



Uniform Law Commission

Dear Commissioners:

The International Legal Developments Committee, under the leadership of former Chair Martha Walters, developed the attached document, "Uniform Law Commission Guidelines for Uniform Law Commission Participation in the Negotiation and Implementation of Private International Law Conventions." The Executive Committee in July 2011 gave tentative approval to this document and directed that it be distributed to all commissioners for comment. The ILDC will review the comments at its meeting on December 3, 2011, and will present any revisions that the ILDC recommends to the Executive Committee for approval in January 2012.

If you have any comments concerning the attached guidelines, please send your comments to Bob Stein (stein@umn.edu), Chair of the ILDC, or Executive Director John Sebert (jsebert@uniformlaws.org) by **Friday, November 4**.

Michael Houghton
President, Uniform Law Commission

**UNIFORM LAW COMMISSION GUIDELINES
FOR UNIFORM LAW COMMISSION PARTICIPATION
IN THE NEGOTIATION AND IMPLEMENTATION
OF PRIVATE INTERNATIONAL LAW CONVENTIONS**
Tentatively Approved by the Executive Committee July 2011

I. PURPOSE OF ULC PARTICIPATION

With the movement toward globalization, the federal government increasingly participates in the promulgation of private international law conventions that, upon ratification, may become preemptive federal law. The states have a profound interest in the negotiation, ratification and implementation of private international law conventions because (1) it may be possible to avoid or limit preemption of state law when a convention is implemented, (2) a convention may improve the law, and (3) a convention may facilitate transactions and movement across borders by recognizing new legal concepts or by harmonizing domestic law with the law of foreign nations.

The international arena is not new to the Uniform Law Commission (ULC) or its members. Over the years, Commissioners have served often on U.S. delegations negotiating international conventions, thus ensuring that persons knowledgeable in state law are involved in the process so that, to the extent practicable, a convention may incorporate principles that are compatible with state law. The ULC itself has from time to time engaged in projects with an international dimension. Examples include the Uniform Mediation Act, which was amended to facilitate state adoption of the Model Law on International Commercial Conciliation; the Uniform International Wills Act, which was an attempt to implement at the state level the provisions of the Convention Providing a Uniform Law on the Form of an International Will; and the Uniform Transboundary Pollution Reciprocal Access Act and the Uniform Unincorporated Nonprofit Organizations Act, which were joint drafting projects between the ULC and the Uniform Law Conference of Canada. The Mexican Center for Uniform Law also participated in the Nonprofit Organizations Act project.

The ULC is well positioned to advance the interests of the states in the global context. It has a long and close working relationship with the Uniform Law Conference of Canada and in recent years has developed an excellent relationship with the Mexican Uniform Law Center. It has also been working with representatives of the U.S. Department of State's Office of Private International Law to develop a collaborative approach to negotiating and implementing international conventions.

**II. PRINCIPLES OF FEDERALISM AND BENEFITS OF STATE LAW
IMPLEMENTATION**

Under the Constitution of the United States, our country is structured to provide its citizens a meaningful voice in shaping and enacting the laws that govern them. The framers of

the Constitution recognized that the states possess unique authorities, qualities, and abilities to meet the needs of the people and that, when possible, issues are most effectively addressed by the level of government closest to the people. The Constitution enumerates the powers of the federal government and reserves the remaining powers to the states or to the people. This relationship is reflected in the Tenth Amendment. This structure stabilizes the government by decentralizing power and by allowing the states to function as laboratories of democracy.

Under the Constitution, treaties or conventions (referred to hereafter as conventions) ratified by the United States become the supreme law of the land. Thus, when the United States negotiates private law conventions that address, as they often do, subjects that are currently addressed by state law, such as conventions concerning commercial law, family law, consumer law, dispute resolution, and judicial cooperation, the federal government creates instruments that, if ratified, may preempt that existing state law and affect the allocation of power between the federal government and the states. As a result, the State Department has, at various times, encountered resistance to ratification of such conventions when they appear to lead to a significant preemption of state law.

Under international law, once a convention takes effect in a nation, the nation is bound by its terms and has the obligation to carry out those terms in good faith. The specific manner in which a convention is implemented in any given nation is usually left for determination by that nation, subject to the obligation of good faith. Different nations will implement the same convention in different ways based on factors that include the particular requirements of that nation's domestic legal system and internal political considerations. As a matter of international law, the United States may choose to implement a convention in any manner that will satisfy its good faith obligation, and, because of the fluid nature of U.S. federalism, and the broad interpretation of the federal treaty power, the United States has considerable flexibility in choosing among the variety of implementation methods available to it.

When conventions that address subject matter that is traditionally a matter of state law are implemented through the enactment of state law, the effect of ratification of those conventions on the balance of power between the federal and state governments is mitigated and the following advantages accrue:

1. State law implementation preserves the federal system of laws that has worked to meet the needs of the people.
2. When a convention addresses subject matter that is the subject of existing state law, the convention preempts conflicting state law and renders it invalid to the extent of any conflict with the convention. If that convention is implemented through the amendment of existing state law, the process of implementation and amendment will require that those with expertise in the affected state law determine the areas of conflict and conform state law accordingly. Without state law implementation and amendment, determination of the continued validity of state law will be left to future court decisions and will increase the risk that the effect of the convention on state law will not be interpreted and applied uniformly.
3. Cases that arise under the application of a convention may require the application of

other state statutory and common law, such as the law of contract, fraud, waiver, estoppel, good faith, or equitable principles. The states' existing network of laws may be necessary for or may affect or be affected by convention provisions. State law implementation creates a closer alignment between convention provisions and other state law, advances predictability, and is more likely to assure good faith implementation without disrupting state law.

4. State courts and practitioners currently look to state law as the controlling law in subject areas historically allocated to the states. Implementation of conventions by uniform state law gives practitioners and others affected by a convention notice of the controlling law, maintains the controlling law in one place, and ensures that existing state and convention law are aligned and integrated.

5. When a convention that affects subject matter that is traditionally the province of state law includes terms that are not commonly used or that do not have accepted meaning in state law, implementation of the convention through the enactment of state law allows “translation” from convention terms to terms with the same meaning but of more common usage. Through the process of “translation” those familiar with the intent of the convention can ensure that there is a seamless connection between the convention and state law and make it more likely that courts will give the convention its intended meaning. In this way, state law implementation will lead to greater uniformity in the application of convention terms.

6. State law implementation enhances the ability of states to adjust the application of specific aspects of a convention to new or unaddressed circumstances while adhering to the general spirit of the convention. Such adjustments may be more difficult to make if Congressional action is required because Congress may lack the time, the expertise, or the information necessary to make such adjustments.

7. The subject matter of private international law conventions is such that, without the existence of a convention, disputes in those subject matter areas normally would be resolved in state courts. Without the existence of a convention, federal courts generally would not have jurisdiction to consider disputes in those subject matter areas, unless they did so by virtue of the diversity of the parties, and in that case the federal courts would apply state law. Conventions that are self-executing or that are implemented by federal legislation preempt state law and create federal question jurisdiction. This additional jurisdiction increases the burden on federal courts and requires them to apply new federal law. Federal legislation and federal court decisions could conflict with state legislation and state court decisions, could affect the federal/state balance of power, and could decrease predictability in the implementation and application of conventions. When conventions that address subject matter that has historically been a matter of state law are implemented by state law, disputes in those subject matter areas continue to be resolved in state courts that are familiar with those subject matter areas and that, due to their greater number and geographic dispersion, may be more geographically accessible to parties and practitioners.

8. The subject matter of private international law conventions is such that state agencies or administrative systems often exist to execute and administer law in areas affected by a convention. If a convention is self-executing or implemented by federal law that preempts state law, the convention may require the formation of federal agencies or administrative systems that

duplicate existing state agencies or systems and at a cost to the federal government. Implementation through state law may avoid that duplication and cost.

III. GUIDELINES FOR UNIFORM LAW COMMISSION PARTICIPATION IN NEGOTIATION AND IMPLEMENTATION OF PRIVATE INTERNATIONAL LAW CONVENTIONS

As a state organization, the ULC represents the interests of the states in areas of law that are or may become the subject of uniform state law. One of the roles of ULC is to advance the independent role of the states in those subject matters and to ensure that dynamic federalism works to keep our state legislative and legal systems a living relevant force. Therefore, the ULC will seek to participate in the negotiation of private international law conventions that affect state law and will seek to have such conventions implemented by uniform state law whenever feasible and preferable given our federal system. The ULC will decide, for its purposes, in accordance with its “Process for Consideration of Issues Relating to the Negotiation and Implementation of Private International Law Conventions,” whether implementation by uniform state law is feasible and preferable, and, if so, which mode of implementation to recommend for a particular convention based on the considerations set forth herein.

To effectuate this primary guideline, the ULC adopts the following additional more specific guidelines:

A. NEGOTIATION OF CONVENTIONS

1. Whenever the State Department considers or participates in the negotiation of private international law conventions that affect existing uniform state legislation or address areas of the law that have traditionally been governed by state law, the ULC will seek to have one or more Commissioners or others who represent state interests, who have knowledge of state law and who would be of benefit to the negotiation process, appointed as members of the U.S. delegation to the negotiating sessions or to any working group established by the State Department concerning the convention.

2. A ULC Commissioner who is appointed to participate in the negotiation of private international law convention, and a ULC Commissioner who is selected to work with the State Department in connection with the negotiation of a private international law convention, will be committed to the ULC policy concerning the implementation of conventions and to the ULC’s objective to advocate for provisions in conventions that will result in the least disruption possible to state law if the convention were to be implemented in the U.S. Those Commissioners will regularly report back to the ULC concerning convention negotiations and whether it will be feasible to implement the convention by uniform state law.

3. The ULC will urge the State Department to consider the means that will be used to implement a private international law convention as early as possible in the negotiating process.

4. The ULC will, when appropriate, inform those who negotiate private international law

conventions of the benefits of using convention terms that are flexible enough to permit and that do not preclude state law implementation.

B. IMPLEMENTATION OF CONVENTIONS

1. When a convention affects existing uniform state legislation or otherwise affects areas of state law in which the ULC has expertise or an interest, ULC will discuss the method of implementation with representatives of the State Department and others.

2. In general, the ULC will not form a drafting committee without the written support of an appropriate official in the State Department for one or more possible implementation modes that are agreeable to ULC.

3. The ULC shall consider the principles of federalism, the benefits of implementation by state law, the primary guideline set forth herein, and any other relevant factors, including but not limited to the following, in deciding whether implementation by state law is feasible and preferable given our federal system and, if so, in determining the particular mode or modes of implementation that it determines to be preferable. The factors are not listed in order of priority and may be given different weight in different circumstances.

- a. The extent to which the convention affects existing and widely adopted uniform state legislation.
- b. The extent to which implementation by uniform state law requires amendments of existing uniform legislation and whether such amendments would be difficult to draft or enact.
- c. The manner in which any prior conventions related to the same subject matter have been implemented in the U.S.
- d. The extent to which the convention affects areas of law that are predominantly state law even though there is no existing uniform state legislation.
- e. The extent to which it is important or desirable to allow states options in particular provisions of the implementing legislation.
- f. The extent to which the convention contains clear, uncomplicated and relatively complete terms that appear not to require supplementation by state or federal legislation.
- g. The extent to which the convention is drafted using language and terms that may be difficult for those in the U.S. to apply, interpret or administer without "translation" into terms of common usage, and the extent to which the lack of

implementing legislation could increase the risk of non-uniform implementation of the convention in the U.S.

- h. The extent to which federal legislation will be necessary to implement the convention even if state law implementing legislation is also used.
- i. The extent to which the United States can assure those affected by the convention, and particularly those outside the United States, that implementing legislation is consistent with the convention, satisfies the U.S. obligation to implement the convention in good faith, and is accessible easily and with certainty.
- j. The extent to which it is necessary or desirable to provide notice of the terms of the convention to those who will be affected by the convention in the U.S., and how best to do so.
- k. The extent to which supplemental state law is necessary to carry out or give effect to the terms of the convention.
- l. The extent to which the convention depends on state rules of procedure for its implementation.
- m. The extent to which the convention affects court jurisdiction or the allocation of cases between courts in the judicial system.
- n. The extent to which a particular means of implementation will impose financial costs on states or the federal government.

4. If the ULC decides that implementation by state law is not feasible or preferable given our federal system and these guidelines and communicates the reasons for that decision, ULC may decide to participate in other implementation efforts if it also decides that such participation is in the interests of the states and the citizens of the states and communicates the reason for that decision. Examples of such participation include assisting in drafting understandings and declarations for a convention that is to be self-executing (the Receivables Convention), assisting in drafting implementing federal legislation (Letters of Credit, E-Commerce,), or preparing comments to a uniform act to alert practitioners to the existence of a controlling convention (Receivables Convention).

5. When the ULC participates in the drafting of federal legislation to implement a convention, it will work to ensure that the federal legislation clearly states the nature and scope of its preemption of state law.

IV. METHODS OF IMPLEMENTATION THAT HAVE BEEN CONSIDERED OR USED IN THE PAST

- 1. The following are modes of implementing private international law treaties

by state law. Implementation by state law cannot occur unless the state law is, or will be, so broadly adopted that the United States can assure other countries, in good faith, that it has implemented the convention.

a. Pre-implementation by existing state law. Pre-implementation by uniform state law may occur when (1) a convention has been negotiated in terms that are consistent with existing state law; and (2) states have widely enacted a uniform state law that addresses the matter or the ULC determines that they will do so., Pre-implementation may be used for implementation of the International Wills Convention.

b. Implementation by Conditional Spending. Implementation by conditional spending may occur when (1) a convention is negotiated in terms that are consistent with an existing uniform state law, or the ULC can draft a consistent uniform state law that meets its criteria; and (2) there is a federal funding mechanism that relates to the subject matter of the uniform act that can be used to ensure that the act will be adopted by states so as to enable the United States to assure other countries, in good faith, that it will implement the convention by adoption of the uniform state law. Implementation by conditional spending requires that the relevant documents submitted to the Senate at the time of ratification indicate that the United States will implement the convention by requiring that states enact the text of the uniform state law or be ineligible to receive specific federal funds. Implementation by conditional spending has been used for the Hague Family Maintenance Convention, as implemented by the 2008 Amendments to UIFSA and pending federal legislation.

c. Implementation by Coordinating State and Federal Legislation. Implementation by state and federal coordinating legislation may occur when (1) a convention is negotiated in terms that are consistent with an existing uniform state law, or the ULC can draft a consistent uniform state law that adequately implements the convention; and (2) the federal government insists that there be federal legislation to implement the convention in the event a state does not enact the implementing uniform state law. Implementation by federal legislative coordinating legislation requires that the relevant documents submitted to the Senate at the time of ratification indicate that the United States will implement the convention by adopting federal legislation that preempts inconsistent state law but permits states to opt out of the preempting federal legislation by adopting the uniform state law. Implementation by coordinating federal legislation provides an excellent vehicle for permitting states to make some choices concerning whether or how to implement particular provisions of a convention, and it is the mode of implementation that ULC recommends for the Hague Choice of Court Agreements Convention.

d. Implementation by federal legislation incorporating the official text of a uniform state law. Implementation by federal legislation incorporating, either expressly or by reference, the official text of a uniform state law may occur when (1) a treaty is negotiated in terms that are consistent with an existing uniform state law; (2) to be consistent with the treaty, only small changes in the uniform state law are necessary; and (3) practical considerations require some assurance that the official text of a uniform act be the implementing legislation in lieu of state enactment of a uniform act. Implementation by federal legislation adopting the official text of a uniform state law requires that the relevant documents submitted to the Senate at the time of ratification indicate that the United States will implement the convention by adopting federal legislation that

incorporates the official text of the uniform state law. Implementation by incorporating uniform state law by reference in federal legislation has been recommended for the UN Convention on Independent Guarantees and Stand-by Letters of Credit.

2. The following are modes of implementing private international law conventions other than through uniform state law.

a. Implementation by Declaring the Convention to be Self-Executing.

Self-execution occurs when it is recommended to the Senate that a convention be self-executing and the Senate gives its advice and consent on that basis. Then, upon ratification by the U.S., the convention itself becomes controlling law in the U.S., without any implementing state or federal legislation. The following conventions are proposed to be implemented as self-executing: the UN Convention on Receivables in International Trade and the Hague Convention on Securities Held by an Intermediary. The Capetown Convention on International Interests in Mobile Equipment and its Aircraft Protocol have been implemented as self-executing.

b. Implementation by Federal Legislation Without Implementing State Legislation. Federal implementing legislation without state legislation may occur when implementing by state legislation is not feasible. Federal implementing legislation may provide statutory notice of the convention and either contains some or all of the terms of the convention or provides that the convention itself is controlling law. The UN E-Commerce Convention is proposed to be implemented in this manner.