

# THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: CREATING ROOM FOR CHOICE IN INTERNATIONAL CASES

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## I. INTRODUCTION

In U.S. domestic business disputes, the virtues of arbitration versus litigation have long been debated.<sup>1</sup> In contrast, the traditional consensus in international business has been that arbitration is a better mechanism for settling disputes.<sup>2</sup> Arbitration's popularity in the international context stems from its "monopoly" in international transactions and is driven by its two perceived virtues: neutrality and worldwide enforceability.<sup>3</sup> This article will focus on a new treaty that may, over time, increasingly give international arbitration a run for its money, break the monopoly, and offer corporate counsel a wider variety of choices to resolve transnational disputes.

That treaty is the Hague Convention on Choice of Court Agreements (the "Convention" or "Choice of Court Convention").<sup>4</sup> Mexico acceded to the treaty in 2007, and the European Union and the United States both signed the treaty in 2009, though they have yet to ratify it.<sup>5</sup> When either the European Union or the United States ratifies the Choice of

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1. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1–60 (2010) (providing that widespread use of arbitration as a surrogate for civil litigation has subjected arbitration to criticism because of its judicialization and concomitant increase in costs); see also Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts* (N.Y.U. Law & Econ. Working Papers, Working Paper no. 70, 2006), [http://lsr.nellco.org/nyu\\_lewp/70](http://lsr.nellco.org/nyu_lewp/70) [hereinafter Eisenberg & Miller].

2. Jan Paulsson, *International Arbitration is not Arbitration*, in STOCKHOLM INT'L ARB. REP., 1 (2008). For example, in the development of transboundary oil and gas deposits, "[c]ommon practice has been to subject most disputes to arbitration." Ana A. Bastida et al., *Cross-Border Unitization and Joint Development Agreements: An International Law Perspective*, 29 HOUS. J. INT'L L. 355, 391 (2007).

3. See Paulsson, *supra* note 2, at 1–2; see also Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

4. Hague Convention on Choice of Court Agreements, June 30, 2005, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) [hereinafter Choice of Court Convention].

5. The Hague Convention on Choice of Court Agreements: Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) (follow "Status Table" hyperlink) (last visited Oct. 3, 2010).

Court Convention, it will enter into force.<sup>6</sup> Currently, the United States has no treaty at all on enforcement of U.S. judgments abroad.<sup>7</sup> Thus, until the Choice of Court Convention enters into force, U.S. parties looking to take advantage of worldwide enforcement must submit to arbitration under the New York Convention on the Enforcement of Foreign Arbitral Awards (the “Convention” or “New York Convention”).<sup>8</sup> However, once the Choice of Court Convention enters into effect, U.S. parties to transnational contracts will have another realistic and attractive choice of dispute settlement: litigation in a chosen court.<sup>9</sup> The practicalities of litigating in a neutral third country will, on many occasions, require litigating outside the United States before the courts of a treaty signatory.<sup>10</sup> But at that point, arbitration’s enforceability advantage may have realistic competition.

## II. ARBITRATION’S “MONOPOLY”

In a tendentiously titled article, Jan Paulsson, one of the deans of the international arbitration bar, pointedly declared

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6. See Choice of Court Convention, *supra* note 4, at art. 31(1).

7. See Eisenberg & Miller, *supra* note 1, at 10; see also *Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments: Before the Subcomm. on Courts & Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Jeffrey D. Kovar, Assistant Legal Adviser for Private Int’l Law, U.S. Dep’t of State), available at <http://www.state.gov/documents/organization/6846.doc>. [hereinafter Kovar].

8. New York Convention, *supra* note 3, at art. III; see Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT’L L. 363, 380 (2004) (noting that, compared to international litigation, “enforcement [of international arbitral awards] is easier because of the broad acceptance of the New York Convention”).

9. Ronald A. Brand, *Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements 2* (Legal Studies Research Paper Series, Working Paper No. 2009-14, 2009), <http://ssrn.com/abstract=1397646> (follow “One-Click Download” hyperlink) [hereinafter *Arbitration or Litigation?*].

10. See Tan Yock Lin, *Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law* 38 (Ctr. for Legal Dynamics of Advanced Mkt. Soc’y, Discussion Paper No. 04/12E, 2004), <http://www.cdams.kobe-u.ac.jp/archive/dp04-12.pdf>; see also Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28 HOUS. J. INT’L L. 663, 675–676 (2006) (noting that, even when both parties are willing to agree to arbitration, “[m]ost often the parties will select a neutral country as the seat of their arbitration proceedings”).

that for international disputes any debate about the merits of arbitration versus litigation was meaningless in an international context:

International arbitration is no more a “type” of arbitration than a sea elephant is a type of elephant. . . . Here is the difference: [in the domestic context,] arbitration is an alternative to courts, but international arbitration is a monopoly—and that makes it a different creature.<sup>11</sup>

In Professor Paulsson’s view, the key characteristic driving the monopoly of international arbitration is the “unique criterion [of] *neutrality*.”<sup>12</sup> The neutrality of arbitration is certainly relevant where the disputing parties worry about being hometowned by the other’s court system.<sup>13</sup> But that is probably as far as neutrality takes us. The English High Court, for example, is likely just as neutral as arbitrators in a dispute between a Kazakh and an Argentine party.<sup>14</sup>

Other prominent commentators echo Professor Paulsson’s view of neutrality’s importance but focus on another characteristic of arbitration—enforceability.<sup>15</sup> Recent empirical

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11. Paulsson, *supra* note 2 at 1.

12. *Id.* at 2; see Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past Present, and Future*, 25 HOUS. J. INT’L L. 301, 306 n.36 (2003) (noting several academics who agree with Paulsson’s characterization of neutrality as an essential advantage of arbitration).

13. Paulsson, *supra* note 2 at 1–2; see also Daniel S. Meyers, *In Defense of the International Treaty Arbitration System*, 31 HOUS. J. INT’L L. 47, 79 (2008) (noting conflicting outcomes of similar arbitration proceedings to show that “arbitrators are objective, good faith adjudicators who simply disagree on how certain legal principles should be applied”). *But see* GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 5–6 (2d ed. 2006) [hereinafter DRAFTING AND ENFORCING] (“Commentary on dispute resolution often extols the virtue of . . . ‘neutral, competent’ tribunals . . . The primary objective of any party, however, must be an agreement to future dispute resolution in the forum where it will have the best chance of definitively prevailing.”).

14. See Luis E. Cuervo, *OPEC From Myth to Reality*, 30 HOUS. J. INT’L L. 433, 601 n.815 (2008) (noting arbitration and litigation in a third country equally negate the risk of being hometowned).

15. NIGEL BLACKABY *ET AL.*, REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 31 (5th ed. 2009) (“There are two main reasons [to arbitrate.] [T]he first is neutrality,

studies support the assertion that international disputes are settled more frequently through arbitration than litigation.<sup>16</sup> Indeed, one recent study suggests that the global enforcement of arbitration awards is the principal driver of arbitration's popularity in international dispute resolution.<sup>17</sup>

In sum, there are two principal virtues of arbitration: First, neutrality is important, albeit in a narrow, "not their hometown" and "equality of arms by choosing *my* arbitrator" sense.<sup>18</sup> Second, and above all, arbitration's crowning virtue is enforceability.<sup>19</sup> An arbitral award rendered in any one of the 144 jurisdictions that are parties to the New York Convention is easily enforceable, subject to non-enforcement only within a narrowly defined set of grave process errors and international public policy grounds.<sup>20</sup>

By contrast, parties seeking to export U.S. court judgments face an uphill battle. Because the United States is not a party to any treaty on the enforcement of court judgments, U.S. judgments abroad are subject to unreliable enforcement that varies from jurisdiction to jurisdiction.<sup>21</sup>

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[and] the second is enforcement.").

16. Eisenberg & Miller, *supra* note 1, at 17 (summarizing "thin" empirical studies that show as many as 90% of international contracts have binding arbitration provisions). Eisenberg and Miller studied 2858 contracts filed with the SEC as attachments to Form 8-K "current reports" and found that contracts with one U.S. party and one foreign party contain arbitration clauses at about double the rate of domestic contracts from the same data set. *Id.* at 22.

17. Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 322 (2008). An earlier study by Professor Mistelis revealed that corporate counsel considered enforceability the single most important ground for adopting arbitration. Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525, 543 (2004).

18. See Paulsson, *supra* note 2, at 1–2.

19. See generally Eisenberg & Miller, *supra* note 1, at 6, 9. The U.S. Supreme Court has been instrumental in ensuring enforceability of arbitration agreements under the New York Convention. Graffi, *supra* note 10, at 723–24. In general, "the U.S. courts have not hesitated to express the view that the use of international arbitration should be encouraged, rather than hindered." *Id.* at 724.

20. See New York Convention, *supra* note 3, at arts. III, V.

21. See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L.

The Choice of Court Convention may change that.<sup>22</sup>

### III. THE CHOICE OF COURT CONVENTION

#### A. *Background of the Choice of Court Convention*

In 1992, the United States requested negotiations for a convention on jurisdiction and the recognition and enforcement of foreign court judgments.<sup>23</sup> After considerable effort, a preliminary draft of a jurisdiction and judgment-enforcement convention was completed in 1999,<sup>24</sup> which was further revised at a diplomatic conference in 2001.<sup>25</sup> Progress in the negotiations stalled, and it became apparent that no final agreement would be reached on the broad jurisdiction and judgment-enforcement issues.<sup>26</sup> As a result, the negotiation efforts were redirected at a convention with a more narrow

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327, 351 (2004) [hereinafter *Impact of Jurisdictional Rules*]; see also *The International Consumer Protection Act of 2003: Hearing Before the Subcomm. On Commerce, Trade & Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 9 (2003) (prepared statement of Timothy J. Muris, Chairman, Fed. Trade Comm'n) (listing various cases in which U.S. judgments were unenforceable in other nations for reasons including invalidity due to attempt to enforce a foreign penal code and an attempt to enforce a foreign regulation).

22. *Impact of Jurisdictional Rules*, *supra* note 21, at 350 (noting that a multilateral treaty covering choice of court agreements would “offer an international norm that would ensure not only enforcement of agreements but also recognition of judgments—providing greater certainty for the use of such clauses in international business transactions”).

23. Ronald A. Brand & Paul M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary & Documents* 6 (2008); see also Franklin O. Ballard, Comment, *Turnabout is Fair Play: Why a Reciprocity Requirement Should Be Included in the America Law Institute’s Proposed Federal Statute*, 28 HOUS. J. INT’L L. 199, 224 (2006) (“The explicit objective was to address the problem encountered when seeking to enforce U.S. judgments in foreign jurisdictions.”).

24. Ballard, *supra* note 23, at 214; Ronald A. Brand, *A Global Convention on Choice of Court Agreements*, 10 ILSA J. INT’L & COMP. L. 345, 345 (2003) [hereinafter *A Global Convention*].

25. *A Global Convention*, *supra* note 24, at 345.

26. *Id.*; see Ballard, *supra* note 23, at 214–15 (noting that E.U. members, among others, did not have the same need for the convention because (1) they were already parties to treaties regulating foreign recognition of judgments and (2) their judgments were often recognized in the United States without a treaty); see also Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT’L L. 385, 402 (2004) (noting the “generous judgment recognition practice” of U.S. courts as evidence of faith in foreign legal systems).

focus: enforcement of choice of court agreements and of the judgments rendered by courts contractually chosen by the parties to resolve their disputes.<sup>27</sup> The negotiations thus shifted to the drafting of a convention that is the “litigation counterpart” of the New York Convention on the Enforcement of Foreign Arbitral Awards.<sup>28</sup> The result of those negotiations is the Choice of Court Convention.<sup>29</sup>

*B. The Basic Rules of the Choice of Court Convention*

The Choice of Court Convention applies in “international cases”<sup>30</sup> and addresses three facets of choice of court agreements in those cases: (1) the mandatory exercise of jurisdiction by a court chosen in exclusive choice of court agreements,<sup>31</sup> (2) the mandatory withdrawal of jurisdiction of a court not chosen in an exclusive choice of court agreement,<sup>32</sup> and (3) the mandatory enforcement of judgments rendered by a court chosen in an exclusive choice of court agreement.<sup>33</sup>

The basic rules of the Choice of Court Convention are:

- (1) The court chosen by the parties in an exclusive choice of court agreement will exercise its jurisdiction over the parties’ dispute and will not decline to exercise that jurisdiction.<sup>34</sup>
- (2) A court not chosen by the parties in such an agreement must decline to exercise jurisdiction over the dispute.<sup>35</sup>

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27. Ballard, *supra* note 23, at 215; *A Global Convention*, *supra* note 24, at 345.

28. *Id.* at 346.

29. See Vaughan Black, *The Hague Choice of Court Convention and the Common Law* 7 (Sept. 2007) (unpublished report) *available at* [http://www.ulcc.ca/en/poam2/Hague\\_Choice\\_of\\_Court\\_Convention\\_Common\\_Law\\_En.pdf](http://www.ulcc.ca/en/poam2/Hague_Choice_of_Court_Convention_Common_Law_En.pdf) (explaining that the Hague Choice of Court Convention was less broad in scope than the prior negotiations of the drafting commission).

30. Choice of Court Convention, *supra* note 4, at art. 1.

31. *Id.* at art. 5.

32. *Id.* at art. 6.

33. *Id.* at art. 8.

34. *Id.* at art. 5.

35. *Id.* at art. 6.

- (3) A judgment resulting from the exercise of jurisdiction by a chosen court must be recognized and enforced in other contracting states.<sup>36</sup>

These rules seem simple on their face, but a number of inquiries are relevant in determining whether they will govern a particular agreement or a particular dispute arising under the agreement. Each of these inquiries is addressed below.

*C. Relevant Inquiries to Determine Whether the Choice of Court Convention Will Govern a Particular Agreement or Dispute*

*1. Does the Choice of Court Convention Apply to the Agreement and to Disputes Arising Under the Agreement?*

Under Article 31 of the Choice of Court Convention, the Convention will enter into force when two contracting states have acceded to it.<sup>37</sup> As noted above, Mexico is the only country to have acceded to the Convention thus far,<sup>38</sup> and therefore the Convention is not yet in force.<sup>39</sup> However, even after the Convention enters into force under Article 31, contract drafters aiming to take advantage of its provisions will need to make additional inquiries to determine (1) whether the Convention applies to the particular agreement being disputed,<sup>40</sup> and (2) whether the Convention will apply to particular disputes that may arise under the agreement.<sup>41</sup>

By its own terms, the Choice of Court Convention “shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.”<sup>42</sup> Thus, both for purposes of determining whether the Convention mandates the exercise of jurisdiction by the chosen court and whether it

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36. *Id.* at art. 8.

37. *See id.* at art. 31.

38. *Oliver J. Armas & Thomas N. Pieper, New Era for Choice of Court Agreements*, 241 N.Y.L.J. (Apr. 13, 2009), <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202429787256&slreturn=1&hbxlogin=1>.

39. *Id.*

40. *See* Choice of Court Convention, *supra* note 4, at arts. 1–2 (outlining the Convention’s scope).

41. *Id.*

42. *Id.* at art. 16(1).

mandates that a non-chosen court must decline jurisdiction,<sup>43</sup> it is necessary to determine whether the choice of court agreement was entered into *after* the country of the chosen court acceded to the Choice of Court Convention.<sup>44</sup> If not, the Convention's jurisdictional provisions will not apply, and any court will apply its own laws in determining whether to exercise or decline jurisdiction.<sup>45</sup> In short, if the country of the chosen court has not acceded to the Convention by the time the agreement is executed, the parties will not receive any benefits from the Convention.<sup>46</sup>

In addition, the Convention's protections do not apply to proceedings instituted in a country before the Convention has entered into force there.<sup>47</sup> As a result, even if the chosen court's country acceded to the Convention before the choice of court agreement was executed, the Convention will not apply to proceedings filed in countries that have not acceded to the Convention.<sup>48</sup> That rule applies both to proceedings asserting claims under the agreement—notwithstanding the exclusive choice of court agreement—and to proceedings seeking to enforce a judgment of a chosen court.<sup>49</sup>

Three hypotheticals illustrate the importance of these determinations:

First, assume that a lawyer is drafting an agreement between a U.S. party and a French party, and both parties agree to an exclusive choice of court clause providing that disputes will be resolved in the courts of New York. If France has acceded to the Choice of Court Convention, but the United States has not yet acceded when the agreement is executed, the Convention

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43. *See id.* at arts. 5, 6.

44. *See id.* at art. 16.

45. *See* William J. Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657, 666–67 (2008) (noting that non-contracting states have no obligations under the Convention to enforce a choice of court agreement eligible for protection under the Convention).

46. *See id.*

47. Choice of Court Convention, *supra* note 4, at art. 16(2).

48. *See id.*

49. TREVOR HARTLEY & MASATO DOGAUCHI, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Convention of 30 June 2005 on Choice of Court Agreements — Explanatory Report 62–63 (2007), *available at* <http://www.hcch.net/upload/expl37e.pdf>.

will not apply to the agreement and will have no effect on the enforcement of the choice of court agreement or judgments rendered by the chosen court.<sup>50</sup>

Second, assume the same facts except that, at the time of agreement, the United States has acceded to the Convention but France has not. The Choice of Court Convention will apply to the agreement and will require the New York courts to take jurisdiction.<sup>51</sup> However, unless and until France accedes to the Choice of Court Convention, the Convention will not prevent a French court from taking jurisdiction of a competing lawsuit filed by the French party in violation of the choice of court agreement, and it will not require a French court to enforce a judgment of the New York court.<sup>52</sup>

Third, assume the same facts, except that both the United States and France have acceded to the Choice of Court Convention at the time of execution of the agreement, and the French party's most significant assets are oil and gas interests held in Egypt. Following entry of a monetary judgment in favor of the United States party and against the French party, the prevailing party goes to an Egyptian court to enforce the judgment against the French party's assets in Egypt. If Egypt has not acceded to the Choice of Court Convention at the time the enforcement proceedings in Egypt are filed, the Egyptian court will not be required to enforce the judgment of the New York court. Instead, the Egyptian court will apply local Egyptian law in determining whether the New York court's judgment should be enforced.<sup>53</sup>

As these hypotheticals demonstrate, the drafter of an international commercial agreement who is seeking to rely on the benefits of the Choice of Court Convention must investigate the facts relating to: (1) the accession to the Choice of Court Convention by the country of the chosen court; (2) the countries where another party might initiate litigation in violation of the choice of court agreement; and (3) countries where the parties might seek to enforce a judgment of the chosen court. If one or

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50. Choice of Court Convention, *supra* note 4, at art. 16(1).

51. *Id.*

52. *Id.* at art. 16(2).

53. *Id.*

more of these countries have not acceded to the Choice of Court Convention at the time of execution of the agreement, the parties will not receive the benefits of the Convention.

Accession by the United States is not imminent at the time this . The Choice of Court Convention is not viewed to be a self-executing treaty, so legislation will be necessary to implement the treaty in the United States.<sup>54</sup> Currently, there is a debate as to whether the Convention should be implemented solely through federal legislation or through a combination of federal legislation and a uniform state law to be enacted by the states.<sup>55</sup> The latter approach is often referred to as “cooperative federalism,” with federal preemption occurring only to the extent that the states have not adopted the uniform legislation that is viewed as fully carrying out U.S. treaty obligations.<sup>56</sup>

Although the New York Convention was implemented solely through federal legislation,<sup>57</sup> implementation of the Choice of Court Convention raises more serious federal concerns—a fact that has resulted in serious consideration of using the cooperative–federalism approach.<sup>58</sup> Specifically, implementing the Choice of Court Convention involves (1) imposing mandatory rules on state courts concerning the exercise of their own jurisdiction and (2) the mandatory enforcement of foreign judgments by state courts.<sup>59</sup> Decisions in both of those arenas

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54. Woodward, *supra* note 45, at 697; see Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States*, 25 HOUS. J. INT'L L. 1, 10–11 (2002) (explaining the difference between self-executing and non-self-executing treaties).

55. See Peter Trooboff, *Convention on Choice of Court Agreements: Task of Implementation Now Rests with State and Justice, along with Uniform State Law Commissioners*, THE NATIONAL LAW JOURNAL, July 27, 2009, <http://www.cov.com> (enter “Choice of Court Agreements” into the search bar; then follow “Convention on Choice of Court Agreements” hyperlink) [hereinafter *Task of Implementation*].

56. See *id.*

57. Graffi, *supra* note 10, at 723 (“The United States implemented the [New York Convention] into Chapter 2 of the Federal Arbitration Act.”); Federal Arbitration Act, 9 U.S.C. § 201–08 (2006).

58. One of the authors, Guy Lipe, is the ABA Advisor to the Uniform Law Commission’s Drafting Committee that is currently drafting a uniform law for implementing the Choice of Court Convention. See *infra*, note 63 and accompanying text.

59. Peter Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 N.Y.U. J. INT'L L. & POL. 237,

have historically been reserved to state law.<sup>60</sup> Of course, the federal government has an interest in ensuring U.S. treaty obligations are satisfied.<sup>61</sup> As a result, the State Department and the Justice Department are currently analyzing whether the implementation of the treaty should be accomplished solely by way of federal legislation or by a combination of federal and state legislation.<sup>62</sup>

Anticipating a combined federal and state implementation mechanism, the Uniform Law Commission (ULC), previously known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), is currently drafting a uniform state law for implementing the Choice of Court Convention.<sup>63</sup> Likewise, the State Department and the Justice Department are drafting a federal law,<sup>64</sup> which will likely preempt state law only to the extent that a state does not adopt the uniform state law.<sup>65</sup> No decision has yet been made on whether a combined federal-state implementation mechanism, or a pure federal implementation mechanism, will be utilized. Until that issue is resolved, and implementing legislation is finalized, U.S. accession will not occur.<sup>66</sup>

2. *What Requirements Must a Forum Selection Clause Satisfy to Qualify as an “Exclusive Choice of Court Agreement” Governed by the Choice of Court Convention?*

The Choice of Court Convention applies “to exclusive choice of court agreements concluded in civil or commercial matters.”<sup>67</sup>

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246 (2009) [hereinafter *Proposed Principles*].

60. *Id.*; see J. Kelly Barnes, Comment, *Telemedicine: A Conflict of Laws Problem Waiting to Happen—How Will Interstate and International Claims Be Decided?*, 28 HOUS. J. INT’L L. 491, 516 (2006) (noting that, because the Full Faith and Credit Clause of the U.S. Constitution does not apply to foreign judgments, “recognition of [foreign] judgments is a matter of state discretion”); see also U.S. CONST. art. IV § 1.

61. Bishop, *supra* note 54, at 34 (“[T]he United States can be held accountable for the violations of [its treaty obligations] by state governments.”).

62. See *Task of Implementation*, *supra* note 55.

63. *Id.*

64. *Id.*

65. *Proposed Principles*, *supra* note 59, at 246.

66. See *id.* at 251.

67. Choice of Court Convention, *supra* note 4, at art. 1(1).

With one exception,<sup>68</sup> the Convention focuses entirely on those “exclusive choice of court agreements.”<sup>69</sup> Thus, a threshold question must be answered in determining the Convention’s applicability: What is an “exclusive choice of court agreement”?

Article 3 of the Choice of Court Convention defines an “exclusive choice of court agreement” as an agreement by two or more parties in writing—or any other form that renders the information accessible and usable for subsequent reference.<sup>70</sup> Furthermore, the agreement must designate, for deciding disputes arising in connection with the particular legal relationship, 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.”<sup>71</sup>

Simply put, to be protected by the Convention, an agreement must: (1) be in writing or another form accessible for subsequent reference,<sup>72</sup> (2) designate the court or courts of one contracting state to resolve disputes under the agreement,<sup>73</sup> and (3) exclude the jurisdiction of any other courts.<sup>74</sup>

An express statement of exclusivity is not necessary; under the Convention, choice of court agreements “shall be deemed to be exclusive unless the parties have expressly provided otherwise.”<sup>75</sup> Accordingly, the parties, by designating the court or courts of a contracting state to resolve their disputes, will be presumed to have intended exclusivity of those courts unless they say otherwise in the agreement.<sup>76</sup>

This approach represents a different approach than that taken by most U.S. jurisdictions in determining the impact of choice of court clauses in agreements under the common law.<sup>77</sup>

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68. Article 22 permits contracting states to make reciprocal declarations regarding enforcement of judgments of courts designated in non-exclusive choice of court agreements. *Id.* at art. 22.

69. *Id.* at art. 1.

70. *Id.* at art. 3(c).

71. *Id.* at art. 3(a).

72. *Id.* at art. 3(c).

73. *Id.* at art. 3(a).

74. *Id.*

75. *Id.* at art. 3(b).

76. *Id.*

77. See *Impact of Jurisdictional Rules*, *supra* note 21, at 348 (“The general rule in

Most U.S. courts have generally required express language of exclusivity in determining whether a choice of court clause should preclude a non-chosen court from hearing a case under common law.<sup>78</sup>

For example, the Tenth Circuit recently examined the following forum selection clause: “Jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich.”<sup>79</sup> The U.S. party to the underlying agreement filed suit in a New Mexico state court, and the German defendant responded by removing the case to federal court and moving to dismiss based on the forum selection clause.<sup>80</sup> Although the district court granted the motion and dismissed the case,<sup>81</sup> the Tenth Circuit reversed, holding that the forum selection clause was permissive, not exclusive.<sup>82</sup>

The Tenth Circuit based its reasoning on a rule adopted by several other federal circuits:

[W]here 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.<sup>83</sup>

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the United States is that choice of court clauses should be construed as non-exclusive unless clearly stated otherwise.”).

78. *Id.* (noting that “[e]xplicit language that the choice of forum clause is an exclusive one will usually solve this problem”) (citing *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 499 (10th Cir. 2002); *John Boutari & Son, Wines & Spirits v. Attiki Importers and Distribs., Inc.*, 22 F.3d 51, 52–53 (2d Cir. 1994)).

79. *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 496 (10th Cir. 2002).

80. *Id.* at 497.

81. *Id.*

82. *Id.* at 500–01.

83. *Id.* at 499 (second and third alterations in original) (citing *John Boutari & Son, Wines & Spirits v. Attiki Importers and Distribs., Inc.*, 22 F.3d 51, 52 (2d Cir. 1994); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992); *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974)).

The Tenth Circuit had “little trouble” finding the clause to be permissive, not exclusive.<sup>84</sup> The court noted that the clause “refers only to jurisdiction, and does so in non-exclusive terms (e.g., there is no use of the terms ‘exclusive,’ ‘sole,’ or ‘only’).”<sup>85</sup>

The *K & V Scientific* court would have decided the issue differently if the dispute had arisen after the United States and Germany had acceded to the Choice of Court Convention.<sup>86</sup> In that scenario, the agreement would have designated the courts of a single contracting state for the resolution of disputes, and the Convention would have directed the Tenth Circuit to presume the designation of Munich courts to be exclusive.<sup>87</sup>

### 3. *Will Disputes Under the Agreement Qualify as an “International Case”?*

The Choice of Court Convention applies only “in international cases.”<sup>88</sup> Accordingly, the Convention will apply to a particular dispute only if the dispute qualifies as an “international case” as defined in the Choice of Court Convention.<sup>89</sup>

The definition of “international case” varies depending on whether the proceeding in question involves the exercise of jurisdiction over a dispute covered by the choice of court agreement or instead involves a request by a party to enforce a judgment rendered by the chosen court.<sup>90</sup>

A case is deemed “international” for purposes of the Convention’s jurisdictional provisions “unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”<sup>91</sup> Thus, all cases are considered “international”

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84. *Id.* at 500.

85. *Id.*

86. See BRAND & HERRUP, *supra* note 23, at 42.

87. See HARTLEY & DOGAUCHI, *supra* note 49, at 39; see also *Impact of Jurisdictional Rules*, *supra* note 21, at 348.

88. Choice of Court Convention, *supra* note 4, at art. 1(1).

89. HARTLEY & DOGAUCHI, *supra* note 49, at 22–23.

90. Choice of Court Convention, *supra* note 4, at art. 1(2)–(3).

91. *Id.* at art. 1(2).

under the jurisdictional provisions of the Choice of Court Convention unless (1) the parties all reside in the same contracting state and (2) the “elements” of the dispute are connected only with that Contracting State.<sup>92</sup>

All proceedings for recognition or enforcement of judgments are “international” under the Convention as long as the relevant judgments are “foreign” (i.e., judgments rendered in another country).<sup>93</sup>

#### 4. *In What Circumstances Will the Chosen Court Be Permitted to Decline to Exercise Jurisdiction?*

Under the Choice of Court Convention, the general rule is that a court chosen in an exclusive choice of court agreement must exercise jurisdiction.<sup>94</sup> The Convention specifically provides that the chosen court cannot decline to exercise jurisdiction “on the ground that the dispute should be decided in a court of another State,”<sup>95</sup> a prohibition that encompasses dismissal on *forum non conveniens* grounds.<sup>96</sup> However, there are several notable exceptions to the mandatory exercise of jurisdiction by the chosen court.<sup>97</sup> These exceptions fall into the following general categories: (1) the chosen court’s lack of subject-matter jurisdiction,<sup>98</sup> (2) rules permitting transfer to another court within a contracting state,<sup>99</sup> (3) law rendering the exclusive choice of court agreement “null and void”,<sup>100</sup> (4) lack of connection between the country of the chosen court and the

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92. HARTLEY & DOGAUCHI, *supra* note 49, at 29.

93. Choice of Court Convention, *supra* note 4, at art. 1(3); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 23.

94. Choice of Court Convention, *supra* note 4, at art. 5(2); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 21.

95. Choice of Court Convention, *supra* note 4, at art. 5(2).

96. HARTLEY & DOGAUCHI, *supra* note 49, at 21.

97. Choice of Court Convention, *supra* note 4, at art. 5(3).

98. Choice of Court Convention, *supra* note 4, at art. 5(3)(a); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 44–45.

99. Choice of Court Convention, *supra* note 4, at art. 5(3)(b); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 45.

100. Choice of Court Convention, *supra* note 4, at art. 5(1); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 21.

parties and the dispute,<sup>101</sup> and (5) subject–matter exclusions laid out in the Convention.<sup>102</sup>

Each of these categories of exceptions is discussed below.

*a. Lack of Subject–Matter Jurisdiction*

The Choice of Court Convention does not affect limitations on the subject–matter jurisdiction of the chosen court.<sup>103</sup> As a result, if the parties have chosen a court that does not have subject–matter jurisdiction of the dispute in question, the court will dismiss the case, notwithstanding the parties’ contractual choice of that court.<sup>104</sup> In essence, the selection of a court without subject–matter jurisdiction in an exclusive choice of court agreement renders the choice of court agreement ineffective, and nothing in the Choice of Court Convention will operate to save such an agreement.<sup>105</sup>

Limitations on the subject–matter jurisdiction of the Delaware chancery courts provide a good example of the application of these principles: “The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.”<sup>106</sup> Thus, a choice of court agreement that designates the Delaware chancery court as the exclusive forum for resolution of disputes can fail by virtue of the statutory limitations on the court’s jurisdiction.<sup>107</sup>

In *El Paso Natural Gas Co. v. Transamerica Natural Gas Corp.*, the Delaware Supreme Court held just that.<sup>108</sup> That case involved an agreement with the following clause: “All actions to enforce or seek damages, specific performance or other remedy

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101. Choice of Court Convention, *supra* note 4, at art. 19; see HARTLEY & DOGAUCHI, *supra* note 49, at 64–65.

102. Choice of Court Convention, *supra* note 4, at art. 2(2); see HARTLEY & DOGAUCHI, *supra* note 49, at 30–37.

103. Choice of Court Convention, *supra* note 4, at art. 5(3)(a).

104. See HARTLEY & DOGAUCHI, *supra* note 49, at 44–45.

105. See BRAND & HERRUP, *supra* note 23, at 86.

106. DEL. CODE ANN. tit. 10, § 342 (2010).

107. See *El Paso Natural Gas Co. v. Transamerica Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

108. *Id.* at 36.

for the alleged breach of this agreement or the operative agreements shall be brought in the Chancery Court of the State of Delaware.”<sup>109</sup> When Transamerica brought suit in Texas, El Paso filed its own suit in Delaware chancery court and sought to enjoin the Texas proceedings.<sup>110</sup> The chancery court dismissed El Paso’s lawsuit on the grounds that El Paso had an adequate remedy at law, and the claims therefore fell outside the jurisdiction of the chancery court.<sup>111</sup>

The Delaware Supreme Court affirmed, noting that “[t]he Delaware Court of Chancery is a court of equity . . . [and] does not have jurisdiction over a controversy unless the plaintiff lacks an adequate remedy at law.”<sup>112</sup> The court then applied the “cardinal principle of the law that jurisdiction of a court over the subject matter cannot be conferred by consent or agreement.”<sup>113</sup> In so holding, the court rejected El Paso’s arguments that the parties’ choice of the chancery court offered important benefits, such as avoidance of a potential jury trial or punitive damages that significantly affected the amount of consideration in the settlement agreement.<sup>114</sup> “These arguments simply miss the point; neither the Court of Chancery nor the parties to a dispute can confer equitable jurisdiction where it is otherwise lacking.”<sup>115</sup>

The Choice of Court Convention mandates the same result because it does not override statutory limitations on subject-matter jurisdiction of the chosen court.<sup>116</sup> Counsel drafting a choice of court agreement must consider limitations on subject-matter jurisdiction when choosing the court that will decide disputes under the agreement.<sup>117</sup>

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109. *Id.* at 38.

110. *Id.*

111. *Id.*

112. *Id.* at 39–40.

113. *Id.* at 39.

114. *Id.*

115. *See id.* (citing *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 215–16 (1978)).

116. Choice of Court Convention, *supra* note 4, at art. 5(3)(a); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 44–45.

117. *See* DRAFTING AND ENFORCING, *supra* note 13, at 28.

*b. Transfer Rules*

The Choice of Court Convention does not affect rules relating to the “internal allocation of jurisdiction among the courts of a Contracting State.”<sup>118</sup> Accordingly, if the rules applicable in the chosen court permit a transfer to another court of that contracting state, nothing in the Choice of Court Convention prohibits the chosen court from declining to hear the case and transferring it to another court in the contracting state to which it may be transferred under the court’s transfer rules.<sup>119</sup>

*i. Transfers Under 28 U.S.C. § 1404(a)*

Transfers allowed by 28 U.S.C. § 1404(a) are an example of those that will remain unchanged under the Choice of Court Convention.<sup>120</sup> Under section 1404(a), a federal court may transfer an action to another federal court “for the convenience of parties and witnesses, in the interest of justice.”<sup>121</sup> U.S. courts already allow section 1404(a) transfers notwithstanding the existence of a forum selection clause selecting the forum where the case was filed.<sup>122</sup> As the Third Circuit noted, “the existence of a valid forum-selection clause whose enforcement is not unreasonable does not necessarily prevent the selected forum from ordering a transfer of the case under § 1404(a).”<sup>123</sup>

In *FUL Inc. v. Unified School Dist. No. 204*, a federal district court applied section 1404(a) to transfer a case filed in the contractually chosen forum and thereby override the parties’

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118. Choice of Court Convention, *supra* note 4, at art. 5(3)(b); see HARTLEY & DOGAUCHI, *supra* note 49, at 45.

119. See HARTLEY & DOGAUCHI, *supra* note 49, at 45.

120. 28 U.S.C. § 1404(a) (2000); see BRAND & HERRUP, *supra* note 23, at 85.

121. 28 U.S.C. § 1404(a).

122. See *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 758 (3d Cir. 1973) (“[T]he convenience of the parties[] is properly within the power of the parties themselves to affect a forum-selection clause. The other factors—the convenience of witnesses and the interest of justice—are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties.”).

123. *Id.* at 757.

forum selection clause.<sup>124</sup> The original lawsuit in *FUL* was filed in the Northern District of Illinois, consistent with the forum selection clause in the underlying agreement.<sup>125</sup> The court nevertheless transferred the case to Kansas federal court under section 1404(a), rejecting the plaintiff's argument that the forum selection clause barred the defendant from seeking a transfer of venue.<sup>126</sup> The court stated that "a valid forum selection clause only waives the convenience of the parties factor," and the court "must still determine whether the convenience of the witnesses or the interest of justice clearly support transferring this action."<sup>127</sup> Finding that the interest of justice would be "well served" by a transfer, the court transferred the action to the Kansas federal court under section 1404(a), notwithstanding the forum selection clause.<sup>128</sup>

The Choice of Court Convention would not change this result. The Convention does not purport to alter the internal rules of the chosen court relating to venue transfers.<sup>129</sup> Consequently, a party to an agreement that files an action in a contractually chosen federal court may be required to defend a motion to transfer under section 1404(a) notwithstanding the applicability of the Choice of Court Convention.<sup>130</sup>

*ii. State Venue Statutes*

State venue statutes that allow for transfers to other courts within the same state will likewise remain unchanged under the Convention.<sup>131</sup>

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124. 839 F. Supp. 1307, 1313–14 (N.D. Ill. 1993).

125. *Id.* at 1309–10.

126. *Id.* at 1313–14. "Contrary to the assertions of *FUL*, the forum selection clause does not bar District 204 from seeking a transfer of venue pursuant to [section] 1404(a)." *Id.* at 1311 n.4.

127. *Id.*; *see also* *Walter E. Heller & Co. v. James Godbe Co.*, 601 F. Supp. 319, 321 n.2 (N.D. Ill. 1984) ("Even when a forum selection clause places venue exclusively within a particular state, courts have held that such a clause is 'but one of many factors to be considered by the Court' in deciding a motion to transfer venue under § 1404(a).").

128. *FUL*, 839 F. Supp. at 1313–14.

129. Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

130. *See* 28 U.S.C. § 1404(a) (2000).

131. Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

The following hypothetical illustrates this point: Assume that a European-based oil and gas producer enters into an oil and gas lease with an east Texas landowner providing the producer with the right to drill wells on his property located in Angelina County, Texas. The European-based producer does not want to face litigation in the landowner's home courts, so a forum selection clause is included in the lease. The forum selection clause provides that disputes will be resolved in the courts located in Dallas, Texas. There is no connection between Dallas and either the parties or the dispute. When a dispute develops, the European-based producer files a declaratory judgment action in state district court in Dallas County, but the landowner files a motion to transfer venue of the case to Angelina County on the grounds that the Texas venue statute does not recognize Dallas County as a proper venue of the case. What result?

The answer is not controlled by the Choice of Court Convention, which explicitly avoids impacting rules relating to the internal allocation of jurisdiction among the courts of the chosen forum.<sup>132</sup> Instead, the question is whether, under Texas state law, venue is improper in Dallas notwithstanding the parties' forum selection clause, mandating a transfer to Angelina County. Though the drafters of the oil and gas lease might assume that Texas would recognize venue as proper in Dallas County based on the forum selection clause, the reality is that in Texas, agreements fixing venue in a particular county are against public policy except to the extent the Texas legislature has authorized them.<sup>133</sup> Although the Texas legislature allows venue to be fixed by contract in a particular Texas county in certain circumstances,<sup>134</sup> venue is proper based on the parties' selection only if the lawsuit arises from a "major transaction."<sup>135</sup> A "major transaction" is defined as "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or

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132. Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

133. See *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972).

134. Tex. Civ. Prac. & Rem. Code Ann. § 15.035 (2002).

135. *Id.* § 15.020(b).

greater than \$1 million.”<sup>136</sup> Thus, the ruling on the transfer motion in the hypothetical will likely turn on resolution of the question of whether the oil and gas lease involves a “major transaction” as defined in the Texas venue statute, not on application of the terms of the Choice of Court Convention.<sup>137</sup>

For contract drafters seeking the Convention’s protection, the lesson to learn is that it is wise to investigate and take into account the transfer rules applicable in the chosen court. Those rules may result in a transfer of future litigation.<sup>138</sup> As discussed below, lawyers practicing in the area should also be aware that a contracting state’s internal transfer rules might impact the enforceability of the judgments.<sup>139</sup>

*c. Law Rendering the Choice of Court Agreement “Null and Void”*

The chosen court must decline jurisdiction if the exclusive choice of court agreement “is null and void” under the law of the country of the chosen state.<sup>140</sup> In applying this rule, two considerations must be kept in mind. First, as a threshold matter, the Choice of Court Convention adopts a rule of severability, under which the exclusive choice of court agreement “shall be treated as an agreement independent of the other terms of the contract.”<sup>141</sup> Thus, “[t]he validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.”<sup>142</sup> Second, there is a question of which set of laws a court should use in deciding whether the exclusive choice of court agreement is null and void: (1) the state’s own substantive law, or (2) its “whole law,” which includes its conflict of law rules.<sup>143</sup> The Choice of Court

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136. *Id.* § 15.020(a).

137. *Id.* § 15.020(b); see Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

138. See Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

139. See *infra* Part II.C.6.

140. See Choice of Court Convention, *supra* note 4, at art. 5(1).

141. See *id.* at art. 3(d).

142. *Id.*

143. See Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT’L L. REV. 511, 521 (2006).

Convention mandates use of the latter.<sup>144</sup> Thus, a chosen court must first determine what substantive law should be applied under its own conflict of law rules, and then it must apply that substantive law in making the determination of whether the exclusive choice of court agreement is null and void.<sup>145</sup>

*d. Lack of Connection Between Location of Chosen Court and the Parties or the Dispute*

In a contracting state that makes a declaration under Article 19 of the Convention, a chosen court may decline to exercise jurisdiction if there is no real connection between it and the parties or the dispute.<sup>146</sup> Article 19 allows a contracting state to declare that “its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.”<sup>147</sup> It is currently unclear whether the United States will make an Article 19 declaration.<sup>148</sup>

Even where a contracting state has not made an Article 19 declaration, limitations on the subject–matter jurisdiction of the chosen court may prevent it from exercising jurisdiction over a case in which neither the parties nor the dispute have a connection with the forum.<sup>149</sup> In fact, unsure of whether the United States will make an Article 19 declaration, the

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144. The official explanatory report on the Choice of Court Convention states: The question whether the agreement is null and void is decided according to the law of the State of the chosen court. The phrase “law of the State” includes the choice-of-law rules of that State. Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law. This could occur, for example, where under the choice-of-law rules of the chosen court, the validity of the choice of court agreement is decided by the law governing the contract as a whole—for example, the law designated by the parties in a choice-of-law clause.

HARTLEY & DOGAUCHI, *supra* note 49, at 43.

145. *Id.*

146. *See* Choice of Court Convention, *supra* note 4, at art. 19.

147. *Id.*

148. *See* Memorandum from Kathleen Patchel & Louise Ellen Teitz, Co-Reporters, Unif. Int’l Choice of Court Agreement Act Drafting Comm. 2 (June 11, 2010), *available at* [http://www.law.upenn.edu/bl/archives/ulc/hcca/2010am\\_memo.pdf](http://www.law.upenn.edu/bl/archives/ulc/hcca/2010am_memo.pdf).

149. Choice of Court Convention, *supra* note 4, at art. 5(3)(a).

committee charged with drafting the uniform state law is considering including an optional provision addressing this “no connection” issue.<sup>150</sup> Under that provision, a state legislature could opt to enact a limitation on subject–matter jurisdiction that would deprive its courts of jurisdiction over cases with no connection to the state of the chosen court other than the location of the chosen court.<sup>151</sup> Effectively, this type of provision would allow each state to make its own determination of whether it wants its courts to hear cases without a connection to its state when the parties to the dispute have designated a court in that state in an exclusive choice of court agreement.<sup>152</sup>

*e. Exclusions from the Scope of the Choice of Court Convention Based on Subject–Matter*

The Choice of Court Convention provides for various exclusions from the scope of the Choice of Court Convention based either on the subject matter of the underlying agreement or the subject matter of the dispute.<sup>153</sup> First, the Convention excludes two types of transactions from the scope of the treaty: consumer transactions<sup>154</sup> and employment contracts.<sup>155</sup> As a result, the Choice of Court Convention will not affect either an exclusive choice of court agreement in a contract involving a consumer or an exclusive choice of court agreement in an employment contract.<sup>156</sup>

Second, Article 2 excludes a number of “matters” from the scope of the Choice of Court Convention.<sup>157</sup> These exclusions are designed to protect “governmental interests that might otherwise be frustrated by the parties’ choice of court.”<sup>158</sup> In

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150. Memorandum from Kathleen Patchel & Louise Ellen Teitz, *supra* note 148, at 2.

151. *See id.*

152. *See id.*

153. Choice of Court Convention, *supra* note 4, at art. 2(2); *see* HARTLEY & DOGAUCHI, *supra* note 49, at 30–37.

154. *Id.* at art. 2(1)(a).

155. *Id.* at art. 2(1)(b).

156. *Id.*

157. *Id.* at art. 2 (2).

158. Ronald A. Brand, *The New Hague Convention on Choice of Court Agreements*, AM. SOC'Y OF INT'L LAW INSIGHTS, July 26, 2005, <http://www.asil.org/insights050726.cfm>.

particular, these exclusions address situations in which a particular court is considered to have exclusive jurisdiction.<sup>159</sup> Matters excluded from the scope of the Convention include family law matters,<sup>160</sup> wills and estates,<sup>161</sup> insolvency,<sup>162</sup> carriage of passengers or goods,<sup>163</sup> antitrust matters,<sup>164</sup> personal injury claims,<sup>165</sup> tort claims for damages to real or tangible personal property,<sup>166</sup> *in rem* rights in real or immovable property,<sup>167</sup> and validity or infringement of intellectual property rights other than copyright and related rights.<sup>168</sup>

Notwithstanding these exclusions, the Choice of Court Convention provides that proceedings are not excluded from its scope “where a matter excluded . . . arises merely as a preliminary question and not as an object of the proceedings,”<sup>169</sup> The Convention does not provide clear guidance on when one of the excluded subject matters arises “merely as a preliminary question,” except to say that “the mere fact that a matter excluded . . . arises by way of [defense] does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.”<sup>170</sup> However, there undoubtedly will be disputes about whether a particular case involves one of the excluded subject matters,<sup>171</sup> and if so, whether the excluded subject matter involves a “preliminary question” that is not an

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159. Guangjian Tu, *The Hague Choice of Court Convention-A Chinese Perspective*, 55 AM. J. COMP. L. 347, 353 (2007).

160. Choice of Court Convention, *supra* note 4, at art. 2(2)(c).

161. *Id.* at art. 2(2)(d).

162. *Id.* at art. 2(2)(e).

163. *Id.* at art. 2(2)(f).

164. *Id.* at art. 2(2)(h).

165. *Id.* at art. 2(2)(j).

166. *Id.* at art. 2(2)(k).

167. *Id.* at art. 2(2)(l).

168. *Id.* at art. 2(2)(n).

169. *Id.* at art. 2(3).

170. *Id.*

171. See Aaron M. Kaufman, Comment *The European Union Goes Comi-Tose: Hazards of Harmonizing Corporate In the Global Economy*, 29 HOUS. J. INT'L L. 625, 653 (2007) (“[O]ne could imagine a real scenario where two member states are battling for jurisdiction over the main insolvency proceeding, each having very different policy goals.”).

“object of the proceedings.”<sup>172</sup> Additionally, as discussed below, enforcement can be made more difficult by the presence of a preliminary question involving an excluded matter.<sup>173</sup>

5. *When Can a Non-Chosen Court Exercise Jurisdiction Notwithstanding an Exclusive Choice of Court Agreement Choosing Another Court?*

Article 6 of the Choice of Court Convention provides that “a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.”<sup>174</sup> There are exceptions to that rule, however.<sup>175</sup> Non-chosen courts can properly exercise jurisdiction under the Convention when either (1) “the agreement is null and void under the law of the State of the chosen court,”<sup>176</sup> (2) “a party lacked the capacity to conclude the agreement under the law of the State” of the non-chosen court in which the proceeding is filed,<sup>177</sup> (3) “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State” of the non-chosen court where the proceeding is filed,<sup>178</sup> (4) exceptional reasons beyond the control of the parties have changed circumstances so that the agreement cannot reasonably be performed,<sup>179</sup> or (5) the chosen court has decided not to hear the case.<sup>180</sup>

Thus, the general rule prohibiting a non-chosen court from exercising jurisdiction is not absolute.

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172. See Choice of Court Convention, *supra* note 4, at art 2(3).

173. See *infra* Part II.C.6.d.

174. *Id.* at art. 6.

175. *Id.* at art. 6(a)–(e).

176. *Id.* at art. 6(a).

177. *Id.* at art. 6(b).

178. *Id.* at art. 6(c).

179. *Id.* at art. 6(d).

180. *Id.* at art. 6(e).

6. *When Must a Court Recognize and Enforce the Judgment of a Chosen Court of Another Contracting State?*

a. *General Rule of Recognition and Enforcement of Judgments of the Chosen Court*

The general rule under the Choice of Court Convention is that the judgment of a chosen court must be recognized and enforced by the courts of other contracting states.<sup>181</sup> When asked to recognize and enforce a judgment, a court may not review the merits of the judgment and is bound by the findings of fact on which the chosen court based its jurisdiction.<sup>182</sup>

b. *Procedural Limitations on Recognition and Enforcement of Judgments of the Chosen Court*

A chosen court's judgment will be recognized only if it "has effect" in the chosen court's state and may be enforced only if it is enforceable in the State of the chosen court.<sup>183</sup> Recognition and enforcement may be postponed or refused if the judgment is the subject of review in the chosen court's state or if the time for seeking ordinary review has not expired.<sup>184</sup>

c. *Substantive Defenses to Recognition and Enforcement of Judgments of the Chosen Court*

The Convention does provide for certain substantive defenses to recognition or enforcement of judgments.<sup>185</sup> As a result, recognition or enforcement may be properly refused in the following circumstances:

- (1) The exclusive choice of court agreement was null and void under the law of the chosen court's state, unless the chosen court determined the agreement was valid.<sup>186</sup>

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181. *Id.* at art. 8(1).

182. *Id.* at art. 8(2).

183. *Id.* at art. 8(3).

184. *Id.* at art. 8(4).

185. *Id.* at art. 9.

186. *Id.* at art. 9(a).

- (2) One of the parties lacked capacity to conclude the exclusive choice of court agreement under the law of the state where recognition or enforcement is sought.<sup>187</sup>
- (3) The defendant did not receive notice of the proceedings with sufficient time and in such a way as to enable him to arrange for a defense, unless he entered an appearance without contesting notification—and only if the chosen court permits notification to be contested.<sup>188</sup>
- (4) The defendant did not receive notice of the proceedings in a way compatible with fundamental principles concerning service of documents in the state where recognition or enforcement is sought.<sup>189</sup>
- (5) The judgment was obtained by fraud in connection with a matter of procedure.<sup>190</sup>
- (6) Recognition or enforcement would be manifestly incompatible with the public policy of the state where recognition or enforcement is sought.<sup>191</sup>
- (7) The judgment is inconsistent with a judgment on a dispute between the same parties given in the state where recognition or enforcement of the judgment is sought.<sup>192</sup>
- (8) The judgment is inconsistent with an earlier judgment on a dispute between the same parties on the same cause of action in another state, provided that the earlier judgment meets the conditions for recognition or enforcement in the state in which recognition or enforcement is sought.<sup>193</sup>

All of these exceptions to the recognition and enforcement of a judgment are discretionary.<sup>194</sup> The court in which recognition or enforcement is sought may recognize and enforce the

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187. *Id.* at art. 9(b).

188. *Id.* at art. 9(c)(i).

189. *Id.* at art. 9(c)(ii).

190. *Id.* at art. 9(d).

191. *Id.* at art. 9(e).

192. *Id.* at art. 9(f).

193. *Id.* at art. 9(g).

194. *Id.* at art. 9 (“Recognition or enforcement *may* be refused” in the listed situations.) (emphasis added); see HARTLEY & DOGAUCHI, *supra* note 49, at 53.

judgment even if the judgment debtor establishes one or more of the grounds in Article 9 for non-recognition and non-enforcement.<sup>195</sup>

*d. Defense to Recognition and Enforcement When Judgment is based on Decision of a Preliminary Question Falling Within a Subject–Matter Exclusion*

In addition to the defenses provided for in Article 9, the Convention, in Article 10, addresses decisions of the chosen court on “preliminary questions” that can have a significant impact on recognition and enforcement.<sup>196</sup> Recognition or enforcement may be refused if, and to the extent that, the judgment was based on a ruling that falls within the subject–matter exclusions.<sup>197</sup> Accordingly, if a case involves an issue that falls within one of the subject–matter exclusions but remains within the Convention because the case involves the excluded matter only as a preliminary question, such as a defense, the judgment rendered by the chosen court may not be recognized or enforced if the decision of the preliminary question involving the excluded matter had an impact on the judgment.<sup>198</sup>

For example, if a defendant raised antitrust arguments as a defense in a breach of contract claim, the chosen court’s judgment, whether in favor of the plaintiff or the defendant, would be “based on” the chosen court’s decision on the defensive issue regarding the antitrust issues, and the court in which recognition or enforcement is sought has the discretion to refuse recognition and enforcement.<sup>199</sup> As a result, even when a matter relating to one of the subject–matter exclusions arises as a “preliminary question” and thus does not move the dispute beyond the Convention’s reach, judgments rendered by the chosen court nevertheless may be refused to be recognized and

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195. See Choice of Court Convention, *supra* note 4, at art. 9; see also HARTLEY & DOGAUCHI, *supra* note 49, at 53.

196. See Choice of Court Convention, *supra* note 4, at art. 10.

197. Choice of Court Convention, *supra* note 4, at art. 10(2).

198. *Id.* at art. 10(2).

199. See *id.*

enforced.<sup>200</sup> As an exception to this general rule, the Convention adopts a special rule for circumstances where the “preliminary question” involves the validity of an intellectual property right other than a copyright (such as a patent).<sup>201</sup> In those situations, the exception to recognition and enforcement for judgments “based on” the ruling applies only if (1) the ruling is inconsistent with a judgment or decision of a competent authority on the same matter in the state where the intellectual property right arose,<sup>202</sup> or (2) proceedings concerning the validity of the intellectual property right are ongoing in the state where the intellectual property right arose.<sup>203</sup>

*e. Defense to Recognition and Enforcement When the Chosen Court Transferred the Case Under Its Transfer Rules*

As noted above, the Convention does not prevent a chosen court from transferring a case to another court of the same contracting state if such a transfer is allowed under the court’s transfer rules.<sup>204</sup> However, in the event of such a transfer, recognition and enforcement of a judgment rendered by the transferee court may be refused against a party who objected to the transfer in a timely manner.<sup>205</sup>

*f. Defense to Recognition and Enforcement When Judgment Awards Non-Compensatory Damages*

Under the Convention, recognition and enforcement may be refused if the judgment awards damages, including exemplary or punitive damages, which do not compensate a party for actual loss or harm suffered.<sup>206</sup> Though this provision allows a court to refuse to recognize and award damages that can be characterized as “non-compensatory,”<sup>207</sup> it also provides a

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200. *Id.* at art. 10(4).

201. *Id.* at art. 10(3).

202. *Id.* at art. 10(3)(a).

203. *Id.* at art. 10(3)(b).

204. *See supra* Part II.C.4.b.; *see* Choice of Court Convention, *supra* note 4, at art. 5(3)(b).

205. *Id.* at art. 8(5).

206. *Id.* at art. 11(1).

207. *Id.*

potential argument to judgment debtors to avoid recognition and enforcement by making a showing that the damage award, although characterized as compensatory by the chosen court, was in fact excessive in that the amount of the judgment exceeded the actual loss or harm sustained by the plaintiff.<sup>208</sup> This provision of the Choice of Court Convention may provide a basis for some re-litigation of the amount of damages in the recognition and enforcement proceedings.

*D. Drafting Considerations—When Does the Choice of Court Convention Provide a Basis for Use of an Exclusive Choice of Court Agreement as an Alternative to an Arbitration Clause in an International Commercial Agreement?*

Arbitration clauses historically have been viewed as preferable to choice of court agreements in international commercial agreements.<sup>209</sup> This is because the New York Convention requires international enforcement of arbitration awards,<sup>210</sup> while the United States has not been party to any treaty dealing with enforcement of U.S. judgments.<sup>211</sup> It remains to be seen whether the Choice of Court Convention will increase the use of choice of court clauses in international commercial agreements, thus giving practitioners a viable alternative to arbitration.

Set out below are a number of factors to be considered by practitioners involved in drafting international commercial agreements to determine whether the Choice of Court Convention renders a choice of court clause an effective alternative to an arbitration clause in a particular international agreement.

*1. Have the relevant countries acceded to the Convention?*

The jurisdictional provisions of the Choice of Court Convention will not apply, and therefore will not require a

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208. *See id.*

209. Eisenberg & Miller, *supra* note 1, at 9; *see* Posch, *supra* note 8, at 380.

210. Posch, *supra* note 8, at 380.

211. *See* Ballard, *supra* note 23, at 214–15, 224; *Impact of Jurisdictional Rules*, *supra* note 21, at 350.

chosen court to exercise jurisdiction, unless the country of the chosen court acceded to the Choice of Court Convention before the date the parties entered into the agreement.<sup>212</sup> Additionally, a non-chosen court will not be required to decline jurisdiction and will not be required to enforce judgments of the chosen court unless the country of that court has acceded to the Choice of Court Convention at the time the proceeding in the non-chosen court is filed.<sup>213</sup> Practitioners involved in drafting an international commercial agreement with an exclusive choice of court agreement should understand the accession status of the countries of the chosen court, the countries of the parties, and the countries where the parties' significant assets are located because the relevant accession dates can have significant impact on the availability of the benefits of the Choice of Court Convention.<sup>214</sup>

*2. Are the parties able to agree on the courts of a single country for resolution of disputes?*

One of the challenges in using a choice of court clause in an international commercial agreement is that the parties are often unwilling to agree that the home courts of the counter-party will be the agreed court for resolving disputes between the parties.<sup>215</sup> As a result, effective use of the Choice of Court Convention will often require that the parties agree on the courts of a third country that is neutral for dispute resolution.<sup>216</sup> Reaching an agreement on such a court may be difficult.

*3. Will the disputes that are likely to arise under the agreement qualify as an "international case" under the Choice of Court Convention?*

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212. See Choice of Court Convention, *supra* note 4, at art. 16.

213. *Id.* at art. 6; see also Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005) (explaining that Article 6 provided great incentive for some Hague members to support the Choice of Court Convention).

214. Choice of Court Convention, *supra* note 4, at art. 16.

215. Lin, *supra* note 10, at 38; see also Graffi, *supra* note 10, at 675–676.

216. See DRAFTING AND ENFORCING, *supra* note 13, at 6, 14.

The Choice of Court Convention imposes no requirements on the chosen court or non-chosen court regarding the exercise of jurisdiction, unless the case is an “international case.”<sup>217</sup> A practitioner seeking to invoke the Convention’s benefits should consider whether disputes likely to arise under the agreement would meet the requirements for an “international case” under the convention.

*4. Will the chosen court have subject–matter jurisdiction of disputes of the type that are likely to arise under the agreement?*

The Choice of Court Convention does not require a chosen court to exercise jurisdiction if it does not have subject–matter jurisdiction under its own jurisdictional rules.<sup>218</sup> If the parties choose a court that does not have subject–matter jurisdiction, the effort to invoke the benefits of the Choice of Court Convention fails.<sup>219</sup> For the same reasons, it will be important to understand whether the country of the chosen court has made a declaration under Article 19, or if there are any subject–matter jurisdiction limitations on cases involving parties and claims having no connection to the location of the chosen court.<sup>220</sup>

*5. Will the transfer rules applicable in the chosen court allow a transfer to a court in the same country that would be unacceptable as a forum for dispute resolution?*

The Convention allows transfers to another court in the same country when permitted by the rules of the chosen court.<sup>221</sup> It also gives courts discretion to refuse recognition and enforcement of a judgment entered by a transferee court when the party opposing enforcement objected to the transfer.<sup>222</sup>

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217. See Choice of Court Convention, *supra* note 4, at art. 1(1).

218. See *id.* at art. 5(3)(a).

219. Choice of Court Convention, *supra* note 4, at art. 5(3)(a); see HARTLEY & DOGAUCHI, *supra* note 49, at 44–45.

220. Choice of Court Convention, *supra* note 4, at arts. 5(3)(a), 19; see Christopher Tate, *American Forum Non Conveniens in Light of the Hague Convention on Choice-of-Court Agreements*, 69 U. PITT. L. REV. 165, 186 (2007).

221. *Id.* at art. 5(3)(b).

222. *Id.* at art. 8(5).

6. *Does the law of the chosen court (or the law that the chosen court would apply under its conflict of law rules) recognize a choice of court agreement as valid?*

Because the Convention permits both a chosen court and a non-chosen court to refuse to apply its terms when the choice of court agreement is null and void under the law of the chosen court (including conflicts of law rules),<sup>223</sup> the benefits of the Choice of Court Convention will be available only if that law would recognize the validity of the choice of court agreement.<sup>224</sup>

7. *Does the transaction involve a consumer transaction or an employment contract?*

If so, the Choice of Court Convention will not apply.<sup>225</sup>

8. *Will disputes arising under the agreement involve any of the subjects that are excluded from the scope of the Convention?*

The benefits of the Convention may not be available if an excluded subject is at issue in disputes arising under the agreement.<sup>226</sup> In particular, even if an excluded subject is raised defensively, and therefore does not exclude the case from the scope of the Choice of Court Convention, the judgment may not be subject to recognition and enforcement under the Choice of Court Convention.<sup>227</sup>

9. *What is the country where assets would be pursued to enforce a judgment of the chosen court, and what public policies in that country might present obstacles to enforcement under the Choice of Court Convention?*

The Choice of Court Convention permits a court in which recognition or enforcement is sought to refuse enforcement if it would be manifestly incompatible with the public policy of that country.<sup>228</sup>

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223. *Id.* at art. 9(a); see HARTLEY & DOGAUCHI, *supra* note 49, at 43.

224. Choice of Court Convention, *supra* note 4, at art. 5(1).

225. *Id.* at art. 2(1).

226. *See id.* at art. 2.

227. *Id.* at art. 2(3).

228. *Id.* at art. 9(e).

10. *Is the rule permitting a court to refuse recognition and enforcement of a judgment involving damages that do not compensate for actual loss or harm a positive, negative, or neutral factor in the transaction in question?*

Courts will not re-litigate the merits of any damage findings of an arbitrator.<sup>229</sup> However, with the Choice of Court Convention, a possibility exists that a court in which recognition and enforcement is sought will decide that it has the authority to determine whether the damages awarded in the judgment are so excessive that they do not compensate the claimant for actual harm or loss, providing a basis for non-recognition of a judgment of the chosen court—either in whole or in part.<sup>230</sup>

#### IV. CONCLUSION

Whether and when the Choice of Court Convention breaks up the enforcement-based monopoly of the New York Convention depends on two factors: innovation in court proceedings<sup>231</sup> and the popularity of the Choice of Court Convention itself.<sup>232</sup>

As for innovation, the high cost of litigation (at least U.S.-style litigation<sup>233</sup>) derives from discovery,<sup>234</sup> and has been

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229. See Meyers, *supra* note 13, at 60–61 (noting the very narrow grounds on which courts can nullify an international arbitration award, grounds that exclude the arbitrator's interpretation of the law).

230. Choice of Court Convention, *supra* note 4, at art. 11.

231. See William H. Knull III & Noah Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 *AM. REV. INT'L. ARB.* 531, 533 (2000) (explaining that one of the reasons a party may choose litigation over arbitration is the lack of appeals in international arbitration and stating that one of the reasons for litigation's unpopularity is its excessive costs and time consumed).

232. See *Arbitration or Litigation?*, *supra* note 9 (providing that once procedural concerns of enforceability have been solved by the Choice of Court Convention, lawyers can choose whether to litigate or arbitrate based on the substantive advantages offered in either forums; see also Knull & Rubins, *supra* note 231, at 533 (noting that one of the reasons for the unpopularity of litigation is the inability to enforce judgments across borders)).

233. U.S. citizens “spend more per person in litigation costs than any other major industrialized nation.” James E. Rogers, Comment, *Going too Far is Worse than Not Going Far Enough: Principle-Based Accounting Standards, International Harmonization, and the European Paradox*, 27 *HOUS. J. INT'L L.* 429, 457 (2005).

compounded by electronic discovery.<sup>235</sup> But courts and parties to litigation are aware of the problems this causes and are currently seeking to remedy them.<sup>236</sup> One initiative, for example, involves a so-called “Economic Litigation Agreement” (“ELA”),<sup>237</sup> which the International Institute for Conflict Prevention & Resolution describes as “a hybrid of civil litigation and arbitration, where parties agree to use finite, defined and proportional discovery procedures in lieu of conventional discovery . . . [which parties] can incorporate” into their contracts by a “model agreement.”<sup>238</sup> This “litigation pre-nup,” includes “mandatory pre-litigation dispute resolution section, as well as fee-shifting in discovery disputes decided by an ELA arbitrator.”<sup>239</sup> In sum, the courts and parties continue to innovate with hybrid procedures that may make litigation less expensive and thus more attractive to parties who would want the appellate review desirable for “bet the farm” cases.<sup>240</sup>

One of the strongest factors arguing for arbitration under the New York Convention is its own success.<sup>241</sup> Because of its adherence by 144 state parties,<sup>242</sup> an arbitration award from a

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234. See John C. Koski, *From Hide-And-Seek to Show-And-Tell: Evidentiary Disclosure Rules*, 17 AM. J. TRIAL ADVOC. 497, 497 (1993) (“Discovery practice continues to constitute a larger and larger part of litigation costs. . . . [T]hese costs alone may generate [40–60%] of a law firm’s profits”).

235. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 25(2008), available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf> (“Now, e-discovery has penetrated even ‘midsize’ cases, potentially generating an average of \$3.5 million in litigation costs for a typical lawsuit.”).

236. See generally *id.*

237. See Int’l Inst. for Conflict Prevention & Resolution, Introduction: Economic Litigation Agreement, Aug. 6, 2010, <http://www.cpradr.org/ClausesRules/EconomicLitigationAgreements/tabid/452/Default.aspx>.

238. *Id.*

239. *Id.*

240. See generally Knull & Rubins, *supra* note 231, at 551–54 (discussing the need for appellate review in significant cases in which appellate review is advisable).

241. See Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT’L & COMP. L. 25, 26 (2009) [hereinafter *The New York Convention After Fifty Years*] (noting that “[w]ith respect to the New York Convention, there are indications that an international standard has emerged at numerous points”); see also Posch, *supra* note 8, at 380.

242. See New York Convention, *supra* note 3, at arts. III, V.

Convention country enjoys almost universal currency,<sup>243</sup> including in every OECD country.<sup>244</sup> To adapt (and mangle) the expression of Willie Sutton: “I arbitrate under the New York Convention because that’s where the money is.”<sup>245</sup>

But the universal currency of the New York Convention took a long time to achieve, and its success over time may provide a rough proxy of a “timeline for competition.”<sup>246</sup> Some might think that the best proxy for the timeline of competition by the Choice of Court Convention would be the very long trail of accessions to the New York Convention: After about thirty-three adoptions of the New York Convention by its tenth anniversary in 1969,<sup>247</sup> accessions proceeded at a steadied, measured pace.<sup>248</sup> About sixty accessions occurred in the 1970s,<sup>249</sup> twenty-five more in the 1980s,<sup>250</sup> forty in the 1990s,<sup>251</sup> and about twenty-three in the first decade of this century.<sup>252</sup> That could indicate a very long time before the Choice of Court Convention would give the New York Convention a run for its money. This timeline, however, neglects a basic set of changes that have occurred since

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243. See *The New York Convention After Fifty Years*, *supra* note 241, at 26 (noting the importance and success the New York Convention has had on international arbitration); see also Posch, *supra* note 8, at 380.

244. See Organisation for Economic Co-Operation and Development, Member Countries, [http://www.oecd.org/document/58/0,3343,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.html) (last visited Oct. 3, 2010).

245. See Fed. Bureau of Investigation, FBI History, Famous Cases: Willie Sutton, <http://www.fbi.gov/libref/historic/famcases/sutton/sutton.htm> (last visited Oct. 3, 2010).

246. New York Convention, Contracting States, <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last visited Oct. 3, 2010).

247. See *id.*

248. See David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT’L L. 1087, 1093 (“In sum, since the advent of the New York Convention, a global movement away from transnational litigation and toward international arbitration has been steady and certain.”).

249. Bradley J. Gross, *International Arbitration as a Method for Dispute Resolution in International Outsourcing Agreements*, 807 PLI/Pat 871, 880 (2004).

250. *Id.*

251. *Id.*

252. *Id.*

the 1958 vintage of the New York Convention: trading blocs.<sup>253</sup> Moreover, if the European Union and the United States accede soon, that alone will account for a very large number of countries and a huge volume of trade,<sup>254</sup> providing an opportunity for extensive use of the Choice of Court Convention, regardless of the number and timing of other accessions.<sup>255</sup>

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253. See, e.g. Lisa Anderson, *The Future of Hemispheric Free Trade: Towards a Unified Hemisphere?* 20 HOUS. J. INT'L L. 635, 637 (1998) (noting the importance of the North American Free Trade Agreement and the growth of Latin American trade blocs like the Southern Cone Common Market (MERCOSUR)).

254. See generally World Trade Organization, World Trade Statistics - 2009, [http://www.wto.org/english/res\\_e/statis\\_e/its2009\\_e/its09\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2009_e/its09_world_trade_dev_e.pdf) (last visited Oct. 3, 2010).

255. See Black, *supra* note 29, at 4 n.6 (citing L.E. Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U.L. REV. 1, 63 (2004)) (stating that "a substantial majority of participants in that survey indicated that if something like the Convention was in place it would make them more willing to designate litigation instead of arbitration in those international contracts they were responsible for negotiating"). *But see* Black, *supra* note 29, at 3-4 (stating that predictions of the Convention's benefits to Canada "are at best unquantifiable . . . and at worst they may turn out to be wrong").