2009).

too will they benefit by having their state laws work in harmony with the laws of other nations.⁸

This statement makes clear the interest of the states in the content of international conventions⁹ and in the manner in which they are implemented, but it is difficult to protect those interests under our Constitution, which vests the responsibility for treaty-making in the Executive and the Senate¹⁰ and under which treaties made under the authority of the United States are, like federal laws generally, the supreme law of the land.¹¹

The interest of the states in coordinating, to the extent practicable, state law and international conventions may be clear, but what is the interest in doing so at the federal level? Boiled down to its essence, it is a respect for federalism that in the past has sometimes manifested itself in an administration's unwillingness to transmit a convention to the Senate or in the Senate's refusal to give its advice and consent in areas where lawmaking is traditionally reserved for the states. As stated by an eminent scholar in the field:

The principal influence of the states in foreign relations derives from the constitutional, decentralized, federal framework of government and the political forces that animate it The President has a national constituency and is chief of a national party, but both are built of local blocks and he cannot be impervious to their qualities and interests. His diplomatic representatives are, or are made, acutely aware of our federal character—as when they hesitate to negotiate about 'local matters,' or insist on adding to treaties 'federal-state' clauses that are constitutionally unnecessary but politically attractive. The Senate still substantially represents the

⁸ *Policy Position on International Activities*, UNIF. ACTIVITIES ENEWSLETTER (UNIF. LAW COMM'N), May 2006, http://www.nccusl.org/nccusl/newsletters/UniformActivities/UniformActivities_long_May06.htm.

⁹ Multilateral agreements negotiated under the auspices of international organizations such as the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Commission on International Trade Law (UNCITRAL), and The Hague Conference on Private International Law (The Hague Conference) are commonly referred to as conventions rather than treaties. The terms are equivalent, however. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 301, cmt. a (1987) ("Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances or their conclusion indicate otherwise.")

¹⁰ See U.S. CONST. art. II, § 2, cl. 2 (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"); U.S. CONST. art. I, § 10, cl. 1, 3 (reinforcing the allocation of the treaty power to the federal level by providing that "[n]o State shall enter into any Treaty, Alliance, or Confederation" and that "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power")

¹¹ See U.S. CONST., art. VI, § 1, cl. 2 (Supremacy Clause).

states and has often protected their interests and adopted their views, as when it refused to consent to treaties that would allow aliens to practice the professions regardless of state requirements, or entered reservations to human rights conventions so as not to override state laws permitting capital punishment for crimes committed by juveniles. The House of Representatives represents 'the people,' but it is the people of the states, and [it] is often even more 'parochial' than the Senate, sometimes obstructing 'enlightened,' 'internationalist' federal regulation on behalf of interests that are even less than statewide. And, for their part, states assert their 'international' interests, sometimes in far reaching forms.¹²

In an era of ever increasing globalization, the United States must play a leading role in the development of private international law conventions, yet its track record in negotiating and obtaining ratification of such conventions has been limited, to a significant extent because of concerns that the conventions will upset the appropriate balance between federal and state lawmaking;¹³ that is, concerns that the conventions will impact negatively on our federal system.¹⁴ If the U.S. fails repeatedly to ratify international conventions that it participates in negotiating, its ability to influence future negotiations will be reduced. No organization is better situated to reassure federal officials that international conventions are not unduly disruptive of state interests than the ULC and thus it is not surprising that the ULC and the State Department's Office of the Assistant Legal Adviser for Private International Law,¹⁵ known within State as L/PIL, have developed a close

¹² LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 167-68 (2d ed. 1996) (asterisk and footnotes excluded).

¹³ *See id.* at 166. Other common concerns include the level of interest among concerned stakeholders and the consistency of the convention regime with U.S. law generally.

¹⁴ Perhaps the most significant private international law convention to which the United States is a party is the United Nations Convention on the International Sale of Goods (CISG). The CISG, which was promulgated by UNCITRAL, was ratified by the U.S. in 1986. A major recent success is U.S. ratification in 2004 of the "Cape Town Convention," a convention promulgated by UNIDROIT that creates a unified international legal regime for the secured financing of highly mobile large aircraft and related equipment. *See* UNIDROIT, *Convention on International Interests in Mobile Equipment*, Nov. 16, 2001, 2307 U.N.T.S. 285; UNIDROIT, *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, Mar. 1, 2006, 2367 U.N.T.S. 615; 49 U.S.C. § 44113 (2006). UNIDROIT has also promulgated a protocol on railway rolling stock, which to date the U.S. has not signed, and is working on a protocol dealing with space assets.

¹⁵ The office, which is part of the U.S. Department of State's Office of the Legal Adviser, "is responsible for the negotiation and conclusion of international conventions, model laws and rules, legislative guides, and other instruments governing private transactions that cross international borders." *See* OFFICE OF THE LEGAL ADVISER FOR

working relationship. Each has a distinct sphere of interest and there is a tension between those spheres, yet there is sufficient overlap that a significant level of cooperation is in the interests of both. There are many aspects to the relationship but this article focuses on collaborative decision-making regarding the methods by which international private law conventions ratified by the United States should be implemented.

Assuming both the ULC and L/PIL have concluded that a convention is appropriate for ratification, a not insignificant hurdle for each, a decision must be made regarding the most appropriate method of implementation. Traditionally, conventions have attained the force of law in two ways: some are "self-executing," meaning that upon ratification the language of the convention itself, standing alone, becomes the law of the United States;¹⁶ in other instances Congress passes implementing legislation, in which case it is the legislation that the courts will look to first in determining the effect of the convention.¹⁷ Under both approaches the law exists entirely at the federal level, meaning that it preempts inconsistent state law. For obvious reasons, the ULC's strong preference is for the law to reside at the state level,¹⁸ and this raises the question whether an international convention can be implemented by state law. Although the Constitution pre-

PRIVATE INTERNATIONAL LAW, <http://www.state.gov/s/1/c3452.htm> (last visited May 2, 2010).

¹⁶ Whether a treaty is self-executing is a complex issue and well beyond the scope of this article. If there is no implementing legislation and an issue regarding the effect of a convention arises in a legal proceeding, the court must determine whether the convention is self-executing and therefore entitled to the status of federal law. In *Medellin v. Texas*, 552 U.S. 491, 514 (2008), the Supreme Court held that in making this determination great weight must be given to whether the language of the convention itself, properly interpreted, indicates that it is to be self-executing, but private international law conventions rarely address the issue. Some have suggested that *Medellin* creates a presumption against self-execution but that the presumption can be overcome by evidence that the Executive and the Senate had a shared understanding to the contrary. See Am. Soc'y of Int'l Law, ABA/ASIL J. TASK FORCE ON TREATIES IN U.S. LAW (ASIL, Mar. 2009) (working document), available at <http://www.asil.org/files/TreatiesTaskForceReport.pdf>.

¹⁷ Congress' power to enact implementing legislation is found in the Necessary and Proper Clause. See U.S. CONST., art. I, § 8, cl. 18.

¹⁸ The ULC's Executive Committee has adopted as policy a recommendation made by its International Legal Developments Committee "that implementation through enactment of uniform or model laws [at the state level] is the general policy of the Conference, although each situation [must] be determined on a case-by-case basis." UNIF. LAW COMM'N, MINUTES OF THE 2007 MIDYEAR MEETING OF THE EXEC. COMM., 3 (Feb. 3-4, 2007), available at <http://www.nccusl.org/Update/Minutes/Exec020307mn.pdf>.

vents the states from becoming direct parties to conventions,¹⁹ there is nothing in the Constitution that prevents a convention ratified by the United States from being implemented at the state level, and the ULC and L/PIL are currently collaborating on two projects, one of which will use conditional spending to accomplish precisely that goal and the other of which may achieve the same result through the use of conditional preemption. Conditional spending and conditional preemption are examples of what might be called “cooperative federalism,”²⁰ and the ensuing sections contain a discussion of the methods and the projects.

II. CONDITIONAL SPENDING: THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

On November 23, 2007, The Hague Conference on Private International Law adopted The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance²¹ and moments later the United States became the first country to sign the convention.²² This dramatic step was possible only because of an unprecedented collaborative effort involving the ULC, L/PIL, and the federal Department of Health and Human Services’ Office of Child Support Enforcement (OCSE). It is anticipated that this collaboration will culminate in ratification of the convention by the federal government with implementation accomplished at the state level through amendments to the Uniform Interstate Family Support Act (UIFSA). Understanding the nature of the collaboration requires some background information.

¹⁹ See U.S. CONST., art. I, § 10, cl. 1.

²⁰ The constitutional foundation for cooperative federalism and the methods that might be used to accomplish state implementation of private international law conventions are discussed at length in a report prepared for the ULC’s International Legal Developments Committee by Kathleen Patchel, Associate Professor of Law at Indiana University School of Law-Indianapolis and an Indiana Uniform Law Commissioner. See Kathleen Patchel, Report: State Law Implementation of Private Int’l Law Treaties, www.law.upenn.edu/bll/archives/ulc/ecom/patchel_report.pdf (last visited Apr. 24, 2010).

²¹ See The Hague Convention on the Int’l Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (last visited May 2, 2010).

²² See Hague Conference on Private Int’l Law Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=131 (last visited May 2, 2010).

UIFSA, which was first promulgated in 1992,²³ creates uniform rules for enforcing family support orders across state lines. It does so by establishing jurisdictional standards that determine the basis upon which a state court may exercise continuing exclusive jurisdiction over a child support proceeding, establishing rules for determining which order is controlling when proceedings are initiated in more than one jurisdiction, and establishing rules to guide a court in determining whether to modify another state's child support order. UIFSA was amended in 1996 just as Congress was implementing sweeping welfare reforms through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).²⁴ PRWORA amended Title IV of the Social Security Act, which authorizes the Child Support Enforcement Program (commonly referred to as the IV-D program) to provide federal money to assist the states in collecting child support from absent parents, by requiring that states adopt the 1996 version of UIFSA, in precisely the form promulgated by the ULC,²⁵ in order to be eligible for continued federal funding. The technique used by Congress is called "conditional spending" and its use, subject to certain conditions, has been approved by the Supreme Court.²⁶ Conditional spending can be very effective: the 1992 version of UIFSA was adopted in thirty-five states; the 1996 version was adopted in almost every state within seventeen months after its promulgation.

²³ UIFSA replaced the Unif. Reciprocal Enforcement of Support Act and the Revised Unif. Reciprocal Enforcement of Support Act. It was developed in close cooperation with the U.S. Comm'n on Interstate Child Support.

²⁴ Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

²⁵ 42 U.S.C. § 666 (f) (West, Westlaw through 2009 Sess.). UIFSA was amended in 2001 and the requirement that states adopt the 1996 version has been routinely waived by the Secretary of the Department of Health and Human Services for states adopting the amendments.

²⁶ The constitutional basis for conditional spending is the Spending Clause, U.S. CONST. art. I, § 8, cl. 1. In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court held that Congress cannot commandeer the state legislatures and dictate that they approve a law but it can condition funding on state adoption of a law. Because states are free to refuse the funds if they do not wish to comply with the conditions, use of the technique does not violate principles of federalism. See also *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (establishing four requirements that must be met for conditional spending to be constitutional). In *Kansas v. United States*, 214 F.3d 1196, 1203-04 (10th Cir. 2000), *cert. denied*, 53 U.S. 1035 (2000), the court held that the conditions imposed by PRWORA did not amount to impermissible coercion by the federal government.

The Hague Convention establishes “a comprehensive system of administrative cooperation among nations with respect to support and the adoption of a system for the recognition and enforcement of support orders across national boundaries.”²⁷ L/PIL concluded that the convention would not be self-executing and that implementation through federal law would be less than optimal because it would require the creation of an entirely new bureaucracy to administer, for international collection efforts, a process that is routinely and efficiently administered at the state level under UIFSA.²⁸ It made eminent sense to assign responsibility for international collections to the existing state agencies.

In March 2007, the ULC’s Executive Committee, working closely with L/PIL and with representatives of OCSE, created a drafting committee for the purpose of integrating the rules of the convention into UIFSA.²⁹ The task was daunting because the language of the convention, chosen for its adaptability to different legal systems, had to be converted, to the extent practicable, into language familiar to practitioners and judges used to the language of UIFSA. After more than a year of work, the ULC at its 2008 Annual Meeting approved a new version of UIFSA that fully incorporated the convention, primarily in a new Article 7 but with some conforming amendments to the original six articles.³⁰

²⁷ B.R. Robinson, *Integrating an International Convention into State Law: the UIFSA Experience*, 43 *FAM. L. Q.* 61, 61-62 (2009). The negotiating process is described in detail by the head of the U.S. delegation, Mary Helen Carlson, Attorney-Advisor to L/PIL. See M.H. Carlson, *United States Perspective on the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 43 *FAM. L. Q.* 21 (2009).

²⁸ See Carlson, *supra* note 28, at 35.

²⁹ The Chair of the drafting committee was the Honorable Battle R. Robinson, a retired Delaware family law judge and life member of the ULC who also chaired the 1996 and 2001 UIFSA drafting committees. The Reporter was Prof. John J. Sampson of the University of Texas School of Law. Prof. Sampson, who served as Co-Reporter (with Prof. Paul M. Kurtz of the University of Georgia School of Law) for the 1996 revision of UIFSA and as Reporter for the 2001 amendments, was also a member of the U.S. delegation that negotiated the convention. Although not formally a member of the U.S. delegation, Commissioner Robinson attended sessions at The Hague under the auspices of the International Bar Association.

³⁰ See UNIF. INTERSTATE FAMILY SUPPORT ACT (2008), available at <http://www.law.penn.edu/bl/archives/ulc/uifsa/2008final.htm>.

On September 8, 2008, President Bush transmitted the convention to the Senate, requesting its advice and consent,³¹ and on October 1, 2009, the Obama administration informed the Senate that it supported the request.³² On October 6, 2009, the Senate Committee on Foreign Relations held a hearing on the request and on November 17, 2009, the committee voted without objection to recommend to the full Senate that it give its advice and consent.³³ Regarding implementation, the report of the Foreign Relations Committee states as follows:

As noted above, the Convention is largely consistent with current U.S. federal and state law and practice in the child support enforcement area. As a result, only minimal changes to U.S. law would be required to allow for implementation of the Convention. The requisite changes would be achieved through adoption of an amended version of UIFSA by states and other relevant jurisdictions, as well as through conforming amendments to Title IV of the Social Security Act.³⁴

In order to speed the adoption process for UIFSA 2008, in late 2009 the ULC advised the commissioners who lead enactment efforts in each state that it expected the full Senate to accept the recommendation of the Foreign Relations Committee, and it urged the states to begin enacting UIFSA 2008 during the 2010 legislative session.³⁵ The Senate gave its advice and consent to the Convention on September 29, 2010, and the ULC will now redouble its efforts to gain enactment in the States. There is no reason to believe that the states will act differently than they did after Congress adopted the original spending condition in 1996 and thus it appears likely that within the next two to three years the United States will be able to ratify the convention. This will be an event unprecedented in U.S. history: the ratification of an international private law convention by the federal government with the substantive implementing legislation consisting entirely of state law.

³¹ Message to the Senate Transmitting The Hague Convention on the Int'l Recovery of Child Support and Other Forms of Family Maintenance, 44 WEEKLY COMP. PRES. DOC. 1187 (Sept. 8, 2008).

³² Hague Convention on Int'l Recovery of Child Support and Family Maintenance, S. Exec. Rep. No. 111-2, pt. V, at 7 (2010). The Report indicates that the Obama Administration specified that it does not intend to deposit the instrument of ratification with The Hague Conference until all states have adopted UIFSA 2008.

³³ *See id.*

³⁴ *Id.* at 6.

³⁵ UIFSA 2008 has already been enacted in Maine, Nevada, North Dakota, Tennessee and Wisconsin. *See* UNIF. LAW COMM'N, LEG. FACT SHEET, available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uifsa2008.asp (last visited Sept. 30, 2010).

While the experience with the child-support convention proves the effectiveness of the conditional-spending approach to state implementation, as a practical matter the method will not often be available because of the limited circumstances in which there will be a relevant federal spending program with which to coerce the states. Thus, the conditional-preemption method described in the next section is likely to be of more practical use.

III. CONDITIONAL PREEMPTION: THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

On June 30, 2005, The Hague Conference adopted The Hague Convention on Choice of Court Agreements,³⁶ and the United States signed the convention on January 19, 2009.³⁷ The convention applies to international business-to-business transactions in which the parties make an exclusive choice-of-court agreement; that is, they make an exclusive selection of a particular court, or the courts of a particular country, to resolve their disputes.³⁸ The convention provides that a court chosen by the parties has jurisdiction to hear their disputes, courts not chosen by the parties do not have jurisdiction and must decline to hear their disputes, and a judgment rendered by a chosen court must be recognized and enforced in the courts of all countries that are parties to the convention.³⁹

The decision to sign the convention was made in consultation with the ULC, and the ULC and L/PIL initially determined that the most appropriate method of implementation would be a technique commonly referred to as conditional preemption but which might also be described as reverse preemption. Like conditional spending, conditional preemption uses coercion⁴⁰ to convince the states that it is in their best interests to adopt legislation designated by Congress. The coercive threat is that the area of law at issue will be preempted by

³⁶ The Hague Conference on Private Int'l Law, Twentieth Session Final Act, June 30, 2005, http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

³⁷ See Status Table for the Hague Convention on Choice of Court Agreements, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited May 2, 2010).

³⁸ The Hague Conference on Private Int'l Law, *supra* note 37, at art. 3.

³⁹ See *id.* at art. 8.

⁴⁰ Although coercive, the states are free not to adopt the designated legislation and thus conditional preemption does not violate the proscription against commandeering the state legislatures adopted by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992). For further discussion, see *supra* note 27.

federal law if the designated legislation is not adopted. An example of conditional preemption is the federal Digital Signatures in Global and National Commerce Act,⁴¹ commonly referred to as “E-Sign,” which provides, with certain exceptions, that its provisions are preempted in states that have adopted the Uniform Electronic Transactions Act in the form promulgated by the ULC.⁴²

In the case of the choice-of-court convention, the current plan is for the convention to be implemented by federal legislation that permits the states to preempt it, at least to some extent, by adopting a uniform act drafted by the ULC. In furtherance of this plan, at its 2008 Midyear Meeting the ULC’s Executive Committee authorized the formation of a drafting committee to prepare a Uniform International Choice of Courts Agreement Act.⁴³ The Prefatory Note to the draft of the act prepared for the 2010 Annual Meeting of the ULC describes the project’s approach to implementation as follows:

The Hague Choice of Court Agreement Act, in conjunction with federal legislation, will implement the Hague Convention on Choice of Court Agreements in the United States. The Convention, the product of over a decade of multilateral negotiations, validates party autonomy by enforcing exclusive choice of court agreements and the judgments that result from them, as will the Act. The Convention is an immeasurably valuable treaty that will help create certainty and predictability for transactional planning, validate party autonomy, facilitate the free movement of judgments, and provide a foundation for further cooperation and harmonization of law. Implementation through a federal statute including provisions for states to choose to opt into the Uniform Law will allow this area to continue to incorporate state law, facilitating greater consistency with existing state law in the broader area of judgment recognition and enforcement.⁴⁴

The quoted language states well one of the principal advantages of state implementation: legislation affecting one area of state law can

⁴¹ See 15 U.S.C. §§ 7001-7031 (2000).

⁴² See 15 U.S.C. § 7002(a)(1). E-Sign also provides, again with exceptions, that its provisions may be preempted by other state statutes that are consistent with its provisions, technology neutral, and make specific reference to E-Sign. See 15 U.S.C. § 7002(a)(2).

⁴³ The Chair of the committee is Commissioner Rex Blackburn from Idaho and the Co-Reporters are Prof. Kathleen Patchel of Indiana University School of Law-Indianapolis and Prof. Louise Ellen Teitz of the Roger Williams School of Law. See Unif. Law Comm’n Drafting Committees, <http://www.nccusl.org/update/DesktopDefault.aspx?tabindex=0&tabid=59> (last visited May 2, 2010).

⁴⁴ UNIF. LAW COMM’N, DRAFT, UNIF. INT’L CHOICE OF COURT AGREEMENTS ACT (INTRODUCTION) (2010 Annual Mtg. Draft), available at http://www.law.upenn.edu/bll/archives/ulc/hccca/2010am_draft.htm.

have a ripple effect and adversely impact related areas of state law, and legislation drafted at the federal level is unlikely to consider such an impact. Put another way, federal implementing legislation may fit into the overall state scheme like a square peg in a round hole. By contrast, the ULC, which has over the years developed expertise in entire fields of state law, may be able to craft the implementing legislation in such a way that it accomplishes the federal goal but fits more easily into the existing body of law. The Prefatory Note to the uniform act describes one such effect:

The recognition and enforcement of judgments is currently a matter of state rather than federal law. The Uniform Law Commission has produced two highly successful and widely adopted Acts covering the area of money judgments from foreign countries, a portion of the area that will be affected by the Convention [the Uniform Foreign-Money Judgments Recognition Act (1962) and the revised Uniform Foreign Country Money-Judgment Recognition Act (2005)].

...

The Act is drafted to work in conjunction with the existing UFCMJRA, especially in the area of recognition and enforcement, such as procedures for recognition (Section 20), statutes of limitations (Section 21), and stays (Section 22). There will be some differences, such as when the Act applies, it may limit a state's grounds for nonrecognition of a judgment under the UFCMJRA (e.g., for an inconvenient forum with tag jurisdiction). The Act affects only a small area of judgments—those that result from exclusive choice of court agreements—and its application is not limited to money judgments (Section 3(8)). Thus there is only a limited area of overlap with the UFCMJRA.⁴⁵

The choice-of-court project is not as far along as the child-support project but a great deal of work has been done, and final approval of the uniform act should occur at the ULC's 2011 Annual Meeting. The federal implementing legislation is being drafted with input from the drafting committee, and when all the legislative packages have been prepared the next step will presumably⁴⁶ be for the State Department, in consultation with the Justice Department and other federal agencies, to prepare materials to be used by the administration in transmitting the convention to the Senate for its advice and consent. Once advice and consent are given and the federal implementing legislation is adopted, preferably with a deferred effective date to give the states an opportunity to act, the ULC will forward the uniform act to the

⁴⁵ *Id.* at 4.

⁴⁶ L/PIL has not yet made a final determination whether to proceed with the conditional-preemption approach and may ultimately decide that implementation should be entirely, or predominantly, at the federal level.

states for adoption. Without the “hammer” of a loss of federal funding, the rate of adoption is likely to be slower than the rate of adoption for UIFSA 2008. Whether enough states will adopt the act to justify use of the conditional-preemption method remains to be seen.

IV. OTHER IMPLEMENTATION METHODS THAT PRESERVE STATE LAW

Because the focus of this article is on implementation of private international law conventions through state law, it does not discuss in detail projects in which the ULC and L/PIL are working together to implement conventions at the federal level in a manner that preserves, to the extent practicable, state law. Nevertheless, a brief mention of two of these projects will provide additional perspective on the wide-ranging nature of the collaboration. In one project, a joint committee composed of members drawn from the UCC’s sponsoring organizations, the ULC and the ALI, worked closely with L/PIL to determine whether the United Nations Convention on the Assignment of Receivables in International Trade,⁴⁷ the subject matter of which is closely related to UCC Article 9, should be ratified by the United States and, if so, the method by which the convention should be implemented.⁴⁸ It was determined that ratification was appropriate and that the differences between the convention and Article 9 did not justify an effort to amend the UCC in every state. It was ultimately decided that the convention should be self-executing, but that did not end the committee’s work. Again in collaboration with L/PIL, the committee drafted declarations⁴⁹ and understandings⁵⁰ designed to maximize the post-ratifica-

⁴⁷ The convention was promulgated by UNCITRAL in 2001 and signed by the United States on Dec. 30, 2003. See G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/477/67/PDF/N0147767.pdf?OpenElement> [hereinafter *U.N. Convention on Assignment of Receivables*].

⁴⁸ Nat’l Conference of Comm’rs on Unif. State Laws, *Harmonized North American Law with Regard to the Assignment of Receivables in International Trade Convention*, 1, 4 (July 27-Aug. 3, 2007), available at http://www.law.upenn.edu/bll/archives/ulc/aor/2007june_amreport.htm [hereinafter *Joint ULC and ALI Committee Report*].

⁴⁹ A declaration is a unilateral statement by a country pursuant to an option provided for by the convention (*i.e.*, the convention may permit a country to declare that it is not bound by, or is modifying the effect of, a particular provision). See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 313 (1987). For example, Article 39 of the receivables convention permits states to opt out of chapter V of the convention and the joint committee drafted a declaration stating that the United States would not be bound by chapter V. Convention on Assignment of Receivable, *supra* note 50, at 4-5.

⁵⁰ In an “understanding,” an adopting country states its interpretation of a particular provision without modifying or supplementing it. See RESTATEMENT (THIRD) OF THE

tion consistency between Article 9 and the convention.⁵¹ The joint committee has completed its work, but the convention has not yet been submitted to the Senate. Presumably the declarations and understandings will be transmitted to the Senate with the convention and the Senate will condition its advice and consent on their inclusion in the instrument of ratification deposited with UNCITRAL. The Permanent Editorial Board for the Uniform Commercial Code has indicated that, when the convention is ratified, an Official Comment will be added to Article 9 calling attention to the convention and that the PEB will also issue a more lengthy commentary that discusses the relationship between the convention and Article 9.⁵²

In another project, a joint ULC/ALI committee worked with L/PIL to determine the most appropriate method of implementing the United Nations Convention on Independent Guarantees and Standby Letters of Credit.⁵³ In this instance, it was decided that the convention should not be self-executing but rather should be implemented by federal legislation drafted by the committee. One reason state implementation was rejected is similar to the reason for its rejection with regard to the receivables convention: the rules of the letter-of-credit convention are the same as those of UCC Article 5 except in two minor respects,⁵⁴ and it would be inefficient to attempt to amend Article 5 in each jurisdiction by defining the transactions to which the convention applies and then applying to those transactions the two different rules rather than the normal Article 5 rules. In addition, the banking community expressed concerns about the due-diligence burden that would be placed on them, and on foreign banks in the chain, if they had to

FOREIGN RELATIONS LAW OF THE U.S. § 313 (1987). For example, the joint committee drafted an understanding that paragraph 2(e) of article 4 excludes from the convention an assignment of a receivable that is a security, whether or not it is held by an intermediary, or of a financial asset or instrument that is held by an intermediary. Joint ULC and ALI Committee Report, *supra* note 50, at 6.

⁵¹ Joint ULC and ALI Committee Report, *supra* note 50, at 4-5.

⁵² See PERM. EDITORIAL BOARD FOR THE UNIF. COMM'L CODE, MINUTES OF 2008 AND 2009 ANNUAL MEETINGS (on file with author).

⁵³ The convention was promulgated by UNCITRAL in 1995 and signed by the United States on Dec. 11, 1997. See U.N. Convention on Assignment of Receivables, *supra* note 48.

⁵⁴ Memorandum from Edwin E. Smith, Chair, Comm. to Implement the UN Convention on Indep. Guarantees & Stand-by Letters of Credit, to Uniform Law Comm'rs 1 (June 4, 2009), http://www.law.upenn.edu/bll/archives/ulc/igasloc/2010june4_report.pdf (last visited Aug. 4, 2010).

keep up with each state's version of Article 5 and with state-court decisions interpreting the article.

As currently drafted, the implementing legislation will provide that a standby letter of credit (referred to in the convention as an "international independent undertaking") that expressly states that it is governed by the convention is governed by the text of the convention; a letter that expressly states that it is governed by a foreign jurisdiction is governed by the law of that jurisdiction, including the convention if and as implemented there; and a letter that expressly states that it is governed by the law of an American state is governed by that state's law and not by the convention. If a letter does not choose applicable law, it is governed by the law of the obligor's location as determined by Section 5-116 of the UCC. If the location is a foreign jurisdiction the letter is governed by the law of that jurisdiction, including the convention if and as implemented there, and if the location is an American state the letter is governed by UCC Article 5 except as to the two minor differences, in which case it is governed by the convention.⁵⁵ All references to Article 5 are to the official text of the article as drafted by the sponsors, not as it might have been enacted in any particular state. The method chosen by the committee is the converse of the conditional-spending and conditional-preemption methods in that it will result in the incorporation of Article 5 by reference into federal law rather than the enactment of the convention as state law. As with the receivables convention and Article 9, it is expected that after ratification the PEB will add an Official Comment to Article 5 calling attention to the convention and will issue a commentary discussing the relationship between the convention and Article 5.

V. CONCLUSION

This brief article merely scratches the surface in terms of the depth of the collaboration between the ULC and L/PIL, which extends well beyond working towards the implementation of completed conventions. Two attorneys from L/PIL serve as Advisory Members of the ULC and routinely, often with other attorneys from their office, participate in its annual meetings. Attorneys from L/PIL also routinely participate in the meetings of the International Legal Developments Committee, which advises the ULC's Executive Committee with

⁵⁵ INDEP. GUARANTEES AND STAND-BY LETTERS OF CREDIT CONVENTION IMPLEMENTATION ACT § 5(a)-(c) (Proposed Draft Oct. 8, 2009), http://www.law.upenn.edu/bll/archives/ulc/igasloc/2009oct8_clean.pdf (last visited May 8, 2010).

regard to international law issues, and in the meetings of the various drafting and study committees working on discreet projects. Several members of the ULC serve on the State Department's Advisory Committee on Private International Law and in that capacity provide L/PIL with advice on a wide range of issues, including whether the United States should encourage the development of conventions in certain areas. The ULC and L/PIL regularly exchange information on upcoming projects and potential projects of interest, and in selecting experts to advise it at all stages of its projects and to serve on its negotiating delegations L/PIL is mindful of the expertise of ULC members and reporters. The ULC has entered into a memorandum of understanding with the American Bar Association's International Law Section creating a Joint Editorial Board for International Law (JEB) the purpose of which, from the ULC's perspective, is to provide it with broad input from experts regarding all aspects of its international program, and attorneys from L/PIL regularly participate in JEB meetings.⁵⁶

We have entered a new era in terms of our global relations and the prior balance, under which respect for state law at the federal level was a significant factor in preventing the ratification of many private international law conventions, is no longer satisfactory. A new balance—one which respects and protects state law but which permits the United States to become a party to, and a leader in the promulgation of, such conventions—must be struck. Finding the right balance is a slow and difficult process but the collaboration between the ULC and L/PIL is leading the country in the right direction.

⁵⁶ See Memorandum of Understanding Joint Editorial Board for Int'l Law (Jan. 3, 2007), http://www.law.upenn.edu/bll/archives/ulc/jeb/memo_understanding.pdf.

