The Implementation of the 2005 Hague Convention on Choice of Court Agreements in the European Union: An Analysis of its Relationship with the Brussels I-bis Regulation

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A. Introduction

On 1 October 2015, the 2005 Hague Convention on Choice of Court Agreements[1] (hereinafter "Convention") entered into force.[2] Accordingly, on that date, the Convention's current contracting states, Mexico and all member states of the European

1 Hague Convention of 30/6/2005 on Choice of Court Agreements, www.hcch.net/index_en.php?act=conventions.text&cid=98 (9/9/2015).

2 Mexico acceded to the Convention on 26/9/2007 and, on 11/6/2015 the European Union deposited its instrument of approval. See Hague Conference on Private International Law, Status Table, www.hcch.net/index_en.php?act=conventions.status&cid=98 (9/9/2015). Pursuant to Article 31(1) of the Convention, the EU's approval triggered the Convention's entry into force on 1/10/2015. Hague Convention, Article 31(1).

Union (except Denmark),[3] became bound by its rules. The Convention establishes a uniform set of rules to apply to exclusive choice of court agreements in international civil and commercial matters and to the recognition and enforcement of judgments rendered by chosen courts. A clear benefit for international contracting parties, the Convention's entry into force strengthens party autonomy by enhancing the effectiveness of choice of court agreements in international commercial transactions, increasing legal certainty and predictability in the litigation of disputes, and, as a result, providing parties a practical alternative to arbitration.

For reasons of flexibility, finality, and confidentiality, but primarily due to the international enforceability of arbitral awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"),[4] international commercial parties tend to favor arbitration over litigation.[5] Indeed, parties that litigate instead of arbitrate generally face greater risks of legal uncertainty in the resolution of their disputes, for instance, uncertainty as to which national court may hear their case or whether a judgment rendered by the forum court can be enforced abroad, which are likely to influence business decisions to engage in cross-border trade.[6] Negotiating a choice of court agreement allows parties to reduce these uncertainties by agreeing in advance where they will litigate their disputes.[7]

3 See Hague Convention, Article 29, authorizing a "Regional Economic Integration Organization" to "sign, accept, approve or accede" to the Convention; Hague Convention, Article 30, stating that upon declaration by the REIO, Member States of the REIO may be bound by virtue of the REIO's approval; Council Decision 2014/887/EU of 4/12/2014 on the approval, on behalf of the European Union, of the Hague Convention of 30/6/2005 on Choice of Court Agreements, OJ L 353 of 10/12/2014, p. 5. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application, OJ C 326 of 26/10/2012, p. 1.

4 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10/6/1958, 330 U.N.T.S. 3. Currently, there are 156 contracting parties to the New York Convention. See New York Convention, List of Contracting States, www.newyorkconvention.org/contracting-states/list-of-contracting-states (9/9/2015).

5 *Blackaby/Partasides/Redfern/Hunter*, Redfern and Hunter on International Arbitration, 5th ed. 2009, pp. 31-34; see also *Lipe/Tyler*, The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases, Hous. J. Int'l. L. 33 (2010), p. 4 et seq., discussing arbitration's "principal virtues" of neutrality and enforceability.

6 See, e.g., Commission staff working document accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, SEC(2008) 2389 of 5/9/2008 (hereinafter "Commission staff working document"), p. 6, referencing a survey conducted by the International Chamber of Commerce in which "41 % of the companies surveyed indicated that a significant business decision of their company had at some point been determined by uncertainty regarding the court that would resolve disputes or the law that would apply to the contract."

7 See *Hartley*, Choice-of-Court Agreements Under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention, 2013, pp. 4-6, discussing the basic elements of a choice of court agreement.

However, while the autonomy of parties to consent to arbitration is widely respected thanks to the New York Convention, "[p]arty autonomy in choice of court is a more recent development."[8] Even today, while a system of uniform rules concerning choice of court agreements is in place in the EU,[9] there are very few bilateral agreements and, prior to the Convention's entry into force, no prospect for a multilateral treaty in this area of law between the world's major economic players.[10] Lacking an applicable global framework, like the New York Convention, to ensure that a choice of court agreement will be honored and that any resulting judgment will be recognized or enforced in foreign courts, it is understandable why arbitration has been described as having a "monopoly" in the resolution of international commercial disputes.[11]

Since it's adoption in 2005, signature and ratification of the Convention has been slow, with the United States and Singapore as the Convention's only other signatory states.[12] While commercial parties and legal practitioners eagerly await further ratification of the Convention, its rules are now a concrete part of the legal landscape in the EU and, as such, an important tool for commercial parties. However, in order to realize the benefits and protections of the Convention, parties not only must understand the Convention's purpose, scope, and fundamental rules, but also how it interacts with EU legislation on choice of court agreements, the Brussels I-bis Regulation.

Intended to assist parties in navigating the relevant law applicable in the EU concerning choice of court agreements, first, this paper analyzes the fundamental rules of the Convention, second, the pertinent rules of the Brussels I-bis Regulation, and, finally, the relationship between these rules. In addition, in order to highlight the importance of the Convention and potential obstacles to its expansion, this paper briefly discusses the ongoing struggle towards the Convention's ratification in the US.

8 *Brand*, Arbitration or Litigation?, Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements, 2009, http://ssrn.com/abstract=1397646 (9/9/2015), p. 10, noting that only in 1972 did the US uphold forum selection clauses as prima facie valid. See *M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), pp. 13-15, holding such clauses are enforceable unless the resisting party "clearly show[s] enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," and recognizing that the ability of parties to negotiate a forum selection clause was "an indispensible element in international trade, commerce, and contracting."

9 See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12/12/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 of 20/12/2012, p. 1 (hereinafter "Brussels I-bis Regulation").

10 Commission staff working document, (fn. 6), p. 4.

11 *Lipe/Tyler*, (fn. 5), p. 2.

12 See Status Table, (fn. 2). The United States signed the Convention on 19/1/2009 and, most recently, Singapore signed the Convention on 25/3/2015.

B. 2005 Hague Convention of Choice of Court Agreements

I. Purpose of the Convention

The Convention's purpose is three-fold. First, its primary purpose is "validating party autonomy."[13] To that end, the Convention is a useful "contract drafting tool" that provides parties control and certainty in planning international commercial contracts.[14] For example, when a dispute concerning an international contract arises, courts in multiple states may have jurisdiction to decide it, inviting uncertainty as to where a plaintiff will file a lawsuit and whether the defendant has the ability to frustrate the proceedings in response.[15] Parties may attempt to reduce this uncertainty by agreeing in advance where they will litigate future disputes. Indeed, by drafting a clause that falls under the Convention, the Convention ensures parties that, at least in the courts of contracting states, their choice of court will be respected.

Second, the Convention aims to create a dispute resolution mechanism in the area of litigation parallel to the New York Convention in the area of arbitration.[16] Subject to certain narrow exceptions, where parties include an arbitration clause in their contract, the New York Convention guarantees that their dispute will be submitted to arbitration as agreed and that an award rendered by a tribunal in one contracting state will be recognized and enforced in another contracting state.[17] Depending on certain factors, however, "such as the legal culture (trust in arbitration as opposed to courts), contractual bargaining power and perception of costs (court costs versus arbitration costs),"[18] parties may view litigation a more appropriate mechanism to resolve their dispute.[19] Though where parties agree to litigate their dispute in a certain forum, diverging national laws may bring uncertainty as to whether the chosen court is obliged to accept jurisdiction, or whether a judgment rendered by the chosen court will be recognized or enforced in another country.[20] Through the implementation of uniform rules that ensure the effectiveness of forum selection clauses and the recognition and

13 *Teitz*, The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, Am. J. Comp. L. 53 (2006), p. 547.
14 Ibid., p. 556.
15 *Talpis/Krnjevic*, The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse, Sw. J. L. & Trade Am. 13 (2006), p. 5.
16 *Hartley/Dogauchi*, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, www.hcch.net/upload/expl37final.pdf (9/9/2015), p. 31, para. 1 (hereinafter "Explanatory Report"); see also *Teitz*, (fn. 13), p. 548.
17 New York Convention, Articles II, III, and V.
18 Commission staff working document, (fn. 6), p. 7.
19 Parties may also opt for litigation due to the availability in court of the option for appeal, comprehensive rules of evidence, and broader discovery. See Hague Conference (prepared by *Haines*), Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text, Prel. Doc. No 18 (Feb. 2002), www.hcch.net/upload/wop/gen_pd18e.pdf (9/9/2015), fn. 4.
20 For example, "companies often do not sue in the United States when assets are elsewhere because they fear the uncertainty of subsequent enforcement of a United States judgment overseas." *Teitz*, (fn. 13), p. 548.

enforcement of any resulting judgments, the Convention seeks to reduce this uncertainty, "leveling the playing field"[21] between arbitration and litigation.

Finally, the Convention aims to "promote international trade and investment."[22] As the Commission noted, the ability to "ensure […] legal predictability in the event of a dispute" is an "important element in the risk assessment for companies when engaging in international trade."[23] Indeed, the risk of exposure to litigation in multiple forums and inability to predict with certainty into which court one might be hailed increase the prospective costs of doing business. By including a choice of court agreement in their contract parties can predict which court will resolve potential disputes, thereby avoiding the time and expenses associated with "duplicative proceedings" and "disputes over jurisdiction."[24] A global framework of uniform rules guaranteeing the enforcement of such agreements and any resulting judgments should increase legal predictability on a broader scale, encouraging parties to contract with foreigners or choose foreign courts and, in turn, stimulating international trade.

II. Scope of the Convention

To take advantage of the Convention, parties must consider two threshold issues: 1. the timing of their choice of court agreement; and 2. whether their agreement is of the type governed by the Convention.[25] Failing to do so, parties may encounter unexpected obstacles in the resolution of their disputes.

1. Temporal scope

Pursuant to Article 16, the "Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court" and, furthermore, "shall not apply to proceedings instituted before its entry into force for the State of the court seised."[26] Thus, if the country of the chosen court has not acceded to the Convention at the time the parties execute their agreement, the national law of the chosen court determines whether the jurisdiction agreement will be respected. Likewise, if a party requests the court of a country that has not acceded to the Convention (perhaps a country where the debtor maintains significant assets) to enforce

21 *Brand*, (fn. 8), p. 18; but see *Garnett*, The Hague Choice of Court Convention Magnum Opus or Much Ado About Nothing?, J. Pvt. Intl. L. 5 (2009), p. 173, arguing that, given the considerable differences in the rules of the Convention and the New York Convention and the inherent advantages of arbitration, "any suggestion that the Hague Convention will lead to the displacement of international arbitration by litigation seems far fetched."

22 Hague Convention, Preamble.

23 Explanatory Memorandum to the Proposal for a Council Decision on the Approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, COM (2014) 46 final of 30/1/2014, p. 3 (hereinafter "Explanatory Memorandum on the approval of the Convention").

24 *Talpis/Krnjevic*, (fn. 15), p. 6.

25 See *Lipe/Tyler*, (fn. 5), pp. 8-9, 13.

26 Hague Convention, Articles 16(1) and (2).

a judgment rendered by the chosen court, the requested court's national law will determine whether the requested court is obligated to enforce the judgment.[27] In either situation, neither the enforcement of the jurisdiction agreement nor the enforcement of a judgment is guaranteed.

2. Substantive scope

The Convention applies to a choice of court agreement when the following three elements are present: the case is "international"; the agreement is "exclusive"; and the agreement was "concluded in a civil or commercial matter."[28]

a) International cases

The Convention defines an "international" case differently depending upon whether its jurisdiction rules or recognition and enforcement rules are invoked. For purposes of jurisdiction, the case is "international" if the parties to the agreement are resident in different states or if an element of the dispute is connected to a state other than that of the court seised.[29] Simply put, the Convention does not apply to "wholly domestic" situations, where the only foreign element of the case is the choice of a foreign court.[30] With regards to the recognition and enforcement rules of the Convention, the case is "international" if a party requests a court in a contracting state to recognize and enforce a foreign judgment, even if that judgment was rendered in a non-international case in the sense of Article 1(2).[31]

b) Exclusive choice of court agreements

Determining whether the Convention governs a particular choice of court agreement requires consideration of two separate issues, the "existence" of an agreement between the parties and the "effectiveness" of that agreement, and with regards to each issue, consideration of the applicable law.[32] Whether an agreement, or mutual consent, exists between the parties is an issue "governed by the law of the forum seised with the case, including its relevant rules on conflict of laws."[33] However, whether an agreement is

27 See *Lipe/Tyler*, (fn. 5), pp. 9-11, providing three hypotheticals that highlight application of Article 16 and the importance of timing.
28 Hague Convention, Article 1(1).
29 Hague Convention, Article 1(2); Explanatory Report, (fn. 16), p. 33, para. 11.
30 Ibid.
31 Hague Convention, Article 1(3); Explanatory Report, (fn. 16), p. 33, para. 11. Notably, Article 20 of the Convention allows a contracting state to declare that its courts may refuse to recognize or enforce a judgment given by a court of another contracting state, if the case is "wholly domestic" to the state of the requested court.
32 *Brand*, Consent, Validity, and Choice of Forum in International Contracts, in: Boone/Claeys/Lavrysen (eds.), Liber Amicorum Hubert Bocken, 2009, pp. 544 and 549 et seq.
33 Ibid., p. 551.

effective and, therefore, triggers the application of the Convention, requires attention to the Convention's rules.

First, to be effective the agreement must be valid.[34] Namely, it must meet the formal validity requirements of Article 3(c) of the Convention: it must be "in writing" or in a means "usable for subsequent reference."[35] Moreover, while the Convention does not include uniform rules of substantive validity,[36] it provides that the agreement must be substantively valid in accordance with the national law of the chosen court.[37]

Second, an effective choice of court agreement must be exclusive. Specifically, it must designate the courts (or one or more specific courts) of a contracting state of the Convention "to the exclusion of the jurisdiction of any other courts."[38] Where a choice of court agreement designates the court or courts of a contracting state, it is presumed exclusive.[39] However, where the parties intend their choice of court to be non-exclusive, they must express this in their agreement.[40] Notably, while most US courts are not in favor of a similar presumption,[41] the same presumption indeed exists under EU law.[42]

c) Civil and commercial matters

Finally, as a general rule, the Convention applies to exclusive choice of court agreements concluded in civil or commercial matters.[43] However, it does not apply to jurisdiction agreements included in consumer contracts and employment contracts[44] or

34 In evaluating the validity of a jurisdiction agreement, a choice of court clause included in a broader contract "shall be treated as an agreement independent of the other terms of the contract." Hague Convention, Article 3(d).

35 Hague Convention, Article 3(c); see also *Talpis/Krnjevic*, (fn. 15), p. 16: "Article 3(c)'s purpose is to unambiguously establish that choice of court agreements can be validly concluded by electronic communications […] provided the data can be retrieved for future reference."

36 See *Teitz*, (fn. 13), p. 552, stating that differences among the drafters' legal systems resulted in failed attempts to harmonize the substantive contract law of the negotiating states on the issue of substantive validity.

37 Hague Convention, Article 5(1), 6(a), and 9(a).

38 Hague Convention, Article 3(a).

39 Hague Convention, Article 3(b). Accordingly parties are not required to specifically state that their agreement is "exclusive". Examples of exclusive agreements falling within the scope of the Convention include the following: "The courts of State X shall have jurisdiction to hear proceedings under this contract" or "Proceedings under this contract shall be brought before the courts of State X." Explanatory Report, (fn. 16), p. 53, para. 108.

40 In addition to incorporating the language "non-exclusive jurisdiction" into the clause, permissive language such as "may" or "shall not preclude" also signals a non-exclusive choice of court agreement. Explanatory Report, (fn. 16), p. 53, para. 109.

41 *Lipe/Tyler*, (fn. 5), p. 13 et seq., citing *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494 (10th Cir. 2002), p. 496, wherein a US federal court held a choice of court clause to be permissive rather than exclusive, where the clause designated a specific court, but failed to include "mandatory or obligatory language", such as terms like "exclusive", "sole", or "only".

42 See Brussels I-bis Regulation, Article 25(1).

43 Hague Convention, Article 1(1).

44 Hague Convention, Article 2(1).

to matters specifically excluded under Article 2(2).[45] In addition, where a contracting state has a "strong interest" in precluding the application of the Convention to a specific matter, Article 21 allows the state to declare that, with regards to that matter, its courts will not apply the Convention.[46] Instead, the contracting state's internal jurisdiction rules will apply.

While Article 21(1) requires that a declaration is "no broader than necessary and that the specific matter excluded is clearly and precisely defined",[47] there is an understandable concern that, if each contracting state excludes by declaration matters upon which a wide range of international commercial disputes are based, the Convention's utility may be reduced in favor of protecting national interests.[48] However, as several commentators have noted, the reciprocity of the declarations mandated by Article 21(2) may in fact reduce the incentive to make multiple declarations.[49] Not only will the declaration apply in the declaring state, but also in the courts of other contracting states, allowing the latter to ignore certain jurisdiction agreements designating the courts of the declaring state and to refuse to enforce judgments from the declaring state concerning the excluded matter.[50]

IV. Fundamental rules of the Convention

Where the Convention governs an exclusive choice of court agreement, the following three fundamental rules apply to proceedings arising under that agreement: 1. the chosen court must hear the case;[51] 2. non-chosen courts must decline to hear the case;[52] and 3. a judgment rendered by the chosen court must be recognized and enforced in the courts of other contracting states, unless an exception applies.[53]

The key provisions concerning these rules, namely the "core of the Convention",[54] are discussed below.

45 See Hague Convention, Articles (2)(a)-(p). As noted by one author, the matters excluded under these subsections generally include "matters for which national laws often claim exclusive jurisdiction for local courts" and "matters often subject to existing international legal regimes or ancillary to the main thrust of the Convention." *Brand*, (fn. 8), p. 8.

46 Hague Convention, Article 21(1).

47 Hague Convention, Article 21(1).

48 See *Garnett*, (fn. 21), pp. 176 and 179 et seq.; see also *Talpis/Krnjevic*, (fn. 15), p. 34, arguing Article 21, as well as Articles 11 and 22, allow "too much room for domestic policies and domestic law which limit the Convention's ability to attain its objective of uniformity of treatment for exclusive choice of court agreements."

49 *Teitz*, (fn. 13), p. 553; *Brand*, (fn. 8), p. 18; *Hartley*, (fn. 7), p. 86.

50 Explanatory Report, (fn. 16), p. 83, para. 238; see also *Hartley*, (fn. 7), p. 86.

51 Hague Convention, Article 5(1).

52 Hague Convention, Article 6.

53 Hague Convention, Articles 8(1) and 9.

54 Explanatory Report, (fn. 16), p. 31, para. 8.

1. The chosen court must hear the case

Article 5(1) of the Convention requires the court of a contracting state designated in an exclusive choice of court agreement to accept "jurisdiction to decide a dispute to which the agreement applies."[55] Unless the chosen court determines, in accordance with its own law, that the agreement is substantively null and void, it must hear the case.[56] To that end, the chosen court has no discretion to decline to hear the case "on the ground that the dispute should be decided in a court of another State", either on the basis of *forum non conveniens* or lis pendens.[57] The general rule of Article 5(1), however, is subject to two important limitations.

First, even if parties agree to submit their disputes to a certain court, the procedural rules of the chosen court still apply, including rules on subject matter jurisdiction, statute of limitations, sovereign immunity, and the allocation of jurisdiction among courts.[58] Thus, a chosen court may decline a case if, under its own rules of procedure, it has no subject matter jurisdiction to decide that type of dispute.[59] Moreover, a chosen court may determine, in accordance with its own transfer rules, to transfer the case to a different court within its state, even if the latter court was not designated in the agreement.[60]

Second, while the Convention respects parties' choice to litigate their disputes in a neutral forum, it recognizes that the law of certain jurisdictions does not. Thus, Article 19 of the Convention allows a contracting state to declare that its courts may refuse to hear a case arising under a choice of court agreement if that state has no connection to the parties or the underlying dispute.[61]

2. Non-chosen courts must decline to hear the case

Subject to the exceptions set forth in Article 6, where an exclusive choice of court agreement designates a court of a contracting state, any non-chosen courts must decline to hear a case arising under the agreement.[62] Accordingly, if one party ignores the agreement and files suit in a non-chosen court located in a different contracting

55 Hague Convention, Article 5(1).
56 Hague Convention, Article 5(1); see Explanatory Report, (fn. 16), p. 55, para. 125 et seq., explaining a choice of court agreement may be substantively invalid due to "fraud, mistake, misrepresentation, duress or lack of capacity."
57 Hague Convention, Article 5(2); see Explanatory Report, (fn. 16), p. 57, paras. 132-134.
58 Hague Convention, Article 5(3); see also Explanatory Report, (fn. 16), p. 57 et seq., paras. 135-140.
59 See ibid., para. 135.
60 Hague Convention, Article 3(b); see also *Heiser*, The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in the United States Courts, U. Pa. J. Int'l L. 31 (2010), pp. 1042-1044, discussing the application of this provision in light of the transfer and removal rules that apply in the United States court system.
61 Hague Convention, Article 19; see also *Talpis/Krnjevic*, (fn. 15), p. 32, noting that this provision "slips a little dose of forum non conveniens in the mix."
62 Hague Convention, Article 6.

state, the non-chosen court must suspend or dismiss its proceedings in favor of the chosen court, even if the non-chosen court has jurisdiction under its national law.[63]

While Article 6 certainly strengthens party autonomy by requiring non-chosen courts to respect the parties' chosen forum, it is not without criticism. One author noted that certain exceptions under Article 6, such as the public policy exception of subsection (c), might "allow excessive intrusion of national law and the consequent weakening of choice-of-court agreements."[64] Another author noted Article 6's failure to effectively prevent parallel litigation and potential inconsistent judgments.[65] For example, if a non-chosen court finds an exception in Article 6 applies, it may proceed with the case and render a judgment, even if litigation is pending in the chosen court pursuant to Article 5.[66] Despite these potential weaknesses, however, Article 5(1) obliges the chosen court to hear the case despite proceedings pending elsewhere, effectively guaranteeing that, at a minimum, "[p]arty autonomy wins over the race to the courthouse."[67]

3. A judgment given by the chosen court must be recognized and enforced in the courts of other contracting states

While the jurisdictional rules of Articles 5(1) and 6 of the Convention operate to ensure parties that courts of contracting states will respect their choice of forum, Article 8(1) of the Convention provides parties certainty that a judgment given by the chosen court will be recognized and enforced in the courts of other contracting states.[68] However, this general rule is subject to specific grounds of refusal set forth in Articles 9 and 11.

Article 9 of the Convention permits the court of a contracting state to refuse to recognize or enforce a judgment given by the chosen court where, for example, the agreement is "null and void" under the law of the chosen court,[69] "a party lacked the capacity to conclude the agreement",[70] the defendant was improperly or untimely notified of the proceedings,[71] there was "fraud in connection with a matter of proce-

63 Hague Convention, Article 6; see also Explanatory Report, (fn. 16), p. 59, para. 141.

64 *Garnett*, (fn. 21), p. 168. As noted in the Explanatory Report, (fn. 16), p. 61, paras. 151-153, however, resort to this public policy exception is reserved for the "exceptional case", and it may not be invoked by the non-chosen court simply because the choice of court agreement "would not be binding under [its] domestic law." Rather, this exception includes, but is not necessarily limited to, situations where a party would not receive a fair trial in the chosen court, where the agreement was the result of fraud, or where the agreement violates a basic norm of the state of the seised court.

65 *Teitz*, (fn. 13), p. 554.

66 Ibid.

67 Ibid.

68 Hague Convention, Article 8(1). Pursuant to Article 8(2) of the Convention, the requested court has no authority to review the merits of the judgment and, furthermore, is bound by any findings of fact made by the chosen court concerning jurisdiction, including any findings as to the validity or scope of the choice of court agreement. Hague Convention, Article 8(2).

69 Hague Convention, Article 9(a).

70 Hague Convention, Article 9(b).

71 Hague Convention, Article 9(c).

dure",[72] the judgment conflicts with the public policy of the requested state,[73] or the judgment conflicts with another judgment between the same parties.[74] Article 11 of the Convention allows a refusal based on the type of damages awarded in a judgment, such as exemplary or punitive damages or any other award of damages intended to punish the defendant as opposed to compensate the plaintiff for actual loss suffered.[75]

At this point, the overall effectiveness of the Convention's rules on recognition and enforcement is arguably limited.[76] The rules only apply to judgments given by courts located in the Convention's contracting states, currently Mexico and the EU member states. Second, the rules only apply to judgments based on exclusive choice of court agreements.[77] Even though Article 22 allows a contracting state to declare that its courts will also recognize and enforce judgments given by courts designated in non-exclusive choice of court agreements,[78] "this provision will only apply where both the state of origin and the state addressed have made such a declaration, which may limit its utility."[79] Consequently, until more countries ratify the Convention and a significant number of those countries make an Article 22 declaration, parties will be unable realize the full potential of this fundamental rule.

C. The Convention and the European Union

I. The Brussels I-bis Regulation on choice of court agreements

On 10 January 2015, the EU enacted the Brussels I-bis Regulation, which along with its predecessors, the Brussels I Regulation[80] and the 1968 Brussels Convention,[81] establishes a system of uniform rules on jurisdiction and judgment recognition and enforcement within the EU. In order to achieve the objectives of legal certainty and predictability in cross-border disputes and "free circulation of judgments in civil and commercial matters",[82] the Brussels I-bis Regulation encourages EU member state courts to respect the "autonomy of the parties to a contract" and, thus, necessarily

72 Hague Convention, Article 9(d).
73 Hague Convention, Article 9(e). As in Article 6(c) of the Hague Convention, the standard to satisfy this provision is high. See Explanatory Report, (fn. 16), p. 71, para. 189.
74 Hague Convention, Article 9(f) and (g).
75 Hague Convention, Article 11(1); Explanatory Report, (fn. 16), p. 73 et seq., para. 203 et seq. This provision is particularly appealing for countries that consider US awards, especially punitive damages awards, "excessive". *Teitz*, (fn. 13), p. 549.
76 *Garnett*, (fn. 21), p. 168.
77 Ibid.
78 Hague Convention, Article 22.
79 *Garnett*, (fn. 21), p. 168.
80 Council Regulation (EC) No. 44/2001 of 22/12/2009 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16/1/2001, p. 1.
81 European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, OJ C 27 of 26/1/1998, p. 1 (consolidated and updated version of the 1968 Convention and the Protocol of 1971).
82 Brussels I-bis Regulation, Recitals 3 and 6.

includes provisions to give effect to choice of court agreements in favor of member state courts.[83]

This sub-section outlines the key rules of the Brussels I-bis Regulation pertaining to choice of court agreements. As explained below, even with the Convention's applicability in the EU, the rules of the Brussels I-bis Regulation will still apply in certain circumstances. Thus, an understanding of them is crucial. It is also important to note that the EU's review in 2009 of the functioning of the Brussels I Regulation[84] took place almost simultaneously with its decision to sign the Convention. Thus, important revisions to the Brussels I-bis Regulation, highlighted below, mirror the rules of the Convention.

1. Choice of court agreements subject to the Brussels I-bis Regulation

The Brussels I-bis Regulation applies where

> "the parties […] have *agreed* that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular relationship."[85]

Thus, for the Brussels I-bis Regulation to apply, there are two threshold requirements: an actual agreement, or consent, between the parties;[86] and an agreement designating

83 Brussels I-bis Regulation, Recital 19.

84 In April 2009, the Commission prepared a Report (Commission Report to the European Parliament, the Council, and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and enforcement of judgments in civil and commercial, COM (2009) 174 of 21/4/2009, hereinafter "Commission Report") and accompanying Green Paper (Commission Green Paper on the Review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175 final of 21/4/2009, hereinafter "Green Paper") assessing the application of the Brussels I Regulation among the member states and highlighting areas in need of improvement. One area earmarked for review was the operation and effectiveness of choice of court agreements within the EU. Based on the Commission's analysis and subsequent proposal, (Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, 2010/0383 (COD) of 14/12/2010, hereinafter "Commission Proposal on Brussels I-bis Regulation"), the EU modified certain provisions of the Brussels I Regulation, including its provisions on choice of court agreements, and adopted a recast of the regulation.

85 Brussels I-bis Regulation, Article 25(1), emphasis added.

86 See ECJ, case C-387/98, *Coreck Maritime GmbH v. Handelsveem BV*, ECLI:EU:C:2000:606, para. 13, explaining that the seised court has a "duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated."

a court located in a member state.[87] Unlike its predecessors, the Brussels I-bis Regulation does not require at least one party to the agreement to be domiciled in a member state.[88] Accordingly, parties domiciled in non-member states may choose a member state court to resolve their disputes and, provided the agreement is formally and substantively valid, that court "shall have exclusive jurisdiction" over the case.[89] This modification sets forth an exception to the general rule that jurisdiction under the Regulation is based on the defendant's domicile[90] and invites non-EU parties to choose EU courts to litigate their disputes.

Despite the EU's general acceptance of choice of court agreements and protection of party autonomy, the Brussels I-bis Regulation limits the prorogation of jurisdiction in certain situations. First, where a contract, such as an insurance, consumer, or employment contract, involves a weak party, a choice of court clause included therein is subject to requirements in addition to those set forth in Article 25(1) of Brussels I-bis Regulation. For example, the jurisdiction agreement must be "entered into after a dispute has arisen"[91] and must expand, not limit, the courts in which the weaker party may initiate proceedings.[92] Second, where a member state has exclusive jurisdiction over a matter pursuant to Article 24 of Brussels I-bis Regulation,[93] any other court, including a court designated by the parties in a choice of court agreement, must decline jurisdiction.[94]

2. Rules of formal and substantive validity

If a choice of court agreement designates a member state court, the Brussels I-bis Regulation requires that the agreement be either: "in writing or evidenced in

87 Brussels I-bis Regulation, Article 25(1). A third threshold determination regarding the applicability of EU law is whether there is an "international element" present. *Hartley*, (fn. 7), p. 102 et seqq., Article 25(1) of the Brussels I-bis Regulation does not specifically mention "international cases"; however, it is generally understood that EU law applies when there are "cross-border implications". However, where a case is wholly domestic to a Member State, other than the designation of a court located in another Member State, it is an open question as to whether this designation alone makes the case "international".

88 See Brussels I-bis Regulation, Article 25(1), applying "regardless of [the parties] domicile", and Brussels I Regulation, Article 23(1), requiring one or more parties to be domiciled in a member state.

89 Brussels I-bis Regulation, Article 25(1).

90 See Brussels I-bis Regulation, Article 4.

91 Brussels I-bis Regulation, Articles 15(1), 19(1), and 23(1).

92 Brussels I-bis Regulation, Articles 15(2), 19(2), and 23(2).

93 Brussels I-bis Regulation, Article 24 grants exclusive jurisdiction to particular courts located in a member state where the matter concerns, for example, rights *in rem* in immovable property or the registration or validity of trademarks.

94 Brussels I-bis Regulation, Article 27.

writing";[95] or in a form that accords with the parties' normal business practices;[96] or in international trade or commerce matters, in a form which accords with common trade usage "in the particular trade or commerce concerned."[97] Moreover, if the Brussels I-bis Regulation applies, any national laws on formal validity are irrelevant.[98]

Regarding the substantive validity of the agreement, the Brussels I-bis Regulation establishes two new rules, both of which operate to strengthen the protection of jurisdiction agreements under EU law. First, mirroring Article 5(1) of the Convention the Brussels I-bis Regulation establishes that substantive validity shall be determined under the law of the member state where the chosen court is located, including that state's conflict of law rules.[99] The Brussels I Regulation failed to include a similar choice of law rule, allowing member state courts to refer to differing rules of national law to determine the substantive validity of a choice of court agreement.[100] Creating a uniform rule ensures the same rule is followed and, therefore, the same result occurs no matter what member state court is invoked. Second, mirroring Article 3(d) of the Convention, the Brussels I-bis Regulation explicitly extends the principle of separability to choice of court agreements, such that a choice of court clause included in a broader contract cannot be invalidated solely on the ground that the underlying contract is invalid.[101]

95 Brussels I-bis Regulation, Article 25(1)(a).

96 Brussels I-bis Regulation, Article 25(1)(b); see ECJ, case 25/76, *Segoura v. Bonakdarian*, ECLI:EU:C:1976:178, paras. 7-11, holding that a buyer in an oral contract is not presumed to have agreed to a choice of court agreement included in seller's written conditions of sale given to buyer upon delivery, unless this sort of oral agreement and general conditions were part of the parties "continuing trading relationship".

97 Brussels I-bis Regulation, Article 25(1)(c); see ECJ, case C-106/95, *MSG v. Les Gravières Rhénanes*, ECLI:EU:C:1997:70, para. 25, holding that where one party to an oral contract fails to object to a choice of court clause contained in a letter of confirmation and several invoices sent by the other party and where "such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate", and of which the parties were or should have been aware, the choice of court agreement will be deemed valid.

98 See ECJ, case 150/80, *Elefanten Schuh GmbH v. Jacqmain*, ECLI:EU:C:1981:148, para. 25 et seq.: "Article 17 [of the Brussels Convention] is […] intended to lay down itself the formal requirements agreements conferring jurisdiction must meet […]. Consequently Contracting States are not free to lay down requirements other than those contained in the Convention." See also ECJ, case C-159/97, *Trasporti Castelletti v. Hugo Trumpy*, ECLI:EU:C:1999:142, para. 39, in determining whether an agreement is in a "form that accords" with common trade practices, the Member State court may not consider "any particular requirements which national provisions might lay down."

99 Brussels I-bis Regulation, Article 25(1) and Recital 20.

100 Commission Report, (fn. 84), p. 5.

101 Brussels I-bis Regulation, Article 25(5). The ECJ confirmed the doctrine of separabiltiy applies to choice of court clauses in a prior decision. See ECJ, case C-269/95, *Benincasa v. Dentalkit Srl*, ECLI:EU:C:1997:337, paras. 24-30. However, this rule was not codified until the adoption of the Brussels I-bis Regulation.

3. Choice of court and lis pendens

a) The Brussels I-bis Regulation's solution to the "Gasser" problem

The most significant contribution of the Brussels I-bis Regulation towards the strengthening of choice of court agreements designating member state courts is the inclusion of an exception to the general lis pendens rule of Article 29, eliminating the strict priority rule established in the Brussels I Regulation.

Under the Brussels I Regulation,

> "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised *shall* of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."[102]

Furthermore, when the first court seised established its jurisdiction, the Brussels I Regulation required, without exception, any other court subsequently seised to "decline jurisdiction in favour of that court."[103] While the intent of this rule was to prevent parallel proceedings and conflicting decisions in the courts of different member states,[104] a broad application of it proved to weaken the effectiveness of choice of court clauses. The ECJ's 2003 ruling in *Gasser*[105] magnified this problem and, ultimately, prompted a review and revision of the rule.

In *Gasser*, the ECJ held that where related actions are pending in the courts of different member states, the second court seised must stay its proceedings until the first court seised established or declined jurisdiction, even where the second court had exclusive jurisdiction pursuant to a choice of court agreement.[106] *Gasser* was problematic, as it invited abuse of the system through the use of defensive strategies, such as "the Italian torpedo."[107] Specifically, the ruling permitted a party seeking to delay the resolution of a dispute to intentionally ignore its jurisdiction agreement and file a parallel action in a non-chosen court notorious for slow dockets, effectively sinking or "torpedoing" the case into a backlogged court system. Recognizing the risk of

102 Brussels I Regulation, Article 27(1), emphasis added.
103 Brussels I Regulation, Article 27(2), emphasis added.
104 Brussels I Regulation, Recital 15.
105 ECJ, case C-116/02, *Gasser v. MISAT*, ECLI:EU:C:2003:657, paras. 12-16. The *Gasser* case involved a contract, pursuant to which several invoices sent by Gasser to MISAT included a clause designating Austria as the parties' chosen forum to decide potential disputes. In contravention of the agreement, MISAT seised an Italian court to seek termination of the parties' contract. Gasser responded by filing suit in Austria, the parties' designated forum. Applying the lis pendens rule of the Brussels I Regulation, the Austrian court stayed its proceedings in favor of the litigation pending in Italy. Upon Gasser's appeal, the high court in Austria requested a preliminary ruling from the ECJ, clarifying certain aspects of the lis pendens rule.
106 Ibid., paras. 42 and 51.
107 The term "Italian torpedo" was introduced by Italian lawyer, *Mario Franzosi*, Worldwide Patent Litigation and the Italian Torpedo., EIPR 19 (1997), pp. 382-385.

"abusive litigation tactics",[108] the drafters of the Brussels I-bis Regulation added an important exception to the strict lis pendens rule of the Brussels I Regulation.

Specifically, pursuant to Article 31(2) of the Brussels I-bis Regulation,

> "where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."[109]

When the chosen court establishes its jurisdiction, any other member state court must decline jurisdiction.[110] By granting the parties' chosen court priority to determine its jurisdiction and to proceed with the case, without waiting on the non-chosen court to stay or dismiss its proceeding,[111] this exception allows party autonomy to control and, as between Member State courts, eliminates the *Gasser* incentive to torpedo a case.

Notably, this modification of the lis pendens rule reflects the system established in the Convention. While the Convention does not contain an explicit lis pendens rule, the operation of Articles 5(2) and 6 give priority to the chosen court to establish its jurisdiction and to proceed with a case despite proceedings pending elsewhere. Revising the Brussels I Regulation to include Article 31(2) ensured that the lis pendens approach among EU courts was consistent with the operation of the Convention's fundamental rules and, thus, laid the appropriate groundwork for the EU's approval and implementation of the Convention's rules.[112]

b) Choice of court agreements in favor of third state courts and the new international lis pendens rule

The lis pendens rule of the Brussels I Regulation also did not address the situation of parallel proceedings in a member state and third state court. Thus, if a member state court had jurisdiction under EU law, for example, based on the defendant's domicile or type of dispute,[113] it was required to hear the case, even if proceedings were already pending in the third state.[114] In operation, this risked costly parallel proceedings, ignored party autonomy insofar as jurisdiction in the third state is based on a choice of court agreement, and precluded a member state court from considering a potentially

108 Brussels I-bis Regulation, Recital 22.
109 Brussels I-bis Regulation, Article 31(2).
110 Brussels I-bis Regulation, Article 31(3).
111 Brussels I-bis Regulation, Recital 22. As noted by one practitioner, however, Article 31(2) imposes no time limit on the non-chosen court to rid of its case. Thus, while the "Italian torpedo" is no longer a threat, a party may nonetheless impose upon its opponent the burden and inconvenience of handling a parallel case in a non-chosen court, at least until the chosen court establishes its jurisdiction. See *Garvey*, Brussels Regulation (Recast): Are You Ready?, 2014, www.allenovery.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx (9/9/2015).
112 See Council Decision 2014/887/EU, Recital 5.
113 Brussels I Regulation, Articles 2 and 5.
114 *Hartley*, (fn. 7), p. 95.

more appropriate forum. The Brussels I-bis Regulation adds a new international lis pendens rule that at least partially addresses these issues, providing some protection for third state jurisdiction agreements in member state courts.

Specifically, under Articles 33(1) and 34(1) of the Brussels I-bis Regulation, where an action involving the same subject matter and same parties, or a related action, is already pending in a third state at the time a member state court is seised, a member state court *may* stay its proceedings in favor of the third state court, provided any judgment given by the third state court is capable of recognition and enforcement in that member state and "a stay is necessary for the proper administration of justice."[115] While the language of this provision does not specifically mention jurisdiction agreements, it is interesting to consider this new rule in light of choice of court agreements designating third state courts.

The application of Articles 33(1) and 34(1) is triggered when a proceeding *already pending* in a third state court involves the same parties and same cause of action as, or is related to, a proceeding instituted in a member state court.[116] Accordingly, under the new rule, when a party who is domiciled in a member state has invoked a choice of court agreement in favor of a third state court, a counterparty cannot *automatically* circumvent the agreement or "torpedo" the case by bringing a parallel or related action in a member state court. Instead, the member state court has the discretion to stay its proceedings, provided it considers "all the circumstances of the case", including, but not limited to, connecting factors to the third state and whether the third state court has exclusive jurisdiction (for example, via a choice of court agreement).[117] Thus, while the application of Articles 33(1) and 34(1) is discretionary, these provisions nonetheless provide a clear, albeit narrow, legislative basis upon which a member state court may decline a case in favor of a third state court. At a minimum, these provisions may discourage a litigant from bringing a costly parallel proceeding in the EU when its opponent has already invoked a third state jurisdiction agreement, as it is no longer guaranteed that a member state court will proceed with the case.

The new international lis pendens rule has been met with some criticism. As one practitioner noted, the test set forth in Articles 33(1) and 34(1) is "very high" and remains subject to interpretation by the ECJ, leaving uncertainty at the member state level as to when a stay is proper.[118] Regrettably, the rule also only addresses the scenario where a third state court is seised *before* a member state court.[119] Accordingly, where a member state court with jurisdiction under the Brussels I-bis Regulation is seised first, the ECJ's ruling in *Owusu* applies, precluding the member state court from

115 Brussels I-bis Regulation, Articles 33(1) and 34(1).
116 Brussels I-bis Regulation, Articles 33(1) and 34(1).
117 Brussels I-bis Regulation, Recital 24.
118 *Garvey*, (fn. 111).
119 Ibid.

declining the case on the ground that jurisdiction in a third state is more appropriate.[120] In short, neither the Brussels I-bis Regulation nor prevailing case law preclude a party from prematurely initiating proceedings in a third state in order to take priority under the international lis pendens rule, or in a member state court to circumvent a valid third state jurisdiction agreement. However, the application of the Convention in the EU should alleviate this concern, so long as the chosen third state court is located in a contracting state.

4. The Brussels I-bis Regulation on recognition and enforcement of judgments rendered by chosen courts

a) Procedure for recognition and enforcement

The Brussels I-bis Regulation applies to the recognition and enforcement by a member state court of any judgment given by a court in a different member state.[121] Whereas the jurisdictional rules of the Brussels I-bis Regulation generally center on the domicile of the defendant (with some exceptions), the rules of recognition and enforcement apply even if the judgment given in a member state "is given against a person not domiciled in a Member State."[122] Accordingly, where two persons not domiciled in a member state execute a choice of court agreement designating a member state court to settle their disputes, a judgment given by that court is recognizable and enforceable in the courts of different member states.

Between member state courts, both judgment recognition and judgment enforcement are essentially automatic. Pursuant to Article 37 of the Brussels I-bis Regulation, a party requesting a member state court to recognize a judgment given in another member state need only produce a copy of the judgment and a standard form certificate.[123] Unless a ground for refusal listed in Article 45 applies, the requested court shall recognize the judgment "without any special procedure being required."[124]

Thanks to recent revisions, the procedure to enforce in one member state court a judgment rendered in another member state court is equally as simple. Unlike the Brussels I Regulation, Article 39 of the Brussels I-bis Regulation does not require the interested party to apply for a declaration of enforceability from the requested court,

120 Ibid. ECJ, case C-281/02, *Owusu v. Jackson*, ECLI:EU:C:2005:120, para. 46, holding that, where a UK national sues a defendant, domiciled in the UK, in English court for damages sustained in an accident that occurred in a third state, Article 2 of Brussels I Regulation is of mandatory application, such that the English court cannot stay its proceedings against a defendant domiciled there, even if the court takes the view that the third state forum is more appropriate.

121 Brussels I-bis Regulation, Articles 36(1) and 39.

122 Brussels I-bis Regulation, Recital 27.

123 Brussels I-bis Regulation, Articles 37(1)(a)-(b).

124 Brussels I-bis Regulation, Article 36.

or *exequatur*, before the judgment can be enforced there.[125] Thus, unless a ground for refusal applies,

> "a judgment given in a Member State which is enforceable in that Member State *shall* be enforceable in the other Member States *without any declaration of enforceability being required*."[126]

It is important to recall, however, that this revision applies only from 10 January 2015.[127] As to proceedings initiated before that date and any judgments resulting therefrom (even if rendered after 10 January 2015), the *exequatur* procedure continues to apply.[128]

b) Grounds for refusal

The grounds for refusal of recognition and enforcement under the Brussels I Regulation remain largely unchanged in the Brussels I-bis Regulation and, thus, need no elaboration here. Pursuant to Articles 45 and 46 of the Brussels I-bis Regulation, the requested court shall refuse to recognize or enforce a judgment given by a different member state court: if doing so violates the public policy of the requested state;[129] if the judgment was entered in default of appearance, where the defendant was not properly served and, therefore, was unable to prepare his defense;[130] if the judgment is inconsistent with a prior judgment between the same parties;[131] or if the judgment conflicts with the Recast's jurisdictional rules protecting weak parties or exclusive jurisdiction rules.[132]

II. Implementation of the Hague Convention in the European Union

The adoption of the Brussels I-bis Regulation and its revisions to EU law pertaining to choice of court agreements "paved the way for the [EU's] approval of the Con-

125 Brussels I Regulation, Article 38(1). The procedure of *exequatur* required a party to expend time and money in order to assert its rights in another member state. Given most applications for declarations were granted (between 90 and 100 %) and that challenges to enforcement were rarely successful – Commission Report, (fn. 84), p. 4 –, the *exequatur* procedure proved to be "an obstacle to the free circulation of judgments" and, thus, likely to "deter […] companies and citizens from making full use of the internal market." Commission Proposal on Brussels I-bis Regulation, (fn. 84), p. 3. Accordingly, the abolition of the *exequatur* procedure of the Brussels I Regulation was a primary objective of the Regulation's revision. Commission Report, (fn. 84), p. 4.

126 Brussels I-bis Regulation, Article 39, emphasis added.

127 Brussels I-bis Regulation, Article 66(1).

128 Brussels I-bis Regulation, Article 66(2).

129 Brussels I-bis Regulation, Article 45(1)(a); see also Brussels I Regulation, Article 34(1).

130 Brussels I-bis Regulation, Article 45(1)(b); see also Brussels I Regulation, Article 34(2).

131 Brussels I-bis Regulation, Articles 45(1)(c) and (d); see also Brussels I Regulation, Articles 34(3) and (4).

132 Brussels I-bis Regulation, Articles 45(1)(e)(i) and (ii); see also Brussels I Regulation, Article 35(1).

vention."[133] Indeed, as discussed above, revisions to the Brussels I Regulation mirror key provisions of the Convention, ensuring "that the approach to choice of court agreements for intra-EU situations [would be] consistent with the one that would apply to extra-EU situations under the Convention."[134]

It is clear, however, that the Convention's applicability in the EU necessarily affects the application of the Brussels I-bis Regulation in certain situations. Determining when the Brussels I-bis Regulation yields to the Convention and, thus, ensuring a coherent relationship between the two instruments is key to realizing the benefits afforded by them. To that end, the following section, first, briefly discusses the EU's rationale in approving the Convention and, second, explores how the rules of the Convention and the Brussels I-bis Regulation interact.

1. Rationale for EU's approval of the Hague Convention

While the Brussels I-bis Regulation ensures the effectiveness within the EU of choice of court agreements designating member state courts, it fails to afford the same protections to third state jurisdiction agreements. Moreover, while the recognition and enforcement of judgments within the EU is more or less automatic, the Brussels I-bis Regulation fails to guarantee parties that an EU court will recognize and enforce a judgment given by a third state court, or that a third state court will recognize and enforce an EU judgment. The legal uncertainties posed by these gaps in EU law may likely discourage the negotiation of contracts between EU and third state parties and, thus, stifle international trade.[135]

The Convention's rules address these gaps and "complement the realization of the aims underlying the EU rules on the prorogation of jurisdiction, by creating a harmonized set of rules within the EU in respect of third states."[136] According to the Commission, the EU's approval of the Convention "[will] reduce legal uncertainty for EU companies trading outside of the EU by ensuring that choice of court agreements included in their contracts are respected and that judgments issued by the courts designated [would be enforced]."[137] In short, the EU's approval of the Convention guarantees party autonomy "beyond the EU's borders"[138] and, in turn, "may act as a stimulus to international trade."[139]

133 Council Decision 2014/887/EU, Recital 5.
134 Explanatory Memorandum to the Proposal for a Council Decision on the Approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, COM (2014) 46 final of 30/1/2014, p. 3 ("Explanatory Memorandum to Proposal on the Approval of the Convention").
135 Commission staff working document, (fn. 6), p. 5.
136 Explanatory Memorandum to Proposal on the Approval of the Convention, (fn. 134), p. 2.
137 Ibid.
138 Ibid., p. 3.
139 Ibid., p. 4.

2. Relationship between the fundamental rules of the Convention and EU law on choice of court agreements

The rules governing the relationship between the Brussels I-bis Regulation and the Convention are provided in Article 26(6) of the Convention as follows:

> "This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –
> a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
> b) as concerns the recognition or enforcement of judgments as between Member States or the Regional Economic Integration Organisation."[140]

Essentially, where the rules of the Convention and the Brussels I-bis Regulation conflict in a given situation, the two "give-way" rules of Article 26(6)(a) and (b) apply to determine whether the relevant rules of the Convention or the Brussels I-bis Regulation prevail.[141]

However, before analyzing the relationship between the jurisdiction and recognition and enforcement rules of the two instruments and application of these "give-way" rules, it is necessary to compare the instruments' threshold rules of scope and validity. Determining whether a choice of court agreement satisfies these threshold rules is essential to deciding which instrument applies in a given case and, ultimately, whether a parties' choice of court agreement will be honored.

a) Threshold rules

(1) Scope

In general, the Convention's scope is narrower than the scope of the Brussels I-bis Regulation. First, the Convention does not apply to non-exclusive or "symmetric" jurisdiction agreements.[142] Moreover, while both instruments exclude from their scope matters concerning the status and legal capacity of natural persons, bankruptcy, arbitration, family law, and trusts and estates,[143] the Convention excludes additional matters that are specifically covered under the Brussels I-bis Regulation. These matters, such as agreements included in consumer and employment contracts and matters concerning immoveable property and the validity, nullity, or dissolution of legal per-

140 Hague Convention, Article 26(6).
141 Explanatory Report, (fn. 16), p. 95, para. 291.
142 Ibid., pp. 51-53, paras. 102-109. However, as *Garnett*, (fn. 21), p. 164 noted, the Convention's exclusion of non-exclusive agreements is "mitigated" by the presumption of exclusivity under Article 3(b) and the option for a contracting state to declare under Article 22 that its courts will recognize and enforce judgments based on non-exclusive agreements.
143 Hague Convention, Articles 2(2)(a)-(e); Brussels I-bis Regulation, Articles 1(2)(a), (b), (d), (e), (f).

sons,[144] involve weak parties, matters of public interest, or matters closely connected with the member state. Essentially, the exclusion of these cases from the Convention's scope allows the rules of the Brussels I-bis Regulation to apply and, thereby, prevent private contracts from circumventing a member state's protective or exclusive jurisdiction.[145]

Notably, the Convention does not exclude from its scope exclusive choice of court agreements in insurance contracts, to which the Brussels I-bis Regulation also applies certain protective rules.[146] Thus, in order to "preserve the protective jurisdiction rules available to the policyholder, the insured party or a beneficiary in matters relating to insurance",[147] the EU has made a declaration pursuant Article 21 of the Convention excluding insurance contracts from the Convention's scope, except in certain specified cases.[148]

(2) Formal and substantive validity

Thanks to revisions of the Brussels I Regulation, the Brussels I-bis Regulation's formal and substantive validity requirements essentially mirror those of the Convention. First, both instruments provide that the law of the chosen court shall determine substantive validity.[149] Second, while the language of the formal validity requirements differ, both instruments' allow jurisdiction agreements to be in writing or in other forms.[150] However, the Convention may arguably provide greater flexibility than the Brussels I-bis Regulation with regards to formal validity, as the Convention requires only that the parties' document their agreement by means allowing the information "to be usable for subsequent reference,"[151] as opposed to in a form that accords with their established practices or common trade usages.[152] Finally, both instruments deem the choice of court clause independent from the remainder of the contract, ensuring a consistent approach among courts in analyzing an agreement's validity.[153]

144 Hague Convention, Articles 2(1) and 2(2)(l-m); see also Brussels I-bis Regulation, Articles 19, 23 and 24.
145 Explanatory Report, (fn. 16), p. 41, para. 52 et seq.
146 See generally Hague Convention, Article 2; see also Brussels I-bis Regulation, Article 15.
147 Council Decision 2014/887/EU, Recital 7.
148 Council Decision 2014/887/EU, Article 3 and Annex I; see also Hague Conference on Private International Law, Declarations of the European Union, Convention of June 30, 2005 on Choice of Court Agreements, www.hcch.net/index_en.php?act=status.comment&csid=1044&disp=resdn (9/9/2015) (hereinafter "Declarations of the European Union to the Convention").
149 See Hague Convention, Articles 5(1), 6(a) and 9(a); Brussels I-bis Regulation, Article 25(1).
150 See Hague Convention, Article 3(c); Brussels I-bis Regulation, Articles 25(1)(a)-(c).
151 Hague Convention, Article 3(c)(ii).
152 Brussels I-bis Regulation, Articles 25(1)(b)-(c).
153 See Hague Convention, Article 3(d); Brussels I-bis Regulation, Article 25(5).

b) Jurisdiction rules

The following four scenarios illustrate how the jurisdiction rules of the Convention and Brussels I-bis Regulation interact and, where a conflict between the rules results, how the first "give-way" rule of Article 26(6) of the Convention applies.

(1) Scenario 1: chosen court not located in a contracting state of the Convention

Where a choice of court agreement designates a court located outside of the EU and in a state that is not a contracting state to the Convention, neither the Convention nor the Brussels I-bis Regulation apply to oblige the chosen court to take the case. Instead, parties must look to the national law of the chosen court, including the relevant choice of law rules, to determine whether the chosen court will give effect to their agreement.

If a party ignores the agreement and seises a non-chosen EU court that has general, special, or exclusive jurisdiction under the Brussels I-bis Regulation, the EU court must proceed with the case, unless Articles 33 or 34 of the Brussels I-bis Regulation apply and the EU court exercises its discretion to decline the case.[154] Unfortunately, as discussed above, the standard for applying Articles 33 and 34 may be difficult to overcome and, given their discretionary and limited nature, the provisions' utility remains to be seen.[155] Consequently, parties in this scenario face a significant risk of legal uncertainty as to whether their agreement will be respected.

(2) Scenario 2: chosen court located in a non-EU contracting state of the Convention

Where a choice of court agreement designates a court of a state that is located outside of the EU, but is a contracting state of the Convention, the Convention applies.[156] Accordingly, Article 5(1) of the Convention requires the chosen court to hear the case, *unless* the matter falls outside of the Convention's scope, a limitation in Article 5(3) applies, or the contracting state in which the chosen court is located has made a declaration under Article 19.[157] If any of these exceptions apply, the chosen court must refer to its national law to determine whether the agreement requires it to accept jurisdiction.

In this scenario, if a party seises a non-chosen court in violation of the agreement, the result differs depending upon where the non-chosen court is located. If the non-chosen court is located outside of a contracting state of the Convention, then Article 6 of the Convention does not apply. Whether the non-chosen court respects the parties' agreement and declines the case in favor of litigation in the chosen court will depend upon the national law in the state where the non-chosen court is located. In that case, the risks of legal uncertainty, parallel proceedings, and conflicting judgments remain.

154 Brussels I-bis Regulation, Articles 33(1) and 34(1); see also ECJ, case C-281/02, *Owusu v. Jackson*, ECLI:EU:C:2005:120, para. 46.
155 See fn. 118-120 and accompanying text.
156 Hague Convention, Article 3(a).
157 See Hague Convention, Articles 2, 5(3) and 19.

However, if the non-chosen court is located in a contracting state of the Convention, Article 6 of the Convention requires the non-chosen court to suspend or dismiss its proceedings, unless an enumerated exception applies. Therefore, if a party seises an EU court in violation of a choice of court agreement designating a non-EU court and the EU court has jurisdiction under the Brussels I-bis Regulation (for example, based on the domicile of an EU defendant), the EU court must nonetheless decline to hear the case. Unlike the discretionary and limited applicability of the international lis pendens rule of Articles 33 and 34 of the Brussels I-bis Regulation, the application of Article 6 of the Convention is mandatory, whether the EU court was seised before or after chosen court. Thus, as a result of the application of the Convention and contrary to the result under the Brussels I-bis Regulation alone, an EU party's choice of a non-EU court is ensured.

Where an agreement, such as a consumer, employment, or insurance agreement, designating a court of a non-EU contracting state involves an EU weaker party and a non-EU party, a concern exists as to whether litigation in the chosen non-EU court will sufficiently protect the EU weaker party.[158] Ordinarily, the designation of a non-EU court in an agreement between an EU party and non-EU party would trigger the application of the Convention, requiring any non-chosen EU court to suspend or dismiss its case. However, where an EU weaker party is involved, the operation of the Convention's rules allow EU law's protection of weak parties to control in two ways.

First, as stated above, the Convention excludes consumer and employment contracts from its scope.[159] Accordingly, where a choice of court agreement included in a consumer or employment contract designates a non-EU court, Article 5 of the Convention does not require the non-EU court to accept the case and, if seised, an EU court is not required under Article 6 to suspend or dismiss the case. Rather, if the EU court has jurisdiction under the Brussels I-bis Regulation, the EU court may proceed with the case and its protective rules of jurisdiction will apply.

Second, if litigation in a non-EU court is based on a choice of court agreement included in an insurance contract, then the rules of the Convention generally apply.[160] However, given the EU's declaration pursuant to Article 21 that it will not apply the Convention to insurance contracts, with certain exceptions,[161] an EU court may determine its jurisdiction in insurance cases pursuant to the Brussels I-bis Regulation without violating the fundamental rules of the Convention. Thus, if a non-chosen EU court is seised of a case in violation of a third state jurisdiction agreement and the case concerns an insurance contract, the rules of the Convention may not apply and the EU court may proceed, applying its protective rules of jurisdiction.

158 Commission staff working document, (fn. 6), p. 11. As stated above, the Brussels I-bis Regulation provides protective rules of jurisdiction in cases concerning consumer, employment, and insurance contracts and limits the autonomy of parties to those contracts to choose where to litigate their disputes. See Brussels I-bis Regulation, Articles 15, 19 and 23.

159 Hague Convention, Article 2(1).

160 See Hague Convention, Article 2.

161 Declarations of the European Union to the Convention, (fn. 148); see also Council Decision 2014/887/EU, Article 3 and Annex I.

(3) Scenario 3: chosen court located in the EU, all EU parties

Where a choice of court agreement designates a court within the EU and all parties to the agreement reside in the EU, Article 26(6)(a) of the Convention provides that the Brussels I-bis Regulation prevails over the Convention.[162] "The underlying principle is that where a case is purely 'regional' in terms of residence of the parties, the Convention gives way to the regional instrument."[163] In this intra-EU situation, Article 25 of the Brussels I-bis Regulation ensures contracting parties that their chosen court will have exclusive jurisdiction over potential disputes, and Article 32(1) of the Brussels I-bis Regulation guarantees that any EU court seised in violation of the agreement must respect the parties' choice.

Even if a party attempts to circumvent the agreement by filing suit in a non-EU court, party autonomy is protected, at least to a certain degree. Specifically, if a party attempts to circumvent the agreement by seizing a court located outside of the EU, but in a contracting state of the Convention, Article 6 of the Convention protects the parties' choice by requiring the non-chosen court to decline the case in favor of the EU court. However, if a party seises a court located neither within the EU nor in a contracting state of the Convention, that court's national law will apply and the risk of parallel proceedings and conflicting judgments remain.

(4) Scenario 4: chosen court located in the EU, non-EU party

Where a choice of court agreement designates a court located within the EU and at least one party to the agreement resides in a contracting state of the Convention that is not an EU member state, Article 26(6)(a) provides that the Convention prevails over the Brussels I-bis Regulation.[164] As one author explained, "the Brussels Regulation 'disconnects' and the Choice of Court Convention controls."[165] Articles 5 and 6 of the Convention, therefore, will ensure that the parties' choice of an EU court is respected by both EU and non-EU courts of contracting states to the Convention.

However, if the choice of court agreement concerns a matter excluded from the scope of the Convention under Article 2 or by declaration under Articles 19 or 21, then the rules of the Brussels I-bis Regulation apply. Again, this situation becomes particularly relevant if litigation in an EU court concerns a contract between an EU weaker party and non-EU party. If the Convention were to apply, its rules would effectively preclude an EU court from protecting EU weak parties. However, because the application of the Convention in these cases is excluded under Article 2 and by the EU's declaration under Article 21, the Brussels I-bis Regulation's protections of weak parties prevail.

The obvious and potentially troubling difference between scenarios 3 and 4 is that an exclusive choice of court agreement designating an EU court may be governed by the Brussels I-bis Regulation in one case, but by the Convention in another case,

162 Hague Convention, Article 26(6)(a).
163 Explanatory Report, (fn. 16), p. 95, para. 291.
164 Hague Convention, Article 26(6)(a).
165 *Teitz*, (fn. 13), p. 556.

simply depending upon where the parties reside. However, because the revised provisions of the Brussels I-bis Regulation, particularly Article 31(2), mirror the fundamental rules of the Convention, the approach of an EU chosen court under either scenario is the same. Moreover, where the Convention's rules might otherwise apply according to Article 26(6)(a), the application of Article 2 of the Convention and the EU's declaration under Article 21 concerning insurance contracts allows an EU court to apply its protective jurisdictional rules when invoked of a case involving a weaker party.

c) Recognition and enforcement rules

Once the chosen court has given a judgment in a case, it is necessary to determine which instruments' recognition and enforcement rules apply. According to the second "give-way" rule of Article 26(6)(b), the Brussels I-bis Regulation applies where the court of origin that gave the judgment and the requested court are both located in EU member states.[166] However, where the requested court is located in an EU member state and the court of origin is located in a non-EU contracting state of the Convention, or vice versa, then the Convention prevails.

Regardless, under both instruments, the relevant requested court *must* recognize or enforce a judgment of the court of origin, unless a ground for refusal applies, and the procedure for recognition or enforcement is minimal.[167] Comparing the two sets of rules, however, it has been noted that Brussels I-bis Regulation "provides for a greater degree of recognition and enforcement than the Convention."[168] Particularly, the grounds for refusal listed in Article 9 of the Convention are slightly more expansive than those of the Brussels I-bis Regulation, allowing a requested court more latitude to refuse recognition or enforcement.

For example, Articles 9(a) and (b) of the Convention permit a requested court to refuse recognition or enforcement on the ground that the agreement was null and void, provided the court of origin hasn't already determined the agreement to be valid, or that a party lacked the capacity to conclude the agreement.[169] The Brussels I-bis Regulation, on the other hand, does not provide a ground of refusal based on the invalidity of the agreement. To the contrary, it clearly states, "the jurisdiction of the court of origin may not be reviewed", unless the defendant in the case is a weak party.[170] Furthermore, pursuant to Article 9(d) of the Convention, the requested court may refuse to recognize or enforce a judgment if it determines "the judgment was obtained by fraud in connection with a matter of procedure."[171] A similar provision is not listed in the Brussels I-bis Regulation, though Articles 45 and 46 allow for refusal based on public policy (which could arguably include due process violations) or im-

166 Hague Convention, Article 26(6)(b).
167 Hague Convention, Article 8(1); Brussels I-bis Regulation, Articles 36(1) and 39.
168 Explanatory Report, (fn. 16), p. 99, para. 306.
169 Hague Convention, Articles 9(a) and (b).
170 Brussels I-bis Regulation, Articles 45(1)(e) and 45(3).
171 Hague Convention, Article 9(d).

proper service.[172] Lastly, Article 11 of the Convention provides another unique avenue for the requested court to refuse to recognize or enforce a judgment where it considers an award of damages to go beyond compensating the plaintiff for actual loss.[173]

On the other hand, one could argue that the permissive language of Article 9 of the Convention, versus the mandatory language of Articles 45(1) and 46 of the Brussels I-bis Regulation, may lead to a greater degree of recognition and enforcement of judgments under the Convention because the courts of contracting states are not obligated to enter a refusal, even if a ground listed in Article 9 applies. More specifically, where one of the grounds of refusal listed in Articles 45(1) and 46 exist, the requested court *must* enter a refusal.[174] While under Article 9 of the Convention, should one of the grounds of refusal apply, the requested court *may* refuse to recognize or enforce a judgment, but is not required to do so.[175] However, despite the mandatory language of Articles 45(1) and 46 of the Brussels I-bis Regulation, the narrow, specified grounds of refusal listed therein make recognition and enforcement of a judgment within the EU almost certain.

It is clear from the rules of Brussels I-bis Regulation that, with regards to an intra-EU situation, a party can predict with a high degree of certainty that a judgment rendered in one member state will be recognized and enforced in another member state. Now, with the application of the Convention's rules in the EU, parties also will be able to predict with certainty that an EU court will recognize and enforce a judgment given by a third state court and that a third state court will recognize and enforce an EU judgment, so long as the third state court is located in a contracting state of the Convention. With regards to the recognition and enforcement of judgments between EU courts and the courts of non-contracting states to the Convention, however, a lack of predictability remains.

D. The Convention and the United States

I. Brief discussion of relevant US law

Although historically resisted,[176] choice of court agreements, or forum selection clauses, are largely recognized in US courts.[177] However, despite a general acceptance of forum selection clauses, a carefully crafted uniform law providing rules governing the validity and enforcement of choice of court agreements and the recognition and enforcement of foreign judgments does not exist in the US. Rather, these areas of law

172 Brussels I-bis Regulation, Articles 45(1)(a) and (b).
173 Hague Convention, Article 11.
174 See Brussels I-bis Regulation, Articles 45(1) and 46.
175 Hague Convention, Article 9.
176 See *Carbon Black Export, Inc. v. The Monrose*, 254 F.2d 297 (5th Cir. 1958), p. 300 et seq.
177 See *M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), pp. 10-15, recognizing the value of forum selection clauses to "sophisticated" business parties engaged in international trade; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), pp. 593-595, wherein the Court expanded its holding in Bremen to cover forum selection clauses included in standard form contracts by average consumers.

have been developed judicially on a case-by-case basis at both the federal and state court levels. Insofar as the interpretation and validity of a choice of court agreement is concerned, state substantive contract law generally controls, whether the case is pending in federal or state court.[178] However, regarding their enforcement, different enforcement mechanisms apply depending upon whether a federal or state court is invoked.[179]

A detailed analysis of the enforcement mechanisms available in US federal and state courts is beyond the scope of this paper;[180] however, the US Supreme Court recently clarified that the procedure in federal court for the enforcement of a forum-selection clause designating a foreign court is governed by the doctrine of *forum non conveniens*.[181] Generally, when a defendant in federal court files a *forum non conveniens* motion to dismiss on the ground the case should be litigated in an alternative, more convenient forum, the court must weigh a number of private and public interest factors in deciding whether to dismiss the case.[182] However, where the parties have executed a choice of court agreement in favor of a foreign court, the *forum non conveniens* analysis changes.[183] In that case, the court should consider only public interest factors and place no weight on the private interests of the parties, giving the forum selection clause "controlling weight in all but the most exceptional circumstances."[184] As one commentator stated, under this new test, the enforcement of forum selection clauses "is all but foreordained."[185]

178 See *Effron*, Atlantic Marine and the Future of Forum Non Conveniens, Hastings Law Journal 66 (2015), p. 697: "Contract law governs the formation, validity, interpretation, and enforceability of the terms to an agreement, and forum selection clauses are usually but one of many terms in a contract". See also *Martinez v. Bloomberg*, 740 F.3d 211 (2nd Cir. 2014), p. 224, holding that "questions of enforceability are resolved under federal law, while interpretive questions – questions about the meaning and scope of a forum selection clause – are resolved under the substantive law designated in an otherwise valid contractual choice-of-law clause".

179 *Dubay*, From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States, Geo. Mason J. Intl. Com. L. 3 (2011), p. 5, explaining that "the existence of concurrent jurisdiction in the United States has created a dichotomy in enforcement mechanisms available at the federal and state level."

180 See ibid., pp. 10-34, discussing the mechanisms used to enforce forum selection clauses at the federal and state court level.

181 *Atlantic Martine Construction Co., Inc. v. U.S. Dist Ct.*, 134 S.Ct. 568, 580 (2013). The doctrine of *forum non conveniens* was recognized by the Supreme Court in *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947).

182 Ibid., p. 508 et seq. Private interest factors include, for example, parties' access to evidence, availability of witnesses, and other convenience factors pertaining to the trial of the case. Public interest factors include administrative costs and burdens on the courts, "local interest in having localized controversies decided at home", and issues in applying foreign law.

183 *Atlantic Martine Construction Co., Inc. v. U.S. Dist Ct.*, 134 S.Ct. 568, 580 (2013), p. 581.

184 Ibid., p. 581 et seq. According to the Supreme Court, by agreeing in advance to a forum selection clause, the parties "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of litigation."

185 *Effron*, (fn. 178), p. 26.

Like the recognition and enforcement of choice of court agreements, the procedure to recognize and enforce foreign judgments in the US is largely governed by state law, whether a federal or state court is invoked.[186] Insofar as incoming judgments are concerned, a majority of states have implemented the 1962 Uniform Foreign Money Judgments Recognition Act (or its 2005 revision) into law, providing uniform requirements on the enforcement of foreign money judgments.[187] With regards to states that have not implemented the UFMJRA, they indeed have adopted similar standards, thus making the grounds for recognition and enforcement (as well as non-recognition) of incoming foreign money judgments nearly uniform across among the several states.[188]

II. Impact of the Convention on relevant US law

If ratified, the implementation of the Convention's rules would change relevant US law in several positive ways. First, the Convention precludes the operation of the doctrine of *forum non conveniens*.[189] Pursuant to the Convention's rules, a chosen court may decline a case and a non-chosen court may proceed with a case only on the basis of specific enumerated exceptions. Therefore, unlike prevailing US law, the Convention leaves no room for judicial discretion to defeat the express choice of contracting parties on the ground that the case should be heard in the court of a third country.

Second, states' laws on the interpretation and validity of forum selection clauses differ, requiring contracting parties and their lawyers to potentially consult a number of laws in anticipation of drafting a choice of court agreement. Practitioners welcome the Convention's uniform formal validity requirements and autonomous choice of law rule on substantive validity, as they will significantly minimize the varying rules parties must consider when drafting their agreement, increasing legal certainty that courts will respect their choice of forum.[190]

Third, further enhancing legal certainty in the drafting of agreements, the Convention's presumption of exclusivity will apply in place of contrary US law. Under US law, rather than presuming a forum selection clause is exclusive or non-exclusive,

186 *Heiser*, (fn. 60), p. 1025, explaining that "[b]ecause no comprehensive treaty or federal statute currently exists, recognition and enforcement of foreign judgments [in the US] is now governed by state law."

187 Ibid. Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 39 (2002) (hereinafter "UFMJRA").

188 *Heiser*, (fn. 60), p. 1025 and also pp. 1026-1032, discussing the mandatory and discretionary grounds for non-recognition of foreign judgments under the UFMJRA.

189 See Hague Convention, Article 5(2).

190 See *Laguardia/Falge/Francheschi*, The Hague Convention on Choice of Court Agreements: A Discussion of Foreign and Domestic Points, 80 U.S.L.W. 1803, U.S. 26/6/2012, www.shearman.com/~/media/Files/NewsInsights/Publications/2012/07/The-Hague-Convention-on-Choice-of-Court-Agreemen__/Files/View-full-article-The-Hague-Convention-on-Choice__/FileAttachment/LaguardiafalgefranceschiarticleHagueConventionon__.pdf (9/9/2015), p. 5, noting that Article 3 of the Convention "would be welcome uniformity in contract drafting for global commercial transactions."

courts must refer to rules of contract interpretation to ascertain the contracting parties' intent.[191] Clearly a win for party autonomy, a presumption of exclusivity "leaves less discretion to the court, ensuring that the parties' expectations at the contract drafting stage persist all the way to court."[192]

Finally, as noted by one author, "the United States currently recognizes incoming judgments much more readily than American judgments are enforced elsewhere."[193] Under the Convention, this imbalance will change, as courts of contracting states will be required to recognize and enforcement judgments of chosen US courts. Moreover, in operation, Article 11 of the Convention should alleviate third states' concerns regarding US awards of punitive damages. As a result, foreign parties can take advantage of the benefits of litigating in the US, for example, the benefit of pre-trial discovery, without worrying whether or not a resulting damages award will be enforced abroad because it includes a punitive element.

For these reasons, implementation of the Convention in the US would increase legal certainty and legal predictability in international commercial transactions by ensuring American litigants that their choice of a foreign court will be respected and ensuring foreign litigants that a judgment rendered by a US court will be enforced abroad. As a result, foreign parties may be more inclined to contract with US parties or to litigate their disputes in US courts.

III. Implementation of the Convention in the US: a hot debate

Although the US signed the Convention in 2009, ratification of the Convention by the US continues to be an uphill battle. Whether or not the US *should* ratify Convention is not the issue. In fact, for the reasons discussed in the previous section, ratification of the Convention is widely supported in the US by federal and state governments, practitioners, and academics.[194] The primary issue is rather *how* the Convention should be implemented into US law.

191 See ibid.; *Dubay*, (fn. 179), p. 9 et seq.; *Heiser*, (fn. 60), p. 1015, stating, "[t]he determination of whether a particular agreement is exclusive or nonexclusive depends on the intent of the parties, which in turn requires an interpretation of the language of the agreement." In the US, "[t]here does not appear to be a uniform approach to this important determination."

192 *Laguardia/Falge/Francheschi*, (fn. 190), p. 5.

193 *Teitz*, (fn. 13), p. 547 et seq. Indeed, the implementation of the UFMJRA into the majority of states' legal schemes ensures that foreign money judgments are enforced in the US, but does not include a uniform reciprocity requirement regarding the "exporting" of US judgments.

194 In 2006, the American Bar Association, Recommendation and Report, 2006, http://apps.americanbar.org/intlaw/policy/investment/hcca0806.pdf (9/9/2015), p. 2, recommended that "the US government promptly sign, ratify, and implement the [Convention]." As evidenced by a survey conducted by the ABA, a vast majority of US practitioners support the ratification of the Convention.

Among the alternatives available in the US for the implementation of an international treaty,[195] there is a consensus that ratification of the Convention as a "self-executing" treaty, or directly applicable federal law, would be inappropriate.[196] Rather, given the detailed nature of the Convention and its direct impact on existing state and federal law in the area of forum selection clauses, it is generally agreed that some form of legislation implementing the Convention into US law is necessary.[197]

The alternatives for implementing legislation currently under heated debate are: 1. implementation through federal legislation only; and 2. implementation through a combination of federal and state legislation.[198] The crux of the debate centers on federalism concerns, or the intrusion of federal law into areas where authority is traditionally reserved to the individual states.[199] To put it simply, any federal legislation implementing the Convention would require certain changes to states' laws concerning jurisdiction and the recognition and enforcement of foreign judgments, and "states are resistant to federally imposed requirements to change their laws."[200]

The first alternative approach involves the implementation of a detailed federal law, more or less tracing the Convention's rules and perhaps borrowing a few provisions from relevant state law.[201] This law would preempt state law and apply in both federal and state courts.[202] Proponents minimize the obvious federalism objection to this approach by underscoring the need for uniform action at the federal level insofar as laws facilitating US participation in the global economy is concerned.[203] The fear is that implementation of a uniform law at the state level and, as a result, differing interpretations and applications of the law by states would cause confusion to foreign lawyers and business parties, possibly deterring them from choosing US courts.[204] Critics of this approach, however, focus on the significant constitutional challenges it will inevitably invite.[205] Even if such challenges ultimately fail, critics argue that the "political sensitivities" surrounding them may be enough to kill the approval of the Convention in the US Senate, a precondition to ratification.[206]

195 See *Sewart*, Implementing the Hague Choice of Court Convention: The Argument in Favor of "Cooperative Federalism", in: Foreign Court Judgments and the United States Legal System, 26th Sokol Colloquium 2013, 2014, p. 2.
196 See ibid., pp. 2-4; see also *Burbank*, A Tea Party at The Hague, Sw. J. Int'l L. 18 (2012), p. 641.
197 See *Stewart*, (fn. 195), p. 3 et seq.
198 Ibid., p. 1.
199 See ibid.; *Dubay*, (fn. 179), p. 34 et seq.
200 *Stewart*, (fn. 195), p. 7.
201 See *Burbank*, (fn. 196), p. 642; see also *Dubay*, (fn. 179), pp. 49-59, advocating a detailed federal implementing law that takes into consideration issues particular to the US, such as federalism, removal jurisdiction, venue transfer, etc.
202 See *Stewart*, (fn. 195), p. 5; *Dubay*, (fn. 179), p. 39 et seq.
203 See *Burbank*, (fn. 196), p. 642.
204 Ibid., p. 643.
205 See *Stewart*, (fn. 195), pp. 10-12, discussing three main areas of the Convention and the constitutional issues surrounding them; but see *Dubay*, (fn. 179), pp. 38-44, arguing that a federal law implementing the Convention "falls squarely within" Congress' treaty power and power to regulate foreign commerce.
206 *Stewart*, (fn. 195), p. 12.

The second alternative, also known as the "cooperative federalism" approach, would require the implementation of two "parallel" laws: a uniform state law and a federal statute.[207] Under this approach, both laws must adhere to the Convention's requirements, with the federal law applying only to the extent a state has opted out of the uniform law or has adopted the uniform law in a manner that is inconsistent with Convention's requirements.[208] Critics of this approach note the time and costs associated with drafting and adopting a uniform state law, the likelihood that not all states will even adopt it, and, regarding the states that do, the inevitability that their courts will interpret it differently.[209] However, proponents of this option argue that the process of drafting and negotiating a uniform state law would allow states to address their particular interests or sensitivities, ultimately resulting in a workable law and greater likelihood of adoption.[210]

In 2012, the US State Department issued a White Paper setting forth a proposal to implement the Convention based on the cooperative federalism approach.[211] As a result, both a uniform law for adoption at the state level[212] and a proposed federal implementing law were drafted.[213] Unfortunately, certain issues addressed in the proposal remained in dispute, resulting in an impasse between the two sides.[214]

In an effort to end the standoff, the Legal Adviser of the State Department recommended an alternative federal-only approach that mirrors the legislation implementing the New York Convention into US federal law.[215] The Legal Adviser encouraged a compromise between the two fronts "in order to complete this important implementation effort",[216] although it does not appear any considerable movement towards an agreement has occurred. Regardless of which side of the debate one supports, it is undisputed that, until the implementation issue is resolved, ratification of the Convention by the US will not occur.[217] Indeed, a failure to reach a workable solution may

207 Ibid., p. 5.
208 Ibid.
209 *Burbank*, (fn. 196), p. 644. The "cooperative federalism" approach was described by one author as having, "in the international context […] the destructive potential of a communicable disease".
210 *Stewart*, (fn. 195), p. 6; but see *Dubay*, (fn. 179), p. 44, noting the Convention's rules allowing parties to choose a completely neutral forum would be undermined in the US if, in the implementation of the uniform law, individual states are allowed to inject their "policy preferences in favor of a geographic nexus requirement."
211 See United States Department of State, White Paper of 16/4/2012, www.state.gov/s/l/releases/2013/211157.htm (9/9/2015).
212 See the draft Uniform Choice of Court Agreements Convention Implementation Act of 18/6/2012, www.uniformlaws.org/shared/docs/choice_of_court/2012am_ccaia_approved text.pdf (9/9/2015).
213 See Proposed Federal Implementing Legislation, www.state.gov/s/l/releases/2013/211154.htm (9/9/2015).
214 White Paper, (fn. 211), section III(B).
215 United States Department of State, Office of the Legal Advisor, Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Court Agreements (COCA), dated 19/1/2013, www.state.gov/s/l/releases/2013/206657.htm (9/9/2015), p. 3.
216 Ibid.
217 See *Lipe/Tyler*, (fn. 5), p. 12; *Stewart*, (fn. 195), p. 12; *Dubay*, (fn. 179), p. 35.

also hinder ratification in the US of similar private international law treaties in the future.[218]

E. Conclusion

In the courts of its contracting states, the Convention promises contracting parties legal certainty that their choice of court will be respected and predictability that any resulting judgment will be enforced. In general, it offers parties an important tool in their ability to plan for potential disputes. Though there are weaknesses in the Convention's rules, such as its inability to outright preclude parallel proceedings and the possibility that too many declarations by contracting states might reduce its overall utility, the benefits offered by the Convention to international contracting parties should not be underestimated. By foreseeing in which court they may be hailed, knowing which law will govern the formal and substantive validity of their agreement, and anticipating whether a court might ignore their agreement, parties gain a significant amount of control in the dispute resolution process.

In the EU, the Brussels I-bis Regulation offers a high degree of certainty and predictability to parties choosing EU courts to hear their dispute or seeking to have an EU judgment recognized or enforced in another member state. Where EU law is lacking, particularly in the area of third state jurisdiction agreements, the Convention's rules offer parties an avenue of assurance. However, in order to realize the benefits of the Convention and ensure their intentions are carried out in the event of a dispute, it is necessary that parties understand which instruments' rules apply in a given situation and, where the rules conflict, how the application of the two "give-way" rules of Article 26(6) of the Convention operate. Should parties fail to grasp the relationship between these rules, they may find themselves litigating in an unfavorable forum or, despite a victory in their chosen court, unable to have their judgment enforced.

With its signing of the Convention in 2009, the US signified the importance it attaches to the Convention's aims; however, the debate over its implementation into US law is one deeply rooted in policy and constitutional issues. To date, both sides of the debate continue to show an unwillingness "to shelve the arguments from first principles, abandon maximal positions, to calm the rhetoric, and to come to an agreement."[219] However, for the sake of this Convention, as well as future private international law treaties, movement towards ratification in the US must occur. Hopefully, the Convention's entry into force and applicability in the EU will encourage a timely resolution of the issues facing implementation in the US and initiate further ratification in other states. Only then can parties fully realize the high degree of legal certainty and predictability that the Convention's rules provides.

218 *Stewart*, (fn. 195), p. 13.
219 Ibid.