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The Hague Convention on Choice of Court Agreements A Discussion of Foreign and Domestic Points



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Adopted on June 30, 2005, by the Hague Conference on Private International Law, the Hague Convention on Choice of Court Agreements (the “Convention”)¹ should be a turning point in an almost twenty year process to enhance international judicial cooperation with respect to choice of court agreements in the commercial context as well as international recognition and enforcement of foreign judgments, if it is ever activated. The Convention originally set out to attain the same importance in its domain as the 1958 New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards² did for arbitration agreements and awards. Its scope has been limited over time, and whether it can still achieve that goal is a matter of some discussion—most recently during a study group meeting of the State Department’s Advisory Committee on Private International Law, held at the beginning of March. Nevertheless, implementation of the Convention could be a large step toward uniformity in the enforcement and utility of forum selection clauses.

The Convention aims to make choice of court agreements as effective as possible and sets forth three key principles for enforcement of forum selection or “choice of court” agreements: (1) the chosen court must hear a covered case when proceedings are brought before it; (2) other courts are not permitted to hear a covered case; and (3) judgments rendered by a chosen court are recognized and enforceable in other member states. The Convention’s scope is limited to exclusive³ choice of court agreements in international civil or commercial matters,⁴ but it also deems all choice of court agreements that match the required

¹ Hague Convention on Choice of Court Agreements, June 30, 2005, available at <http://www.hcch.net/upload/conventions/txt37en.pdf> (last visited June 25, 2012).

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² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.

³ Individual member states may use the opt-in provision of Article 22 of the Convention to extend its scope to non-exclusive choice of court agreements with respect to recognizing and enforcing respective judgments.

⁴ Convention, Art. 1(1); see also Proposed Federal Implementing Legislation § 105(a) (draft Feb. 28, 2012) [hereinafter Proposed Federal Implementing Legislation]. The Convention excludes certain specific areas from its scope, in particular consumer contracts, contracts of employment, various family-law matters, and a miscellaneous group of matters ranging from liability for nuclear damage to the validity of entries in

form to be exclusive unless expressly declared non-exclusive by the parties.⁵ Thus, a choice of court agreement shall be deemed exclusive if it provides that: “Proceedings under this contract shall be brought before the courts of State X.”⁶ In contrast, choice of court agreements that are to be non-exclusive must say so explicitly, e.g., “The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract.”⁷ Other form requirements merely mandate that the choice of court agreement “must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.” Significantly, the Convention does not limit its scope based on the residence of parties.⁸ Any party may invoke the Convention by entering into a choice of court agreement that designates a member state as the chosen court.

The key implementing provisions are contained in Articles 5, 6, and 8(1) of the Convention.

Article 5—The Chosen Court Must Hear the Case

A court chosen by the parties to an exclusive choice of court agreement must hear a covered case when proceedings are brought before it. It “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State,”⁹ and it is barred from refusing to hear the case on grounds of forum non conveniens and lis pendens. The latter exclusion in particular is intended to prevent a race to the

public registers. Convention, Art. 2; Proposed Federal Implementing Legislation § 105(b)-(c).

⁵ Convention, Art. 3 b); Proposed Federal Implementing Legislation § 106.

⁶ Trevor Hartley & Masato Dogauchi, EXPLANATORY REPORT ON THE CONVENTION OF JUNE 30, 2005, at 40, ¶ 108 (Permanent Bureau of the Conference ed., 2007) [hereinafter EXPLANATORY REPORT], available at <http://www.hcch.net/upload/exp137e.pdf> (last visited June 25, 2012). While not a binding instrument, the Explanatory Report serves as one means of interpretation. Cf. Christopher L. Blakesley, *Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT’L L. 1, 61 n.264 (1991) (stating that an Explanatory Report to a different Hague Convention is non-binding).

⁷ Additional examples of non-exclusive choice of court agreements are as follows:

“Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law”;

“Proceedings under this contract may be brought before court A in State X or court B in State Y, to the exclusion of all other courts”;

“Proceedings against A may be brought exclusively at A’s residence in State A; proceedings against B may be brought exclusively at B’s residence in State B.”

EXPLANATORY REPORT, *supra* note 6, at 40, ¶ 109.

⁸ Compare also Convention, Article 4(2), which defines in which state—not contracting state—an entity or person other than a natural person shall be considered to be resident. See also Proposed Federal Implementing Legislation § 108 (entitled “Residence of legal persons”).

⁹ Convention, Art. 5(2); see also Proposed Federal Implementing Legislation § 201(b) (“A chosen court in the United States shall not decline to exercise jurisdiction over a dispute on the ground that the dispute should be decided in a court of another country or state, including on the ground of forum non conveniens.”).

courthouse in which litigants sue in non-selected courts first to prevent the competent court from hearing the case later, a tactic which often significantly delays litigation.

Notwithstanding the above, the chosen court may decline to hear the case if it finds that the choice of court agreement is null and void under its own law for reasons other than form. Enforceability will therefore depend on contract law under the substantive law of the chosen court, taking into account its choice of law rules (including with respect to any choice of law provision within the agreement), with grounds for invalidity including such claims as fraud, mistake, misrepresentation, duress, or lack of capacity.¹⁰ Moreover, the Convention does not affect domestic rules on subject matter jurisdiction, which also remain as appropriate grounds on which a chosen court may refuse to hear a case.¹¹

Article 6—Other Courts Are Not Permitted to Hear the Case

Where a valid choice of court agreement identifies a specific court as the forum for dispute resolution, any other court in a state that is party to the Convention must suspend or dismiss any proceedings brought before it. The Convention allows for exceptions where public policy concerns are implicated,¹² or the chosen court has declined to hear the case.¹³

Article 8(1)—Recognition and Enforceability In Member States

Judgments rendered by a chosen court will generally be recognized and enforced in all other member states, with no review of the merits permitted and binding effect granted to the findings of fact in cases other than default judgments.¹⁴ The most significant limitation to that rule under the Convention is stipulated in Article 11, which provides that courts may refuse to recognize or enforce a judgment “if, and to the extent, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered,” but taking into account costs and expenses related to the proceeding. This exception is of particular relevance to U.S. claimants in U.S.-European international disputes, as it codifies an exception that has so far regularly been discussed under the more general *ordre public* doctrine.¹⁵

¹⁰ EXPLANATORY REPORT, *supra* note 6, at 43, ¶ 126.

¹¹ Convention, Art. 5(3) a); see also Proposed Federal Implementing Legislation § 201(c) (“Subsections (a) and (b) shall not affect application of: (5) jurisdictional limits placed on the chosen court by applicable law relating to subject matter or amount in controversy.”).

¹² This approach is also used by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which, however, does not specify the law applicable to determine the exceptions. Pursuant to Convention, Art. 6 c), public policy of the state of the chosen court is decisive.

¹³ See Convention, Art. 6 e), discussed *infra*; see also Proposed Federal Implementing Legislation § 203(b).

¹⁴ Convention, Art. 8(1)-(2); see also Proposed Federal Implementing Legislation § 301.

¹⁵ For Germany, cf. BGH, decision dated Jun. 4, 1992—Case-No. IX ZR 149/91 (BGHZ 118, 312); for France, cf. Arrêt n° 1090 of Dec. 1, 2010 (09-13.303)—Cour de cassation—Première chambre civile; for Italy, cf. Corte app. Venezia, Oct.

History and Status

The origins of the Convention can be traced back nearly twenty years, when the United States, at that point not a member of any treaties on the mutual recognition of judgments,¹⁶ had an interest in ensuring that U.S. judgments could be more easily enforced abroad, particularly in Europe.¹⁷ The European Union, on the other hand, had an interest in limiting U.S. venues, which it perceived as being too broad.¹⁸

Professor A.T. von Mehren articulated the initial concept of an international treaty on choice of court agreements.¹⁹ Mehren's approach was that of a broad convention-mixte.²⁰ The parties to the negotiations for the Convention²¹ ultimately rejected Mehren's broad approach, however, because, ironically, it proved difficult to realize within a reasonable time frame. Of particular concern were the differences between the U.S. and European legal systems regarding venue and certain procedural aspects, problems known as the "European-American Judicial Conflict."²²

Following an initial limitation of the scope of the negotiations to choice of court agreements in certain types

15, 2001, n.1359, Giur. It. II 2002, 1021; the European Union addressed this issue explicitly in the preamble to the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), under No. 32: "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum."

¹⁶ Louise Ellen Teitz & Peter Winship, *Developments in Private International Law: Facilitating Cross-Border Transactions and Dispute Resolution*, 40 INT'L LAW. 505, 506 (2006).

¹⁷ Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 59 *et seq.* (2004).

¹⁸ Stephan B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIV. INT'L L. 287, 288 (2006).

¹⁹ A. T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994); *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 61, No. 1 at p. 86 (1997).

²⁰ A convention-mixte provides for three types of jurisdictional grounds: approved grounds ("white list"), prohibited grounds ("black list"), and other grounds not on any of the two lists ("grey area"). Courts may hear cases on approved grounds, and the resulting judgment would be recognized and enforceable in other contracting states under the convention. Courts may also hear cases on grey area grounds, but the resulting judgment would not be covered by the convention regarding recognition and enforcement. *Cf.* EXPLANATORY REPORT, *supra* note 6, at 16.

²¹ Among them were the United States, the European Union on behalf of its member states, Japan, China, Russia, Canada, and Australia.

²² Florian Eichel, *Das Haager Übereinkommen über Gerichtsstandsvereinbarungen vom 30. 6. 2005*, 55 RIW 289, 290 (2009).

of cases,²³ in April 2002, the Commission on General Affairs and Policy of the Hague Conference tasked the Hague Conference Permanent Bureau, assisted by an informal working group chaired by Professor Allan Philip (Denmark) and representing the global membership of the Hague Conference,²⁴ with preparing a revised draft of the Convention. The informal working group ultimately proposed to limit the scope of the Convention to choice of court agreements in business-to-business cases. During several meetings between 2002 and 2005, the Hague Convention Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters resolved open issues and prepared drafts of the Convention, which were published by the Hague Conference in 2003, 2004 and 2005. Finally, in June 2005, the 20th session of the Hague Conference on Private International Law agreed upon the definitive text of the Convention, which the Plenary Session adopted on June 30, 2005.

The Convention will come into force once at least two contracting states have ratified, accepted, or acceded to the Convention.²⁵ As of March 2012, only Mexico has acceded to the Convention. The United States signed the Convention on Jan. 19, 2009, and the European Union, on behalf of all its member states, signed the Convention on April 1, 2009. Given the below described implementation status, the Convention may well come into force following implementation in the United States.

Implementation Efforts In the European Union and the United States

The European Union

As noted above, despite the European Union's involvement in the negotiation and drafting process, and its execution of the Convention in April 2009,²⁶ the European Union has not undertaken efforts to implement or ratify the Convention to date. That said, proposed revisions to the European Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I")²⁷ make explicit reference to the Convention and imply progress may be made in the Convention's implementation.

²³ Those cases include: business-to-business cases, submissions, defendant's forum, counterclaims, trusts, physical torts, and certain other possible grounds.

²⁴ Its members were Marie-Odile Baur (European Commission), Paul Beaumont (United Kingdom), Antonio Boggiano (Argentina), Alegría Borrás (Spain), Andreas Bucher (Switzerland), Masato Dogauchi (Japan), Antonio Gidi (Brazil), David Goddard (New Zealand), Jeffrey Kovar (United States of America), Nagla Nassar (Egypt), Gugu Gwen Ncongwane (South Africa), Tatyana Neshataeva (Russian Federation), Fausto Pocar (Italy), Kathryn Sabo (Canada), Peter Trooboff (United States of America), José Luis Siqueiros (Mexico), Sun Jin (China), and Rolf Wagner (Germany).

²⁵ Convention, Art. 31.

²⁶ The Convention was signed by the European Union itself. Individual E.U. member states will not become parties to the Convention, but are bound by virtue of the European Union's signature pursuant to Article 30(1) of the Convention.

²⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, as amended.

Brussels I governs civil judicial cooperation between member states in the European Union, and contains, inter alia, provisions on choice of court agreements in its Article 23 similar to such provisions in the Convention.²⁸ The proposed revisions mirror provisions of the Convention more closely than Brussels I and, thus, may facilitate a possible ratification and adoption of the Convention by the European Union.²⁹

The two main proposed revisions to Brussels I relate to (i) exceptions under which a chosen court may decline to hear a case and (ii) the substantive validity of choice of court agreements. Under Brussels I, chosen courts may invoke *lis pendens* if one of the parties to a choice of court agreement brings the case before a non-chosen court first. To harmonize with the Convention, the proposed revised Brussels I regulation stipulates that a chosen court takes priority in deciding its competency, and any other court before which a covered matter is brought has to stay or dismiss proceedings.

The second proposed regulation harmonizes the conflict of law rules regarding the substantive validity of choice of court agreements. Under Brussels I, different courts would apply different conflict of law rules to determine the validity of choice of court agreements. By designating the law of the chosen court as determined in such matters,³⁰ the new regulation ensures that courts examine the validity of choice of court agreements in a uniform manner.

The United States

As noted, the Convention is not yet in force in the United States, but the State Department is currently considering submission of the Convention to the Senate for consent to ratification.³¹ To that end, it is anticipated that ratification of the Convention would be accompanied by federal implementing legislation (the “Federal Act”), the object of which is to streamline the Convention’s application in the United States.³² The State Department also currently intends to implement the Convention through a “cooperative federalism” approach, whereby any state in the United States may opt out of the Federal Act and instead be governed by a uniform act being developed by the Uniform Law Commission: the “Uniform International Choice of Court Agreements Act” (the “Uniform Act”).³³

²⁸ Unlike the Convention, Brussels I applies both to exclusive and non-exclusive choice of court agreements.

²⁹ Brussels I would apply to cases where at least one party is domiciled in the European Union, whereas the Convention applies in cases where at least one party is not domiciled in the European Union, but in another Convention member state. Convention, Art. 26(6).

³⁰ Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2010)748, Art. 23(1) (final draft Dec. 14, 2010).

³¹ U.S. Department of State Advisory Committee on Private International Law: Study Group on the Hague Convention on Choice of Court Agreements, 74 Fed. Reg. 30,660 (June 26, 2009).

³² *Id.* The case could be made that the Convention contains self-executing language, making a federal implementing law unnecessary. But the State Department, the government agency responsible for drafting the legislation, has deemed it preferable to implement procedures through federal law.

³³ UNIFORM INTERNATIONAL CHOICE OF AGREEMENTS ACT (Draft 2010).

The current draft of the Federal Act³⁴ essentially tracks the Convention’s language and, where appropriate, adapts it to the United States.³⁵ The Uniform Act also fully implements the Convention, but it allows for differences in federal and state law and practice. The Uniform Act’s Prefatory Note states that its “main drafting principle has been to remain as faithful as possible to the Convention text except where variation is necessary, and then while maintaining the integrity of the original text.”³⁶ That said, the Uniform Act has modified the Convention’s language in some instances “to simplify the Convention for a common law tradition.”³⁷ In instances where the Uniform Act has retained the Convention’s language, its *Reporter’s Notes* have supplemented relevant terms, which in some instances refer to civil law concepts, with their appropriate common law interpretations.³⁸ But, “terms and phrases that have an international character or meaning,” which appear in the Uniform Act, the Federal Act, and the Convention, are to be interpreted in a consistent and autonomous manner; that is, they will not refer to national (or, in the United States, state) law but rather retain the recognized meaning attributed to them in other Hague Conventions.³⁹

The idea of “cooperative federalism” appears to enjoy very broad bipartisan support, but the interplay between the Federal Act and the Uniform Act is, as one would expect, tilted toward the power of the Federal Act. Indeed, Section 405 of the current draft of the Federal Act, entitled “Relationship to state law,” provides that if a state has enacted the Uniform Act, the Federal Act will nevertheless preempt it to the extent that “the language of the state enactment varies from the Uniform Act,” or “the interpretation of the state enactment leads to a different result with regard to a particular issue from that which would obtain under [the Federal Act].”⁴⁰ Thus, the effect under the “cooperative federalism” approach is that states have the authority to “opt out” of the Federal Act by adopting the Uniform Act, but that authority is circumscribed in such a manner that if there is a conflict, the Federal Act will govern. In theory, this maintains a desirable predictability for litigants, but it has received criticism for creating extra work for courts, i.e., courts will have to analyze both the state and federal law to determine whether they conflict, and if they conflict, to then apply the federal law.

Subject matter jurisdiction as it applies to the enforcement of foreign judgments also remains a very live issue. The State Department has considered whether

³⁴ See Proposed Federal Implementing Legislation.

³⁵ One such example is the Proposed Federal Implementing Legislation’s clear delineation of “states” versus “countries.” The word “state” as it is used in the Convention denotes both countries and smaller territorial units within those countries. But Section 104(g) of the Proposed Federal Implementing Legislation defines “state” to mean “a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or possession of the United States.”

³⁶ UNIFORM INTERNATIONAL CHOICE OF AGREEMENTS ACT, prefatory note VI, at 5.

³⁷ *Id.*

³⁸ *Id.* One such example is the concept of a “statutory seat,” which is explained in Section 7 of the Uniform Act’s *Reporter’s Notes*.

³⁹ *Id.* prefatory note VI, at 5.

⁴⁰ Proposed Federal Implementing Legislation § 405(c).

the federal law implementing the Convention should include a provision, like that in the Federal Arbitration Act⁴¹ regarding the recognition and enforcement of foreign arbitral awards, expressly providing for federal court jurisdiction (concurrent with state court jurisdiction) in all cases involving the enforcement of a foreign judgment governed by the Convention (i.e., not just where subject matter jurisdiction is independently satisfied).⁴² But the current draft of the Federal Act does not contain any independent basis for subject matter jurisdiction.⁴³ Instead, the current draft insists on complete diversity, and does not provide any special mechanism for removal that would allow litigants to move their case to federal court. The State Department has indicated that this choice will both reduce forum shopping and also underscore the Convention's cooperative federalism approach.⁴⁴ Some practitioners have expressed their disappointment, claiming that the failure to create an independent basis for subject matter jurisdiction severely lessens the Convention's utility, especially in comparison with the Federal Arbitration Act.

Value Added for U.S. Litigants

The Convention benefits U.S. commercial litigants by establishing uniformity on a number of key issues. The vast majority of courts in the United States enforce choice of court agreements, commonly referred to as "forum selection clauses."⁴⁵ Historically, however, state law has governed the interpretation and validity of forum selection clauses.⁴⁶ To say the least, then, the Convention stands poised to federalize both the interpretation and the formal requirements of choice of court agreements, two legal issues that traditionally reside in the shadow of state law.

To be effective under the Convention, a choice of court agreement need only satisfy the requirements of Article 3, and "no further requirements of a formal nature may be imposed."⁴⁷ Thus, a court under the scope of the Convention cannot refuse to give effect to a choice of court agreement where it fails to comply with separate "territorial" form requirements. For instance, a state requirement that a choice of court agreement be written in English or in a special type must yield to the "no further requirements" standard imposed by the

⁴¹ 9 U.S.C. § 1 *et seq.*

⁴² *Id.* § 203 ("An action or proceeding falling under the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards] shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.").

⁴³ Proposed Federal Implementing Legislation § 204.

⁴⁴ U.S. State Department, IMPLEMENTATION OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS IN THE UNITED STATES 6 (2012).

⁴⁵ Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013, 1014 & n.4 (2010).

⁴⁶ See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3803.1, at 132 (3d ed. 2007) ("[I]t seems that the interpretation and character of the contract [with regard to a choice of court clause] must be governed by state law.").

⁴⁷ EXPLANATORY REPORT, *supra* note 6, at 40, ¶ 110.

Convention. To be sure, Article 3 treads on the doorstep of state law, but it would provide a welcome uniformity in contract drafting for global commercial transactions.⁴⁸

In general, the Convention's benefits only apply to exclusive choice of court agreements.⁴⁹ But the Convention also presumes that a choice of court agreement under the Convention's scope is exclusive, unless otherwise "expressly provided."⁵⁰ In the present body of state law, there is no uniform presumption of exclusivity; courts will examine the language of a forum selection clause to determine whether the parties intended for it to be exclusive or nonexclusive.⁵¹ In creating a presumption, the Convention leaves less to court discretion, ensuring that the parties' expectations at the contract drafting stage persist all the way to court. At least one commenting organization has noted, however, that "U.S. parties and counsel may be caught unaware by this change in legal presumptions, and may inadvertently draft choice-of-court agreements that they believe to be non-exclusive (as they would be under U.S. law), but which are deemed to be exclusive under the Convention."⁵²

Outstanding Uncertainty As to Forum Non Conveniens and Transfer

The Convention may also, unfortunately, create or perpetuate additional grounds of uncertainty as to certain domestic court choices in the United States. The Convention's benefit in terms of a forum non conveniens argument in connection with a motion to dismiss a domestic action, for example, or a motion to transfer under 28 U.S.C. § 1404(a) in federal courts, is less defined.

The issue arises out of the definition of state. According to the Convention, the word "state" as it is used in Article 5(2) (addressing forum non conveniens) and as it applies within the United States, refers to the "court or courts in the relevant territorial unit," i.e., the federal court system in its entirety or the relevant state court system if a particular state is identified.⁵³ Neither judicial districts within a federal system nor counties within

⁴⁸ It should be noted that there is a danger that courts may well not grasp, accept, or, in some cases, even see the rule, as it appears in the Convention's Explanatory Report and not, after all, in the text of the Convention itself. As noted *supra* note 6, the Explanatory Report is non-binding, but a court exercise in statutory interpretation almost always leads to a review of the relevant legislative history. To that end, the Explanatory Report represents a definitive and comprehensive examination of the Convention and its drafters' intentions.

⁴⁹ But, as noted *supra* note 3, member states may opt-in under Article 22 to extend its scope to non-exclusive agreements with regard to recognition and enforcement of foreign judgments.

⁵⁰ Convention, Art. 3 b); Proposed Federal Implementing Legislation § 106.

⁵¹ Heiser, *supra* note 45, at 1015 ("The determination of whether a particular agreement is exclusive or nonexclusive depends on the intent of the parties, which in turn requires an interpretation of the language of the agreement.").

⁵² International Commercial Dispute Commission of N.Y.C. Bar Association, REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES OF THE NEW YORK CITY BAR ON THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 3 (2006).

⁵³ EXPLANATORY REPORT, *supra* note 6, at 43, ¶ 128.

a state are separately addressed under the Convention. Thus, where the chosen court is the “Supreme Court of New York, New York County,” the relevant “state” is the state of New York, but any county may be appropriate.⁵⁴ Where the chosen court is the “U.S. District Court for the Southern District of New York,” the “state” may be interpreted as the entire U.S. federal court system.⁵⁵

In addition, the current draft of the Federal Act implementing the Convention provides: “A chosen court in the United States shall not decline to exercise jurisdiction over a dispute on the ground that the dispute should be decided in a court of another country or state, including on the ground of *forum non conveniens*.”⁵⁶ Thus, read in conjunction with the Convention, *forum non conveniens* is not available to defendants seeking to litigate in other countries or states, but it may be available for defendants trying to switch from one county court to another (e.g., from New York County to Suffolk County), or from one judicial district to another (e.g., from the Southern District of New York to the Northern District of Texas)—unless future adjudicators decide that the prohibition on state-based motions precludes arguing for a federal district court in another state (here Texas), in which case presumably alternative New York district courts such as the Northern District of New York might be allowable.

Thus, if a choice of court agreement identified all courts in a territorial unit or “state” as the chosen court, as in the following example: “Proceedings under this contract shall be brought before the courts of the State of New York,” no ambiguity or uncertainty is created because the parties have bargained for broad latitude in selecting a chosen court within New York. Under the general rule of Article 5(2), no New York state court could dismiss the case pursuant to *forum non conveniens* on the basis that the dispute should be decided in any other U.S. state or country.⁵⁷ But a New York state court could, if it wished, transfer the case to another court in New York.⁵⁸ A New Jersey state court, of course, must dismiss the action (subject to some exceptions).⁵⁹ (Notably, if a New York state court had already declined to hear the case (e.g., on the basis of subject matter jurisdiction), the New Jersey court could hear the case pursuant to Article 6 e).⁶⁰)

If, however, a choice of court agreement identified a specific court within a “state” as the chosen court (as in the following example: “Proceedings under this contract shall be brought before the U.S. District Court for the Southern District of New York”), the results would be less clear. Under the general rule of Article 5(2), the Southern District of New York could not dismiss such a case pursuant to *forum non conveniens* on the basis that the dispute should be decided in a state court or another country.⁶¹ But the possibility remains that it could transfer the case to any other federal court because they are all in the same “state”⁶² or, under the alterna-

tive reading discussed above, be precluded from transferring to a District Court outside of New York state. Of course, where suit were first brought in a New Jersey state court, that court would have to dismiss the action (subject to some exceptions).⁶³ (For instance, as before, if the Southern District of New York had already declined to hear the case (e.g., on the basis of subject matter jurisdiction), the New Jersey court could hear the case pursuant to Article 6 e).⁶⁴

There is also potential for confusion if the case is initially brought in the Western District of Texas. According to the Convention’s definition of the word “state,” the Western District of Texas is a part of the same “state” as the Southern District of New York, and therefore ultimately eligible to be a transferee court.⁶⁵ The Convention’s Explanatory Report does not explicitly clarify whether the Western District of Texas in this instance could also be an original court, but such a reading would run counter to the goals of the Convention. Rather, for the Convention to have the most meaningful impact, a “chosen court” should not be interpreted to be coterminous with its “state.” Only the specifically identified “chosen court”—not another court in its “state”—should be the first court to hear the case (and, if it so decides later, transfer or dismiss).⁶⁶

Enforcement of Foreign Judgments

In terms of its effect on the recognition and enforcement of foreign judgments, the Convention will greatly benefit U.S. interests abroad and at home. As noted, one significant benefit for U.S. litigants exists in Article 11, which allows courts to refuse to recognize punitive or exemplary damages that do not compensate parties for actual loss.⁶⁷ Also, although the grounds for recognition and enforcement of foreign judgments are nearly uniform throughout the United States, the standards for recognition and enforcement of foreign judgments vary

tribut court system, that choice of court clause is examined under the balancing test established by Section 1404(a). *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (“[T]he first question for consideration should have been whether § 1404(a) itself controls respondent’s request to give effect to the parties’ contractual choice of venue and transfer this case [W]e hold that it does.”). This article need not discuss the factors considered in the “balancing test” of Section 1404(a). It is worthwhile to mention that it requires a court to consider other factors besides the parties’ agreement. *See id.* at 31 (“A forum-selection clause should receive neither dispositive consideration nor no consideration, but rather the consideration for which Congress provided in § 1404(a).”)

Neither the current draft of the Federal Act nor the Convention appears poised to significantly alter this standard. Article 5(3) b) of the Convention and Section 201(d) of the current draft of the Federal Act both provide that “due consideration” should be given to the parties’ choice when deciding upon transferring a case from a chosen court. This “due consideration” does not seem materially different from the current Section 1404(a) balancing test.

⁶³ Convention, Art. 6.

⁶⁴ *Id.* Art. 6 e).

⁶⁵ EXPLANATORY REPORT, *supra* note 6, at 49, ¶ 158.

⁶⁶ One need only look to Article 6 e), which allows a non-chosen court to hear a case where “the chosen court has decided not to hear the case,” for support for the proposition that any specifically identified court (if any) is the “chosen court.”

⁶⁷ Convention, Art. 11; *see also* Proposed Federal Implementing Legislation § 303(b).

⁵⁴ *Id.* at 44, ¶ 130.

⁵⁵ *Id.*

⁵⁶ Proposed Federal Implementing Legislation § 201(b).

⁵⁷ EXPLANATORY REPORT, *supra* note 6, at 44, ¶ 130.

⁵⁸ *Id.* at 48-49, ¶ 156.

⁵⁹ Convention, Art. 6.

⁶⁰ *Id.* Art. 6 e).

⁶¹ EXPLANATORY REPORT, *supra* note 6, at 44, ¶ 130.

⁶² At present, where one party relies upon a choice of court agreement to urge transfer to another venue in the federal dis-

globally.⁶⁸ To that end, the Convention “establishes reciprocal recognition of foreign judgments rendered pursuant to a choice of court agreement.”⁶⁹ Once in force, the Convention will have the effect of an international Full Faith and Credit Clause, and signatory nations will be required to recognize judgments issued within its scope. That obligation stands irrespective of a contracting nation’s refusal to recognize a foreign judgment outside of the Convention’s scope.⁷⁰

Any change in enforcement of foreign judgments domestically, however, will be less pronounced. Historically, state law has governed the enforcement of judgments, in both state and federal courts.⁷¹ Many states have enacted the Uniform Foreign Money-Judgments Recognition Act of 1962⁷² or its 2005 revision.⁷³ Thus, the Convention adds little to the current landscape be-

cause it is like the Uniform Foreign Money-Judgments Recognition Act in that they both put forth the general proposition that judgments within their scope ought to be recognized and enforced.⁷⁴ They both also contain the same general authorized grounds for non-recognition. Although there are a few minor differences between the current body of state law dealing with recognition of foreign judgments and the Convention, it seems unlikely that the Convention’s ratification will lead to a material change in practice among U.S. courts.⁷⁵

The United States has played an active role in both initiating and revising the Convention thus far, and upon the United States’ implementation (assuming it is forthcoming), the Convention will go into effect for Mexico and the United States. The Convention’s purpose of achieving uniformity in choice of court agreements and the enforcement of resulting judgments should be viewed as promoting legal certainty in global commercial litigation, but that is not to say it could not be improved.

⁶⁸ Heiser, *supra* note 45, at 1024.

⁶⁹ *Id.* at 1048.

⁷⁰ *Id.*

⁷¹ See Fed. R. Civ. P. 69(a)(1) (providing that the procedure for executing a money judgment shall accord with state procedure).

⁷² UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962).

⁷³ UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005).

⁷⁴ See Heiser, *supra* note 45, at 1045-47.

⁷⁵ See *id.*