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ARBITRATION OR LITIGATION?
PRIVATE CHOICE AS A POLITICAL MATTER

By
Ronald A. Brand*

The Federal Arbitration Act and New York Convention solidified U.S. law on arbitration and have together been read by the courts to result in a strong federal policy in favor of arbitration. Party autonomy to choose a court for resolution of a private dispute came later in the United States, but now receives similar deference in the courts, largely as a result of the 1972 Supreme Court decision in Bremen v. Zapata. What began as a body of federal common law on the recognition and enforcement of foreign judgments now is found in state statutes and common law which, while uniform on the surface, is fragmented in its application. The recognition and enforcement of both choice of court agreements and the resulting judgments would receive treatment similar to that for arbitral agreements and awards if the United States were to ratify and implement the 2005 Hague Convention on Choice of Court Agreements. But political disagreements are preventing the U.S. from becoming a party to that Convention, despite widespread agreement that implementation of its rules would be good for U.S. constituencies.

This paper presents and compares the current framework for enforcement of choice of forum agreements and the resulting decisions in both the arbitration and litigation contexts. In doing so, it considers the similarities and differences in the New York and Hague Conventions that should be considered when choosing a forum in international commercial contracts. It then considers the decisions (of a political as well as legal nature) that must be made by states upon entry into either of these treaty systems—particularly in the form of available declarations. Finally, it considers how the current U.S. political environment is affecting private international law development and the implications that process may have for the future.

I. INTRODUCTION

There was a time when only sovereigns could determine the proper institution to make decisions that would be enforceable by the state in disputes between private parties. In the United States, the Federal Arbitration Act of 1925 changed that,¹ initiating an era of party autonomy in choice of forum, with the U.S. Supreme Court consistently finding a federal policy in favor of arbitration that is strong enough to support—almost without question—the enforcement of single-party imposition of arbitration agreements in unbalanced economic relationships.² U.S. ratification of the New York Convention in

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¹ Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2016).

² See, e.g., DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (holding that an arbitration clause and a class action waiver clause in non-negotiable DIRECTV service agreement were binding and pre-empted California state law which otherwise made class action waivers unenforceable).

1970 extended this policy to consideration of arbitration agreements in international contracts.³

Party autonomy to choose a court for resolution of a private dispute came later in the United States. In its 1972 decision in *Bremen v. Zapata*,⁴ the Court gave effect to a contract clause choosing a London court in a contract between German and American parties. In doing so, the Court stated that “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”⁵ The Court thus recognized that the parties to an international transaction often have good reason to provide for a neutral court for the resolution of disputes. Thus, forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”⁶

Bremen brought about a policy in the United States favoring the enforcement of choice of court agreements. While state law has brought about a similarly liberal policy on the recognition and enforcement of foreign judgments⁷—including those emanating from courts contractually chosen by the parties⁸—both the *Bremen* decision and state law on the recognition of foreign judgments operate only in U.S. courts. Unlike the New York Convention rules on arbitration, the United States is not a party to a treaty creating reciprocal recognition and enforcement of U.S. choice of court agreements or U.S. judgments in foreign courts. While such a treaty is available in the form of the 2005 Hague Convention on Choice of Court Agreements (Hague Convention),⁹ politics currently prevent its U.S. ratification and implementation.¹⁰

³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739 (entered into force as to U.S. Dec. 29, 1970) [hereinafter New York Convention]; *see also* 9 U.S.C. §§ 201-208 (implementing the New York Convention).

⁴ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 2005), http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf [hereinafter 2005 RECOGNITION ACT] (amending Uniform Foreign Money-Judgments Recognition Act of 1962); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-482 (AM. LAW INST. 1987) [hereinafter RESTATEMENT].

⁸ The 2005 Recognition Act and the Restatement contain provisions authorizing the non-recognition of a judgment rendered by a court other than the court chosen in a choice of court agreement. *See* 2005 RECOGNITION ACT, *supra* note 7, at § 4(c)(5) and cmt. 4 (stating that the grounds in § 4 of the 2005 Recognition Act were based on the grounds in the 1962 Recognition Act); RESTATEMENT, *supra* note 7, at § 482 cmt. h.

⁹ Hague Convention on Choice of Court Agreements, *opened for signature* June 30, 2005, 44 I.L.M. 1294, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/53483/Part/I-53483-08000002804613e4.pdf> (entered into force Oct. 1, 2015).

¹⁰ *See, e.g.*, Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT’L L. 101 (2013).

It simply makes no sense to have multinational reciprocal recognition of a right to choose private dispute resolution in the form of arbitration, with the corresponding sovereign enforcement of both that choice and the resulting decision, and not to have parallel recognition of private party choice of court and of the resulting judgment. Yet that is the state of affairs in the United States. Thus, while business persons and their legal counsel acknowledge differences between arbitration and litigation, and demonstrate preferences for each in international commercial relationships, the ability to get treatment of choice of court clauses and judgments that is as favorable as the treatment of arbitration clauses and arbitral decisions is prevented for purely political reasons having nothing to do with the quality or desirability of the rules found in the Hague Convention.

In the following discussion, I will first introduce the current status of U.S. law regarding the recognition and enforcement of arbitral agreements and arbitral awards, with particular attention to the rules of the New York Convention. I will then discuss the current status of U.S. law on the recognition and enforcement of choice of court agreements and foreign judgments resulting from the exercise of jurisdiction in compliance with such agreements. I will follow with a discussion of the rules found in the Hague Convention on Choice of Court Agreements, which would largely bring choice of court in line with choice of arbitration, providing a level playing field for party choice of arbitration and litigation.

After consideration of the existing internal law frameworks and treaties for both arbitration agreements and choice of court agreements, I will discuss two political matters. The first of these is the set of choices contracting states may make under each of the New York and Hague Conventions in the form of declarations that mold the contours of a contracting state's obligations under each convention. These choices are to be made by the political branches of government (executive and legislative) in each contracting state. They are legitimate choices and raise legitimate questions of policy in the treaty ratification process.

The second political matter in the United States is the impact on the development of the law which has resulted from claims to state control over treaty obligations in matters of choice of court and the recognition of foreign judgments. While this too is a political question, it is one that should not exist in the consideration of U.S. participation in the Hague Convention. It is—quite simply—only politics. It is time to recognize the difference between necessary and unnecessary political choices in the ratification of the Hague Convention, and time to move the United States into the twenty-first century of private international law through ratification and federal implementation of that Convention. The Hague Convention offers real advantages for both transaction planning and dispute resolution processes. U.S. failure to ratify—or even delay in that ratification—will leave our courts, our legal profession, and our legal system behind the rest of the world, creating continuing problems for contract drafters, arbitrators, courts, and the legal sector of the U.S. economy generally.

II. RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS AND ARBITRAL AWARDS

A. *The Basic Issue: Choosing a Forum for Dispute Resolution*

Parties to international commercial contracts are well advised to include a choice of forum clause in their agreement in order to increase predictability of the outcome in the event of any possible dispute. In doing so, they have two basic choices: arbitration and litigation. The current status of the law regarding these choices differs, however, leading to a global institutional framework favoring arbitration. The existence of the New York Convention, with over 150 Contracting States,¹¹ provides greater certainty that both the choice of an arbitral tribunal and its resulting award will be recognized and enforced when a dispute arises. This factor alone results in a distinct advantage for arbitration over litigation.¹²

Other factors—such as the enhanced availability of interim relief, expanded evidentiary tools, reduced institutional fees, and a clearer connection between substantive law and procedural rules—may well make litigation a more attractive dispute settlement mechanism than arbitration in some international commercial relationships.¹³ The unbalanced international legal system often outweighs such factors, however, making arbitration an easy choice without full consideration of matters which may well otherwise lead to litigation as a preferable choice.¹⁴

This tilted playing field in favor of arbitration in the international legal realm is beginning to change. With the ratification of the 2005 Hague Convention on Choice of Court Agreements by the European Union (EU) in 2015, that Convention is now in effect between twenty-seven of the Member States of the EU and Mexico, offering incentives to ratification by other states, and setting up a more equal comparison in the choice between arbitration and choice of court agreements in international commercial contracts.¹⁵

¹¹ At the time this article was written, there were 156 Contracting States. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Sept. 28, 2016).

¹² For discussion of the choice between arbitration and litigation more broadly, see Ronald A. Brand, *Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements*, 57 ANNALS FAC. L. BELGRADE (BELGRADE L. REV.) 23 (2009), available at <http://anali.ius.bg.ac.rs/Annals%202009/Annals%202009%20p%20023-035.pdf>. For a discussion of recent criticisms of arbitration, and a rebuttal, see Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49.

¹³ Brand, *supra* note 12.

¹⁴ *Id.*

¹⁵ While the European Union currently has 28 Member States, Denmark is not bound by the E.U. ratification of the Convention. *Compare Countries*, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Sept. 28, 2016), with *Members of the Organisation*, HAGUE CONF. PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98> (last visited Sept. 28, 2016).

B. *The Background for Arbitration*

In the United States, arbitration agreements are clearly recognized as “a specialized kind of forum-selection clause.”¹⁶ The enactment of the United States Arbitration Act in 1925,¹⁷ “was designed to allow parties to avoid what was seen as ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts,’” “reversing centuries of judicial hostility to arbitration agreements.”¹⁸ Section 2 of the Act provides the basic rule that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁹

Section 3 of the Act provides for a stay of proceedings in a case where the issue before a court is arbitrable under the agreement,²⁰ and section 4 directs federal courts to order parties to arbitrate if there has been a “failure, neglect or refusal” of a party to honor an agreement to arbitrate.²¹ The Act demonstrates a clear policy in favor of enforcing agreements to arbitrate. Sections 9-13 of the Act similarly provide for the recognition and enforcement of the resulting award.²²

The 1958 New York Convention entered into force in the United States on December 29, 1970.²³ The result was an expansion of the rules of the Federal Arbitration Act to the international realm. Under Article II of the New York Convention, courts in each contracting state have an obligation to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by

¹⁶ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

¹⁷ United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2016)).

¹⁸ *Scherk*, 417 U.S. at 510-11.

¹⁹ 9 U.S.C. § 2 (2016).

²⁰ 9 U.S.C. § 3.

²¹ 9 U.S.C. § 4.

²² 9 U.S.C. §§ 9-13.

²³ New York Convention, *supra* note 3.

arbitration.”²⁴ Once an award is rendered, Article III requires that each contracting state recognize an award granted in another contracting state as binding and enforce the award just as if it had been rendered domestically.²⁵ These obligations are carried into effect domestically in Chapter 2 of the Federal Arbitration Act.²⁶

The Supreme Court has read the Federal Arbitration Act and the New York Convention to create a strong federal policy in favor of arbitration. This has had three significant results in particular. First, very few matters are considered to be non-arbitrable simply because of subject matter public policy.²⁷ Thus, according to the Supreme Court:

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.²⁸

Second, unlike the law in many other countries,²⁹ in the United States, arbitration law itself is not used to protect groups of “weaker” persons from the deference to arbitration agreements in otherwise valid contracts. In particular, there are no rules in U.S. arbitration law carving out special protection for consumers in the enforcement of arbitration agreements. Thus, for example, in *Hill v. Gateway*, consumer purchasers of a computer were held bound to the arbitration clause on page 3 of a “Standard Terms” document enclosed in the box with the computer, even though they had no chance to learn of the clause before the computer was ordered, paid for, and delivered, and the clause called for ICC arbitration that required the party filing a claim for arbitration to pay administrative fees of \$2,000.³⁰

²⁴ *Id.* art. II.

²⁵ *Id.* art. III.

²⁶ 9 U.S.C. ch. 2 (2016).

²⁷ *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (holding that United States antitrust law matters were not so imbued with public policy as to prevent their determination by a panel of three Japanese arbitrators in Japan); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (ordering arbitration of securities law matters in a “truly international agreement”).

²⁸ *Mitsubishi Motors*, 473 U.S. at 628.

²⁹ For a comparison of the U.S. and E.U. approaches to the use of private international law restrictions for the “protection” of consumers, see Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 LOY. U. CHI. INT’L L. REV. 11 (2012).

³⁰ *Hill v. Gateway* 2000, 105 F.3d 1147 (7th Cir. 1997).

Third, because the policy favoring arbitration is a federal policy, it preempts state law and thus does not allow state enactment of legislation contrary to the policy.³¹ The basics of arbitration law in the United States are found in federal, not state, law.

The result in the United States is a very strong policy favoring arbitration, with an overlay of international obligations created by the New York Convention. This creates a significant incentive to draft arbitration agreements in international commercial contracts where one party is from the United States. And, because it is federal law which is applied, it is the same law in both state and federal courts and in all states.

III. RECOGNITION AND ENFORCEMENT OF CHOICE OF COURT AGREEMENTS AND FOREIGN JUDGMENTS

A. *Enforcing Choice of Court Agreements*

While jurisprudence on party autonomy in choice of court in the United States has developed in some ways in parallel with the law of arbitration, it is in other ways a more recent development. U.S. courts were traditionally jealous of private party decisions to go to the courts of other states. Thus, until the latter half of the twentieth century, it was common for courts to hold that “agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.”³² This approach changed in 1972 with the Supreme Court decision in *Bremen v. Zapata*.³³ The Court enforced a clause choosing the courts in London for dispute resolution between a German firm and a U.S. company, in a contract for towing an oil rig from the United States to Italy. In doing so, the Court stated that “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”³⁴ Thus, choice of court clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”³⁵ While *Bremen* was brought under federal admiralty jurisdiction, its results have been consistently applied.

Like the Court’s jurisprudence on arbitration agreements, choice of court agreements have been found to be binding regardless of the issues that may be addressed or the parties involved. Thus, for example, in *Carnival Cruise Lines v. Shute*, a consumer from the state of Washington was held bound by a choice of court agreement on the

³¹ See generally, e.g., *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

³² *Carbon Black Exp., Inc. v. S.S. Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958).

³³ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

³⁴ *Id.* at 9.

³⁵ *Bremen*, 407 U.S. at 10. While the *Bremen* case resulted from admiralty jurisdiction, subsequent cases extended this deference to party choice of forum broadly, even to consumer contracts. See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

“contract page” of a cruise ticket that provided for all disputes to be litigated in the state courts of Florida, even though the ticket was not received until after the consumer had arranged for and paid for the cruise.³⁶

B. *Recognizing Foreign Judgments*

The law on the recognition and enforcement of foreign judgments in the United States is founded on Justice Gray’s 1895 opinion in *Hilton v. Guyot*.³⁷ While the *Hilton* decision rejected recognition of a French judgment against a U.S. defendant on the basis of a lack of reciprocity,³⁸ it is Justice Gray’s application of the doctrine of comity which survives.³⁹ Thus, if “a court of competent jurisdiction, conduct[ed] the trial upon regular proceedings after due citation or voluntary appearance, and under a system of jurisprudence likely to secure an impartial administration of justice,” and there was no “fraud in procuring the judgment,”⁴⁰ then “the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.”⁴¹

While Justice Gray considered himself to be applying international law,⁴² and the decision effectively created a rule of federal common law,⁴³ it developed in the twentieth

³⁶ *Carnival Cruise Lines*, 499 U.S. 585. For a more recent example, see *Starkey v. G Adventures, Inc.*, 796 F.3d 193 (2d Cir. 2015) (holding that a choice of court clause was reasonably communicated to a consumer even though it was available only by clicking on a hyperlink in an email, which led to the full set of terms and conditions).

³⁷ *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁸ *Id.* at 210-28.

³⁹ According to Justice Gray:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Id. at 163-64

⁴⁰ *Hilton*, 159 U.S. at 202.

⁴¹ *Id.* at 203.

⁴² *Id.* at 163 (“International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the ‘law of nations,’ but also questions arising under what is usually called ‘private international law,’ or the ‘conflict of laws,’ and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.”).

⁴³ 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (2d ed. 1996 & Supp. 2015). (“Because it is clear that there is a ‘federal common law,’ even if not a ‘general federal common law,’ it is not accurate to say that the law of the state is to be applied

century primarily through state common law and state statutes. Thus, unlike U.S. law on arbitration,⁴⁴ the concept of a single body of federal law has not prevailed on matters of choice of court and the recognition and enforcement of foreign judgments.⁴⁵ After the landmark 1938 decision in *Erie Railroad v. Tompkins*,⁴⁶ there developed a common law approach to judgments recognition law among the states, as well as a more recent pair of uniform acts created by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission or ULC). Currently, about two-thirds of the states have enacted either the 1962 Uniform Foreign Money-Judgments Recognition Act,⁴⁷ or the 2005 Uniform Foreign-Country Money Judgments Recognition Act,⁴⁸ with the remaining one-third continuing to rely on common law, reflected in sections 481 and 482 of the *Restatement (Third) of Foreign Relations Law*.⁴⁹ Whether it is found in statute or common law, the basic approach is the same. A foreign judgment, that is final and binding in the country where it was rendered,⁵⁰ will be recognized and enforced in a U.S. court, unless it runs afoul of either the list of mandatory grounds for non-recognition⁵¹ or the discretionary grounds for non-recognition⁵² found in both the Restatement and the Uniform Acts.

in all cases except on matters governed by the Constitution or by an Act of Congress.”). For a discussion of the relationship between federal common law and a statute designed to replace and limit an area of federal common law, see *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). For a discussion focused on judgments recognition law as federal common law, see Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 312-18 (1991) (referring to “*Jus Gentium* and Federal Common Law: The Lost Legacy of *Swift v. Tyson*” (italics added)).

⁴⁴ See *supra* Part II.

⁴⁵ For a more detailed discussion of the development of U.S. law on the recognition and enforcement of foreign judgments, and its evolution from federal common law to something different, see RONALD A. BRAND, FEDERAL JUDICIAL CENTER INTERNATIONAL LITIGATION GUIDE: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/\\$file/brandenforce.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf); Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT’L L. & COM. REG. 877 (2015); Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT’L L. (forthcoming 2017), earlier version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670866.

⁴⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁴⁷ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 1962) [hereinafter 1962 RECOGNITION ACT].

⁴⁸ 2005 RECOGNITION ACT, *supra* note 7.

⁴⁹ RESTATEMENT, *supra* note 7, §§ 481-482.

⁵⁰ 2005 RECOGNITION ACT, *supra* note 7, §§ 3(a), 4(a); 1962 RECOGNITION ACT, *supra* note 47, §§ 1(2), 2; RESTATEMENT, *supra* note 7, § 481.

⁵¹ 2005 RECOGNITION ACT, *supra* note 7, § 4(b); 1962 RECOGNITION ACT, *supra* note 47, § 4(a); RESTATEMENT, *supra* note 7, § 482(1).

⁵² 2005 RECOGNITION ACT, *supra* note 7, § 4(c); 1962 RECOGNITION ACT, *supra* note 47, § 4(b); RESTATEMENT, *supra* note 7, § 482(2).

IV. LEVELING THE PLAYING FIELD FOR CONTRACT DRAFTING: THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

A. The Concerns

From the above discussion, we can draw the following conclusions regarding U.S. law that are important to the choice between arbitration and litigation when drafting international commercial contracts:

- (1) Arbitration (including the recognition of arbitration agreements and the recognition and enforcement of arbitral awards) is governed by federal law.
- (2) Federal common law provides the historical foundations of the law for both choice of court agreements,⁵³ and the recognition and enforcement of foreign judgments.⁵⁴
- (3) Nonetheless, particularly on the matter of judgments recognition and enforcement, it has been state law that has most commonly been the source of applicable rules in the latter half of the twentieth century.
- (4) International arbitration is governed largely by the New York Convention,⁵⁵ providing greater global uniformity and broader recognition and enforcement of both agreements to arbitrate and the resulting awards.
- (5) Choice of court agreements and the recognition and enforcement of foreign judgments—when governed largely by state law—provide greater opportunity for divergent rules and, because no global treaty exists, provide significantly reduced certainty of recognition and enforcement of both the agreement and the resulting judgment.
- (6) Unless the balance of other factors significantly favors litigation, arbitration clauses are a much safer option in international commercial contracts than are choice of court agreements.

In other words, the playing field between arbitration and litigation is unbalanced and seriously skewed in favor of arbitration.

⁵³ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

⁵⁴ *Hilton v. Guyot*, 159 U.S. 113 (1895).

⁵⁵ New York Convention, *supra* note 3.

B. *The Opportunity for Balance: The Hague Convention on Choice of Court Agreements*

In 1992, The U.S. State Department proposed to the Hague Conference on Private International Law the negotiation of a multilateral convention on the recognition and enforcement of judgments.⁵⁶ The matter was placed on the agenda of the Hague Conference in October 1996,⁵⁷ resulting in a Preliminary Draft Convention text being produced in October 1999.⁵⁸ By that time, however, it had become clear that many issues were beyond easy resolution, and that the convention being considered was more expansive in scope than anything likely to be achieved. This was most evident after a Diplomatic Conference held in June 2001, when a new text was filled with bracketed (yet-to-be-agreed-upon) language and explanatory footnotes.⁵⁹ The result was a scaled-down effort, focusing on party choice as the only basis of jurisdiction, and resulting in the 2005 Hague Convention on Choice of Court Agreements.⁶⁰

While the United States signed the Hague Convention in January of 2009, it has not yet ratified.⁶¹ With the accession of Mexico in 2007 and ratification by the European Union in 2015, however, the Convention went into effect for Mexico and twenty-seven of the twenty-eight EU Member States on October 1, 2015.⁶²

⁵⁶ Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Secretary General, The Hague Conference on Private Int'l Law (May 5, 1992) (*distributed with Hague Conference document L.c. ON No. 15 (1992)*).

⁵⁷ HAGUE CONFERENCE ON PRIVATE INT'L LAW, FINAL ACT OF THE EIGHTEENTH SESSION WITH THE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN, AND DECISION ON MATTERS PERTAINING TO THE AGENDA OF THE CONFERENCE pt. B.1, 34 I.L.M. 1391, 1405 (19 Oct. 1996).

⁵⁸ *See generally* HAGUE CONFERENCE ON PRIVATE INT'L LAW, INFORMATIONAL NOTE ON THE WORK OF THE INFORMAL MEETINGS HELD SINCE OCTOBER 1999 TO CONSIDER AND DEVELOP DRAFTS ON OUTSTANDING ITEMS, Preliminary Doc. No. 15 (May 15, 2001), https://assets.hcch.net/upload/wop/jdgm_pd15e.pdf (containing the text of the Preliminary Draft Convention).

⁵⁹ HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6 (June 20, 2001), https://assets.hcch.net/upload/wop/jdgm2001draft_e.pdf.

⁶⁰ Hague Convention on Choice of Court Agreements, *supra* note 9; *see generally* *Choice of Court Section*, HCCH, <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> (last visited Oct. 2, 2016) (text of the Convention and documentary history of the Choice of Court Convention project).

⁶¹ *See Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (updated June 2, 2016) [hereinafter *Status Table*].

⁶² *See id.* Denmark is the exception to full effect within the EU. The EU ratification included the following notification:

The European Community declares, in accordance with Article 30 of the Convention on Choice of Court Agreements, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community. For the purpose of this declaration, the term

The Hague Convention contains three basic rules:

- (1) Article 5 provides that a court chosen in an exclusive choice of court agreement shall have exclusive jurisdiction;⁶³
- (2) Article 6 provides that a court not chosen shall defer to the chosen court;⁶⁴ and
- (3) Article 8 provides that the courts of all contracting states shall recognize and enforce judgments from a court chosen in an exclusive choice of court agreement, subject to an explicit list of bases for non-recognition found in Article 9.⁶⁵

In effect, the Hague Convention is the litigation counterpart to the New York Convention. However, because it so far has effect in only 29 states (and not internally among the 27 Member States of the European Union), compared to the 150+ Contracting States for the New York Convention, it is not a functionally equivalent legal instrument at this point. It is, however, worth comparing its provisions to those found in the New York Convention in order to determine the relative comparative impact if and when the Hague Convention draws an effectively comparable body of Contracting States.

V. THE PRIVATE CHOICE: ARBITRATION OR LITIGATION

A. *The Agreement: Comparing the Applicable Rules*

The choice of forum rules contained in the New York Convention are found in Article II, which creates an obligation to recognize and enforce agreements to arbitrate,⁶⁶

"European Community" does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community.

Declaration/Reservation/Notification, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn> (last visited Oct. 2, 2016). The Convention entered into force as to Singapore on October 1, 2016, bringing the number of states party to the Convention to twenty-nine. *Status Table*, *supra* note 61.

⁶³ Hague Convention on Choice of Court Agreements, *supra* note 9, art. 5.

⁶⁴ *Id.* art. 6.

⁶⁵ Hague Convention on Choice of Court Agreements, *supra* note 9, arts. 8-9.

⁶⁶ Article II provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

so long as the agreement concerns “a subject matter capable of settlement by arbitration,”⁶⁷ and the agreement is not otherwise “null and void, inoperative or incapable of being performed.”⁶⁸

The comparable rules of the Hague Convention are contained in Articles 3 through 6.⁶⁹ Article 3(a) defines the applicable exclusive choice of court agreement as an agreement to submit disputes to “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.”⁷⁰ Article 3(b) deems choice of court agreements to be exclusive “unless the parties have expressly provided otherwise.”⁷¹ Article 5(1) provides that a court “of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction . . . unless the agreement is null and void under the law of that State.”⁷² Such a court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State,”⁷³ but such an agreement cannot affect internal rules on subject matter jurisdiction, the value of the claim, or the internal allocation of jurisdiction among the courts of that Contracting State.⁷⁴ Article 6 then provides the accompanying rule for all other courts, obligating courts of a Contracting State not chosen by the parties to “suspend or dismiss proceedings” to which the choice of court agreement applies, unless the agreement is null and void, a party lacked capacity to conclude the agreement, there would be a violation of public policy, the agreement cannot be performed, or the chosen court has declined to hear the case.⁷⁵

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention, *supra* note 3, art. II.

⁶⁷ *Id.* art. II(1).

⁶⁸ *Id.* art. II(3).

⁶⁹ Hague Convention on Choice of Court Agreements, *supra* note 9, arts. 3-6.

⁷⁰ Hague Convention on Choice of Court Agreements, *supra* note 9, art. 3(a).

⁷¹ *Id.* art. 3(b).

⁷² *Id.* art. 5(1).

⁷³ *Id.* art. 5(2).

⁷⁴ *Id.* art. 5(2).

⁷⁵ Hague Convention on Choice of Court Agreements, *supra* note 9, art. 6.

B. Enforcement of the Forum Choice: The Crucial Issues

Any choice of forum agreement, whether selecting arbitration or litigation, must be considered in light of four basic issues:

- (1) **Consent.** Does a choice of forum agreement exist—have the parties effectively consented to the choice of forum?
- (2) **Formal validity.** Is the choice of forum agreement formally valid—does it meet the formal requirements set out in the law?
- (3) **Substantive validity.** Is the choice of forum agreement substantively valid—does it run afoul of prohibitions placed on the parties’ ability to enter the agreement?
- (4) **Scope and exclusivity.** What is the effective scope of the choice of forum agreement—are there limitations due to party intent which circumscribe the scope and effect of the agreement?

Determining the answer to each of these questions requires first that one apply rules of private international law in order to know what law governs each determination, and whether that law allows party choice to adjust the otherwise applicable rule. This requires a four-step process:

- (1) determining the rule of applicable law;
- (2) applying that choice of law rule in order to determine the governing rule of substantive law;
- (3) determining the effect of the substantive law rule; and
- (4) determining whether the substantive law rule may be changed by party agreement.

The following chart catalogues the conflict of laws rules resulting from the application of the New York and Hague Conventions for purposes of considering each of the four issues noted above, which must be considered in selecting the choice of arbitration or litigation.⁷⁶

⁷⁶ The discussion which follows builds on the author’s prior work in RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 19-21, 78-82 (2008), and Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, in LIBER AMICORUM HUBERT BOCKEN 541 (I. Boone, I. Claeys & L. Lavrysen eds., 2009).

	New York Convention	Hague Convention
Consent/Existence	Outside the Convention	Outside the Convention
Formal Validity	Article II (autonomous Convention Rules)	Article 3 (autonomous Convention Rules)
Substantive Validity	Article II(3) (“null and void” determined by application of national law, including rules of applicable law)	Articles 5, 6, and 9 (autonomous Convention Rules for determining applicable national law, including rules of applicable law)
Scope	Interpretation of the clause under applicable national law	Interpretation of the clause under applicable national law

1. Consent to the Choice Forum Agreement

Neither the New York Convention nor the Hague Convention has a rule for determining whether there is in fact an agreement, *i.e.*, whether the parties have consented to dispute resolution in the forum stated. That is as it should be. This is a matter of substantive contract law, and is to be determined by the contract law rules determined to apply in accordance with the relevant choice of law rules. For example, if the U.N. Convention on Contracts for the International Sale of Goods (CISG) is applicable,⁷⁷ then its rules of contract formation will apply. Similarly, if the parties are both from European Union Member States, then the rules of the Rome I Regulation would apply to determine the applicable law—including Article 4, which allows the question to be governed by the law chosen by the parties.⁷⁸

The important point here is, if the applicable law operates to determine that no choice of forum agreement has been formed, then no further analysis is necessary. Both the New York and Hague Conventions apply only when there is an “agreement” to the relevant chosen forum.⁷⁹

2. Formal Validity of the Choice of Forum Agreement

Each of the two Conventions has rules of formal validity. Thus, Article II(1) of the New York Convention requires that there be “an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or

⁷⁷ See United Nations Convention on Contracts for the International Sale of Goods art. 1, Apr. 11, 1980, 1489 U.N.T.S. 58.

⁷⁸ Commission Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 4, 2008 O.J. (L 177) 6, 11.

⁷⁹ See Brand, *supra* note 76, at 541 (the question of which forum, court or arbitral tribunal, determines whether a choice of forum agreement has been formed and is a separate issue).

which may arise between them in respect of a defined legal relationship.”⁸⁰ Article II(2) further elaborates by providing that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁸¹ These requirements have created problems in an age of electronic communication,⁸² but nonetheless continue to exist given the extreme difficulty in amending a treaty to which there are over 150 parties.⁸³

Similar requirements are found in Article 3(a) of the Hague Convention, which defines an “exclusive choice of court agreement” as

an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a 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;⁸⁴

Article 3(c) then requires that

an exclusive choice of court agreement must be concluded or documented –

- i) in writing; or
- ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.⁸⁵

This makes the substantive validity rules of the two Conventions relatively similar. While the Hague Convention applies only to exclusive choice of court agreements, this is replicated in the fact that it is difficult to find a non-exclusive arbitration agreement. Both Conventions require a writing, or equivalent method of rendering the agreement accessible for evidentiary purposes. If these requirements are not met, then the agreement is not formally valid.

⁸⁰ New York convention, *supra* note 3, art. II(1).

⁸¹ *Id.* art. II(2).

⁸² See U.N. Comm’n on Int’l Trade Law, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/61/17 (July 7, 2006). <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>.

⁸³ See United Nations Convention on the Use of Electronic Communications in International Contracts art. 20, U.N. Doc. A/60/17 (July 2005), http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

⁸⁴ Hague Convention on Choice of Court Agreements, *supra* note 9, art. 3(a).

⁸⁵ *Id.* art. 3(c).

3. *Substantive Validity of the Choice of Forum Agreement*

One of the key differences between the New York and Hague Conventions is the insertion of an autonomous choice of law rule for purposes of determining substantive validity, found in articles 5(1), 6(a), and 9(a) of the Hague Convention.⁸⁶ Thus, while both Conventions provide that a court need not honor a choice of forum agreement that is “null and void,” the Hague Convention provides a specific rule regarding what law is to be applied to determine whether an agreement is null or void.⁸⁷ All courts are to apply the law of the state of the chosen forum.⁸⁸ This includes the application of the choice of law rules of that state.⁸⁹

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.⁹⁰

The New York Convention has no such rule on law applicable to the determination of agreement validity, thus leaving the matter to the conflict of laws rules of the forum seised with the matter.⁹¹

4. *Effectiveness of the Choice of Forum Agreement*

The determination of the effect—largely the issue of scope—of a choice of forum agreement is generally factual and not legal. However, to the extent that it is a question of construction of contract language, with the goal of determining the intent of the parties, then contract formation rules for determining party intent are relevant. In that regard, the same concerns about the applicable law of contract formation which govern the question of consent to (existence of) the agreement will apply. While the doctrine of separability determines that a choice of forum agreement must be considered separately from the core contract for purposes of measuring consent, formal validity, substantive validity, and effect/scope, that does not change the applicable law.

There is a line of cases that considers specific words commonly used in choice of forum agreements in order to determine scope, and they are worth some mention here. The earlier cases in that line tended to make stark distinctions based on word choices,

⁸⁶ *Id.* arts. 5(1), 6(a), 9(a).

⁸⁷ *Id.*

⁸⁸ Hague Convention on Choice of Court Agreements, *supra* note 9, art. 3(a).

⁸⁹ TREVOR HARTLEY & MASATO DOGAUCHI, HAGUE CONFERENCE ON PRIVATE INT’L LAW, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT ¶ 125 (2007), <https://assets.hcch.net/upload/exp137final.pdf>.

⁹⁰ *Id.*

⁹¹ For further elaboration on the substantive validity issue, and on how it must not be confused with the rule of consent/existence, see BRAND & HERRUP, *supra* note 76, at 20.

finding different intent behind phrases such as “arising under” and “arising out of” the agreement.⁹² More recent cases, however, have eschewed such distinctions on the assumption that

there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.⁹³

The second rationale for such an approach is one of predictability:

The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.⁹⁴

The principal lesson of these cases seems to be that there is now a general presumption of broad scope of choice of forum agreements, and that any desire for limitations on scope should be clearly expressed.

⁹² See, e.g., *Heyman v. Darwins Ltd* [1942] AC 356 (HL) 399 (appeal taken from Eng.) (“arising under” has a narrower meaning than “arising out of”). See also *Overseas Union Insurance Ltd. v. AA Mutual International Ins. Co. Ltd.* [1988] 2 Lloyd’s Rep. 63 (QB) 67 (Evans, J.) (Eng.) (finding a broad distinction between agreements covering “only those disputes which may arise regarding the rights and obligations which are created by the contract itself” and those covering “some wider class or classes of disputes”).

⁹³ *Premium Nafta Products, Ltd. v. Fili Shipping Co. Ltd.*, [2007] UKHL 40, [7] (appeal taken from Eng.).

⁹⁴ *Id.* at [26] (Lord Hope of Craighead). Similar approaches have been taken in the United States, Australia, and Germany. See *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986) (in absence of express exclusion of a particular issue, presumption favored its inclusion); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (clause providing that “all disputes, controversies or differences which may arise . . . out of or in relation to” the contract included claims of violation of U.S. antitrust law, even where arbitration was to be in Japan, by Japanese arbitrators); *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.*, [2006] FCAFC 192 (20 December 2006) ¶ 165 (Austl.) (finding a commercial presumption that parties do not intend to have disputes from their transaction heard in two places, particularly in an international market); *Bundesgerichtshof [BGH] [Federal Court of Justice]* Feb. 27, 1970, 6 ARB. INT’L 79, 1990 (Ger.) (“There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.”).

C. *The Decision: Recognition and Enforcement of Arbitral Awards and Judgments*

While the basic rules of the Hague Convention are very similar to existing U.S. law on the recognition and enforcement of judgments (now found in the 1962 and 2005 Uniform Acts and the Restatement),⁹⁵ current law cannot guarantee the reciprocal effect that will result in the recognition and enforcement of U.S. judgments in other countries. That would be a significant benefit of the Convention for U.S. parties engaging in international commercial contracts.

If the Hague Convention should become widely ratified, then those who draft international commercial contracts will need to consider the innate benefits and disadvantages of each of arbitration and litigation, as well as any differences built in to the system of recognition and enforcement found in the New York and Hague Conventions. That makes it worthwhile at this point to consider the differences on this matter between the two Conventions.

In the New York Convention, Article III requires that each “Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”⁹⁶ The counterpart in the Hague Convention is Article 8, which requires that a “judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States.”⁹⁷

The bases for non-recognition of an arbitration award under the New York Convention are found in Article V, which allows a court to refuse recognition upon a finding of lack of party capacity; of lack of proper notice; of a decision outside the scope of the agreement to arbitrate; of improper arbitration procedure; that an award is not yet binding, or has been set aside; that the subject matter “is not capable of settlement by arbitration;” or that recognition or enforcement would be contrary to the public policy of the recognizing state.⁹⁸ The similar limitations on recognition of a judgment under the Hague Convention are found in its Article 9, which provides for non-recognition if the agreement was null and void; a party lacked capacity to enter the agreement; there was a lack of proper notice; the judgment was obtained by fraud; recognition would be “manifestly incompatible with public policy;” or there exists either an inconsistent local judgment or an inconsistent earlier judgment from another state.⁹⁹

⁹⁵ See 2005 RECOGNITION ACT, *supra* note 7; 1962 RECOGNITION ACT, *supra* note 47; RESTATEMENT, *supra* note 7.

⁹⁶ New York Convention, *supra* note 3, art. III.

⁹⁷ Hague Convention, *supra* note 9, art. 8.

⁹⁸ New York Convention, *supra* note 3, art. V.

⁹⁹ Hague Convention, *supra* note 9, art. 9.

These differences are compared in the following chart:

New York Convention	Hague Convention
<u>Rule (Article III):</u>	<u>Rule (Article 8):</u>
Arbitral awards will be recognized and enforced	Judgments will be recognized and enforced
<u>Exceptions (Article V):</u>	<u>Exceptions (Article 9):</u>
<ul style="list-style-type: none"> • lack of party capacity • lack of proper notice • outside the scope of the agreement to arbitrate • improper arbitration procedure • award is not yet binding, or has been set aside • subject matter “is not capable of settlement by arbitration” • contrary to public policy 	<ul style="list-style-type: none"> • agreement was “null and void” • lack of party capacity • lack of proper notice • judgment “obtained by fraud” • manifestly incompatible with public policy • inconsistent with local judgment • inconsistent with earlier judgment

Each Convention includes a list reasonably comparable to the national law of states regarding bases for non-recognition of foreign judgments. The comparison provides no significant differences, with the public policy ground for non-recognition contributing the safeguard in each list.

VI. THE PUBLIC CHOICE: DECLARATIONS IN THE PROCESS OF TREATY RATIFICATION

Each of the New York and Hague Conventions also provides Contracting State choices to be made at the time of ratification. The following chart demonstrates those choices:

New York Convention Declarations:¹	Hague Convention Declarations:²
Article I(3): “any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”	<p>Article 19: refusal to determine disputes unrelated to the forum</p> <p>Article 20: refusal to recognize or enforce judgments on domestic matters</p> <p>Article 21: declaration of reciprocal exclusion from scope</p>

¹ New York Convention, *supra* note 3, art. I(3).

² Hague Convention, *supra* note 9, arts. 19-21.

Here, the choices available are very different in each Convention, but those choices reflect the special attributes of each type of dispute resolution. In the New York Convention, only two declarations are available.

VII. THE TROUBLING POLITICAL QUESTION: MISGUIDED FEDERALISM AND THE HAGUE CONVENTION

Both choice of court and the recognition and enforcement of foreign judgments have received a great deal of attention in legal circles in the early twenty-first century. While the external rules were being negotiated in the form of a treaty in The Hague, both the American Law Institute (ALI) and the Uniform Law Commissioners were busy dealing with internal rules in the United States. In 2005, the same year in which the Hague Convention on Choice of Court Agreements was completed, the ULC completed its revision of the 1962 Uniform Act, the Uniform Foreign-Country Money Judgments Recognition Act (2005 Recognition Act).¹ Also in 2005, the ALI completed its proposed federal statute on the recognition and enforcement of judgments.² The ALI project called for the return to federalization of the law of foreign judgments recognition. In reaching that result, the ALI specifically found that (1) the federal government has the authority “as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the power to regulate commerce with foreign nations,”³ to govern the recognition and enforcement of foreign judgments, and (2) “a coherent federal statute is the best solution” for addressing “a national problem with a national solution.”⁴

While the ALI Federal Statute and the ULC’s 2005 Recognition Act contained very similar substantive rules, they presented two very different views of what the source of judgments recognition law should be in the United States. Federal legislation under the ALI approach would be state statutes under the ULC approach. This variance in approach was accentuated by the ULC’s 2012 draft of a Uniform Choice of Court Agreements Convention Implementation Act.⁵

The different approaches to the source of the law were taken up in the State Department, when Harold Koh, then the Legal Adviser to the Secretary of State, convened an informal working group under the auspices of the American Society of International Law to consider how the United States might implement the Hague Convention on Choice of Court Agreements. The group included representatives from both the ALI and the ULC. The working group discussed whether consensus could be

¹ 2005 RECOGNITION ACT, *supra* note 7.

² AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

³ *Id.* at 3.

⁴ *Id.* at 6.

⁵ UNIF. CHOICE OF COURT AGREEMENTS CONVENTION IMPLEMENTATION ACT (UNIF. LAW COMM’N 2012), http://www.uniformlaws.org/shared/docs/choice_of_court/2012am_ccaia_approvedtext.pdf.

reached on a form of implementation referred to as “cooperative federalism,” in which a uniform act for the states would be combined with federal legislation.⁶

When the informal working group failed to resolve the differences in approach, the Legal Adviser prepared a memorandum in which he concluded that implementation of the Convention in a manner similar to that used for the New York Convention in the Federal Arbitration Act presented “the most promising way forward.”⁷ The process of U.S. ratification and implementation of the Hague Convention has moved no further since that memorandum was issued in January of 2013. It has remained clear that any effort to seek implementation through federal statute alone would be met with ULC efforts to prevent Senate advice and consent.⁸

This failure of the United States to move forward with the Hague Convention has a number of important implications, both at home and abroad, and in regard to both governmental and private party decision-making. They include the following:

- (1) On the national level, the law on choice of court remains mostly a result of federal case law, while the law on the recognition and enforcement of foreign judgments is generally governed by state law. This separates the two parts of the Hague Convention in a way that presents both non-uniformity and potential confusion.

⁶ The author was a member of the informal working group. The position of the Legal Adviser following these meetings is recorded in HAROLD HONGJU KOH, U.S. DEP’T OF STATE, MEMORANDUM OF THE LEGAL ADVISER REGARDING UNITED STATES IMPLEMENTATION OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (COCA) 3-4 (2013), <http://www.state.gov/documents/organization/206865.pdf>.

⁷ *Id.*

⁸ One specialized area of judgments recognition law has been the source of both state and federal legislation. In 2008, New York enacted its Libel Terrorism Protection Act, in response to concerns regarding foreign libel judgments, particularly from the United Kingdom. Libel Terrorism Protection Act, 2008 N.Y. Laws 66. *See generally* Marissa Gerny, Note, *The SPEECH Act Defends the First Amendment: A Visible and Targeted Response to Libel Tourism*, 36 SETON HALL LEGIS. J. 409, 410-13, 432-33 (2012) (describing background of New York’s Libel Terrorism Protection Act). That Act added a paragraph (d) to the rules on personal jurisdiction found in N.Y. C.P.L.R. § 302 to specifically provide for jurisdiction “to the fullest extent permitted by the United States constitution,” in order to allow parties otherwise subject to jurisdiction in New York to bring an action for a negative declaratory judgment to prevent the recognition or enforcement of a foreign defamation judgment. N.Y. C.P.L.R. § 302(d) (McKinney 2009). The New York statute was followed on the federal level when, on August 10, 2010, President Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act., Pub. L. No. 111-223, 124 Stat. 2480 (2010) (codified at 28 U.S.C. §§ 4101-4105 (2016)). The SPEECH Act similarly prevents recognition and enforcement of foreign libel judgments and allows preemptive declaratory judgments against recognition. Section 4102(a)(1) provides that

a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that-

(A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located

28 U.S.C. § 4102(a)(1) (2016).

- (2) Again on the national level, the law of recognition and enforcement of judgments, while largely found in two Uniform Acts and the Restatement, is subject to important differences from state-to-state, creating unpredictability, unnecessary forum shopping, and sometimes inequitable results.⁹
- (3) On the international front, a focus on judgments recognition has continued at the Hague Conference on Private International Law, where a special commission completed a preliminary draft of a convention on the recognition and enforcement of judgments in civil and commercial matters in June 2016.¹⁰
- (4) Also on the international front, as discussed above,¹¹ the 2005 Hague Convention has gone into effect between the European Union, Mexico, and Singapore. This is likely to draw additional ratifications,¹² leading to broader effect for the Convention—without the United States.

Each of these implications of the current status of choice of court and judgments recognition law has significant impact on private party choice between arbitration and litigation. So long as the legal framework for both choice of court and the recognition of foreign judgments remains less predictable and more diffused than does the legal framework for the recognition and enforcement of arbitration agreements and foreign arbitral awards, parties to international commercial contracts will continue to be drawn to arbitration over litigation. As one commentator has explained:

It's probably only a matter of time before the rest of the world lines up for easy reciprocal enforcement with the nations of Europe. Once that happens, a court judgment from London will be more valuable than one from New York. For if clients from Asia or Latin America can sue anywhere, which would they rather have in their back pockets? Deal lawyers drafting the dispute-resolution clause in international contracts are sure to take note. And U.S. litigators, having spent the past decade watching their global

⁹ See Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT'L L. & COM. REG. 877 (2015).

¹⁰ See HAGUE CONFERENCE ON PRIVATE INT'L LAW, SPECIAL COMM'N ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, 2016 PRELIMINARY DRAFT CONVENTION (2016), <https://assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf>.

¹¹ See *supra* Section IV.B.

¹² Ukraine has signed, but had not ratified as of the time this was written. *Status Table*, *supra* note 61.

business flow to arbitration, may be chagrined to see more of it diverted to the Royal Courts of Justice.¹³

Moreover, implementation of the Choice of Court Convention as contemplated under the Uniform Choice of Court Agreements Convention Implementation Act could well result in the inclusion of arbitration clauses in an even higher percentage of international commercial contracts than is now the case when those contracts involve one party from the United States. As noted above, the balance of the law clearly weighs in favor of arbitration at the current time, and the 2005 Hague Convention is intended in part to change that balance. The Uniform Act approach to implementation would, however, result in any U.S. party drafting a choice of court clause in an international contract being required to consider three separate—and not entirely uniform—texts: the Convention, the federal implementing statute, and the Uniform Act as enacted in the relevant state. Given that the ULC insisted on changing some of the language agreed upon in The Hague with our treaty partners, there is a serious and significant risk of non-uniform interpretation, and a near certainty of increased litigation costs resulting just from consideration of the governing texts. One might even be excused for suggesting that including a choice of court clause in an international commercial contract under such circumstances would border on malpractice given the increased uncertainty of results for the client.

VIII. CONCLUSION

The current status of the law creates clear incentives for including arbitration clauses rather than choice of court clauses in international commercial contracts to which one party is from the United States. That imbalance could be reduced dramatically through U.S. ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements. To date, no constituency has come out against ratification and implementation of the Convention. Wide ratification on a global basis would also help to prevent the current difference between a liberal reception of foreign judgments in the United States and a less hospitable reception of U.S. judgments in many countries.

While the New York Convention and the Hague Convention have some differences in regard to rules on formal and substantive validity of the relevant choice of forum agreements to which they are addressed, they provide reasonably similar regimes for respecting party autonomy by encouraging the recognition and enforcement of both the agreement choosing the forum and the resulting decision rendered in that forum.

As with the New York Convention, the Hague Convention requires each Contracting State to make certain political decisions at the time of ratification and implementation in determining whether or not to exercise the relevant declarations allowed under each Convention. While the available declarations differ between the two Conventions, in neither case do they change the basic structure and operation of the Convention. They are intended to be limited in scope and effect, and it is likely that their

¹³ Michael D. Goldhaber, *Ideology Blocks Arbitration Treaty*, NAT'L L.J. (Jul. 6, 2015), <http://www.nationallawjournal.com/id=1202731197599?keywords=goldhaber&publication=National+Law+Journal>.

use will be consistent with the intended limitations.

The United States runs the risk of being left behind in the world of judgments recognition if it does not move to ratification and implementation of the Hague Convention in the relatively near term. Already, countries like Singapore and the United Arab Emirates have begun to create commercial courts designed to become magnets for international commercial disputes.¹⁴ Whether they will be able to eclipse traditional judicial dispute resolution centers like London and New York remains to be seen. Regardless of their impact, it seems certain that, if a significant number of states become parties to the Hague Convention, those who draft international commercial contracts and prefer litigation over arbitration are likely to be inclined to place that litigation in London rather than New York or any other U.S. location.

The current political climate in the United States has had many negative results. It would be unfortunate if one more result was to prevent effective ratification and federal implementation of the Hague Convention. Nonetheless, at this point it appears quite likely that political differences will prevent the availability of effective private choice in selecting among dispute resolution forums for international commercial contracts.

¹⁴ See DUBAI INT'L FIN. CTR. CTS., <http://difccourts.ae/> (last visited Oct. 5, 2016); SING. INT'L COM. CTS., <http://www.sicc.gov.sg/> (last visited Oct. 5, 2016).