The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases

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The debate over the virtues of arbitration versus litigation in business-to-business disputes has now continued for years, at least for US domestic disputes. The international arbitration bar claims things are different in the international context. That difference stems from the “monopoly” of international arbitration in international transactions, driven by its two perceived virtues: neutrality and world-wide enforceability. This paper will focus on a new treaty that may over time increasingly give international arbitration a run for its money, perhaps break the monopoly, and offer corporate counsel a wider variety of choices for resolution of transnational disputes.

That treaty is the Hague Convention on Choice of Court Agreements, acceded to by Mexico in 2007, and signed by the European Union and United States of America in 2009 ("Choice of Court Convention"). The Choice of Court Convention awaits US and EU ratification. When the first of those two ratify, the treaty will enter into force. Until it does, the tested regime of international arbitration under the New York Convention offers US-based parties the clear advantage of world-wide enforcement, as the United States has no treaty at all on enforcement of US-court judgments. But once the Choice of Court Convention does enter into effect, US-based parties to transnational contracts will have a realistic and increasingly attractive choice of litigation in a chosen court. The practicalities of litigating in a neutral third country will on many occasions require

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4 See Hague Convention on Choice of Court Art. 31(1).


6 New York Convention, Art. III.
litigating outside the United States before the courts of a treaty signatory. But at that point, arbitration’s enforceability advantage may have realistic competition.

**Arbitration’s Enforcement-Based Monopoly**

In an article recent, tendentiously titled article,\(^7\) Jan Paulsson, one of the deans of the international arbitration bar, pointedly declared that 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: arbitration is an alternative to courts, but international arbitration is a monopoly — and that makes it a different creature.\(^8\)

To Professor Paulsson’s view, the key characteristic driving the monopoly of international arbitration is the “unique criterion [of] neutrality.”\(^9\) Other prominent commentators echo that view, but add another characteristic — enforceability.\(^10\)

Some recent empirical studies support the view that for transnational disputes international arbitration is chosen more frequently than litigation.\(^11\) One recent study

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\(^7\) Jan Paulsson, *International Arbitration is not Arbitration*, 2008:2 *STOCKHOLM INT’L ARB. REP.* 1-20 (2008) (hereinafter “Paulsson”). But c.f. GARY BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 5-6 (2d ed. 2006) (“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.”). Both Paulsson and Born, however, agree that the most favorable forum for one party may be its own national courts; but the other party will argue for its own, resulting in choosing the neutral forum. To Paulsson’s view, the only neutral forum is in arbitration.

\(^8\) *Id.* at 1.

\(^9\) *Id.* at 2.

\(^10\) NIGEL BLACKABY ET AL., *REDFERN & HUNTER ON INTERNATIONAL ARBITRATION* 31 (5th ed. 2009) (henceforth “REDFERN”) (responding to the question “why arbitrate?” that “[t]here are two main reasons, the first is neutrality, the second is enforcement.”).

\(^11\) Eisenberg & Miller, *Flight from Arbitration*, *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’s study of 2,858 contracts filed with the SEC as attachments to Form 8-K “current reports” does indeed find contracts in which one party is not from the United States contain arbitration clauses at about double the rate of domestic contracts from the same data set. *Id.* at 22. The authors note that international contracts do have a low absolute rate of arbitration clauses, suggesting that “[t]his contrasts with predictions or descriptions that arbitration is the dispute resolution mechanism in international contractual settings and that the vast majority of international contracts provide for binding arbitration.” *Id.* at 23. The contrast between Eisenberg and Miller’s findings and earlier ones, however, may be explained by the highly-US-centric nature of the data set, which does not account for contracts in which *neither* party is from the United States.
suggests that much of the principal driver of the popularity (or monopoly) “is the worldwide recognition and enforcement of arbitral awards.”

In sum, the principal virtues of arbitration are viewed as neutrality, but, above all, enforceability. An arbitral award rendered in any one of the 144 jurisdictions party to the New York Convention is easily enforceable and subject to the narrowly defined, uniform set of grave process errors and international public policy grounds set out in the Convention. Parties seeking to export US court judgments have a tough road. Because the United States is not a party with any country to a currently-effective treaty on the enforcement of court judgments, US court judgments are subject to a varied patchwork of defenses that vary from enforcing jurisdiction to enforcing jurisdiction.

The Choice of Court Convention may change that.

**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. After considerable effort, a preliminary draft of a jurisdiction and judgment-enforcement convention was completed in 1999, which was further revised at a diplomatic conference in 2001. Progress in the negotiations stalled, and it became apparent that no final agreement would be reached on the broad jurisdiction and judgment-enforcement issues. As a result, the negotiation efforts were redirected at a convention with a more narrow focus – enforcement of choice of court agreements and of the judgments rendered by courts contractually chosen by the parties to resolve their disputes. The effort shifted to the drafting of a convention that is the “litigation counterpart” of the New York Convention on the enforcement of foreign arbitral awards.

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

The Choice of Court Convention addresses (1) the mandatory exercise of jurisdiction in an “international case” by a court that has been chosen by the parties in an exclusive choice of court agreement, (2) the mandatory withdrawal of jurisdiction in an

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13 New York Convention, Art. III.
14 Id. Art. V.
16 Id.
17 Id.
18 Id.
international case of a court not chosen in an exclusive choice of court agreement, and (3) the mandatory enforcement of judgments rendered by a court chosen in an exclusive choice of court agreement.\footnote{Choice of Court Convention, Arts. 5, 6, and 8.}

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 not decline to exercise that jurisdiction.

2. A court not chosen by the parties in such an agreement must decline to exercise jurisdiction over the parties’ dispute.

3. A judgment resulting from the exercise of jurisdiction by a court chosen by the parties to resolve disputes in an exclusive choice of court agreement must be recognized and enforced in other Contracting States.

While these basic rules seem simple on their face, a number of questions must be answered to determine whether the basic rules will apply in a particular case:

1. Does the Choice of Court Convention apply to the agreement in question based on the timing of accession of the countries involved?

2. Does the agreement in question qualify as an “exclusive choice of court agreement” that is covered by the Choice of Court Convention?

3. Is the dispute an “international case” that is covered by the Choice of Court Convention?

4. In what circumstances can the chosen court refuse to exercise jurisdiction?

5. In what circumstances can a non-chosen court exercise jurisdiction notwithstanding the parties’ exclusive choice of court agreement?

6. In what circumstances are courts not required to recognize and enforce the judgment of a chosen court?

Each of these questions is addressed below.

In What Circumstances Will the Choice of Court Convention Apply?

As noted above, only Mexico has acceded to the Choice of Court Convention as of the writing of this article in March 2010. Under Article 31, until one more Contracting State accedes to the Choice of Court Convention, it will not enter into force. Yet, even after the Choice of Court Convention enters into force under Article 31, reference to the
provisions of Article 16 will be necessary to determine (1) whether the Choice of Court Convention applies to a particular agreement for purposes of evaluating the applicability of its jurisdictional provisions to that agreement, and (2) whether the Choice of Court Convention applies to a proceeding in a non-chosen court, involving either the exercise of jurisdiction over the merits of a dispute between the parties to the agreement or the recognition or enforcement of a judgment rendered by court chosen in an exclusive choice of court agreement.

Section 1 of Article 16 states that 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.” Thus, both for purposes of determining whether the Choice of Court Convention mandates the exercise of jurisdiction by the chosen court and whether it mandates that a non-chosen court must decline jurisdiction, 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. If not, then the Choice of Court Convention’s jurisdictional provisions will not apply, and both the chosen court and any non-chosen court will apply their own laws, without reference to the Choice of Court Convention, in determining whether to exercise or decline jurisdiction.

In addition to the limitation on applicability of the Choice of Court Convention that is tied to the date of accession of the country of the chosen court, Section 2 of Article 16 provides that the Choice of Court Convention shall not apply to proceedings instituted before its entry into force in the country of the court in which the proceeding is filed. As a result, even if the country of the chosen court acceded to the Choice of Court Convention before the parties entered into the choice of court agreement, the Choice of Court Convention will not apply to proceedings filed in a non-chosen court if the country of the non-chosen court had not acceded to the Choice of Court Convention at the time the proceedings were instituted. That rule applies both to proceedings in a non-chosen court in which a party is attempting to assert claims under the agreement in the non-chosen court, notwithstanding the exclusive choice of court agreement, and to proceedings seeking to enforce a judgment of a chosen court.

These limitations on applicability of the Choice of Court Convention that are tied to the accession dates of countries of both the chosen court and non-chosen courts have significant impact on drafters of dispute-resolution clauses in international commercial agreements. Obviously, the drafter of an international commercial agreement who is seeking to rely on the benefits of the Choice of Court Convention must insure that the benefits of the treaty will be available when a dispute develops, both for purposes of insuring enforcement of the jurisdiction-selection provisions of the agreement and enforcement of judgments of the chosen court. To insure that those benefits are available, the drafter must investigate the facts relating to the accession to the Choice of Court Convention by the country of the chosen court as well as the countries where the counter-party might initiate litigation in violation of the parties’ exclusive choice of court agreement.

20 Choice of Court Convention, Art. 16(1).
21 Choice of Court Convention, Art. 16(2).
agreement and where the parties hold assets that would provide the source of satisfaction of a judgment rendered by the chosen court.

For these reasons, the status of accession of the United States to the Choice of Court Convention, and the steps that will be necessary to accomplish that accession, are important facts that must be understood in determining whether the Choice of Court Convention will make an exclusive choice of court agreement an effective alternative to an arbitration clause in a transaction involving a US party.

Although the United States is a signatory to the Choice of Court Convention, a number of steps remain before the U.S. formally accedes to the treaty. In particular, the Choice of Court Convention is not viewed to be a self-executing treaty, meaning that legislation will be necessary to implement the treaty in the United States. There is a current debate as to whether the Choice of Court Convention should be implemented solely through federal legislation or whether it should be implemented through a combination of federal legislation and a uniform state law to be enacted in the states. 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 the United States’ treaty obligations.

Although the New York Convention on the enforcement of foreign arbitration agreements and awards was implemented solely through federal legislation, the federalism issues associated with implementation of the Choice of Court Convention are much more significant, resulting in serious consideration of use of the cooperative-federalism approach. Specifically, the implementation of the Choice of Court Convention involves imposing mandatory rules on state courts concerning the exercise or non-exercise of jurisdiction by state courts, as well as the mandatory enforcement of foreign judgments by state courts, matters that historically have been reserved to state law. Of course, the federal government has an interest in insuring that the United States’ treaty obligations are satisfied. 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.

In anticipation of a combined federal and state implementation mechanism, the Uniform Law Commission is currently engaged in drafting a uniform state law for passage by each of the states that would implement the Choice of Court Convention in each of the states. Likewise, the State Department and the Justice Department are preparing a draft of a federal law, which may have provisions that preempt state law only to the extent that the states do not adopt the uniform law. No decision has yet been made on whether a combined federal/state implementation mechanism, or a pure federal implementation mechanism, will be utilized. As this brief discussion makes clear, US accession is not imminent.
What is an “Exclusive Choice of Court Agreement”?

Article 1 of the Choice of Court Convention states that it applies “in international cases to exclusive choice of court agreements concluded in civil or commercial matters.” Although the Choice of Court Convention has an article permitting Contracting States to make reciprocal declarations regarding enforcement of judgments of courts designated in non-exclusive choice of court agreements, the provisions of the Choice of Court Convention otherwise deal only with “exclusive choice of court agreements,” consistent with the description of its scope in Article 1. Thus, there is a threshold question that must be answered in determining the applicability of the Choice of Court Convention: What is an “exclusive choice of court agreement”?

Article 3 of the Choice of Court Convention defines an “exclusive choice of court agreement” to be an agreement concluded by two or more parties that is in writing or any other form that renders the information accessible so as to be usable for subsequent reference, and that designates, for the purpose of deciding disputes which have arisen or may arise 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.”

To break down these requirements into their component parts, the agreement must:

1. Be in writing or other accessible form for subsequent reference;
2. Designate the court or courts of only one Contracting State for the purpose of resolving disputes under the agreement; and
3. Exclude the jurisdiction of any other courts.

The third of these requirements would appear to require an express statement of exclusivity of the chosen court or courts of a single Contracting State in order to qualify as an “exclusive choice of court agreement.” However, Article 3(b) of the Choice of Court Convention says that a choice of court agreement that designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise. Accordingly, the parties, by designating the court or courts of a single Contracting State to resolve their disputes, will be deemed to have intended exclusivity of those courts, unless they say otherwise in the agreement. This approach represents a different approach than that taken by most US jurisdictions in determining the impact of choice of court clauses in agreements under the common law, as most jurisdictions 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 the common law.

22 Choice of Court Convention, Art. 22.
23 Choice of Court Convention, Art. 3(a).
24 Choice of Court Convention, Art. 3(b).
It also is important to note that the definition of an “exclusive choice of court agreement” requires that the parties select one or more courts of a single “Contracting State.” As a result, the Choice of Court Convention will not apply to an agreement that was entered into before a country accedes to the Convention, as in that circumstance, the agreement does not select a court of a “Contracting State.” Article 16 also makes it clear that the Choice of Court Convention only applies to exclusive choice of court agreements that were entered into after the treaty entered into force in the country of the chosen court. This means that parties to international transactions that reach agreement on the court or courts of a particular country cannot take advantage of the Choice of Court Convention by choosing the courts of a country that has not yet acceded to the Choice of Court Convention.

What is an “International Case”?

As noted above, Article 1 of the Choice of Court Convention states that it applies only “in international cases.” Accordingly, it will apply only if the “case” that is the subject of the dispute qualifies as an “international case” as defined in the Choice of Court Convention.

The definition of “international case” varies depending on whether the proceeding in question involves the exercise of jurisdiction in a dispute that is covered by the choice of court agreement or instead is a proceeding to enforce a judgment rendered by a court chosen in an exclusive choice of court agreement.

In determining whether a case is “international” for purposes of the jurisdictional provisions of the Choice of Court Convention, a case will be international “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.” Thus, all cases are considered “international” under the jurisdictional provisions of the Choice of Court Convention unless (1) the

25 Choice of Court Convention, Art. 3(a).
26 Choice of Court Convention, Art. 16(1).
27 If the parties have entered into an agreement that would otherwise qualify as an exclusive choice of court agreement but for the fact that the country of the chosen court had not acceded to the Choice of Court Convention at the time the parties executed the agreement, judgments rendered by the chosen court might nevertheless be enforceable under the Choice of Court Convention as a non-exclusive choice of court agreement. Specifically, if the country of the chosen court and the country in which recognition and enforcement is sought have both executed declarations under Article 22, the Choice of Court Convention requires recognition and enforcement of the judgment if there no other judgment has been rendered and if no other proceeding is pending in another court on the same cause of action. Choice of Court Convention, Art. 22. Such an agreement is not an “exclusive choice of court agreement” by virtue of the fact that the courts of a “Contracting State” were not designated in the agreement (as required by the definition of “exclusive choice of court agreement” in Article 3(a), making it a non-exclusive choice of court agreement under Article 22.
28 Choice of Court Convention, Art. 1(1).
29 Choice of Court Convention, Art. 1(2) and Art. 1(3).
30 Choice of Court Convention, Art. 1(2).
parties are both resident of the same Contracting State, and (2) the “elements” of the dispute are connected only with that Contracting State.31

With regard to a proceeding for recognition or enforcement of a judgment under the Choice of Court Convention, every such proceeding is “international” as long as the judgment sought to be enforced is a “foreign” judgment, i.e., a judgment rendered in another country.32

In What Circumstances Is the Chosen Court Required 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.33 The Choice of Court 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,” which encompasses dismissal on forum non conveniens grounds.34 However, there are several notable exceptions to the mandatory exercise of jurisdiction by the chosen court. These exceptions fall into the following general categories:

1. Lack of subject-matter jurisdiction of the chosen court;
2. Rules permitting transfer to another court;
3. Law rendering the exclusive choice of court agreement “null and void”;
4. Lack of connection between the country of the chosen court and the parties and the dispute; and
5. Subject-matter exclusions in the text of the Choice of Court Convention.

Each of these categories of exceptions to the mandatory exercise of jurisdiction by the chosen court is discussed below.

Lack of Subject-Matter Jurisdiction

Under Section 3 of Article 5, the Choice of Court Convention does not affect limitations on the subject-matter jurisdiction of the chosen court.35 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. In essence, the selection of a court without subject-matter jurisdiction in an exclusive choice of court agreement renders the agreement ineffective.

31 Id.
32 Choice of Court Convention, Art. 1(3).
33 Choice of Court Convention, Art. 5(2).
34 Id.
35 Choice of Court Convention, Art. 5(3).
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.” Accordingly, if the rules applicable to 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 instead transferring it to another court in the Contracting State to which it may be transferred under the court’s transfer rules. Such a transfer, however, may have an impact on the enforceability of the judgments of the transferee court, an issue that is discussed below with regard to enforcement of judgments.

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

The chosen court shall decline jurisdiction if the exclusive choice of court agreement “is null and void” under the law of the country of the chosen state. In applying this rule, two considerations must be kept in mind. 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.” Thus, “[t]he validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.” Another consideration relates to the question of whether the chosen court should apply its own substantive law in determining whether the exclusive choice of court agreement is “null and void” or should apply its “whole” law, including its choice of law rules, in making that determination. It is generally understood that the Choice of Court Convention’s references to “law” are references to the “whole law,” so that a chosen court must first determine what substantive law should be applied under its own choice of law rules, and then apply that substantive law in making the determination of whether the exclusive choice of court agreement is null and void.

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

It is possible that the chosen court may decline to exercise jurisdiction if, except for the location of the chosen court, there is no connection between the country of the chosen court and the parties or the dispute. Article 19 allows Contracting States to make a declaration that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if the chosen court has no connection to the parties and the dispute other than the location of the chosen court.

Furthermore, even if a Contracting State has not made an Article 19 declaration, it is possible that limitations on the subject-matter jurisdiction of the chosen court may

36 Choice of Court Convention, Art. 5(3)(a).
37 Choice of Court Convention, Art. 5(1).
38 Choice of Court Convention, Art. 3(d).
39 Id.
40 Choice of Court Convention, Art. 19.
prevent the chosen court from exercising jurisdiction over a case in which neither the parties nor the dispute have a connection with the forum. In fact, as discussed above in the portion of this article dealing with the current steps that are being taken toward implementation of the Choice of Court Convention in the United States, the Uniform Law Commission’s drafting committee that is working on the draft uniform state law is considering insertion of an optional provision in the uniform law that may be used to implement the treaty addressing this “no connection” issue, even if the United States does not make an Article 19 declaration. Under that optional provision, a state legislature, in adopting the uniform state implementing legislation for the treaty, could opt to enact a limitation on subject-matter jurisdiction that would deprive its courts of subject-matter jurisdiction over cases that have no connection to the state of the chosen court other than the location of the chosen court. Effectively, this type of provision will allow each state to make its own determination of whether it wants its courts to hear cases that have no connection to its state when the parties to the dispute have designated a court in that state in an exclusive choice of court agreement.

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 subject matter of the underlying agreement or subject matter of the dispute. First, Section 1 of Article 2 excludes two types of transactions from the scope of the treaty – consumer transactions and employment contracts. As a result, an exclusive choice of court agreement in a contract involving a consumer, as well as an exclusive choice of court agreement in an employment contract, will not be governed by the Choice of Court Convention.

Second, Article 2 excludes a number of “matters” from the scope of the Choice of Court Convention. These exclusions are designed to protect “governmental interests that might otherwise be frustrated by the parties’ choice of court.” In particular, these exclusions address situations in which a particular court is considered to have exclusive jurisdiction to decide certain issues as well as situations in which other treaties are implicated. Some examples of the types of matters that are excluded from the scope of the Choice of Court Convention are:

1. Family law matters;
2. Wills and estates;
3. Insolvency;

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41 Choice of Court Convention, Art. 2(1).
42 Choice of Court Convention, Art. 2(2).
44 Choice of Court Convention, Art. 2(2).
3. Carriage of passengers or goods;
4. Antitrust matters;
5. Personal injury;
6. Tort claims for damages to real or tangible personal property;
7. In rem rights in real or immovable property; and
8. Validity or infringement of intellectual property rights other than copyright and related rights.

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.”45 The Choice of Court Convention does not provide clear guidance on when one of the excluded subject matters arises “merely as a preliminary question.” Some clarification is provided in the last sentence of Section 3 of Article 2, which states that “the mere fact that a matter excluded . . . arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.”46 However, there undoubtedly will be litigation over whether a particular case involves one of the excluded subject matters, and if so, whether the excluded subject matter involves a “preliminary question” that is not an “object of the proceedings.” Additionally, as discussed below in the discussion of the judgment-enforcement provisions of the Choice of Court Convention, the presence of an excluded matter, even if it involves only a preliminary question that does not exclude application of the Choice of Court Convention, can affect the enforcement of judgments rendered by the chosen court.

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 unless:

1. the agreement is null and void under the law of the State of the chosen court;
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;

45 Choice of Court Convention, Art. 2(3).
46 Id.
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 in which the proceeding is filed;

4. for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

5. the chosen court has decided not to hear the case.

Choice of Court Convention, Art. 6. Thus, the general rule prohibiting a non-chosen court from exercising jurisdiction is not absolute.

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

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.\(^47\) The court from which recognition and enforcement is sought may not review the merits of the judgment of the chosen court and is bound by the findings of fact on which the chosen court based its jurisdiction.\(^48\)

Procedural Limitations on Recognition and Enforcement of Judgments of the Chosen Court

A procedural limitation on recognition and enforcement of a judgment of a chosen court under an exclusive choice of court agreement is that the judgment may be recognized only if it “has effect” in the State of the chosen court and may be enforced only if it is enforceable in the State of the chosen court.\(^49\) Recognition and enforcement may be postponed or refused if the judgment is the subject of review in the State of the chosen court or if the time for seeking ordinary review has not expired.\(^50\)

Substantive Defenses to Recognition and Enforcement of Judgments of the Chosen Court

With regard to substantive defenses to recognition or enforcement, recognition or enforcement may be refused in the following circumstances:\(^51\)

\(^{47}\) Choice of Court Convention, Art. 8(1).
\(^{48}\) Choice of Court Convention, Art. 8(2).
\(^{49}\) Choice of Court Convention, Art. 8(3).
\(^{50}\) Choice of Court Convention, Art. 8(4).
\(^{51}\) Choice of Court Convention, Art. 9.
1. the exclusive choice of court agreement was null and void under the law of the chosen court, unless the chosen court has determined that the agreement is valid;

2. a party lacked capacity to conclude the exclusive choice of court agreement under the law of the State of the court in which recognition or enforcement is sought;

3. the defendant did not receive notice of the document instituting the proceedings in sufficient time and in such a way as to enable the defendant to arrange for a defense, unless the defendant entered an appearance in the chosen court without contesting notification in a manner permitted by the chosen court;

4. notice of the proceedings in the chosen court that was given to the defendant in the State in which the judgment is sought to be recognized or enforced is incompatible with fundamental principles concerning service of documents of the State in which recognition or enforcement is sought;

5. the judgment was obtained by fraud in connection with a matter of procedure;

6. recognition or enforcement would be manifestly incompatible with the public policy of the State in which recognition or enforcement is sought;

7. the judgment is inconsistent with a judgment given in the State in which recognition or enforcement of the judgment is sought; or

8. the judgment is inconsistent with a judgment given in another country between the same parties on the same cause of action, provided that the earlier judgment meets the conditions for recognition or enforcement in the State in which recognition or enforcement is sought.

All of these exceptions to the recognition and enforcement of a judgment are discretionary. The court in which recognition or enforcement is sought may recognize and enforce the judgment even if the judgment debtor establishes one or more of the grounds in Article 9 for non-recognition and non-enforcement.

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 substantive defenses to recognition and enforcement in Article 9, Article 10 also has provisions relating to decisions of the chosen court on “preliminary questions” that can have significant impact on recognition and enforcement of the underlying judgment. Section 2 of Article 10 states that recognition or enforcement may be refused if, and to the extent that, the judgment was based on a ruling that falls within

52 Id.
53 Id.
the subject-matter exclusions. Accordingly, if a case involves an issue that falls within one of the subject-matter exclusions but does not fall outside the scope of the Choice of Court Convention because the issue falling within the scope of an exclusion was a preliminary question, such as a defense, the judgment rendered by the chosen court will nevertheless be subject to an order denying recognition and enforcement if the decision on the excluded matter had an impact on the judgment.

For example, if a defendant raised defensive 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 under Section 2 of Article 10, the court in which recognition or enforcement is sought has the discretion to refuse recognition and enforcement. As a result, even when a matter relating to one of the subject-matter exclusions arises as a “preliminary question” such that the Choice of Court Convention applies, judgments rendered by the chosen court nevertheless may refused recognition and enforcement because of the necessity of deciding a “preliminary question” that involves one of the subject-matter exclusions and that impacts the outcome of the case. It should be noted that the Choice of Court Convention adopts a special rule in these circumstances when the “preliminary question” involves the validity of an intellectual property right other than a copyright (such as a patent), such that the exception to recognition and enforcement for judgments “based on” the ruling on the excluded matter applies only if the ruling on the validity of the intellectual property right is inconsistent with a judgment or decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose.

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

As noted above in the discussion of the jurisdiction provisions of the Choice of Court Convention, the treaty 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. However, Article 8(5) provides that 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.

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

Article 11 of the Choice of Court Convention provides that recognition and enforcement may be refused if and to the extent the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm

54 Choice of Court Convention, Art. 10(2).
55 Choice of Court Convention, Art. 10(3).
56 Choice of Court Convention, Art. 5(3)(b).
57 Choice of Court Convention, Art. 8(5).
suffered. While this provision allows a court to deny recognition and enforcement of damages that are of a type that can be characterized as “non-compensatory,” it also provides a 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. 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.

*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?*

As noted at the beginning of this article, arbitration clauses historically have been viewed as preferable to choice of court agreements in international commercial agreements. This perceived preference has been due in part to the fact that the New York Convention requires international enforcement of arbitration awards, while the United States has not been party to any treaty dealing with enforcement of US judgments. It remains to be seen whether the Choice of Court Convention will increase the use of choice of court clauses, rather than arbitration clauses, in international commercial agreements.

Set out below are a number of factors to be considered by practitioners involved in drafting international commercial agreements in determining whether the Choice of Court Convention makes a choice of court clause an effective alternative to an arbitration clause as the dispute-resolution mechanism in a particular international agreement.

1. *Have the relevant countries acceded to the Choice of Court Convention?* As noted above, the jurisdictional provisions of the Choice of Court Convention will not apply and therefore will not require a chosen court to exercise jurisdiction and will not require a non-chosen court to decline jurisdiction unless the country of the chosen court acceded to the Choice of Court Convention prior to the date that the parties entered into the agreement. Practitioners involved in drafting an international commercial agreement that includes an exclusive choice of court agreement should understand the status of accession to the Choice of Court Convention of the countries of the chosen court and of the parties, as the accession dates have a significant impact on the availability of the benefits of the Choice of Court Convention.

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. 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. Reaching agreement on such a court may be difficult.

58 Choice of Court Convention, Art. 11.
3. **Will the disputes that are likely to arise under the agreement qualify as an “international case” under the Choice of Court Convention?** 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. A practitioner seeking to invoke the benefits of the Choice of Court Convention should consider whether disputes that are likely to arise under the agreement would meet the requirements for an “international case” under the treaty.

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. 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. For the same reasons, it will be important to understand whether courts of the chosen state have 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.

5. **Will the transfer rules applicable in the chosen court allow a transfer to a court in the same country that would not be a forum for dispute resolution that would be acceptable to the parties?** The Choice of Court Convention allows transfers to another court in the same country when permitted by the rules of the chosen court. It also gives discretion to refuse recognition and enforcement of a judgment entered by a transferee court when the party opposing enforcement objected to the transfer.

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 Choice of Court Convention permits both a chosen court and a non-chosen court to refuse to apply the terms of the Choice of Court Convention when the choice of court agreement is null and void under the law of the chosen court (including conflicts of law rules), 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.

7. **Does the transaction involve a consumer transaction or an employment contract?** If so, the Choice of Court Convention will not apply.

8. **Will disputes arising under the agreement involve any of the subjects that are excluded from the scope of the Choice of Court Convention?** The benefits of the Choice of Court Convention may not be available if any of the excluded subjects may be at issue in disputes that arise under the agreement. 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.
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.

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. Under the Choice of Court Convention, there is a possibility that a court in which recognition and enforcement is sought will decide that it has the authority to determine the question of whether the damages awarded in the judgment are so excessive that they necessarily do not compensate the claimant for actual harm or loss, providing a basis for non-recognition of a judgment of the chosen court, in whole or in part.

**Conclusion**

The Choice of Court Convention is an important step in providing parties to international commercial agreements with a real alternative to international arbitration for dispute resolution. However, the steps that still must be taken in order to effectuate accession by the United States, and the likely delays in the treaty’s implementation in the United States through legislation at either the federal level, state level, or both, make the prospect of its use in the short term doubtful. Nevertheless, once the United States has acceded to and implemented the Choice of Court Convention through legislation, it is likely that it will provide a real alternative to arbitration that should be considered for possible use in international commercial contracts. The determination of whether a choice of court clause will work in a particular transaction will depend on the parties’ ability to agree on a neutral court and consideration of a variety of factors requiring a full understanding of the requirements and limitations on the enforcement of exclusive choice of court agreements under the Choice of Court Convention and the judgments entered under those agreements.