The Landmark 2005 Hague Convention on Choice of Court Agreements

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I. INTRODUCTION

The Convention on Choice of Court Agreements, adopted at the twentieth session of the Hague Conference on Private International Law on June 30, 2005, is an important step toward international harmonization of national conflicts rules on forum selection clauses. The Convention both strives to ensure the recognition and enforcement of international choice of court clauses in the context of international business by providing uniform rules, and validates the parties’ choice of forum as the single basis for jurisdiction. At the same time, it provides sufficient safeguards for governmental interests and for rendering and enforcing courts.

It is worth recalling that the United States Supreme Court had validated party autonomy as early as 1972 in M/S Bremen v. Zapata Off-Shore Co., by giving effect to “the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.” By eliminating uncertainties regarding the place of suit by forum selection in advance, such contractual stipulations were found by the Court to constitute an “indispensable element in international trade, commerce, and contracting.”

The Court approved of what it called a recent trend in adopting “a more hospitable attitude” toward choice of forum clauses, and called upon federal district courts sitting in admiralty to follow this as “the correct doctrine.” The Court established a reasonableness test to determine the validity of forum selection clauses, as it held that “such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” A strong showing could indeed be made for setting aside the forum selection clauses “for such reasons as fraud or overreaching” or if the enforcement would be “unreasonable and unjust” or contrary to “a strong public policy of the forum.” The Bremen Court’s reasoning that “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts,” would certainly apply equally in every other country.

3. Id. at 12.
4. Id. at 13-14.
5. Id. at 10.
6. Id. at 10.
7. Id. at 15.
Bremen was a case in admiralty; although both federal and state courts have generally followed the Bremen holding in non-admiralty cases as well. However, were the U.S. to become a contracting party to the Choice of Court Convention, the Convention may have impact, not only on cases in U.S. courts involving international forum selection clauses, but eventually even in the domestic setting as jurisdictional law may be harmonized by federal legislation.

Although the Hague Convention was adopted in June 2005, the actual drafting of the document began at the Hague Conference in 1992 with the United States’ initiative to create a global convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The United States’ interest in such a convention is driven by the obvious need it perceives for a legal structure to “support the growth of global markets” and promote international cooperation. Moreover, since the United States is not a party to any treaty—bilateral or multilateral—on recognition and enforcement of foreign judgments, the U.S. finds itself at a major disadvantage, for re-litigation becomes a prerequisite for the enforcement of U.S. judgments abroad. The U.S. courts are perceived to be more hospitable to the enforcement of foreign judgments than foreign courts are to U.S. judgments.

The negotiation process was lengthy and cumbersome. A Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters was finally adopted at the October 1999 meeting of the Hague Conference, which generally mirrored in its structure and content the prior European Union instruments on the topic—the Brussels Convention of September 27, 1968, and the

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Lugano Convention of September 16, 1988. Subsequent consultations showed serious differences among the delegates on the text of this ambitious project, parts of which had been adopted by narrow majorities and, consequently, would not have received wide approval.

A lack of consensus on the text was coupled with the concern that in the era of special issues raised by e-commerce and intellectual property rights, the rules based on the Brussels and Lugano conventions, adopted so long ago, would not meet contemporary needs. Thus, formal negotiations on the 1999 draft were suspended. Subsequent informal discussions between 2000 and 2002 led to the realization that a consensus could not be reached on a global convention of such a wide scope as envisaged earlier; the decision was made to scale down the project and use a “bottom-up-approach,” starting with choice of court clauses on business-to-business cases, on which there already was broad agreement. After several sessions of an informal working group during 2002-2003, the group prepared a draft that it submitted to the Commission on General Affairs and Policy of the Hague Conference in April 2003. The Commission met in December 2003 and April 2004 and produced a Preliminary Draft Convention, and, after further deliberations and work, a diplomatic session convened in June 2005 unanimously adopting the Convention.

Three basic rules that ensure the effectiveness of the Hague Convention form its core. First, the court specified by an exclusive and valid choice of court agreement must hear the case. Second, pursuant to limited exceptions, all other courts must suspend or dismiss the case. Third, the resulting judgment of the chosen court must generally be enforced by courts in other Contracting States. In addition to these three rules, the Convention contains a fourth optional rule on reciprocal declarations, that Contracting States may declare that they will recognize and enforce judgments of other Contracting States resulting from non-exclusive choice of court agreements. These provisions will be elaborated later.

16. See Schulz, supra note 1, at 244-48 (detailing the negotiations). As First Secretary at the Permanent Bureau of the Hague Conference on Private International Law, Schulz was in charge of the negotiations beginning in 2002.
17. Id.
19. Hague Convention, supra note 1, art. 5.
20. Id. art. 6.
21. Id. art. 8.
This discussion will begin in the next section on the scope of the Convention. The third section will review the jurisdictional issues, which will then lead to a section on recognition and enforcement. Selected issues will be discussed next, and issues related to the Convention’s implementation in the United States will be reviewed after that. The final section will cover an appraisal of the Convention.

II. SCOPE OF THE CONVENTION

Article 1 defines the Convention’s scope. It applies only to international cases, only if there is an exclusive choice of court agreement, and only in civil and commercial matters. The definition of “international” varies between the Convention’s application regarding jurisdiction and its application regarding recognition and enforcement. A case is international unless the parties are residing in the same Contracting State and all relevant elements except the location of the chosen court are connected only with that State. Thus, merely the choice of a foreign court in an otherwise totally internal case does not make it international.

The Convention’s reach is expansive, however, for the purpose of recognition and enforcement, as the mere fact that a judgment is given by a foreign court suffices to make it international. To illustrate: assume that the parties, both residents of France, a Contracting State, enter into an exclusive forum selection agreement, choosing the courts in Italy to resolve their disputes and that all elements relevant to the dispute are connected with France. For jurisdictional purposes, this is not an international case. If a court in Italy, however, renders judgment, and the judgment is taken by one of the parties to Germany or France (assuming that France, Italy, and Germany are all Contracting States), both Germany and France will be obligated to recognize and enforce the judgment. Recognizing this anomalous situation, the Convention does authorize the State, namely France in this example, to declare that it will not recognize or enforce such judgments.22

The Convention defines an entity or person other than a natural person is as a resident of a state—where it has its statutory seat, central administration, or principal place of business, or the State under whose law it was formed or incorporated.23 A judgment under the Convention follows the traditional meaning of “judgment” for recognition purposes—namely that it is given by a court on the merits and does not include interim measures of protection,24 which are not covered under the Convention.25

To provide further clarity, the Convention explicitly states that it does not govern interim measures of protection and that it “neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.”26

The Convention uses the term “State” or “Contracting State” to include states with two or more territorial units with different legal systems, such as Canada, the

22. Id. art. 20.
23. Id. art. 4(2).
24. Id. art. 4(1).
25. Hague Convention, supra note 1, art. 7.
26. Id.
United Kingdom, and the United States, as well as “Regional Economic Integration Organizations,” such as the European Union.27 As to the former, the Convention provides that the term “State” or “Contracting State” applies, where appropriate, to “the relevant territorial unit,” that is, either the larger entity (say the United Kingdom), or its sub-unit (say Scotland).28 Thus, the choice of a Scottish court would mean that Scotland would be the “Contracting State.”

As to the Regional Economic Integration Organizations, the Convention authorizes such an entity to become a party to the Convention if the organization’s member states have granted it “competence over some or all of the matters governed by [the] Convention.”29 Such an organization may also declare that it alone and not its member states individually will be party to the Convention but that they will also be bound by virtue of the organization’s adherence.

An exclusive choice of court agreement is defined as an agreement that “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.”30 Accompanying this rather limited form requirement is the provision that the agreement designate “the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts” to resolve past and future disputes.31 Assuming that the United States ratifies the Convention to apply federally as well as to all its states, an agreement could, for example, specify the federal courts of the United States, or the Federal District Court of Colorado, or the state courts of Colorado.

The Convention validates party autonomy, presuming exclusivity for a choice of court agreement “unless the parties have expressly provided otherwise.”32 Thus, an agreement designating the courts of a non-Contracting State is excluded from the Convention’s coverage. Finally, the Convention provides severability of a choice of court agreement from the rest of a contract so that the validity of the exclusive forum selection clause “cannot be contested solely on the ground that the contract is not valid.”33

The Convention appropriately confines its scope to exclusive choice of court agreements, although it does provide for reciprocal declarations by Contracting States that their courts will recognize and enforce judgments of other Contracting States resulting from non-exclusive choice of court agreements.34 Otherwise, it

27. Id. art. 25.
28. Id.
29. Id.
30. Id. art. 29.
31. Hague Convention, supra note 1, art. 30.
32. Id. art. 3(c); see also Schulz, supra note 1, at 248 (explaining that article 3(c)(ii) of the Hague Convention is drawn from the UNCITRAL Model Law on Electronic Commerce); c.f., Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (providing a contrast to the flexible language of The Hague Convention art. 3 with the rigid requirement in the 1958 Convention that the “agreement [be] in writing under which the parties undertake to submit to arbitration all or any differences” between them regarding “a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”) [hereinafter New York Convention].
33. Hague Convention, supra note 1, art. 3(a).
34. Id. art. 3(b).
35. Id. art. 3(d).
36. Id. art. 22.
would have to address the issue of parallel proceedings and consequently the rigid rule of priority, which is the practice in Europe, but on which there is no wide consensus. The United States, for example, rejects the priority concept and instead follows the forum non conveniens approach; thus, the United States courts routinely apply public and private law factors in exercise of their broad discretion to determine whether they should or should not hear the case.

The presumption of exclusivity resolves an issue fraught with difficulty in the United States courts, where generally forum selection clauses are not presumed to be exclusive absent explicit language to that effect. Furthermore, courts in the United States differ on what makes a forum selection clause mandatory and hence enforceable, or permissive and hence discretionary. A Tenth Circuit case decided in 2002, *K & V Scientific Co., Inc. v. BMW*, aptly makes the point: “Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum.” In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere.

The clause in question read: “[[jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany.]]” The Tenth Circuit’s conclusion was that “is Munich” does not sufficiently imply “is [only] Munich.”

The court added that “where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties’ intent to make venue exclusive.”

Among the U.S. circuit courts, the Second, Fifth, Seventh, Ninth, and Eleventh Circuits have also held such clauses to be permissive, while the Sixth Circuit has concluded otherwise.

Regarding the third limit on the Convention’s scope—that it applies only in civil or commercial matters—the rapporteurs note that the use of both terms was necessary because in some legal systems “civil” and “commercial” are considered separate and mutually exclusive categories. However, as will be discussed next, several issues normally considered to fall within the civil and commercial categories are excluded from the scope of the Convention.

In addition to the exclusion of forum selection clauses in consumer and employment contracts, which obviously do not belong in a convention aimed at promoting “international trade and investment,” article 2 enumerates sixteen subject matters for exclusion. Several of these excluded matters are of special governmental interests or are subject to regional or international treaties or national

38. *Id.* at 498 (internal quotations omitted).
39. *Id.* at 496.
40. *Id.* at 498-501.
41. *Id.* at 499 (citations omitted).
42. *Hague Convention, supra* note 1, art. 1.
43. *Id.* pmbl., art. 2.
44. *See id.* arts. 2(2)(a)-(p).
rules. These include the status and legal capacity of natural persons and family law and succession matters. Other excluded matters include insolvency, the carriage of passengers and goods, marine pollution, anti-trust (competition) matters, torts, rights in rem in immovable property, the validity of intellectual property rights other than copyrights and related rights, limited proceedings regarding infringement of intellectual property rights, and the validity of entries in public registers. However, the scope of the Convention does include proceedings where one of the excluded matters “arises merely as a preliminary question and not as an object of the proceedings.”

Also specifically excluded are arbitration and related proceedings. Specifically not excluded are proceedings involving a government, a government agency, or any person acting on behalf of a government. The Convention does not “affect privileges and immunities of States or of international organisations.”

Also, a State is authorized to declare that it will not apply the Convention to a specific matter in which it has a strong interest. However, the Convention does provide adequate safeguards: first, it requires the State making such a declaration to define it “clearly and precisely” in order to ensure that the declaration is “no broader than necessary”; second, the State is to notify the Depositary (the government of the Netherlands) which will inform the other States; third, such a declaration will not take effect for at least three months if the Convention is already in force for the State making it; fourth, it will not apply to contracts concluded before the Convention takes effect; and fifth, acknowledging reciprocity, the Convention provides that where the chosen court is in the State making the declaration, other States are not required to apply the Convention regarding the matter in question.

III. JURISDICTION

Articles 5 and 6 prescribe jurisdictional rules. Under article 5, the designated court of a state must decide the case “unless the agreement is null and void under the law of that state,” which includes its choice of law under its conflict of laws rules. This provision will have a considerable impact in the United States because once the Convention is ratified, the United States courts will no longer be able to use the familiar doctrine of forum non conveniens, under which they currently have the discretion to dismiss the proceedings in favor of another court.

45. See Schulz, supra note 1, at 247; see also Brand, supra note 1 at 1292.
46. Hague Convention, supra note 1, arts. 2(a), 2(2)(b)-(d).
47. Id. arts. 2(2)(e)-(p).
48. Id. art. 2(3).
49. Id. art. 2(4).
50. Id. art. 2(5).
51. Id. art. 2(6).
52. Id. art. 21(1).
53. Id. art. 21(2)(b).
54. Id. arts. 32, 33.
55. Id. art. 32(4).
56. Id. art. 32(5).
57. Id. art. 21(2)(b).
58. Hague Convention, supra note 1, art. 5(1).
However, under article 19, the freedom to do so is partly restored as a State may declare that its courts, if chosen in an exclusive choice of court agreement, may refuse to “determine disputes” if there is no other connection with that State except the location of the chosen court. After having made a declaration under article 19, a State may conceivably mandate its courts to refuse jurisdiction under these circumstances. Similarly, the doctrine of *lis pendens*, familiar on the European scene, will not apply because the designated court cannot refuse to hear the case under the rationale that another court was seised first.

Rules on subject matter and venue remain unaffected under this provision. Thus, the choice of court agreement has no effect if the chosen court lacks the subject matter or if the venue is improper. The chosen court of a Contracting State may transfer the case to another court in that State under its law. As an example, such a chosen court may be federal courts in the United States or the Federal District Court of Colorado. In either case, the chosen court is authorized to transfer the case according to U.S. law. Similarly, the Convention provides that a court with the discretion to transfer should give due consideration to the choice of the parties.

Article 6 requires the court that is seised, but not located, in the state of the chosen court to suspend or dismiss proceedings unless one of the followings exceptions applies: The agreement is “null and void” under the law of the chosen court; the capacity is lacking under the law of the court seised; giving effect to the agreement would lead to “manifest injustice” or be “manifestly contrary to public policy” of the court seised; the agreement cannot reasonably be performed because of exceptional circumstances beyond the control of the parties; or the chosen court has decided not to hear the case. This rule will also apply where the chosen court transfers the case to another court in the same state as permitted under the Convention.

Pursuant to the “null and void” exception as noted above in connection with article 6, the Convention prescribes that the choice of court agreement’s substantive validity must be examined under the law of the chosen court, including the choice of law rules of the state of the chosen court, as the Convention does not prescribe its own independent rule on substantive validity.

59. *Id.* art. 19.
60. *Id.* art. 5(3).
61. *Id.* art. 5(3)(b)
62. See 28 U.S.C. § 1404 (stating that a federal district court may, for the convenience of the parties and in the interest of justice, transfer any civil action to any other district or division where it might have been brought).
63. *Id.* art. 5(3)(b).
64. See Hague Convention, supra note 1 art. 6(a)-(c).
65. *Id.; c.f.,* New York Convention, supra note 32, art. II(3) (providing for similar exceptions as those found in article 6, except that the Hague Convention provides that the court seised may hear the case (but it is not obligated to do so) if the chosen court has decided not to hear the case).
66. See Schulz, supra note 1, at 253.
67. Hague Convention, supra note 1, art. 6(a).
IV. RECOGNITION AND ENFORCEMENT

Article 8 requires the recognition and enforcement of the judgment of a chosen court in other Contracting States. No review of the judgment on merits is allowed by the court addressed, which is bound by the court of origin’s findings of fact unless it is a default judgment. Also, the status of the judgment in the court of origin—whether it has effect and whether it is enforceable—determines whether it will be recognized or enforced. Similarly, if the judgment is under review in the state of origin or if the time limit for seeking review there has not expired, the addressed State may postpone or refuse recognition or enforcement.

Article 9 enumerates exceptions when recognition or enforcement may be refused. Several of these are similar to those contained in Article 6 on jurisdiction, such as when the agreement is “null and void”; capacity of a party to the agreement is lacking under the law of the requested State; and “enforcement would be manifestly incompatible” with the public policy of the requested State. Other exceptions include fraud in obtaining the judgment, and defective service. As to inconsistent judgments between the same parties, the mere fact that the inconsistent judgment is from the requested State suffices as an exception. If, however, the inconsistent judgment is from another State, the Convention requires that it must be earlier, involve the same cause of action, and fulfill the conditions needed for its recognition in the requested State.

Article 11 states another exception. Judgments awarding damages, including exemplary or punitive damages, may be refused to the extent that they “do not compensate a party for actual loss or harm suffered.” The court is to “take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.”

As mentioned earlier, a State may declare under article 20 that if the parties’ residence, their relationships, and all other elements relevant to the dispute except the location of the chosen court, are connected only with the requested State, its courts will refuse to recognize or enforce a judgment of a court of another Contracting State.

68. See id. art. 8(1); see also id. art. 8(5) (including judgments pursuant to transferred cases except that “where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin”).
69. Id. art. 8(2).
70. Id. art. 8(3).
71. Id. art. 8(4).
72. Hague Convention, supra note 1, arts. 9(a)-(g).
73. Id. arts. 9(a), (b), (e).
74. Id. arts. 9(c), (d).
75. Id. art. 9(f).
76. Id. art. 9(g).
77. Id. art. 11(1).
78. Hague Convention, supra note 1, art. 11(2).
79. Id. art. 20.
V. SELECTED ISSUES

A. Preliminary Questions and Intellectual Property Rights

Articles 2(3) and 10 address the treatment of preliminary questions. If excludable subject matter arises under article 2(2), or is excludable pursuant to an article 21 declaration, and the subject matter is not an object of the proceedings but is merely a preliminary question, those “proceedings are not excluded from the scope of [the] Convention." Furthermore, if the excluded matter is not an object of the proceedings but arises by way of defense, such proceedings are not excluded from the Convention. For example, in a dispute between a licensor and a licensee on an alleged breach of contract regarding royalties due to the licensor, the licensee should not escape the application of the Convention to the contract by raising the defense of the alleged invalidity of the intellectual property right.

Article 10, in conjunction with the excluded matters, provides that the preliminary ruling given by the court in the example above on the validity of the intellectual property right “shall not be recognized or enforced under [the] Convention” in other Contracting States. This is an issue the court might have had to decide, for the obligation to pay royalties might have depended on the validity of the intellectual property right. Paragraphs 2 and 4 provide that recognition or enforcement of the judgment, as for example to pay the licensor, “may be refused if, and to the extent that, the judgment was based on a [preliminary] ruling on [an excluded] matter.

Article 10(3) adds that the recognition or enforcement authorized under 10(2) and 10(4) (for payment of royalties in the example used above regarding the dispute between the licensor and the licensee) may be refused only where the ruling on which the judgment was based, namely the validity of the intellectual property rights (other than a copyright or a related right), is inconsistent with the judgment or decision of the competent authority in the requested State or another State where that intellectual property right is granted. This means that the judgment may be refused only if the State where the intellectual property right is granted finds the purported right to be invalid.

Moreover, the decision on recognition and enforcement of the judgment mentioned above may be postponed if at the time of request for such recognition or enforcement, proceedings on the validity of the intellectual property right in question are still pending in the State that granted the right.

As noted, the Convention provides a balanced approach to the extremely sensitive issues of intellectual property rights respecting State sovereignty while rejecting party autonomy to determine the validity of most intellectual property rights. The compromise reached, which seems to have satisfied the intellectual
property community, excludes the validity of intellectual property rights from its coverage with the exception of copyright and related rights. Accordingly, the Convention does not apply to infringement of these excluded rights unless infringement proceedings are brought or could have been brought for breach of a contract between the parties related to such rights.

B. Transitional Provisions

To meet the parties' expectations and to validate party autonomy, the Convention states transitional provisions. First, the Convention does not apply if it is not in force for the State of the chosen court under the exclusive choice of court agreement when the agreement is concluded. In other words, parties may not avail themselves to the benefits of the Convention through choice of court agreements if the Convention is not yet in force in the chosen jurisdiction. Conversely, if the Convention is in force in the chosen jurisdiction, the chosen court must hear the case, all other courts must decline jurisdiction, and all other Contracting States must recognize and enforce the judgment of the chosen court.

Second, if the Convention is not yet in force in the State of the chosen court, the Convention does not apply to proceedings that take place there. Accordingly, any court requested to recognize and enforce the judgment of the chosen court is not obliged to do so under Article 8. Nor is the court seised on the merits required to dismiss the case as required under Article 6 of the Convention.

These provisions, however, do not apply to non-exclusive choice of court agreements authorized under article 22. These reciprocal declarations by Contracting States allow that their courts will recognize and enforce judgments of other Contracting States resulting from non-exclusive choice of court agreements. States may set specific time limits in such declarations pertaining to the application of the Convention.

C. Contracts of Insurance and Reinsurance

Article 17 will be most helpful to the insurance industry. Under its provisions, proceedings under a contract of insurance (or reinsurance) fall within the scope of the Convention and are not excluded on the ground that such a contract relates to a matter to which the Convention is inapplicable. For example, although marine pollution is excluded from the Convention's coverage under Article 2(2)(g), a contract of insurance for marine pollution falls within the Convention's coverage. Assuming that marine pollution has occurred and the insured brings a case against

87. Id. art. 2(2)(o).
88. Id. art. 2(2)(o).
89. See id. art. 16.
90. Hague Convention, supra note 1, art. 16.
91. Id. arts. 5, 6, 8, 16(1).
92. Id. art. 16(2).
93. See id. art. 8(1).
94. Id. art. 16(2).
95. Id. art. 17(1).
the insurer under an exclusive choice of court agreement for refusing her indemnification, the Convention allows the suit.

Assume further that the insured secures a judgment on her suit. Recognition and enforcement of that judgment may not be limited or refused on the ground that the contract includes liability indemnification of the insured or reinsured regarding an excluded matter or an award of damages to which Article 11 on non-compensatory damages might apply.

D. Relationship with other International Instruments

Article 26 provides rules regarding the relationship of the Hague Convention to other treaties or instruments. \(^{96}\) First, the Convention aims at reaching compatibility with other treaties. \(^{97}\) It also does not affect the application of the rules of a regional arrangement that is a party to the Convention. \(^{98}\) However, the issue of incompatibility could arise when the Hague Convention and the Brussels I Regulation, would both apply. The Convention would claim exclusive jurisdiction of the chosen court and the latter Brussels I Regulation would prescribe a rigid rule of priority of the seised court and the recognition and enforcement of a judgment given by the court of a Member State in all others without examining the jurisdictional basis of the first court. Under Article 23 of the Brussels I Regulation, the Regulation would apply if one of the parties is domiciled in an E.C. Member State. However, under Article 26(6) of the Hague Convention, in such a situation the Hague Convention will apply, while the Brussels I Regulation will apply where none of the parties is resident in a Contracting State that is not an E.C. Member State. As to the recognition and enforcement of judgments, the Brussels I Regulation will apply where both the court granting the judgment and the one in which enforcement is sought are located in the E.C.

The Hague Convention generally follows the 1969 Vienna Convention’s framework which prescribes rules of international law pertaining to treaties. \(^{99}\) Specifically, Article 30(2) of the Vienna Convention approaches the problem of inconsistency and incompatibility between treaties by providing that, “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” \(^{100}\)

Under a provision of Article 26, when a Contracting State is a party to a treaty and all the parties are residents in Contracting States which are all parties to that treaty, the treaty applies. \(^{101}\) Moreover, states that are party to the Hague Convention as well as prior instruments, are authorized to comply with their previous obligations to any non-Contracting State. \(^{102}\) The prior treaty may continue to apply with the provision that recognition or enforcement may not be granted “to a lesser extent
than under [the Hague] Convention."^{103} Treaties on specific subject matters, whether concluded before or after the Hague Convention, may also apply, provided that “the Contracting State has made a declaration” to that effect.\textsuperscript{104}

VI. IMPLEMENTATION OF THE CONVENTION IN THE UNITED STATES

Assuming that implementing legislation will be required in the United States,\textsuperscript{105} Professor Curtis Reitz has advocated implementation through the uniform state law process rather than federal legislation, on the rationale that uniform state legislation appropriately harmonizes treaty provisions with pertinent state law.\textsuperscript{106} In response, Professor Stephen Burbank first analyzes the restrictive powers of the federal government and the states regarding the issues addressed in the Hague Convention and second, discusses and evaluates the “considerations that bear on the wise use of these powers.”\textsuperscript{107} He notes Congressional enactment of federal legislation for the New York Convention for Arbitral Agreements and Arbitral Awards as well as Congressional ratification of the Hague Service Convention and the Hague Evidence Convention after the Congressional determination that a federal response was necessary to address the problems of international litigation.\textsuperscript{108} He adds: “[T]he interests of US participants in the global marketplace would be well served by uniform international standards for the recognition and enforcement of US judgments in other nations and of foreign-country judgments in the United States.”\textsuperscript{109}

Professor Burbank identifies the issues on which the Hague Convention provides for disuniformity: 1) the law governing the validity of contract; 2) the law governing the capacity to enter into contract; 3) public policy norms; and 4) procedures regarding service of process and of “procedural fairness” that are considered fundamental.\textsuperscript{110} He then provides cogent arguments in favor of uniform federal norms rather than state legislation.\textsuperscript{111} On “public policy” he appropriately refers to the American Law Institute’s Project on Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute\textsuperscript{112} as proposing a model statute that points to state law in some situations:

(a) A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that: . . . (vi) the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the

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103. Id. art. 26(4).
104. Id. art. 26(5).
107. Burbank, supra note 105, at 293-308.
108. Id. at 296-97.
109. Id. at 297.
110. Id. at 300-01.
111. Id. at 301-07.
public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.\textsuperscript{113}

Similarly, he prefers federal determination rather than state-by-state decisions regarding partial declarations on jurisdiction and enforcement as authorized in articles 19 and 20 as discussed earlier.\textsuperscript{114} I concur with his conclusion that based on the need for certainty, efficiency, and uniformity, “federal implementation through legislation prescribing federal law that is mostly uniform, but a few provisions of which may borrow designated state law, would impose lower transaction and administrability costs, with no loss of accessibility, than would state implementation.”\textsuperscript{115}

\section*{VII. Appraisal and Recommendation}

The presumption of exclusivity established in the Hague Choice of Court Convention is of special significance in the United States. The major reason is that notwithstanding the U.S. Supreme Court’s ruling in \textit{Bremen} in 1972, which validates forum selection clauses, U.S. courts have not generally held forum selection clauses to be exclusive without explicit language showing that jurisdiction is exclusively in the designated forum.\textsuperscript{116}

Thus, following the ratification and implementation of the Hague Convention in the United States, there should be no uncertainty that choice of court agreements will be held exclusive by U.S. courts. As the existing uncertainty on this issue is removed and there is predictability that a decision by the chosen U.S. court will be recognized and enforced abroad, a foreign business should find no disincentive in choosing a U.S. court as a forum to resolve potential disputes in business-to-business transactions.

The importance of the Hague Convention is not limited just to the United States, for it is widely seen as a viable alternative to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under whose provisions not only arbitration awards but arbitration clauses are recognized and enforced abroad.\textsuperscript{117} However, the Hague Convention should not be seen as competing with the New York Convention, as evidenced by the International Chamber of Commerce (ICC) and its International Court of Arbitration’s strong support for this new development.\textsuperscript{118}

The Hague Convention has gained wide support. For instance, the intellectual property community considers the Convention to be an important instrument, as it will make licensing agreements easier to enforce.\textsuperscript{119} Similarly, the Convention will be

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.} § 5(a)(vi), cited at Burbank, supra note 105, at 307.
  \item \textsuperscript{114} See Burbank, supra note 105, at 309.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} See supra notes 37-41 and accompanying text.
  \item \textsuperscript{117} See New York Convention, supra note 32, art. II(3) (obligating courts of Contracting States to enforce arbitration agreements as well as arbitration awards).
  \item \textsuperscript{118} See Schulz, supra note 1, at 266.
  \item \textsuperscript{119} See Hartley, supra note 1, at 424.
\end{itemize}
equally important for the insurance industry. The legal profession has also enthusiastically endorsed it: professional associations, including the American Bar Association, the International Bar Association, the International Law Association, and the American Society of International Law, have all featured the Convention at their conferences. The ABA’s Section of International Law stated in its August 2006 report:

The Choice of Court Convention addresses a specific perceived need for facilitating global transactions and providing certainty for US parties and litigants. It can be understood as a contract drafting tool and should be part of cross-border planning starting today. The Convention is also a means of dispute resolution, providing a viable alternative to arbitration.

It recommended that the ABA urge the U.S. government “promptly to sign, ratify and implement the Hague Convention on Choice of Court Agreements.” At its annual meeting the ABA resolved to make that recommendation. It is in the interest of the United States to ratify the Convention and implement it through federal legislation.

120. See id.; see also Schulz, supra note 1, at 260-61.
121. See Schulz, supra note 1, at 266 and n.65.
123. The author was in attendance for these proceedings.