

## ARTICLES

### THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: A CRITICAL ASSESSMENT

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INTRODUCTION

The Hague Convention on Choice of Courts Agreements (“Convention” or “Choice of Court Convention”) aspires to be one of the most significant private international law treaties of this century. The Convention would substantially alter existing rules in many jurisdictions, including the United States, governing the recognition and enforcement of both international choice-of-court agreements and judgments obtained in proceedings based on such agreements. The Convention’s drafters and other proponents promote it as replicating both the terms and success of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), transposed to cross-border forum selection agreements.

Despite these aspirations, little critical assessment of the Convention’s terms or effects has been undertaken. Both scholarly commentary and official explanatory reports are almost entirely descriptive or promotional. There have been virtually no serious efforts to evaluate the costs and benefits of the Convention or the wisdom of its fundamental structure and terms.

Despite its obvious good intentions, there are substantial grounds for doubting the wisdom of the Convention, both for the United States and other jurisdictions. The Convention transplants basic principles from the New York Convention to the context of cross-border choice-of-court agreements, notwithstanding substantial differences between the arbitral process and proceedings in (many) national courts. These differences raise serious doubts as to the benefits of the Choice of Court Convention’s basic terms and objective; in particular, there are very substantial grounds for questioning whether it is wise, in the context of a global convention, to treat choice-of-courts agreements and national court judgments in the same manner as international commercial arbitration agreements and arbitral awards. The Choice of Court Convention also omits significant safeguards that the New York Convention and most national legal systems incorporate, which ensure that both the parties’ autonomy and the procedural integrity of the adjudicative process are respected. In doing so, the structure and terms of the

Choice of Court Convention again raises serious doubts as to both the benefits it would produce and the fairness of proceedings under the Convention.

This Article seeks to provide an objective assessment of the Choice of Court Convention's structure and terms, evaluating the costs and benefits to the United States and other jurisdictions' ratification of the Convention. Part I of the Article summarizes the negotiating history of the Convention and the aspirations of its proponents. Part II of the Article outlines the Convention's basic terms, including comparisons with the principal provisions of the New York Convention. Part III of the Article evaluates the Choice of Court Convention, focusing in particular on its provisions dealing with the parties' autonomy and the procedural integrity of the adjudicative process. The Article concludes that, in both respects, the Convention fails to provide counterparts to the safeguards of the New York Convention and existing U.S. law and it appears likely to expose parties to significant risks of unfairness and ought not be ratified by nations committed to the rule of law.

#### I. THE CHOICE OF COURT CONVENTION: ORIGINS AND NEGOTIATIONS

The Choice of Court Convention was drafted under the auspices of the Hague Conference on Private International Law ("Hague Conference").<sup>1</sup> The Hague Conference is an influential inter-governmental organization, conceived and largely dominated by Continental European academics and government representatives.<sup>2</sup> Over the past 70 years, the Conference has produced texts of some 40 private international law instruments, addressing

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<sup>1</sup> Hague Convention on Choice of Court Agreements, Jun. 30, 2005, 44 ILM 1294. (hereinafter Convention). See *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (June, 30 2005) (available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>).

<sup>2</sup> The Hague Conference was conceived in the late 19th century and held its first conference in 1893. It was for decades an "exclusively European event." Jürgen Basedow, *The Hague Conference and the Future of Private International Law: A Jubilee Speech*, 82 RABELSZ 924, 935 (2018). In recent decades, non-European states have participated in the Conference, but European states have retained their "programmatic influence" and both the Conference and its Permanent Secretariat remain predominantly European in focus. *Id.* at 924. That has been reinforced by the European Union's exercise of control over the positions of European states on issues of private international law, while those states retain individual voting rights in the Conference's decision-making. Ronald A. Brand, *Community Competence for Matters of Judicial Cooperation at the Hague Conference on Private International Law: A View from the United States*, 21 J. L. & COMM. 191, 208 (2002). For the original Statute of the Hague Conference on Private International Law, see 15 U.S.T. 2228. Amendments to the Statute were adopted on June 30, 2005 and approved on September 30, 2006. See generally Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L. Q. 553 (1993); Peter Pfund, *The Hague Conference Celebrates its 100th Anniversary*, 28 TEX. INT'L L.J. 531 (1993).

various aspects of the recognition of judgments,<sup>3</sup> choice of law,<sup>4</sup> jurisdiction<sup>5</sup> and related topics.<sup>6</sup>

Among other things, in 1954, the Hague Conference proposed a convention on international civil procedure,<sup>7</sup> in 1965, a convention on choice of court agreements<sup>8</sup> and, in 1971, a convention (and addendum) on the recognition and enforcement of foreign judgments.<sup>9</sup> As with a number of other proposals by the Conference,<sup>10</sup> these various conventions attracted only minimal state support and none of them came into effect.<sup>11</sup> In contrast,

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<sup>3</sup> See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Feb. 2, 1971, 1144 U.N.T.S. 249; Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 2, 1971, 1144 U.N.T.S. 271; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>).

<sup>4</sup> See Convention on the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 149; Convention on the Law Governing Transfer of Title in International Sales of Goods, Apr. 15, 1958 (not in force) (available at <https://assets.hcch.net/docs/17ba42d1-9aab-4459-8eef-c86052d195b9.pdf>); Convention on the Law Applicable to Products Liability, Oct. 2, 1973, 1056 U.N.T.S. 187; Convention on the Law Applicable to Maintenance Obligations, Oct. 2, 1973, 1056 U.N.T.S. 199; Convention on the Law Applicable to Matrimonial Property Regimes, Mar. 14, 1978, 16 INT'L L. MATERIALS 14; Convention on the Law Applicable to Agency, Mar. 14, 1978, 26 AM. J. COMPAR. L. 434, 438.

<sup>5</sup> See Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, Apr. 15, 1978 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=34>); Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, 1107 U.N.T.S. 34; Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 INT'L L. MATERIALS 1396.

<sup>6</sup> See, e.g., Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, Apr. 15, 1958, 539 U.N.T.S. 27; Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 143.

<sup>7</sup> Convention on Civil Procedure, Mar. 1, 1954, 286 U.N.T.S. 265.

<sup>8</sup> Convention on the Choice of Court, Nov. 25, 1965 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>).

<sup>9</sup> Supplementary Protocol the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 2, 1971, 1144 U.N.T.S. 271 (concluded Feb. 1, 1971).

<sup>10</sup> Among the least effective proposals of the Hague Conference are “the two conventions that were drafted to supplement the Conflicts Convention on Sales, the Convention of April 15, 1958 on the Law Governing Transfer of Title in International Sales of Goods . . . and the Convention . . . on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods. The first named convention has received one ratification and the latter, none.” Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law: A “History” with Comments*, 30 LAW & CONTEMP. PROBS. 291, 316 (1965).

<sup>11</sup> See, e.g., Convention on the Law Governing Transfer of Title in International Sales of Goods, Apr. 15, 1958 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full->

several of the treaties negotiated under the Hague Conference's auspices with other subject matters have proven relatively successful.<sup>12</sup>

Notwithstanding this history,<sup>13</sup> the Hague Conference elected to revisit the topic of a multilateral recognition of judgments and jurisdiction convention in 1996 (after four years of discussions and study).<sup>14</sup> Thereafter, the Conference devoted nearly a decade to discussion of a jurisdiction and judgments convention, which took what was described as a “mixed

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text/?cid=32); Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, Apr. 15, 1958 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=34>); Convention of 1 June 1956 Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions, June 1, 1956 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=36>); Convention on the Choice of Court, Nov. 25, 1965 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>); Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=61>); Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=62>); Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019 (not yet in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>).

net/en/instruments/conventions/full-text/?cid=98); Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=61>); Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989 (not in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=62>); Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019 (not yet in force) (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>).

<sup>12</sup> See, e.g., Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 659 U.N.T.S. 163 (78 Contracting States); Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 847 U.N.T.S. 231 (16 ratifications); Convention on Abolishing the Requirement of Legalisation [sic] for Foreign Public Documents, Oct. 5, 1961, 537 U.N.T.S. 189 (120 Contracting States); Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 000 (103 Contracting States). See also Status of Signatures, Ratifications, and Accessions, HAGUE CONF. ON PRIV. INT'L L. (available at <https://www.hcch.net/en/instruments/status-charts>) (last updated: Sep. 9, 2021).

<sup>13</sup> It is often remarked that the Choice of Court Convention was proposed in 1992 by the United States. See Trevor Hartley & Masato Dogauchi, *Hague Conference on Private International Law: Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* 785 [hereinafter *Report*] (citing proposals by Arthur T. von Mehren as “intellectual origins” of Convention); RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 6 n.19 (3d ed. 2008) (citing Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, Hague Conference (May 5, 1992)).

<sup>14</sup> *Report*, at 785. For accounts of the Convention's history, see Paul Beaumont, *Hague Choice of Court Agreement Convention 2005: Background, Negotiations, Analysis and Current Status*, 5 J. PRIV. INT'L L. 125 (2009); BRAND & HERRUP, *supra* note 13, at 7–10; Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. PRIV. INT'L L. 243, 244–48 (2006); Christian Thiele, *The Hague Convention on Choice-of-Court Agreements: Was It Worth the Effort?*, in ECKART GOTTSCHALK, RALF MICHAELS, GIESELA RÜHL, & JAN VON HEIN, CONFLICT OF LAWS IN A GLOBALIZED WORLD 63 (2007); Hans van Loon, *The 2005 Hague Convention on Choice of Court Agreements—An Introduction*, 18 ANNALS FAC. L.U. ZENICA 11 (2016).

Convention approach.”<sup>15</sup> The Conference’s proposed mixed treaty would have relatively comprehensively regulated both permissible and prohibited grounds of jurisdiction and the recognition and enforcement of judgments.<sup>16</sup> After (another) five years of discussions, a draft convention was narrowly approved by the Hague Conference (with European states constituting the majority, while a number of non-European states voted against the draft).<sup>17</sup>

The lack of broad-based support for the Conference’s proposed draft jurisdiction and judgments convention led to a decision in June 2001 to suspend work on a mixed convention.<sup>18</sup> Instead, in April 2002, the Hague Conference “modified the entire project”<sup>19</sup> by directing the formation of an informal Working Group charged with drafting an entirely new convention limited only to areas of apparent agreement on jurisdictional rules between state representatives.<sup>20</sup> The Group’s efforts were focussed on proceedings involving jurisdiction based on choice of court agreements in business-to-business cases, submission, the defendant’s forum, and counterclaims.<sup>21</sup>

The Working Group produced a draft in less than a year (in April 2003),<sup>22</sup> which was then submitted to a Special Commission that, in another year, produced a materially revised text (in April 2004).<sup>23</sup> The draft was presented in June 2005 to the Hague Conference’s Diplomatic Conference, which then produced the Convention’s final text. With the signing of the Final Act, on

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<sup>15</sup> The Secretary General of the Hague Conference appointed a Special Commission which held five meetings between 1997 and 1999. Schulz, *supra* note 14, at 244–45.

<sup>16</sup> See BRAND & HERRUP, *supra* note 13, at 5, 7 (departing from past conventions by creating a “hybrid” structure); van Loon, *supra* note 14, at 13–14 (noting how this is a “grey area” to national law).

<sup>17</sup> BRAND & HERRUP, *supra* note 13, at 9.

<sup>18</sup> This was suspended because of the wide differences existing in rules of jurisdiction in different States and the consequences of technological developments (including the Internet and electronic commerce) for jurisdictional rules. *Report*, *supra* note 13, at 785–86.

<sup>19</sup> BRAND & HERRUP, *supra* note 13, at 9.

<sup>20</sup> The Working Group was chaired by Professor Allan Philip from Denmark and included participants from the European Commission, Germany Italy, Switzerland Spain, the UK, Argentina, Brazil, China, Egypt, Japan, Mexico, New Zealand, the Russian Federation, South Africa, and the United States. Schulz, *supra* note 14, at 247. The Special Commission was chaired by Professor Philip (and later Andreas Bucher), with Messrs. Hartley and Dogouchi as Rapporteurs, and included participants from Japan, Switzerland, US, China, Russia Federation, United Kingdom, Canada and Australia.

<sup>21</sup> *Report*, *supra* note 13, at 787; Schulz, *supra* note 14, at 247.

<sup>22</sup> The informal Working Group met three times in 2002 and 2003, submitting its draft text to the Hague Conference’s Commission on General Affairs and Policy of the Conference in April 2003. See BRAND & HERRUP, *supra* note 13, at 9 (documenting the expedited timeline).

<sup>23</sup> After consultation with Member States in April 2003, it was concluded that there was sufficient support for the draft to form a Special Commission to continue work on the informal work draft. The Special Commission had two meetings during December 2003 and April 2004. *Report*, *supra* note 13, at 786.

June 30, 2005, the Convention was “open[ed] for signature and ratification.”<sup>24</sup>

The first state to accede to the Choice of Court Convention was Mexico (in 2007), followed by the European Union (in 2015).<sup>25</sup> The Convention has also been ratified by Singapore (in 2016),<sup>26</sup> Montenegro (in 2018) and the United Kingdom (in 2020).<sup>27</sup> The Convention first entered into force on October 1, 2015, and is now in force for the European Union and its 27 Member States (including Denmark, which acceded separately), Montenegro, the United Kingdom and Singapore.<sup>28</sup> The Convention has also been signed, but not ratified, by several states, including the United States (in 2009), Ukraine (in 2016) and China (in 2017).<sup>29</sup>

The Hague Conference has high aspirations for the Convention, which has been vigorously promoted by both the Conference’s Permanent Bureau and the European Union. The New York Convention, with nearly 170 Contracting States, has been repeatedly identified as both the Choice of Court Convention’s model and ultimate measure of success. In the words of the Hague Conference’s Explanatory Report, “[t]he hope is that the Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 has done for arbitration agreements.”<sup>30</sup> Or, as the

<sup>24</sup> BRAND & HERRUP, *supra* note 13, at 10.

<sup>25</sup> The EU’s instrument of accession was deposited on June 2015. The Convention entered into force for members of the EU on 1 October 2015 (except for Denmark, as to which it entered into force on 1 September 2018). The United Kingdom and Ireland are also bound by the Convention. The United Kingdom left the EU on January 31, 2020 but acceded to the Convention in its own right on 28 September 2020. Michael James, *Hague Convention on Choice of Court Agreements*, THOMAS REUTERS PRACTICAL LAW <https://uk.practicallaw.thomsonreuters.com> (last visited Jan. 8, 2021).

<sup>26</sup> *Singapore ratifies the 2005 Choice of Court Convention*, HCCH <https://www.hcch.net/en/news-archive/details/?varevent=491> (last visited June 10, 2021).

<sup>27</sup> *Montenegro signs the 2005 Choice of Court Convention*, HCCH <https://www.hcch.net/en/news-archive/details/?varevent=575> (last visited June 10, 2021). *United Kingdom joins 2005 Choice of Court and 2007 Child Support Conventions*, HCCH <https://www.hcch.net/es/news-archive/details/?varevent=751> (last visited June 10, 2021). *See also* Van Loon, *supra* note 14, at 14, 16.

<sup>28</sup> James, *supra* note 25.

<sup>29</sup> *Id.* at 28.

<sup>30</sup> *Report, supra* note 13, at 791. *See also* Mark Pring & Ryan Craig, *United States: The Hague Convention on Choice of Court Agreements: A New York Style Global Convention for Litigation*, MONDAQ (Feb. 7, 2006) <https://www.mondaq.com/unitedstates/reinsurance/37694/the-hague-convention-on-choice-of-court-agreements-a-new-york-style-global-convention-for-litigation?login=true> (emphasis omitted) (noting that the New York Convention “has provided a much clearer structure for ensuring easier recognition and enforcement (of arbitration awards)”); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005) (citing how the Choice of Court Convention is “the litigation analogue for the New York

First Secretary of the Permanent Bureau later put it, with even higher aspirations:

It is hoped that the new Convention will do for choice-of-court agreements what the highly successful 1958 New York Convention does for arbitration agreements, namely to protect party autonomy and to provide predictability and legal certainty to business parties who want to make arrangements for the resolution of disputes that have arisen or may arise between them.<sup>31</sup>

In these and other commentary, there has been no hesitation about recommending the Convention or promoting its ratification by states on a worldwide basis. On the contrary, the Convention's proponents variously describe it as "filling the governance gap that, in the absence of a uniform global legal regime, currently exists concerning the effect of choice of court agreements;"<sup>32</sup> marking "a major milestone of international civil procedure;"<sup>33</sup> enhancing the "movement of people, goods, capital, services, and ideas" [by ensuring] the "free movement of judgments;"<sup>34</sup> and providing "an opportunity for creating a worldwide judicial alternative for business-to-business dispute resolutions."<sup>35</sup> Like the New York Convention, the Choice of Court Convention has been consistently promoted as a global instrument, suitable for ratification by all states, which will ensure respect for party autonomy (by giving effect to forum selection agreements) and efficiency (by permitting relatively easy recognition and enforcement of foreign judgments).

## II. THE CHOICE OF COURT CONVENTION: STRUCTURE AND PROVISIONS

The basic structure and purpose of the Choice of Court Convention are straightforward. The Convention requires that Contracting States give effect to international choice-of-court agreements, and to enforce the resulting judgments, subject in each case to only limited exceptions. The stated purpose of the Convention is to encourage cross-border trade and investment by enhancing international judicial cooperation through "uniform rules on

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Convention because it seeks to provide an equal and viable alternative to arbitration); Thiele, *supra* note 14, at 66 ("It is this gap that the Hague Convention now strives to close").

<sup>31</sup> Schulz, *supra* note 14, at 267–68.

<sup>32</sup> Van Loon, *supra* note 14, at 11.

<sup>33</sup> Schulz, *supra* note 14, at 269.

<sup>34</sup> BRAND & HERRUP, *supra* note 13, at 3, 25.

<sup>35</sup> *Commission Proposal for a Council decision on the Signing by the European Community of the Convention on Choice-of-Court Agreements*, at 2, COM (2008) 538 final (Sep. 5, 2008).

jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters.”<sup>36</sup>

The Convention implements these objectives through provisions that: (a) require a Contracting State’s court to hear disputes that are subject to an exclusive choice-of-court provision designating that court as the forum for adjudication;<sup>37</sup> (b) forbid Contracting States’ courts from hearing disputes that are subject to an exclusive choice-of-court provision specifying the courts of another state;<sup>38</sup> and (c) require the recognition and enforcement of judgments by a court specified in a choice-of-court provision.<sup>39</sup> In the words of the Hague Conference’s Explanatory Report:

If the Convention is to attain its aim of making choice of court agreements as effective as possible, it has to ensure three things. Firstly, the chosen court must hear the case when proceedings are brought before it; secondly, any other court before which proceedings are brought must refuse to hear them; and thirdly, the judgment of the chosen court must be recognized and enforced.<sup>40</sup>

The Convention includes various exceptions to these obligations, including for cases where a choice-of-court agreement is null and void; where it would lead to manifest injustice or cannot reasonably be performed;<sup>41</sup> and for cases where a judgment was based upon a null and void choice-of-court provision, was obtained by procedural fraud, or was manifestly incompatible with the recognizing State’s public policy.<sup>42</sup> The Convention also contains additional provisions regarding punitive damages,<sup>43</sup> preliminary questions,<sup>44</sup> and interim relief.<sup>45</sup>

#### A. *Scope of Convention*

The Convention is limited in scope, applying only to a defined category of choice-of-court agreements and the judgments resulting from such agreements. Article 1 of the Convention makes this clear, providing that “this Convention shall apply in international cases to exclusive choice of court

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<sup>36</sup> Convention, preamble.

<sup>37</sup> *Id.*, Arts. 1(1), 3 & 5.

<sup>38</sup> *Id.*, Art. 6.

<sup>39</sup> *Id.*, Art. 8.

<sup>40</sup> *Report, supra* note 13, at 791.

<sup>41</sup> Convention, Arts. 6(a), 6(c)–(d).

<sup>42</sup> *Id.*, Arts. 9(a), 9(d)–(e).

<sup>43</sup> *Id.*, Art. 11(1).

<sup>44</sup> *Id.*, Art. 10.

<sup>45</sup> *Id.*, Art. 7 (noting how “interim measures of protection are not governed by this Convention.”).

agreements concluded in civil or commercial matters.”<sup>46</sup> Each of these three limitations are significant.<sup>47</sup>

### 1. *International Cases*

The Convention applies only in “international cases,” as defined by the Convention itself. Article 1 of the Convention defines “international,” with separate definitions, one for purposes of jurisdiction and one for the recognition and enforcement of judgments.

First, Article 1(2) adopts an unusual approach to defining “international cases” for jurisdictional purposes (under Chapter II of the Convention). It provides that, for jurisdictional purposes, a case is “international” “unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”<sup>48</sup> Thus, unless all “elements” of a case are connected only with a single State, the case is international, and the fact that the parties have selected a foreign court as the forum will not make a case international.<sup>49</sup> Phrased positively, any case with elements that are connected to more than a single state will be international, except where the sole foreign element is the choice of a foreign forum.

Second, Article 1(3) defines “international” cases for purposes of the recognition and enforcement of foreign judgments differently. Article 1(3) provides that “a case is international where recognition or enforcement of a foreign judgment is sought.”<sup>50</sup> Under Article 1(3), the fact that a judgment is rendered by a foreign court makes the case “international,” with the result that a case that was domestic (non-international) for jurisdictional purposes can become international after a judgment is rendered and recognition is sought in another State.<sup>51</sup> In contrast to the treatment of Article 1(2), the sole

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<sup>46</sup> *Id.*, Art. 1(1).

<sup>47</sup> See Thiele, *supra* note 14, at 67, 71 (“the Convention’s scope is limited by a vast number of mandatory exclusions and the opportunity for each member state to allow other exclusions.”).

<sup>48</sup> *Id.*, Art. 1(2). This produces the odd result that a case can be international if between two nationals of the same non-Contracting State, with all relevant elements of the case connected to that state, although it would not be international in the case of two nationals of a Contracting State. See Francesca Ragno, *The Brussels I Recast Regulation and the Hague Convention on Choice-of-Courts Agreements: Convergences or Divergences?*, in CROSS-BORDER LITIGATION IN EUROPE: THE BRUSSELS I RECAST REGULATION AS A PANACEA? 95 (Franco Ferrari & Francesca Ragno, eds., 2015).

<sup>49</sup> *Id.*, Art. 1(2). BRAND & HERRUP, *supra* note 13, at 16.

<sup>50</sup> Convention, Art. 1(3).

<sup>51</sup> *Report*, *supra* note 13, at 792.

fact that a judgment was rendered by a foreign court makes the case international for purposes of Article 1(3).

The Convention also permits Contracting States to make declarations that can affect the definitions of “international” cases. Article 19 permits a Contracting State to “declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between the State and the parties or the dispute.”<sup>52</sup> A declaration made under Article 19 allows a court of a Contracting State not to comply with the otherwise applicable requirement, under Article 5, to hear disputes that are subject to an exclusive choice-of-court agreement selecting that court as the parties’ chosen forum. The rationale underlying this provision is that it allows Contracting States to choose not to bear the cost of dispute resolution for parties with no connection to the forum, while permitting other States to encourage international commercial disputes to be litigated in their courts (by not exercising their rights to make an Article 19 declaration).<sup>53</sup> The Convention also permits a Contracting State to make a declaration that:

Its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.<sup>54</sup>

This provision, in Article 20, complements Article 1(3), providing that, if the only foreign element in a case is the location of the chosen court, but all the other elements are connected to the requested State, that State may refuse recognition on the theory that the case is domestic to its legal system.<sup>55</sup>

## 2. *Exclusive Choice-of-Court Agreements*

The Convention is applicable to “exclusive choice of court agreements,” which are defined in Article 3(a).<sup>56</sup> Article 3(a) limits the scope of the Convention to those forum selection agreements that designate “for the

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<sup>52</sup> Convention, Art. 19.

<sup>53</sup> BRAND & HERRUP, *supra* note 13, at 16.

<sup>54</sup> Convention, Art. 20.

<sup>55</sup> BRAND & HERRUP, *supra* note 13, at 16.

<sup>56</sup> Article 3(a) provides: “‘exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of paragraph *c*) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.”

purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship” the courts of a Contracting State.<sup>57</sup> Article 3(a) does not include choice-of-court provisions selecting the courts of countries that are not Contracting States.

Article 3 also prescribes three other rules regarding exclusive choice-of-court agreements: a deeming rule, an evidentiary or formal validity rule and a severability rule. The deeming rule adopts the treatment of forum selection provisions that prevails under European Union law,<sup>58</sup> and provides that a choice-of-court agreement is deemed to exclude the jurisdiction of all courts other than the chosen court unless the parties agree otherwise. Thus, Article 3(b) provides that “a choice of court agreement which designates the courts of one Contracting State . . . shall be deemed to be exclusive unless the parties have expressly provided otherwise.”<sup>59</sup> Commentary on the Convention observes that Article 3(b) “is an important provision. It reverses the presumption found in the majority of U.S. courts that a choice of court agreement is ‘permissive’ (non-exclusive) unless otherwise expressly indicated.”<sup>60</sup> Or, in the words of another commentator, “Article 3(b) contains an important rule that will change the legal situation in particular in the USA and other common law jurisdictions, and will greatly expand the scope of the Convention.”<sup>61</sup>

Article 3(c) also prescribes an evidentiary rule that imposes formal requirements that a choice-of-court agreement must satisfy in order to be considered valid. Those requirements are that the agreement must be “concluded or documented” either “in writing” or “by any other means of communication which renders information accessible so as to be usable for subsequent reference.”<sup>62</sup> Article 3(c) is a mandatory rule, which neither contracting parties nor Contracting States may modify (for example, if a

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57 Convention, Art. 3 (including agreements that select (a) in general terms the courts of one Contracting State (*e.g.*, English courts), or (b) one or more specific courts of a particular Contracting State (*e.g.*, Southern District of New York)).

58 See Ashlee Schaller, *Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions*, 44 N.C. J. Int'l L. 124 (2018) (noting that EU law governing private international law issues regarding jurisdiction clauses is primarily regulated by the “re-cast” Brussels I Regulation. The Regulation also contains a deeming rule regarding forum selection agreements, with Article 25(1) providing that jurisdiction under a choice-of-court clause “shall be exclusive unless the parties have agreed otherwise.” *Id.* at 125; see Ragno, *supra* note 48, at 225 (comparing the Convention and the EU regime).

59 Convention, Art. 3(b).

60 BRAND & HERRUP, *supra* note 13, at 17; see *Report*, 785.

61 Schulz, *supra* note 14, at 253.

62 BRAND & HERRUP, *supra* note 13, at 17(emphasizing that the requirements of Article 3(b) are consistent with other recent international private law conventions such as 2005 UNCITRAL Convention on the Use of Electronic Communications in Internal Contracts).

Contracting State wished to recognize choice-of-court agreements satisfying a less demanding form requirement).<sup>63</sup> On the other hand, the form requirement imposed by Article 3 is relatively lenient, giving effect to choice-of-court agreements even if concluded orally or by conduct, provided only that they are also documented in written form.

Article 3(d) provides for a severability rule: a choice-of-court agreement shall be “treated as an agreement independent of the other terms of the contract.”<sup>64</sup> This provision, which is relatively non-controversial, limits the circumstances in which the existence, validity, or legality of a forum selection agreement may be challenged (by requiring that such challenges be directed to the choice-of-court provision itself, and not only to the underlying commercial contract within which that provision is found).<sup>65</sup>

### 3. *Civil or Commercial Matters*

The Convention is limited to choice-of-court agreements and judgments in “civil” or “commercial” matters.<sup>66</sup> Neither Article 1 nor other provisions of the Convention define either of these terms, although the Explanatory Report opines that “civil or commercial matters has an autonomous meaning: it does not entail a reference to national law or other instruments” and it is “primarily intended to exclude public law and criminal law.”<sup>67</sup> There is a substantial body of authority (including national courts, commentary, and other materials) which consider the meaning of the terms “civil” and “commercial” in other private international law contexts, and which would be instructive in matters arising under the Convention.<sup>68</sup>

### 4. Exclusions from Scope of Convention

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<sup>63</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 756 (3d ed. 2021) (noting that in this respect, the Convention is materially more limited than the New York Convention, which imposes a maximum, but not a minimum, form requirement, leaving Contracting States free to adopt more lenient forum requirements for international arbitration agreements).

<sup>64</sup> Convention, Art. 3(4).

<sup>65</sup> *Report, supra* note 13, at 813; *see* BORN, *supra* note 63, at 375–506 (noting that the separability provision is derived from the treatment of international arbitration agreements under the New York Convention and most national arbitration statutes).

<sup>66</sup> *Report, supra* note 13, at 801 (explaining that the reason for including both terms (civil and commercial) is because in some countries civil and commercial matters are regarded as separate and mutually exclusive categories).

<sup>67</sup> *Id.* at 801.

<sup>68</sup> *See* BRAND & HERRUP, *supra* note 13, at 74 (noting that Article 2(5) sheds some light on these terms, providing that a case remains within the scope of the Convention when it involves a State, including a government agency or any person acting for a State. In this sense, if the State is acting in its private capacity (“*ius gestionis*”), “the benefits and burdens of the Convention should be shared evenly”).

The Convention also includes a number of subject matter exclusions from its scope.<sup>69</sup> First, Article 2(1) provides that the Convention will not apply to choice-of-court agreements in which a “consumer is a party” or to choice-of-court agreements “relating to contracts of employment.”<sup>70</sup> This generally parallels the treatment of forum selection provisions under European Union and Member State legislation,<sup>71</sup> and results in the Convention applying primarily to choice-of-court provisions in commercial contracts between merchants.<sup>72</sup> The Convention departs in this respect from the treatment of consumer and employment contracts in the United States and a number of other developed jurisdictions.<sup>73</sup>

The Convention also excludes a number of specific subject matters from its scope. Article 2(2) excludes matters that are assertedly so closely connected to a State, or its interests, that mandatory exclusive jurisdiction is justified.<sup>74</sup> This (fairly detailed and lengthy) list includes disputes related to personal status,<sup>75</sup> legal capacity of natural persons,<sup>76</sup> maintenance obligations and other family law matters,<sup>77</sup> wills and successions,<sup>78</sup> insolvency proceedings,<sup>79</sup> in rem rights in immovable property,<sup>80</sup> internal corporate matters,<sup>81</sup> validity of intellectual property rights<sup>82</sup> (with the exception of copyright and related

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69 Convention, Art. 2(3) (permitting subject matters that are excluded from the Convention’s scope nonetheless to be heard by a chosen court if they arise “merely as a preliminary question and not as an object of the proceedings); see Convention, Art. 10 (providing that Article 2(3) has particular application to intellectual property rights disputes, where questions on validity and infringement, excluded by Article 2(2), might arise as incidental to a primary contract claim); see also *id.* (emphasizing the counterpart to Article 2(3)’s exception: under Article 10, a court is not required under the Convention to recognize the resulting judgment of the case in which the preliminary matter was heard).

70 Arts. 2(1)(a) and 2(1)(b).

71 See Brussels I Regulation, Commission Regulation 1215/2012 of Dec. 12, 2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. (L 351) 8–12 (outlining special protections for insureds, consumers, and employees in sections 3–5 of Chapter 2).

72 Schulz, *supra* note 14, at 248.

73 Van Loon, *supra* note 14, at 11.

74 BRAND & HERRUP, *supra* note 13, at 18.

75 Convention, Art. 2(2)(a).

76 *Id.*

77 *Id.*, Art. 2(2)(c).

78 *Id.*, Art. 2(2)(d).

79 *Id.*, Art. 2(2)(e).

80 *Id.*, Art. 2(2)(l).

81 *Id.*, Art. 2(2)(m).

82 *Id.*, Art. 2(2)(n); see also *Report*, *supra* note 13, at 805 (“Proceedings that concern the validity of an intellectual property right other than copyright or related rights are excluded from the Convention . . . . However, Article 2(3) makes clear that proceedings on a matter covered by the Convention are not excluded just because the validity of an intellectual property right arises as a preliminary question.”)

matters) and infringement of intellectual property rights.<sup>83</sup> This list parallels European Union instruments and departs from that of the New York Convention and many other private international law regimes (which are both less restrictive and do not mandatorily exclude particular subjects, instead leaving it to Contracting States to define matters that are excluded).<sup>84</sup>

The Convention also includes another list of exclusions in Article 2(2) for matters that “raise particular concerns in cross-border commerce, often because they are subject to other well-functioning legal regimes or because they will involve disputes ancillary to the main thrust of the Convention.”<sup>85</sup> This list is also lengthy and includes the carriage of passengers and goods,<sup>86</sup> certain maritime matters,<sup>87</sup> “anti-trust (competition) matters,”<sup>88</sup> claims for personal injury to natural persons,<sup>89</sup> liability for nuclear damages,<sup>90</sup> validity of entries in public registers<sup>91</sup> and non-contractual tort claims for damage to tangible property.<sup>92</sup> Article 2(2) excludes from the Convention’s scope a number of matters (e.g., antitrust, tort claims) that are within the scope of both the New York Convention and most international arbitration agreements.<sup>93</sup>

Finally, Article 21(1) of the Convention also provides that a Contracting State that has a “strong interest in not applying this Convention to a specific matter, may declare that it will not apply the Convention to that matter”; it also provides that, in doing so, the State must “ensure that the declaration is no broader than necessary and that the matter excluded is clearly and precisely defined.”<sup>94</sup> The Convention includes additional safeguards, regulating a State’s ability to exclude additional matters from the

<sup>83</sup> *Report*, *supra* note 13, at 806, discussing how under Article 2(2)(o):

[i]nfringement proceedings (for intellectual property rights other than copyright and related rights) are excluded except where they are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract . . . . Secondly, the proceedings must either be for breach of that contract or they must be proceedings which, even if brought in tort, could have been brought for breach of the contract.

<sup>84</sup> BORN, *supra* note 63, at 1028–31.

<sup>85</sup> BRAND & HERRUP, *supra* note 13, at 18.

<sup>86</sup> Convention, Art. 2(2)(f).

<sup>87</sup> *Id.*, Art. 2(2)(g).

<sup>88</sup> *Id.*, Art. 2(2)(h).

<sup>89</sup> *Id.*, Art. 2(2)(j).

<sup>90</sup> *Id.*, Art. 2(2)(i).

<sup>91</sup> *Id.*, Art. 2(2)(p).

<sup>92</sup> *Id.*, Art. 2(2)(k). Article 2(4) also provides that the Convention “shall not apply to arbitration and related proceedings.” *Id.*, Art. 2(4).

<sup>93</sup> See BORN, *supra* note 63, at 1036 (discussing how, among other things, antitrust or competition law claims, securities law claims, corruption defenses, fraud claims, insolvency disputes and a wide range of other matters are generally treated as arbitrable).

<sup>94</sup> Convention, Art. 21(1). *But see* Ragno, *supra* note 48, at 133 (criticizing the Article 21(1) mechanism).

Convention, by requiring transparency<sup>95</sup> and non-retroactivity:<sup>96</sup> Contracting States must deposit declarations under Article 21 in advance and cannot apply them retroactively to choice-of-court agreements concluded prior to the effective date of the declaration.<sup>97</sup>

### *B. Jurisdictional Rules under Convention*

Chapter 2 of the Convention sets out what the Convention terms jurisdictional rules, which address the validity and enforceability of international choice-of-court agreements that are subject to the Convention. Chapter 2 contains two basic sets of rules, providing for: (1) the exclusive and mandatory jurisdiction of a court chosen by a valid exclusive choice-of-court agreement; and (2) the lack of jurisdiction of other courts, not chosen by a valid exclusive choice-of-court agreement.<sup>98</sup>

#### *1. Exclusive and Mandatory Jurisdiction of Chosen Court*

The Convention provides that the court of a Contracting State that is designated by a valid exclusive choice-of-court agreement possesses exclusive jurisdiction, which it is mandatorily required to exercise (subject to minor exceptions discussed below). Thus, Article 5(1) provides that a chosen court “shall have” jurisdiction to decide disputes governed by a choice-of-court provision unless the agreement is null and void under the law of that State:

The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.<sup>99</sup>

Article 5(1) includes both a positive grant of jurisdiction, coterminous with a valid choice-of-court agreement and a choice-of-law provision, selecting the law of the chosen State to govern the validity of the choice-of-

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<sup>95</sup> See Convention, Art. 32 (describing how any declaration made under Article 21 must be notified to the depositary, which will inform the other States in order to ensure transparency and prevent the retroactive application of national law).

<sup>96</sup> See *Report*, *supra* note 13, at 843 (“If the declaration is made after the Convention comes into force for the State making it, it will not take effect for at least three months. Since it will not apply retroactively (Art. 32(3)) to contracts concluded before it takes effect, it will be possible for the parties to know, when they conclude a contract, whether it will be affected. This protects legal security.”).

<sup>97</sup> The Convention also provides that Article 21 is subject to a reciprocity requirement. Convention, Art. 21. When a State makes an Article 21 declaration, “other States will not be required to apply the Convention regarding the matter in question when the chosen court is in the State making the declaration.” *Report*, *supra* note 13, at 843.

<sup>98</sup> See Convention, Ch. II.

<sup>99</sup> Convention, Art. 5(1).

court agreement. The Convention's Explanatory Report opines, in a departure from general private international law principles,<sup>100</sup> that the law of the chosen State referred to in Article 5(1) includes its conflict of laws rules,<sup>101</sup> apparently, if anomalously, contemplating a form of *renvoi*.

The Convention does not define the phrase “null and void,” which was borrowed from the New York Convention. The Explanatory Report opines that Article 5(1)'s “null and void” exception applies only to substantive, not formal, grounds of invalidity the provision:

is intended to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity. It does not qualify, or detract from, the form requirements in Article 3 *c*), which define the choice of court agreements covered by the Convention and leave no room for national law as far as form is concerned.<sup>102</sup>

The Convention does not expressly address the issue, but the “null and void” formula presumably also extends to issues of formation and consent (as indicated by both the general inclusion in other contexts of such issues as grounds for concluding that an agreement is “null and void” and by the Explanatory Report's specific inclusion of duress and capacity within the category).<sup>103</sup> The Convention also does not specify the law to be applied to

<sup>100</sup> In most private international law contexts involving the choice of applicable law, specification of a jurisdiction's law refers to its substantive law, not including its choice-of-law rules. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §186 cmt. b (AM. L. INST. 1971) (“The reference, in the absence of a contrary indication of intention . . . , is to the ‘local law’ of the state of the applicable law and not to that state's ‘law’ which means the totality of its law including its choice-of-law rules . . . .”); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 642–47 (2017) (describing the canon in favor of internal law in conflicts of law); Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* § 10 (9th ed. 2004). The purpose of this rule is to provide predictability and avoid the expense and uncertainty of *renvoi*.

Oddly, the Explanatory Report asserts that, if no *renvoi* had been contemplated, the Convention would have referred to the “internal” law of the chosen state. See also Paul Beaumont & Burcu Yüksel, *The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention*, in K. Boele-Woelki et al., eds., *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr* 563, 575 (2010). That reasoning would apply to all choice-of-law agreements and statutory choice-of-law rules, which virtually always refer simply to the “law” of a specified jurisdiction and which are uniformly interpreted as referring only to the internal or substantive law of that state. See also Ragno, *supra* note 48, at 137–38; Symeon C. Symeonides, *Choice-of-Court Agreements: American Practice in A Comparative Perspective*, in *US Litigation Today: Still A Threat for European Businesses or Just A Paper Tiger?* 85 (Andrea Bonomi & Krista Nadakavukaren Schefer, eds., 2018).

<sup>101</sup> *Report*, *supra* note 13, at 815.

<sup>102</sup> *Id.*

<sup>103</sup> The Explanatory Report also comments, less than clearly, that “the Convention as a whole comes into operation only if there is a choice of court agreement, and this assumes that the basic factual requirements of consent exist. If, by any normal standards, these do not exist, a court would be entitled to assume that the Convention is not applicable, without having to consider foreign law.”

determine the existence of a choice-of-law agreement, although Article 5(1)'s general choice-of-law provision would again appear applicable.<sup>104</sup>

The Convention also prohibits the chosen court under a valid exclusive choice-of-court agreement from declining jurisdiction. Article 5(2) provides: “A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.”<sup>105</sup> This rule adopts the approach of European Union private international law instruments and was intended to prohibit application of either of two doctrines: *lis pendens* and *forum non conveniens*.<sup>106</sup> (As discussed above, a Contracting State can declare that its court will not exercise jurisdiction when the only element or connection between the parties, the dispute, and the State, is the chosen court, permitting a limited form of refusals to exercise jurisdiction on *forum non conveniens* grounds.<sup>107</sup>)

The possibility of transfer and removal within a state or court system is addressed in Article 5(3)(b), which provides that the Convention will not affect rules regulating the internal allocation of jurisdiction among courts within a Contracting State.<sup>108</sup> This permits a judgment issued by another court than the chosen court, where that court exercised jurisdiction by

*Id.* at 809. That arguably implies that issues concerning “basic factual requirements of consent” are not subject to the law of the chosen court or to the Convention’s null and void standard. *See id.*; *see* BRAND & HERRUP, *supra* note 13, at 29, 79 (emphasizing formation and existence not governed by Convention); *see also* Jason Webb Yackee, *A Matter of Good Form: The (Downsized) Hague Judgements Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements*, 53 DUKE L.J. 1179, 1193–94 (2004) (highlighting federal courts’ use of forum selection agreements); *see also* Peter Nygh, *Autonomy in International Contracts* 83 (1998). That conclusion, which requires drawing difficult distinctions between (some kinds of) consent and other defects in formation and validity, appears unlikely. *See* Beaumont, *supra* note 14, at 139–40 (distinguishing the Hartley and Dogauchi approach from the Brand and Herrup approach of choice-of-law rules); *see also* Ragno, *supra* note 48, at 130.

<sup>104</sup> Some commentators have suggested the contrary. BRAND & HERRUP, *supra* note 13, at 79 (quoting “[p]resumably, the law of the forum—including its choice of law rules—will apply . . .”). That conclusion is difficult to reconcile with either the breadth of Article 5(1)'s “null and void” formula or the difficulties in distinguishing between issues of formation (or existence) and validity in an international context. *See* Beaumont, *supra* note 14, at 139–40 (emphasizing the international context of choice-of-law rules).

<sup>105</sup> Convention, Art. 5(2).

<sup>106</sup> *See* BRAND & HERRUP, *supra* note 13, at 82 (defining *lis pendens* and *forum non conveniens*); *see also* Report *supra* note 13, at 791 (emphasizing that refusal to hear a case is prohibited on the grounds of *lis pendens* or *forum non conveniens*).

<sup>107</sup> Convention, Art. 19.

<sup>108</sup> *See* Convention, Art. 5(3)(b) (quoting “[t]he preceding paragraphs shall not affect rules . . . (b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.”).

operation of the mechanism referred to in Article 5(3)(b), to be recognized under the Convention. This obligation is subject to a further exception in cases where the Article 5(3)(b) transfer mechanism involved the exercise of discretion, in which case recognition of a resulting judgment may be refused under the Convention as against a party that objected to the transfer.<sup>109</sup>

## 2. *No Jurisdiction of Courts Not Chosen*

The Convention also provides that a court in a Contracting State other than the court chosen in a valid choice-of-court agreement shall suspend or dismiss cases to which the agreement applies.<sup>110</sup> Article 6 provides: “A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies,” subject to specified exceptions.<sup>111</sup>

Article 6’s first, and most important, exception provides that a court is not obligated to dismiss or suspend the case if the agreement is null or void under the law of the State of the chosen court (paralleling Article 5(1) of the Choice-of-Court Convention and prescribing the same choice-of-law rule). The Explanatory Report elaborates, saying that “[b]y specifying the applicable law, Article 6(a) of the Convention helps to ensure that the court seised and the chosen court give consistent judgments on the validity of the choice of court agreement.”<sup>112</sup>

Article 6 also sets forth four other exceptions related to the “null and void” formula in Article 6(a). Article 6(b) provides that a court need not give effect to a choice-of-court provision where a party lacked capacity under the law of the court seised, including its choice-of-law rules.<sup>113</sup> Additionally, Article 6(c) provides that a seised court may exercise jurisdiction after determining that giving effect to the agreement will lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.<sup>114</sup>

Relatedly, Article 6(d) provides that a choice-of-court agreement need not be given effect by a seised court where, “for exceptional reasons beyond

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<sup>109</sup> BRAND & HERRUP, *supra* note 13, at 87.

<sup>110</sup> *Report, supra* note 13, at 791.

<sup>111</sup> Convention, Art. 6 (listing the exceptions which permit the seised court to exercise jurisdiction).

<sup>112</sup> *Report, supra* note 13, at 821.

<sup>113</sup> BRAND & HERRUP, *supra* note 13, at 90.

<sup>114</sup> *Report, supra* note 13, at 791; see BRAND & HERRUP, *supra* note 13, at 92 (citing the references to “manifest” injustice or public policy violations, commentary concludes that a choice-of-court agreement may be denied effect under Article 6(c) only if “[t]he result [is] incontrovertibly unjust from the perspective of the law and policy of the state of the court seised.”).

the control of the parties, the agreement cannot reasonably be performed.”<sup>115</sup> This exception includes no choice-of-law rule, and, although the text is arguably broader, commentary suggests that it will be applicable when “the chosen court has decided not to hear the case.”<sup>116</sup> It appears that this exception was designed to ensure that the Convention will not result in cases where the court chosen in an exclusive choice-of-court agreement refuses to hear a case, but courts of other Contracting States are nonetheless barred by the Convention from hearing it.<sup>117</sup>

### *C. Recognition and Enforcement Rules*

Chapter 3 of the Convention addresses the recognition and enforcement in a Contracting State of judgments rendered by a chosen court in another Contracting State. The Convention’s general rule is that a judgment rendered by a court designated in an exclusive choice-of-court agreement shall be recognized and enforced in all other Contracting States, subject only to limited and defined exceptions.<sup>118</sup> Thus, paralleling Articles III and V of the New York Convention, Article 8 of the Choice of Court Convention provides:

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

(2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default . . . <sup>119</sup>

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<sup>115</sup> Convention, Art. 6(d).

<sup>116</sup> See BRAND & HERRUP, *supra* note 13, at 95 (noting that the exception encompasses cases of impossibility and (more controversially) fundamentally changed circumstances).

<sup>117</sup> BRAND & HERRUP, *supra* note 13, at 95.

<sup>118</sup> Convention Art. 8(1).

<sup>119</sup> *Id.* Article 8(2) also provides, as under the New York Convention, that the requested court cannot review the merits of the judgment. The grounds of non-recognition (established on Article V of the New York Convention) do not include an error of law or fact by the arbitral tribunal and do not permit review of the merits of the arbitral tribunal’s decision. See BORN, *supra* note 63, at 3760. The rule makes clear that a recognition court may not review foreign judgments in an appellate capacity. *Report, supra* note 13, at 825; see Schulz, *supra* note 14, at 256 (highlighting Article 8).

Article 8 also provides that a judgment shall be recognized only if it has effects in the State where it was rendered and shall be enforced only if it is enforceable in the State of origin.<sup>120</sup>

Article 8(5) addresses circumstances in which a chosen court in a Contracting State has transferred a case to another court in that State, providing that the Convention's obligation to recognize and enforce judgments applies in such circumstances. In addition, however, Article 8(5) also provides that, where a transfer entailed the exercise of discretion by the chosen court, recognition and enforcement may be refused against a party that objected to the transfer.<sup>121</sup>

Article 9 of the Convention prescribes an exclusive list of seven exceptions to the obligation in Article 8 to recognize judgments by the chosen court pursuant to a choice-of-court agreement. Where one of these exceptions applies, the Convention does not require recognition and enforcement of the judgment (but also does not preclude such recognition if the requested court chooses to do so under local law).<sup>122</sup> Conversely, unless one of Article 9's exceptions apply, a judgment based upon an exclusive international choice-of-court agreement must be recognized and enforced.

Article 9(a) provides that recognition may be denied where a choice-of-court agreement is null and void, complementing the similar jurisdictional rule for chosen courts in article 5(1) and paralleling Article V(1)(a) of the New York Convention. Importantly, however, Article 9(a) also provides that, if the chosen court has determined that a choice-of-court agreement is valid under its law, the requested court *must* accept this decision: a judgment may be denied recognition if “the [choice-of-court] agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid.”<sup>123</sup> This qualification replicates the approach of EU law to the recognition of Member State judgments,

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<sup>120</sup> Convention, Art. 8(3). The Convention grants discretion to the requested court to determine whether to proceed with recognition and enforcement or to postpone recognition and enforcement until a decision by the court of origin. If the requested court enforced the judgment and the court of origin later set it aside, the requested court could rescind enforcement. *Report, supra* note 13, at 825.

<sup>121</sup> Schulz, *supra* note 14, at 25–57.

<sup>122</sup> *Report, supra* note 13, at 829.

<sup>123</sup> *See* Convention, Art. 9(a) (extending to determinations by the chosen court that a choice-of-court agreement exists, including issues of formation; those issues are subsumed within the concept of a “valid” choice-of-court agreement, referred to in Article 9(a)).

assertedly in order to avoid conflicting rulings on the validity of the choice-of-court agreement under the law of the chosen court.<sup>124</sup>

Article 9 also permits non-recognition of a judgment where the judgment-debtor was not properly notified of proceedings in the chosen court. First, Article 9(c) permits non-recognition if the document that instituted proceedings was not notified to the judgment-debtor in sufficient time and in a manner to permit a defense.<sup>125</sup> The exception does not apply if the judgment-debtor entered an appearance and presented its defense without objecting to inadequate notice.<sup>126</sup> Second, Article 9(c) also provides that a judgment may be denied recognition where the document instituting proceedings in the chosen court “was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents.”<sup>127</sup> This limb of Article 9(c) has no parallel in either the New York Convention or other international arbitration treaties and is said to be designed to accommodate concerns of some Contracting States regarding local judicial sovereignty.<sup>128</sup>

Article 9(d) permits non-recognition of a judgment where “the judgment was obtained by fraud in connection with a matter of procedure.”<sup>129</sup> According to the Explanatory Report, fraud for purposes of Article 9(d) is “deliberate dishonesty or deliberate wrongdoing,”<sup>130</sup> apparently excluding cases of reckless, negligent, or similar misconduct.

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<sup>124</sup> See Convention, Art. 9(b) (permitting non-recognition of a judgment where “a party lacked the capacity to conclude the agreement under the law of the requested State”); see also Schulz, *supra* note 14, at 257 (concluding that issues of capacity are subject to dual scrutiny: under the law of the chosen court (which may make the agreement invalid under Article 9(a)) and under the law of the court seised or of the court addressed for recognition and enforcement under Article 9(b)).

<sup>125</sup> Convention, Art. 9(c)(i).

<sup>126</sup> See *Report*, *supra* note 13, at 767 (noting that Article 9(c) is potentially applicable “unless the defendant entered an appearance and presented his case without contesting notification in the court of origin . . .”).

<sup>127</sup> Convention, Art. 9(c)(ii).

<sup>128</sup> Thus, the court addressed may refuse to recognize or enforce the judgment “if the writ was notified to the defendant in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents.” See *Report*, *supra* note 13, at 829. This permits the requested state to apply its local conceptions of state sovereignty, and its interpretation of instruments like the Hague Service Convention, to deny recognition of a judgment.

<sup>129</sup> Convention, Art. 9(d).

<sup>130</sup> The Explanatory Report cites examples of situations where fraud in connection with procedural matters can take place: “[e]xamples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence.” See *Report*, *supra* note 13, at 831.

Finally, Article 9(e) also allows a requested court to deny recognition of a judgment if “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.”<sup>131</sup> Like the New York Convention,<sup>132</sup> however, Article 9(e) includes a choice-of-law provision, specifying the law (or public policy) of the recognition forum. Unlike the New York Convention, Article 9(e) only includes violations of procedural fairness (or due process) within the concept of public policy, rather than as independent grounds for non-recognition.<sup>133</sup>

#### D. Other Matters

The Choice of Court Convention also contains a variety of provisions on other matters, largely incidental to the Convention’s primary objectives. First, Article 10 addresses proceedings where a matter excluded from the scope of the Convention under Article 2(2) or 21 was addressed as a preliminary issue. In those circumstances, as noted above, the ruling on that preliminary question itself need not be recognized or enforced under the Convention.<sup>134</sup> Additionally, under Article 10, where a final judgment is based on such a preliminary ruling, then that judgment also may be denied recognition if, and to the extent that, the judgment was based on a matter excluded under Article 2(2).<sup>135</sup>

An additional ground for denial of recognition is provided by Article 11, which applies where a judgment awards non-compensatory damages. In these circumstances, recognition of the non-compensatory damage award may be refused, and, if local law in the requested state so provides, compensatory elements of the judgment also may be denied recognition if

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<sup>131</sup> Convention, Art. 9(e).

<sup>132</sup> New York Convention, Art. V(2)(b) (“[t]he recognition or enforcement of the award would be contrary to the public policy of that country.”). See BORN, *supra* note 63, at 4000–01.

<sup>133</sup> Finally, Article 9 contains two exceptions, providing that a judgment may be denied recognition in some circumstances where a conflicting judgment exists. If a judgment has been rendered in the requested state between the same parties as those in the foreign judgment, then the requested state’s judgment prevails, regardless of whether it was rendered first and irrespective of whether the cause of action in the two proceedings was the same. Convention, Art. 9(f). In contrast, if the conflicting judgment was rendered by a foreign court, the judgment rendered under the choice-of-court agreement may be refused only if several additional requirements are met. Convention, Art. 9(g); *Report*, *supra* note 13, at 833.

<sup>134</sup> Schulz, *supra* note 14, at 269.

<sup>135</sup> The Article 10 exception applies only where the court addressed would decide the preliminary question in a different way. Schulz, *supra* note 14, at 261.

they cannot be detached from the non-compensatory award. States are free to recognize judgments that include non-compensatory awards, including either the entire award or only the compensatory portion of the award (but need not do so if local law does not permit).<sup>136</sup>

### III. THE CHOICE OF COURT CONVENTION: AN ASSESSMENT

The Choice of Court Convention aspires to be one of the most significant private international law treaties of this century. As noted earlier, its proponents predict that the Convention will “soon become a major milestone of international civil procedure”;<sup>137</sup> relatedly, the Convention is said to make “transnational litigation more predictable and consistent.”<sup>138</sup> The Convention’s advocates also assert that its adoption will “remov[e] obstacles to productive commercial relations, which are best served by party autonomy,” assertedly safeguarded by the Convention,<sup>139</sup> and that the Convention may “supplant the [New York Convention] as the norm for resolving international commercial disputes.”<sup>140</sup> More expansively, the Convention is said to “fill[] the governance gap that, in the absence of a uniform global legal regime, currently exists concerning the effect of choice of court agreements and the recognition and enforcement of judgments based on such agreements.”<sup>141</sup>

As discussed in detail above, the Convention seeks to accomplish these aspirations by substantially altering the existing private international law rules in many countries that govern the recognition and enforcement of both international choice-of-court agreements and judgments obtained in proceedings based on such agreements. In particular, the Choice of Court Convention’s proponents describe it as replicating, while putatively improving on, the terms of the New York Convention. Thus, “the new

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<sup>136</sup> Schulz, *supra* note 14, at 257–58 (“Those States that already now recognise and enforce foreign damage awards, including punitive damages, to the full extent, may continue to do so. States that currently ‘shave off’ the punitive part (eg, under the public policy exception) and enforce the compensatory part may continue to do so. And those States that currently refuse recognition and enforcement of the judgment as a whole because the punitive part is incompatible with their legal system and they lack a rule to divide the judgment will in the future be obliged under the Convention to enforce the compensatory part but will be entitled (but not obliged) to enforce the non-compensatory part.”).

<sup>137</sup> Schulz, *supra* note 14, at 269.

<sup>138</sup> BRAND & HERRUP, *supra* note 13, at 5.

<sup>139</sup> Van Loon, *supra* note 14, at 12.

<sup>140</sup> Jeffrey Talpis & Nick Krnjec, *The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to A Mouse*, 13 SW. J. L. & TRADE AM. 1, 35 (2006).

<sup>141</sup> Van Loon, *supra* note 14, at 11.

Convention will do for choice-of-court agreements what the highly successful 1958 New York Convention does for arbitration agreements,”<sup>142</sup> and will “create[] a level playing field with international commercial arbitration.”<sup>143</sup> In particular, the Convention is seen as “protect[ing] party autonomy” and “provid[ing] predictability and legal certainty to business parties.”<sup>144</sup>

Despite the Convention’s global aspirations and potential importance, and the significance of the changes that it would produce for private international law rules in both the United States and other jurisdictions, there has been virtually no critical assessment of the Convention’s basic terms and likely effects. Scholarly commentary and official reports are thorough, but for the most part entirely descriptive or interpretive,<sup>145</sup> and, in many cases, primarily laudatory or promotional.<sup>146</sup> There have been no sustained efforts to assess the costs and benefits of the Convention or the wisdom of its structure and terms.<sup>147</sup>

The Convention’s basic objectives of facilitating the autonomy of commercial parties in international forum selection and enhancing the efficiency of dispute resolution in cross-border commercial matters are worthy. Existing mechanisms for resolving international commercial disputes in national courts have numerous shortcomings and improvements in the field of international civil litigation are long overdue. Nonetheless, despite its drafters’ good intentions and high aspirations, there are substantial grounds for doubting the wisdom of the Convention, both for the United States and other jurisdictions. That is true for two related sets of reasons.

First, as discussed below, the Convention is almost universally described as seeking to transplant basic principles from the New York Convention and its legal regime for international commercial arbitration to the context of cross-border choice-of-court agreements and national court judgments. The Convention would, if ratified, replace existing private international law rules, in the United States and elsewhere, governing the recognition and enforcement of forum selection provisions and foreign judgments, with new

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<sup>142</sup> Schulz, *supra* note 14, at 267.

<sup>143</sup> Van Loon, *supra* note 14, at 11.

<sup>144</sup> Schulz, *supra* note 14, at 267.

<sup>145</sup> *Report*, *supra* note 13, at 799–861 (providing article-by-article commentary describing and interpreting the Convention); BRAND & HERRUP, *supra* note 13, at 11–24; 139–72.

<sup>146</sup> Van Loon, *supra* note 14, at 14–28; Schulz *supra* note 14, at 248–69 (providing a promotional description of the Convention).

<sup>147</sup> For exceptions, see Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing*, 5 J. PRIV. INT’L L. 161 (2009) (considering likely future role of Convention); Francesca Ragno, *Forum Selection under the Hague Convention on Choice of Court Agreements—A European Perspective* (2018) (considering interplay of Convention and EU regime).

rules assertedly modelled on the New York Convention. This objective is pursued by the Convention notwithstanding very substantial differences between the arbitral process, on the one hand, and proceedings in (many) national courts, on the other hand. These differences raise serious doubts as to the benefits of the Choice of Court Convention's basic terms and objective.

Second, and relatedly, the Choice of Court Convention omits significant safeguards that the New York Convention and national arbitration legislation incorporate for the recognition of international arbitration agreements and arbitral awards. These safeguards ensure that both the parties' autonomy and basic tenets of procedural fairness are respected in the arbitral process and the recognition of arbitration agreements and awards. By omitting these safeguards, the Choice of Court Convention threatens, rather than protects, the autonomy of commercial parties and mandates recognition of judgments notwithstanding significant unfairness in the national court proceedings that produced them.

*A. The New York Convention: A Suitable Paradigm?*

As discussed above, the Choice of Court Convention is modelled in significant respects on the New York Convention and the highly successful legal regime which that treaty provides for international commercial arbitration agreements and arbitral awards.<sup>148</sup> In particular, as also discussed above, like the New York Convention, the Choice of Court Convention seeks to enhance the autonomy of commercial parties to select forums for resolution of their cross-border disputes and to facilitate the recognition of judgments resulting from choice-of-court agreements.

Despite the potential significance of the Choice of Court Convention, there appears to have been little or no serious consideration in drafting the Convention as to whether the New York Convention, and the international arbitration process it governs, provide a suitable model for international choice-of-court agreements and national court judgments.<sup>149</sup> In fact, there are very substantial grounds for questioning whether it is wise, in the context of a global convention, to treat choice-of-court agreements and national court judgments in the same manner as international commercial arbitration agreements and arbitral awards.

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<sup>148</sup> See *supra* pp. 14, 17, 19–22.

<sup>149</sup> As noted above, there was minimal involvement of international arbitration authorities in the negotiations of the Choice of Court Convention. In any event, there is no apparent evidence of analysis regarding the suitability of the New York Convention as a model for the Choice of Court Convention.

First, it is unfortunate, but equally undeniable, that a substantial number of national courts are highly unsuitable forums for the resolution of international commercial disputes. In a significant number of jurisdictions—amounting to well more than half of the countries that are potential candidates for ratification of the Convention—basic standards of integrity, independence and competence are seriously compromised. As discussed below, this conclusion is demonstrated by a wealth of empirical evidence from neutral and non-partisan sources, as well as by consistent anecdotal evidence from experienced international counsel. These facts are vital to consider in assessing the wisdom of a global treaty that is open to ratification by all states and that makes the recognition and enforcement of foreign court judgments substantially easier than hitherto was the case.

Despite the obvious difficulties in obtaining data (of intentionally wrongful activities), there is a substantial body of empirical evidence that documents the extraordinarily high incidence of judicial corruption around the world.<sup>150</sup> Thus, litigants in a substantial number of jurisdictions report direct experiences with judicial corruption in between 25 and 75% of all cases. Transparency International, a highly-respected anti-corruption organization,<sup>151</sup> reports that, in 2019, 30% of respondents from all jurisdictions believe that “most” or “all” judges are corrupt, with significantly higher percentages in Africa, Latin America and Russia;<sup>152</sup> the United Nations Development Programme reports that 24% of respondents

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<sup>150</sup> See, e.g., TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER: MIDDLE EAST & NORTH AFRICAN 12 (2019) (hereinafter *Transparency Barometer*) (27% of North African and Middle Eastern respondents view judges as corrupt); Council of Europe, *Corruption Risks in Criminal Process and Judiciary* (2009) (reporting on the corruption risks present in the four basic court proceedings); World Justice Project, *Rule of Law Index*, (2020) (measuring the rule of law in practice around the world); International Bar Association, THE INTERNATIONAL BAR ASSOCIATION JUDICIAL INTEGRITY INITIATIVE: JUDICIAL SYSTEMS AND CORRUPTION 19–20 (2016) (hereinafter IBA, *Initiative*) (finding that bribery and undue political influence are the most frequently reported types of corruption in judicial systems and that judges may accept or demand bribes especially where economic interests of a company are at stake); Franziska Rinke et al., *Corrupt Judges—Threat to the Constitutional State*, KONRAD-ADENAUER-STIFTUNG 6–10 (2021) (noting how common judicial corruption is in Latin America and how widespread judicial corruption is in Asian countries as well) (hereinafter Konrad-Adenauer Stiftung Report); Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WISC. INT’L L.J. 353, 353–55 (2000) (discussing the consequences of corruption when it appears in the judiciary and noting that every country, regardless of political tradition, culture, or socio-economic status, has experienced bribery, misappropriation of funds and misuse of political position).

<sup>151</sup> Transparency International has published a “Global Corruption Barometer” annually since 2003, as part of Gallup’s Voice of the People Survey. TRANSPARENCY INT’L, GLOBAL CORRUPTION BAROMETER 243 (2007).

<sup>152</sup> CORALIE PRING, TRANSPARENCY INT’L, PEOPLE AND CORRUPTION: CITIZENS’ VOICES FROM AROUND THE WORLD 5 (2017).

worldwide reported having paid bribes to the judiciary in the preceding year;<sup>153</sup> and the International Bar Association reports that more than 75% of respondents (in a global study) had direct, recent experience with judicial corruption.<sup>154</sup>

Evidence of judicial corruption is worldwide, affecting judicial systems in every part of the world: “corrupt judges are a global problem.”<sup>155</sup> Transparency International’s 2011 Annual Report found that, globally, almost half of those surveyed (forty-six percent) perceived their judiciary as corrupt.<sup>156</sup> In one study, respondents reported that forty-two percent of Latin American and Caribbean judges are “involved in corruption,”<sup>157</sup> with eighty percent of participants in Bolivia, Mexico, Paraguay and Peru describing the judicial system as corrupt.<sup>158</sup> Another study reported that respondents regarded roughly eighty-five percent of national court judges in Africa as corrupt, with some ten percent believing that all such judges are corrupt.<sup>159</sup> Likewise, a Konrad-Adenauer-Stiftung report concludes that, in Asia, “the ability to secure justice can often be a question of who you know and how

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153 See UNITED NATIONS DEVELOPMENT PROGRAMME, *A TRANSPARENT & ACCOUNTABLE JUDICIARY TO DELIVER JUSTICE FOR ALL* 11 (2016) (noting that in a survey covering 95 countries, 24% of respondents reported having paid bribes to judiciary within year preceding interview).

154 IBA, *Initiative*, *supra* note 150, at 19–20 (reporting rates of corruption in excess of 75% of respondents with recent experience with direct judicial corruption in numerous jurisdictions).

155 Konrad-Adenauer-Stiftung, *supra* note 150, at 7. See also TRANSPARENCY INT’L, *GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS* 11 (2007) (twenty-one percent of participants having contact with judiciary in Africa reported having paid a bribe; eighteen percent in Latin America; fifteen percent in Asia-Pacific; and fifteen percent in Newly Independent States); TRANSPARENCY INT’L, *GLOBAL CORRUPTION BAROMETER 2013*, at 15, 17 (2013) (finding in a global survey of 107 countries that the judiciary was ranked as among the third most corrupt institutions; on average, thirty percent of participants in 20 countries reported having paid a bribe to judiciary).

156 TRANSPARENCY INT’L, *ANNUAL REPORT 2011* 34 (Rachel Beddow & Michael Sidwell eds., 2012); see also CORALIE PRING & JON VRUSHI, TRANSPARENCY INT’L, *GLOBAL CORRUPTION BAROMETER: LATIN AMERICA & THE CARIBBEAN: CITIZENS’ VIEWS & EXPERIENCES OF CORRUPTION* 13–14 (2019) (finding that forty-two percent of participants in 18 Latin American countries think the judiciary is corrupt).

157 TRANSPARENCY INT’L, *GLOBAL CORRUPTION BAROMETER: LATIN AMERICA & THE CARIBBEAN: CITIZENS’ VIEWS & EXPERIENCES OF CORRUPTION* 14 (2019); Konrad-Adenauer-Stiftung, *supra* note 150, at 8 (“Judicial corruption is an everyday occurrence in Latin America . . .”).

158 Transparency International, *Global Corruption Report*, *supra* note 155, at 12.

159 Afrobarometer 2008/09 and Afrobarometer 2016/18 (studies show approximately eleven percent of participants believe all national judges are corrupt, 21–23% believe most judges are corrupt and 44–50% believe some judges are corrupt). See also Transparency International, *Global Corruption Report*, *supra* note 155, at 11 (twenty-one percent of participants having contact with judiciary in Africa reported having paid a bribe).

much you can pay,”<sup>160</sup> while corruption is also widely-reported in many European jurisdictions.<sup>161</sup> Indeed, a number of the United States’ largest trading partners have particular reputations for judicial and other forms of corruption.<sup>162</sup>

No less serious than, and often related to, judicial corruption is the lack of judicial independence in many jurisdictions. Empirical reports by non-governmental organizations, including the World Justice Project, Freedom House and Heritage Foundation, report that, in an alarming number of countries, judicial independence is entirely or largely lacking, with indicia of independence falling, rather than increasing, in recent years.<sup>163</sup>

Countries in Latin America, Africa, Asia and Eastern Europe rank particularly poorly on many indicators of judicial independence (correlating with significant incidences of judicial corruption).<sup>164</sup> A number of European

<sup>160</sup> Konrad-Adenauer-Stiftung, *supra* note 150, at 10. *See also* Transparency International, *Global Corruption Report*, *supra* note 155, at 11 (fifteen percent of participants having contact with judiciary in Asia-Pacific reported having paid a bribe).

<sup>161</sup> *See, e.g.*, COUNCIL EUR., CHALLENGES FOR JUDICIAL INDEPENDENCE AND IMPARTIALITY IN THE MEMBER STATES OF THE COUNCIL OF EUROPE INFORMATION DOCUMENTS 95 (Mar. 24, 2016) (“Eurobarometer 397 found in its survey in 2013 that overall twenty-three percent of inhabitants in EU member states assumed that the taking and giving of bribes was widespread in courts . . . . Most negative were perceptions in Bulgaria (fifty-eight percent), Slovenia (fifty-eight percent), Croatia (fifty-seven percent) and Slovakia (fifty-six percent).”); EUR. NETWORK COUNCILS FOR THE JUDICIARY, INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIARY AND OF THE PROSECUTION PERFORMANCE INDICATORS 2015 46 (2015) (significant percentages of judges reporting that, in past two years, they believed judges had taken bribes).

<sup>162</sup> TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2–3 (2020) (noting that in a survey of perceived levels of corruption in the private sector in 180 countries, Russia ranks 137/180; Mexico ranks 130/180; China and India rank 80/180; Brazil and Egypt rank 106/180); *see also* Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POLICY, Winter 1996–97, 56 (“Systemic corruption nurtures local criminal organizations and has helped to convert major trading partners such as China, Mexico, and Russia into crime-exporting states.”); Tom Blass, *Combating Corruption and Political Influence in Russia’s Court System*, in TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT, *supra* note 155, at 31–34.

<sup>163</sup> *See generally*, WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–2018 (2018) (annual report on rule of law); *see also* HERITAGE FOUNDATION, 2021 INDEX OF ECONOMIC FREEDOM: KEY FINDINGS OF THE 2021 INDEX, (2021) (annual report on economic freedom, including judicial effectiveness and government integrity); *see also, generally* MICHAEL J. ABRAMOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2018 (2018) (annual report on good governance, including rule of law); *see also*, Siri Gloppen, *Courts, Corruption and Judicial Independence* 68 (Tina Soreide et al, 2013); Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS & DEV. L.J. 87 (1999).

<sup>164</sup> WORLD JUSTICE PROJECT, RULE OF LAW INDEX 8–9 (2017–18). The rule of law index conducts surveys in 113 countries, based on eight factors including constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. In the survey, “China ranks 75/113, Mexico 92/113, India 62/113, Russia 89/113, Brazil 52/113 and Egypt 110/113.”

states also lack basic assurances of judicial independence. In the words of one recent study by the European Commission:

The level of perceived independence has decreased in nine Member States over the past year and in a few Member States, the level of perceived judicial independence remains very low (below thirty percent) . . . Despite reform efforts in a number of Member States to enhance judicial independence, developments raise concerns in a few of them. They range from concerns about the capacity of councils for the judiciary to exercise their functions to more structural concerns over an increasing influence of the executive and legislative branch over the functioning of the justice systems, including constitutional courts or Supreme Courts.<sup>165</sup>

More generally, a World Economic Forum survey of 137 countries reported that more than half of all jurisdictions scored poorly (below average) on a scale of independence,<sup>166</sup> while other respected reports reach equally harsh conclusions.<sup>167</sup> Low levels of judicial independence are of particular concern given the frequency with which state-owned entities, or politically-influential local businesses or individuals, participate in contemporary international commerce.<sup>168</sup>

Finally, basic levels of competence are demonstrably lacking in many national court systems. In many jurisdictions, judges are poorly trained, badly compensated and under-resourced, while often confronted with intolerably heavy caseloads.<sup>169</sup> “[M]any judges [outside of developed

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<sup>165</sup> Commission Communication on the 2020 Rule of Law Report: The Rule of Law Situation in the European Union, at 8, 10 COM (2020) 580 final (Sep. 30, 2020); *see also* European Commission, The 2017 Justice Scoreboard (2017) COM 167 final (Apr. 10, 2017).

<sup>166</sup> KLAUS SCHWAB & SAADIA ZAHIDI, WORLD ECONOMIC FORUM, *Judicial Independence Chart* (2007); World Economic Forum, THE GLOBAL COMPETITIVENESS REPORT 12–13 (2020). Moreover, the perception of judicial independence declined by about 4.6% in G20 economies in the past decade. *Id.*

<sup>167</sup> *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 6–7 (2017–18) (showing dramatic differences in adherence to the rule of law among different jurisdictions); *see also* WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2020), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020> (last visited Jan. 27, 2021) (“The WJP Rule of Law Index 2020 shows that more countries declined than improved in overall rule of law performance for a third year in a row, continuing a negative slide toward weakening and stagnating rule of law around the world. The declines were widespread and seen in all corners of the world.”); *see also* FREEDOM HOUSE, FREEDOM IN THE WORLD 2018, *supra* note 161, at 1–2 (2018) (categorizing twenty-five percent of states as Not Free, and thirty percent as Partly Free; citing “period characterized by emboldened autocrats [and] beleaguered democracies.”).

<sup>168</sup> *See* JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 774–75 (2d ed. 2003).

<sup>169</sup> *See* Amélie Arvidsson & Emelie Folkesson, *Corruption in the Judiciary: Balancing Accountability and Judicial Independence* 12 (May 28, 2010); *see also* Dakolias, *Performance*, *supra* note 148, at 88 n.4; John Owen Haley, *Judicial Reform: Conflicting Aims and Imperfect Models*, 5 WASH. U. GLOBAL STUD. L. REV. 81, 96 (2006).

democracies] choose to conform with the expectations of their superiors because they lack training about what the law requires, or they are accustomed to accepting direction from senior executive branch or judicial branch officials.”<sup>170</sup> The lack of judicial competence is frequently associated with increased corruption: as an EU study reported with respect to EU Member State courts, “another substantial cause of corruption practices in courts [is the] low level of the judges’ professional education . . . prior corruption experience or lack of real practical experience.”<sup>171</sup> In addition to empirical evidence, external and internal counsel with experience in international dispute resolution almost uniformly agree that judiciaries in a substantial number of countries fail to display basic levels of competence.

Given these characteristics of national court proceedings in numerous jurisdictions, substantial care should be exercised in prescribing any global system for the recognition and enforcement of foreign judgments, including the recognition of judgments in proceedings based on forum selection agreements. It is true that commercial parties can generally be relied upon to select—and should have the autonomy to select—suitable forums for the resolution of international business disputes.<sup>172</sup> Nonetheless, it is also true that all developed legal regimes include both limits on the parties’ autonomy, including for forum selection agreements,<sup>173</sup> and guarantees for procedural fairness in the dispute resolution process.<sup>174</sup>

These considerations are directly applicable in assessing the wisdom and suitability of the Choice of Court Convention. The widespread lack of judicial integrity, independence, and competence in many jurisdictions, outlined above, provide powerful arguments against permitting foreign judgments to be readily recognized and enforced, including in cases based on choice-of-court agreements. Those factors mean that, in a substantial number of cases, recognizing a foreign judgment means giving effect to serious denials of justice and procedural unfairness or, at a minimum, recognizing judgments lacking in elementary attributes of diligence and quality.

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<sup>170</sup> UNITED STATES AGENCY FOR INT’L DEVELOPMENT, OFFICE OF DEMOCRACY & GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 27 (2002).

<sup>171</sup> COUNCIL OF EUROPE, CORRUPTION RISKS IN CRIMINAL PROCESS AND JUDICIARY 199-200 (2009).

<sup>172</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). See also GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 447-48 (6th ed. 2018).

<sup>173</sup> BORN & RUTLEDGE, *supra* note 170, at 456.

<sup>174</sup> BORN, *supra* note 63, at 3821-22, 3826-34; U.S. Const. Amends. V & XIV; Charter of the Fundamental Rights of the European Union, Art. 47.

In this respect, the New York Convention and the international arbitral process do not provide a suitable paradigm for the recognition and enforcement of national court judgments. That is because, as detailed below, the international arbitral process contains a number of vital safeguards against the risks of denials of justice and procedural unfairness that exist in many national court systems. These protections are not present in either national court proceedings or the regime established by the Choice of Court Convention.

Thus, in contrast to national court proceedings, in which judges are selected by local officials or randomly, international arbitral proceedings are conducted and decided by arbitrators chosen by or for the parties in individual cases.<sup>175</sup> The parties' role in selection of the decision-makers in individual cases makes the risk of foreign government interference highly unlikely.<sup>176</sup> The parties' involvement in selection of the arbitrators also significantly reduces the risks of corruption or lack of substantive competence: parties are able to select arbitrators who have both integrity and competence (particularly given that arbitrators are virtually always selected after a dispute arises, when the expertise relevant to resolving the parties' dispute is known<sup>177</sup>). Consequently, despite the substantial numbers of international commercial and investment arbitrations that are conducted each year, there are virtually no recorded instances of corruption by arbitrators.

Moreover, all leading international arbitration regimes provide robust and effective mechanisms for ensuring the independence and impartiality of individual arbitrators.<sup>178</sup> Both commonly-used institutional arbitration rules

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<sup>175</sup> The process of selecting a tribunal offers unique opportunities to the parties, which are distinct to arbitration. Parties may, and often do, select a tribunal which includes experts in a particular substantive discipline (e.g., insurance practitioners, construction lawyers/experts, maritime lawyers, or commodities practitioners) or arbitrators with specific language, technical, cultural, and other abilities or experience. See BORN, *supra* note 63, at 1766.

<sup>176</sup> National arbitration legislation almost uniformly provides that local courts may only consider challenges to arbitrators in arbitrations seated on national territory or (less uniformly) conducted pursuant to the procedural law of the relevant jurisdiction. With regard to other arbitrations, seated abroad and conducted under the procedural law of another state, local courts have no entitlement or power to remove arbitrators. BORN, *supra* note 63, at 2079–80.

<sup>177</sup> BORN, *supra* note 63, at 1766–67.

<sup>178</sup> The duties of independence and impartiality are an inherent and vital aspect of the arbitrator's adjudicatory role, which are expressly set forth in virtually all national arbitration legislation and institutional arbitration regimes. These duties include both a personal obligation of impartiality (which requires the arbitrator to be free of subjective biases, predispositions, or affinities that interfere with fairly and impartially deciding the parties' dispute) and an objective obligation of independence (which requires the arbitrator to be free of personal, contractual, institutional, or

and virtually all national arbitration legislation uniformly require that arbitrators be “independent and impartial,”<sup>179</sup> while providing effective procedural mechanisms, administered by independent arbitral institutions, requiring disclosure of potential conflicts by arbitrators and permitting challenges of arbitrators by parties.<sup>180</sup> The New York Convention and virtually all national arbitration statutes also provide for the possibilities of both annulment and non-recognition of arbitral awards rendered by arbitral tribunals lacking independence and impartiality; importantly, both annulment and non-recognition proceedings occur in national courts and provide external scrutiny of the arbitral process.<sup>181</sup>

Relatedly, and equally important, the procedures in international arbitral proceedings are selected and tailored by the parties, with the arbitral tribunal exercising procedural authority in the absence of agreement by the parties.<sup>182</sup> Both the New York Convention and national arbitration legislation require that arbitral procedures satisfy basic due process standards and to comply with the parties’ procedural agreements<sup>183</sup>—with annulment and non-recognition of arbitral awards by national courts, external to the arbitral process, again available as sanctions for violation of these requirements.<sup>184</sup>

These various characteristics of the arbitral process are essential to the New York Convention’s facilitation of the recognition and enforcement of arbitral awards. First, these guarantees provide both reliable assurances as to the underlying procedural fairness of the arbitral process and effective external protections in the (rare) event that these assurances are not realized. That contrasts significantly with the absence of such assurances, and, on the contrary, the presence of endemic corruption and incompetence, in a very substantial number of national court systems and proceedings.

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other relationships that would compromise his or her independence). These duties also include the obligation not just to be impartial and independent, but to conduct oneself and the arbitration impartially, treating both parties equally and fairly. BORN, *supra* note 63, at 2132–36.

<sup>179</sup> BORN, *supra* note 63, at 1891–1908. *See also* ICC Rules of Arbitration, Art. 11 (“Every arbitrator must be and remain impartial and independent of the parties”); UNCITRAL Arbitration Rules, Art. 11 (“When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”).

<sup>180</sup> BORN, *supra* note 63, at 1961–64.

<sup>181</sup> *Id.* at 1957–61.

<sup>182</sup> *Id.* at 2309–15.

<sup>183</sup> BORN, *supra* note 63, at 2295–3000. *See also* New York Convention, Arts. V(1)(b), (d); UNCITRAL Model Law, Art. 19.

<sup>184</sup> BORN, *supra* note 63, at 2322–25, 2330, 2351. *See also* New York Convention, Arts. V(1)(b), (d); UNCITRAL Model Law, Arts. 34(2)(a)(ii), (iv) & 36(1)(a)(ii), (iv).

Second, and relatedly, the parties' right to control both the selection of the arbitrators that decide their dispute and the procedures that those arbitrators will apply, subject to enforceable due process guarantees, operates to minimize the risks of governmental interference in the arbitral process and to maximize the role of party autonomy in that process. In recognizing an arbitral award under the New York Convention, a court gives effect largely to the parties' own agreements and actions, not to the rulings of a foreign court or government. In contrast, in recognizing a national court judgment under the Choice of Court Convention, a court gives effect primarily to the rulings of a foreign court, based upon a foreign state's procedural rules—which, as discussed above, are frequently subject to grave doubts as to independence and impartiality.

The desire of the Convention's drafters to "level the playing field" between international arbitration and national court litigation has a surface rhetorical appeal. But that objective in fact counsels away from accepting the basic logic of the Choice of Court Convention. International arbitration is a consensual process, dominated by the parties and regulated by strict, enforceable guarantees of independence, impartiality, and fairness, applied as external checks on the arbitral process by both annulment and recognition courts; national court litigation is predominantly a non-consensual process, taking place within a single legal system, with uncertain and frequently unreliable assurances of independence, integrity, or fairness. Levelling the playing field does not mean treating these two processes, or their results, the same; it should instead mean treating them differently.

Put concretely, why should U.S., Canadian, Australian, Swiss, Singaporean, Ghanaian, Uruguayan or other courts commit to recognize all foreign judgments—including judgments of courts in Russia, China, Venezuela, Iran, the Congo, and Nicaragua—in the same basic way that they recognize international arbitral awards? In the latter case, courts give effect to largely independent, expert and fair decisions concerning commercial disputes, made by arbitral tribunals whose members are selected by the parties themselves, applying procedures also chosen by the parties themselves, with external supervision provided by both arbitral institutions and annulment and recognition courts; a robust, pro-enforcement legal framework makes eminent sense in that context, as nearly 70 years of experience under the New York Convention has demonstrated. In the former case, courts would be required to give effect to judgments that are frequently rendered by courts that are neither independent, competent nor fair, and that, at the same time, are subject to no external scrutiny; the

historic safeguards of private international law rules in most states, which only permit recognition of foreign judgments after reasonable careful scrutiny of their fairness, make eminent sense in these circumstances.

On other occasions, the Hague Conference has acknowledged, by both word and deed, that the judiciaries in a large proportion of countries around the world lack the integrity, independence, and competence to justify recognition of their judgments, even where those judgments were plainly made pursuant to an indisputably legitimate jurisdictional base. The 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments included, in Article 21, a provision that the Convention would apply only where two Contracting States had agreed to its application on a bilateral basis.<sup>185</sup> Similarly, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments included, in Article 29, a provision allowing states to opt-out of the Convention's application as to any other Contracting State.<sup>186</sup> In both cases, these provisions applied even where jurisdiction over the judgment-debtor was undisputed (and indisputable), including where it was established by consent.<sup>187</sup> Likewise, in both cases, the reason for these provisions was pervasive doubts about the integrity, independence and competence of courts in many countries<sup>188</sup>—which led to

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<sup>185</sup> Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (hereinafter 1971 HAGUE CONVENTION), Art. 21 (“Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.”).

<sup>186</sup> Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter 2019 HAGUE CONVENTION), Art. 29.

<sup>187</sup> 1971 HAGUE CONVENTION, Arts. 10(5) (“if, by a written agreement or by an oral agreement confirmed in writing within a reasonable time, the parties agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of the State addressed would not permit such an agreement because of the subject-matter of the dispute”); 2019 HAGUE CONVENTION, Art. 5(1)(e) (“the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given”).

<sup>188</sup> This is the case for both the 2019 Hague Convention and the 1971 Hague Convention. For the 2019 Hague Convention, see Lucas Clover Alcolea, *The 2005 Hague Choice of Court and the 2019 Hague Judgments Conventions versus the New York Convention: Rivals, Alternatives or Something Else?*, 6 MCGILL J. DISP. RES. 185, 213–14 (2019–2020) (the 2019 Hague Convention opt-out provision has the “unfortunate effect of further undermining the uniformity intended by the Convention”; David P. Stewart, *The Hague Conference Adopts A New Convention On The Recognition And Enforcement Of Foreign Judgments In Civil Or Commercial Matters*, 113(4) AM. J. INT’L L. 773, 780 (2019) (“This provision reflected a concern, driven by the prospect of widespread adherence to the Convention, that contracting states might be bound to recognize and enforce judgments from other states whose legal systems were considered likely to produce biased, unprincipled, or defective judgments.”); Ning Zhao, *Completing A Long-Awaited Puzzle in the Landscape of Cross-Border Recognition and Enforcement of Judgments: An Overview of the HCCH 2019 Judgments Convention*, 30 SWISS. REV. INT’L & EUR. L. 345

insistence on provisions allowing Contracting States to opt out of application of the Convention as to such states.

These provisions underscore the gravity of concerns about the integrity and competence of courts in many jurisdictions. In both the 1971 and 2019 Hague Judgments Convention, states rejected provisions that would have required them to recognize judgments from all states, precisely because of doubts about the reliability of many national judicial systems. States did so in cases of both choice-of-court agreements and other types of unequivocal consent to a state's jurisdiction: in each case, the lack of judicial integrity, independence, and competence in many countries overrode deference to consent to a state's jurisdiction. The same conclusions apply, with equal force, under the Choice of Court Convention: notwithstanding a valid choice-of-court agreement, there is no justification for recognizing judgments from courts whose integrity and independence are suspect.

There is also no justification for adopting the Choice of Court Convention, notwithstanding the foregoing criticisms, on the theory that commercial parties will never (or seldom) agree to choice-of-court provisions selecting courts lacking integrity and competence. That rationale was rejected in the 1971 and 2019 Hague Judgments Conventions, on the correct grounds that states should not facilitate the judgments of states whose judicial systems lack integrity, independence, and competence, notwithstanding a party's consent. That rationale also ignores the increasingly ambitious and effective efforts of states—including China, Middle Eastern states, Singapore and elsewhere—to support local courts as dispute resolution centers, through

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(2020) (“The second condition establishes a special ‘opt-out’ mechanism, enabling a Contracting State to object to the establishment of a treaty relation with another Contracting State . . . . Introducing this mechanism was to address certain States’ concerns regarding allegedly systemic lack of due process in other States.”).

For the 1971 Hague Convention, see Ronald Brand, *The Circulation of Judgments Under the Draft Hague Judgments Convention*, U. OF PITT. LEGAL STUD. RES. PAPER NO. 2019–20, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3334647](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334647) (2019) (“The structure of the 1971 Judgments Convention demonstrates that countries may be hesitant to ratify a judgments convention which allows any other country to join and automatically receive reciprocal benefits.”); Catherine Kessedjian, *Is the Hague Convention of 2 July 2019 A Useful Tool for Companies Who Are Conducting International Activities?*, 1 *NEDERLANDS INT’L PRIV. REV.* 19, 23 (2020) (“[Article 1(2)] shows that States do not trust each other and their courts. . . . lack of trust is confirmed by the bilateralisation system inserted in Article 29. The procedure chosen here is different from the classic bilateralisation, whereby a convention has effect among two States only if they have ‘accepted’ each other as partners by a separate ‘positive’ agreement (see the 1971 Hague Judgments Convention, Art. 21).”); Wenliang Zhang & Guangjian Tu, *The 1971 and 2019 Hague Judgments Conventions: Compared and Whether China Would Change Its Attitude Towards The Hague*, 2020 *J. INT’L DISP. SETT.* 11, 614, 618 (citing scholars who characterize the 2019 Hague Convention’s opt-out mechanism as “inverse bilateralisation”).

strategic initiatives (like China's Belt and Road project<sup>189</sup>), the insistence of state-owned (and other) enterprises on local courts, and through vigorous marketing.<sup>190</sup> In practice, forum selection provisions selecting jurisdictions that lack minimal assurances of integrity, independence, and competence are common and increasing.<sup>191</sup>

Importantly, this conclusion does not mean denying effect to international choice-of-court provisions or national court judgments based on such agreements. Rather, it means ensuring that the characteristics of national court litigations are taken into account in deciding whether and how to recognize forum selection clauses and foreign court judgments. In particular, the considerations outlined above argue for maintaining the safeguards provided by historic private international law regimes which require exercising caution in recognizing international choice-of-court agreements and, more acutely, foreign court judgments.

#### B. *The Choice of Court Convention: Party Autonomy and Procedural Fairness*

As discussed above, given the underlying differences between international arbitration and national court litigation, there are serious grounds for questioning whether the New York Convention's model is an appropriate paradigm for the Choice of Court Convention. Even apart from this basic question, however, there are additional, at least equally serious, grounds for doubting the wisdom of the terms of the Choice of Court Convention which were ultimately adopted. These grounds focus on the

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<sup>189</sup> See, e.g., *A Belt-and-Road Court Dreams of Rivalling the West's Tribunals*, THE ECONOMIST (June 6, 2019) ("In the law courts of Communist China, power and political control count for more than fairness.").

<sup>190</sup> See, e.g., Pamela Bookman, *The Adjudication Business*, YALE J. INT'L L. 239–57 (2020); Matthew Eric, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225 (2020).

<sup>191</sup> See, e.g., *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487 (6th Cir. 1992) (choice-of-court agreement specifying Brazil); *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F.Appx. 612 (5th Cir. 2007) (choice-of-court agreement specifying Brazil); *Mendes Junior Int'l Co. v. Banco Do Brasil, SA*, 15 F.Supp.2d 332 (S.D.N.Y. 1998) (choice-of-court agreement specifying Brazil); *Asoma Corp. v. M/V Southgate* 98 Civ. 7407 (S.D.N.Y. 1999) (choice-of-court agreement specifying Korea); *Glyphics Media, Inc. v. M.V. "Conti Sing."* 02 Civ. 4398 (S.D.N.Y. 2003) (choice-of-court agreement specifying India); *World Vacation Travel, SA, de CV v. Brooker*, 799 So.2d 410 (Fla. Dist. Ct. App. 2001) (choice-of-court agreement specifying Mexico); *Kanner v. Pan American Assistance, Inc.*, 807 So.2d 80 (Fla. Dist. Ct. App. 2002) (choice-of-court agreement specifying Colombia); *Union Bancaire Privée v. Nasser*, 300 A.D.2d 49 (1st Dept 2002) (choice-of-court agreement specifying Brazil); *Turnkey Projects Resources v. Gawad*, 198 So.3d 1029 (Fla. Dist. Ct. App. 2016) (choice-of-court agreement specifying Nigeria); *Ogorodnikov v. Dikker*, N.J. Super. Unpub. 2016 LEXIS 3351920 (N. J. Super. Ct. 2016) (choice-of-court agreement specifying Russia); *Batbrothers LLC, v. Paushok*, 60 Misc.3d 1205 (S. Ct. N.Y. 2018) (choice-of-court agreement specifying Russia).

Convention's treatment of issues of party autonomy and procedural fairness, particularly as compared to the New York Convention's treatment of these issues.

### *1. Consent and Party Autonomy*

There is no dispute that the related principles of party autonomy and consent are fundamental to contemporary private international law regimes and, in particular, to matters of international dispute resolution. It is foundational that both international commercial arbitration subject to the New York Convention and judicial proceedings subject to the Choice of Court Convention are based on consent:<sup>192</sup> absent a valid arbitration agreement or forum selection clause, there can be neither a legitimate international arbitration<sup>193</sup> nor a national court litigation properly subject to the Choice of Court Convention.<sup>194</sup> Indeed, as noted above, proponents of the Convention emphasize that it is intended to “protect party autonomy”<sup>195</sup> and “remov[e] obstacles to productive commercial relations, which are best served by party autonomy.”<sup>196</sup>

Party autonomy does not, however, mean giving effect to every alleged international arbitration clause or forum selection agreement. Rather, respect for party autonomy means giving effect to those dispute resolution agreements that commercial parties have in fact validly concluded. As a consequence, the provisions of both the Choice of Court Convention and the New York Convention that govern the treatment of challenges to the existence, validity or scope of dispute resolution agreements—and hence the parties' consent to a particular forum for adjudication—are of central importance.

Contrary to the claims of the Convention's proponents, the Choice of Court Convention does *not* parallel the New York Convention's treatment of international arbitration agreements in this respect. Under the New York Convention, the existence, validity or scope of an arbitration agreement can generally be challenged at three separate stages: (a) in challenges to the validity of the arbitration agreement, in both the arbitral proceeding and litigation in the arbitral seat (and often elsewhere);<sup>197</sup> (b) in challenges to an arbitral award in annulment proceedings in national courts which supervise

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<sup>192</sup> See *Report*, *supra* note 13, at 809; BORN, *supra* note 63, at 3881.

<sup>193</sup> New York Convention, Art. V(1)(a).

<sup>194</sup> Convention, Art. 6(b).

<sup>195</sup> Schulz, *supra* note 14, at 267.

<sup>196</sup> Van Loon, *supra* note 14, at 12.

<sup>197</sup> BORN, *supra* note 63, at 1139–41, 1145–49. See also UNCITRAL Model Law, Arts. 8, 16(3).

the arbitral process in the seat of the arbitration;<sup>198</sup> and (c) in challenges to recognition of the arbitral award in proceedings in foreign courts outside the arbitral seat.<sup>199</sup> Importantly, the results of one of these challenges in a particular national court system (or the arbitral proceedings) will ordinarily not have preclusive effect in other jurisdictions.<sup>200</sup> As a consequence, parties will not be required to arbitrate, nor bound by an arbitral award, unless several independent inquiries into the existence and scope of valid consent to arbitrate have been satisfied, including inquiries by both the arbitrators themselves and by national courts in the recognition forum.

Importantly, the Choice of Court Convention dispenses with inquiries into the existence of valid consent to a choice-of-court agreement that would parallel those of the New York Convention. As discussed above, the existence and validity of a choice-of-court agreement may be challenged under Articles 5 and 6 of the Convention—generally paralleling Article II of the New York Convention.<sup>201</sup> Critically, however, if such a challenge is made, and rejected by the putatively chosen legal system, then no further avenues for inquiry into the existence or validity of the agreement are possible in any other judicial forum.

As a consequence of changes that were made to Article 9(a) of the Choice of Court Convention late in the negotiating process,<sup>202</sup> if the court putatively chosen by a choice-of-court agreement has previously decided that the agreement exists and is valid under the chosen court's law, then the requested court, where a judgment is sought to be recognized and enforced, *must* accept this decision: a judgment may be denied recognition if “the [choice-of-court] agreement was null and void under the law of the State of the chosen court, *unless the chosen court has determined that the agreement is valid.*”<sup>203</sup> As one commentator explains:

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<sup>198</sup> BORN, *supra* note 63, at 3434–37, 3450–62. *See also* UNCITRAL Model Law, Arts. 34(2)(a)(i), (iii).

<sup>199</sup> BORN, *supra* note 63, at 3765–77. *See also* New York Convention, Arts. V(1)(a), (c).

<sup>200</sup> BORN, *supra* note 63, at 3797–3808, 3995–4000.

<sup>201</sup> *See supra* pp. 15–19.

<sup>202</sup> The draft of Article 9(a) prepared by the Working Group (then Article 7(a)) in March 2003 replicated the New York Convention approach to the validity of dispute resolution agreements. *See Preliminary Result on the Informal Working Group on the Judgment Projects 6* (Hague Conf. on Priv. Int'l Law, Preliminary Document No. 8, 2003), [https://assets.hcch.net/upload/wop/genaff\\_pd08e.pdf](https://assets.hcch.net/upload/wop/genaff_pd08e.pdf). The Special Commission subsequently introduced the existing text of Article 9(a) during meetings held in April 2004. *See Draft on Exclusive Choice of Court Agreement Proposal by the Drafting Committee* (Hague Conf. on Priv. Int'l Law, Working Document No. 110 E, 2004), [https://assets.hcch.net/upload/wop/jdgm\\_wd110\\_e.pdf](https://assets.hcch.net/upload/wop/jdgm_wd110_e.pdf).

<sup>203</sup> Convention, Art. 9(a) (emphasis added).

The dependent clause in Article 9(a) qualifies the availability of the review of validity in the court addressed by *creating a rule of preclusion*. An explicit determination by the chosen court that the choice of court agreement is ‘valid’ under its law *cuts off review of the issue in the court addressed*. Under the choice of law rule in the Convention, whether a choice of court agreement is ‘null and void’ is measured by the law of the state of the chosen court, and when the court with greatest expertise in that law has held the choice of court agreement to be valid, *all other courts are bound by that determination*.<sup>204</sup>

Relatedly, Article 8(2) also provides that “The court addressed [in recognition proceedings] shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.”<sup>205</sup> Thus, even if the chosen court has not decided on the existence and validity of the choice-of-court agreement, Article 8(2) makes its factual determinations binding in subsequent recognition proceedings.<sup>206</sup> In any event, if the chosen court has not decided that the choice-of-court agreement exists and is valid, it will virtually always be because the judgment-debtor did not object to the agreement’s validity in the chosen court proceedings—almost certainly resulting in a waiver of any subsequent jurisdictional objection, including under Article 9.<sup>207</sup>

The consequences of these provisions of the Choice of Court Convention are profound. Their effect is to give the national legal system putatively chosen in a choice-of-court agreement the sole authority to decide on the existence and validity of that agreement, without the possibility of subsequent review in recognition proceedings in any other forum. That is a striking contrast to the New York Convention, where recognition courts are explicitly granted the authority by Article V(1)(a) to deny recognition based upon the absence of a valid arbitration agreement—notwithstanding an arbitral tribunal’s ruling that such an agreement existed and, in addition, notwithstanding an annulment court’s decision to the same effect. Given the central importance of consent and party autonomy to both international arbitration agreements and choice-of-court agreements, the Convention’s elimination of Article V(1)(a)’s safeguard is highly problematic: it creates a

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<sup>204</sup> BRAND & HERRUP, *supra* note 13, at 111 (emphasis added). The same commentary also notes that the determination by the chosen court need not take the form of “an explicit finding to that effect.” *Id.* In practice, there will be very few circumstances in which the chosen court will not explicitly or implicitly uphold the existence and validity of the choice of court agreement. And, where no such determination is made, it will virtually always be as a consequence of waiver by the judgment-debtor.

<sup>205</sup> Convention, Art. 8(2).

<sup>206</sup> *Id.*, Art. 8(2).

<sup>207</sup> *Id.*, Art. 9(a).

very real risk of parties being forced to litigate in, and being bound to judgments by, courts to whose authority they never validly consented.

The Choice of Court Convention's treatment of issues of consent is also a striking contrast to existing U.S. law. Under both the 1962 Uniform Foreign Money-Judgments Recognition Act<sup>208</sup> ("UFMJRA") and the 2005 Uniform Foreign-Country Money Judgments Recognition Act<sup>209</sup> ("UFCMJRA"), the recognition court must deny recognition to a foreign judgment if it determines that the rendering court lacked personal jurisdiction.<sup>210</sup> Among other things, §5(a)(3) provides that personal jurisdiction existed if the judgment debtor submitted, in a valid forum selection agreement, to the rendering court's jurisdiction, but makes clear that it is for the recognition court to determine whether a valid forum selection agreement exists.<sup>211</sup> As the Comments to the UFCMJRA provide:

Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, *the forum court must find both the existence of a valid agreement to submit to the foreign court's jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.*<sup>212</sup>

<sup>208</sup> UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM'N 1963) (hereinafter UFMJRA). Roughly a third of all states (31 states, the U.S. Virgin Islands, and the District of Columbia) have adopted some version of the UFMJRA; 18 of these states have also adopted the UFCMJRA (typically without repealing their original enactment of the UFMJRA), with the result that 13 states have adopted only the UFMJRA, while 25 states have adopted either the UFCMJRA or both the UFMJRA and the UFCMJRA. *Compare Foreign Money Judgments Recognition Act*, UNIFORM LAW COMMISSION, (last visited Apr. 29, 2021) <https://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc> with *Foreign-Country Money Judgments Recognition Act*, UNIFORM LAW COMMISSION, (last visited Apr. 29, 2021) <https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e> (hereinafter ULA, *FCMJRA*).

<sup>209</sup> 2005 UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM'N 2005), 13 U.L.A. pt. 2 at 18 (Supp. 2011) (hereinafter UFCMJRA). Half of all states (25 states and the District of Columbia) have adopted some version of the UFCMJRA. *See* ULA, *FCMJRA*, *supra* note 230.

<sup>210</sup> UFCMJRA, §4(b)(2) ("the foreign court did not have personal jurisdiction over the defendant"). *See id.* Comment 6; *id.* §4(c)(5) & Comment 9. *See also* UFMJRA, §4(b)(2) (same).

<sup>211</sup> UFCMJRA, §5(a)(2) ("the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved"). *See also* UFMJRA, §5(a)(3).

<sup>212</sup> UFMJRA, §5, Comment (emphasis added). U.S. courts have consistently conducted independent inquiries into the existence, validity, and scope of forum selection clauses in recognition proceedings. *See Genujo Lok Beteiligungs GmbH v. Zom*, 943 A.2d 573, 580 (Me. 2008) (no deference to foreign court's determination that forum selection agreement applied); *Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1246 (N.D. Cal. 1977) (parties only agreed that the law of British Columbia would apply, not that defendant submitted to jurisdiction of British Columbia's courts); *John Galliano, S.A.*

In contrast, under the Choice of Court Convention, the recognition court is required to accept the decisions of the rendering court as to the existence, validity, and scope of a putative choice-of-court provision, thereby eliminating the existing safeguards for consent that exist under U.S. law, and again posing the very real risk that parties will be bound to judgments by courts to whose authority they in fact never validly consented.

The Choice of Court Convention's treatment of consent is subject to additional, serious criticisms, which are also of substantial practical importance. Under Article 9 of the Convention, there is no provision for denying recognition based upon the chosen court's excess of authority, including by deciding disputes that are not within the scope of the parties' choice-of-court agreement. In particular, there is no analog to the text of Article V(1)(c) of the New York Convention, and parallel annulment provisions of national arbitration legislation, which permits a recognition court to deny recognition where the arbitral tribunal made an award that deals "with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."<sup>213</sup>

This is again a deeply problematic treatment of issues of consent. In practice, disputes very frequently arise as to the scope of both arbitration and forum selection agreements.<sup>214</sup> Under the New York Convention, an arbitral tribunal (and an annulment court) does not have the sole authority to resolve such issues; rather, objections to the scope of the tribunal's authority may be raised in subsequent recognition proceedings under Article V(1)(c), providing a critical safeguard for the parties' autonomy. As with challenges to the existence and validity of choice-of-court agreements, however, the Convention eliminates Article V(1)(c)'s protections—leaving the chosen

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*v. Stallion, Inc.*, 15 N.Y.3d 75, 80 (N.Y. 2010) (independently assessing existence and validity of "agreement's forum selection clause"). See also *Clientron Corp. v. Devon IT, Inc.*, 35 F.Supp.3d 665, 684 n.14 (E.D. Pa. 2014) ("the grounds for nonrecognition in the UFCMJRA contemplate that a recognition court will independently review whether a foreign proceeding was contrary to an agreement between the parties") (emphasis added); *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842, 847 (Tex. App. 2011) (Dutch judgment should not be recognized because Dutch court wrongly refused to apply forum selection agreement which provided courts of Bermuda with exclusive jurisdiction); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482 cmt. h (1987) ("When parties to a contract select an exclusive forum (whether a court or arbitral tribunal) for any dispute that may arise between them, courts in the United States are not required to recognize a judgment rendered by a different forum").

<sup>213</sup> New York Convention, Art. V(1)(c); UNCITRAL Model Law, Art. 34(2)(a)(iii).

<sup>214</sup> See BORN, *supra* note 63, at 3889–92; BORN & RUTLEDGE, *supra* note 170, at 117–18.

court, of any Contracting State, as the sole judge of the scope of its own jurisdiction. Again, this does not protect, but undermines, party autonomy.

Furthermore, the treatment of non-exclusive choice-of-court agreements in Article 3(b) is also inconsistent with concepts of party autonomy. As discussed above, Article 3(b) is a “deeming” provision which provides that “a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.”<sup>215</sup> As also discussed above, this rule reverses historic (and current) common law presumptions, including in the United States—which are that choice-of-court clauses are non-exclusive.<sup>216</sup> Those presumptions were based, correctly, on notions of party autonomy and served to avoid undue restrictions on the general right of parties of access to justice and relief in any court with jurisdiction over a dispute.<sup>217</sup> The Convention overrides those considerations, instead imposing the opposite presumption (that parties’ freedom of choice and access to justice is limited), implemented through a relatively rigorous requirement that parties “expressly provide” that their choice-of-court agreement is non-exclusive.

It is understandable that the Convention applies only to exclusive choice-of-court agreements; as the Explanatory Report discusses, significant practical difficulties would result from extending the Convention to non-exclusive choice-of-court agreements. It is much less understandable, however, that the Convention goes further and deems all choice-of-court agreements to be exclusive forum selection clauses. That deeming provision is again a significant intrusion on the autonomy of commercial parties to structure their dispute resolution mechanisms in the manner they consider most appropriate.

Finally, the suitability of the Choice of Court Convention’s treatment of issues of consent in Articles 3(b), 8 and 9 is subject to even greater doubts because of the considerations discussed above (concerning the integrity, independence, and competence of many national courts).<sup>218</sup> The Convention’s elimination of any check on the jurisdictional determinations of the putatively chosen court must be seen in circumstances where that legal system will, in many cases, be of doubtful integrity, independence, and competence (in contrast to arbitral tribunals, where the opposite is true, and, in any event,

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<sup>215</sup> Convention, Art. 3(b).

<sup>216</sup> See *supra* p. 12.

<sup>217</sup> BRAND & HERRUP, *supra* note 13, at 18. See also *Report*, *supra* note 13, at 785.

<sup>218</sup> See BRAND & HERRUP, *supra* note 13, at 19–23.

where proceedings are supervised by the courts of the arbitral seat and recognition forums). Eliminating Article V(1)(a) and V(1)(c)'s safeguard for ensuring valid consent in these circumstances is a gravely flawed choice. Contrary to the assurances of its proponents, the Convention's provisions do not protect party autonomy; they instead eliminate essential mechanisms for ensuring that the parties' autonomy is validly exercised and genuinely respected.

## 2. *Procedural Fairness*

No less important than respect for party autonomy in international adjudication are requirements of procedural fairness. It is elementary that both international commercial arbitrations subject to the New York Convention<sup>219</sup> and judicial proceedings in national courts must be conducted in accordance with basic principles of procedural fairness:<sup>220</sup> the failure of a court or tribunal to respect these principles constitutes a denial of justice and deprives its rulings of both validity and legitimacy.<sup>221</sup> Although materials promoting the Choice of Court Convention appear oddly silent regarding the critical importance of procedural fairness,<sup>222</sup> these principles are beyond controversy.

Again, contrary to claims by its proponents, the Choice of Court Convention does *not* parallel the New York Convention's treatment of issues of procedural fairness. Under the New York Convention, an award may be denied recognition if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."<sup>223</sup> Moreover, as discussed above, many aspects of the procedures in international commercial arbitration are a product of the parties' consensual arrangements, with the New York Convention again providing for non-recognition of awards where there has been non-compliance with these procedural agreements.<sup>224</sup> These protections complement the parties' explicitly guaranteed rights to "equality of treatment" and a "full opportunity to be heard" under virtually all national arbitration legislation (including the UNCITRAL Model Law) and the

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<sup>219</sup> New York Convention, Art. V(1)(b).

<sup>220</sup> Convention, Art. 9(e).

<sup>221</sup> See BORN, *supra* note 63, at 3821–23, 3834–35, 3875.

<sup>222</sup> See generally BRAND & HERRUP, *supra* note 13; Schulz, *supra* note 14.

<sup>223</sup> New York Convention, Art. V(1)(b). See BORN, *supra* note 63, at 3821–28.

<sup>224</sup> New York Convention, Art. V(1)(d). See BORN, *supra* note 63, at 3902–10.

availability of annulment of awards for violations of these guarantees of procedural unfairness.<sup>225</sup>

Together with the parties' role in selection of the arbitral tribunal,<sup>226</sup> Articles V(1)(b) and V(1)(d) of the Convention and analogous provisions under national arbitration legislation in annulment proceedings provide effective, and essential, protections for the parties' due process rights in international commercial arbitration. At both the annulment and recognition phase of arbitral proceedings, the procedural decisions of the arbitral tribunal are subject to external scrutiny by national courts—in order to ensure that the arbitral proceedings were conducted fairly.

Importantly, the Choice of Court Convention does not replicate these safeguards for the procedural fairness of adjudicative proceedings. As discussed above, Article 9(d) of the Convention permits non-recognition of a judgment where it was “obtained by fraud in connection with a matter of procedure,”<sup>227</sup> defined as “deliberate dishonesty or deliberate wrongdoing,”<sup>228</sup> Although important, this provision is directed only to deliberately fraudulent conduct—not to other denials of procedural fairness, including through incompetent, negligent, inadvertent or biased decision-making by a national court: the provision provides substantially less protection than the New York Convention's protections, in Articles V(1)(b) and V(1)(d), for the parties' due process rights.

In addition, Article 9(e) of the Choice of Court Convention allows a requested court to deny recognition of a judgment if “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.”<sup>229</sup> Article 9(e) of the Convention provides more extensive protections than Article 9(d), but it too does not provide the safeguards that exist in international arbitral proceedings subject to the New York Convention.

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<sup>225</sup> See BORN, *supra* note 63, at 2334–44.

<sup>226</sup> See *id.* at 1764–68.

<sup>227</sup> Convention, Art. 9(d).

<sup>228</sup> The Explanatory Report cites examples of fraud in connection with procedural matters: “examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence.” *Report, supra* note 13, at 831.

<sup>229</sup> Convention, Art. 9(e).

First, Article 9(e) treats procedural unfairness as a subcategory of the public policy of the requested state, prescribing an elevated and two-pronged standard of proof—that recognition of a judgment be “manifestly incompatible” with a state’s public policy—and requiring that the “specific proceedings leading to the judgment” have been “incompatible with fundamental principles of procedural fairness.” In Article 9(e), the Convention appropriately seeks to restrain excessively broad applications of the public policy exception.<sup>230</sup> Nonetheless, by treating procedural unfairness solely as a sub-set of public policy, Article 9(e) dilutes the specific due process and other procedural protections that are provided by Article V(1)(b) and Article V(1)(d) of the New York Convention.

Second, Article 9(e) of the Choice of Court Convention also limits non-recognition to cases where “the specific proceedings leading to the judgment” were procedurally unfair. By so doing, the Convention deliberately forbids inquiry into the fairness and independence of the legal system of the Contracting State whose courts rendered the judgment in question.<sup>231</sup> In the words of one commentator:

[Article 9(e)’s] words were chosen with care. Review may be had in the court addressed of something which may have occurred in the particular case leading to the particular judgment for which recognition and enforcement is sought. Article 9(e) is not an invitation to a broad scale attack on the *nature, character, or alleged conduct of the foreign judicial or legal system as a whole*.<sup>232</sup>

This approach is seriously flawed in the context of an instrument aspiring to be a global convention, open to all states to ratify as Contracting States: Article 9(e) mandatorily requires recognition of judgments rendered by judicial systems that lack fundamental attributes of independence, integrity, and competence—which is a characterization that, as discussed above, describes a substantial number of states. That not only fails to protect private parties from initial procedural unfairness in a foreign judicial proceeding, but can require a subsequent denial of justice by the requested court.<sup>233</sup>

Detecting corruption or bribery in individual cases, as required by the Choice of Court Convention, is extraordinarily difficult. Although

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<sup>230</sup> It is trite to observe that public policy is an unruly horse, posing risks of unprincipled and unrestrained non-recognition of judgments (or awards). It is therefore appropriate to limit application of the public policy exception to cases of “manifest incompatibility,” much as recognition courts have done under the New York Convention. *See* BORN, *supra* note 63, at 3611–14.

<sup>231</sup> *See Report, supra* note 13, at 825; BRAND & HERRUP, *supra* note 13, at 118.

<sup>232</sup> BRAND & HERRUP, *supra* note 13, at 118 (emphasis added).

<sup>233</sup> Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 46–47 (1962) (“[T]he American court, by granting recognition, would itself deny due process.”).

widespread, official corruption, particularly in judicial proceedings, is deliberately, and often expertly, concealed; efforts to detect, much less prove, the existence of judicial corruption are notoriously challenging and very seldom successful.<sup>234</sup> In a cross-border context, demonstrating the existence of corruption in an individual foreign judicial proceedings is even more problematic, because of difficulties in obtaining evidence, language, cost, risks of official interference and the like. Likewise, proving the existence of governmental interference in individual proceedings is extremely difficult.<sup>235</sup> As a consequence, the Convention's provisions regarding procedural fairness are very likely, in practice, to prove inadequate as safeguards against the types of misconduct that are endemic in far too many jurisdictions.

The Choice of Court Convention's treatment of issues of procedural fairness also significantly dilutes the protections that are available under existing U.S. law. That is true notwithstanding the fact that the United States is one of the most generous jurisdictions, and arguably the most generous jurisdiction, in the world in its treatment of foreign judgments.<sup>236</sup>

Thus, under both common law standards and the 1962 UFMJRA, and 2005 UFCMJRA, U.S. courts may deny recognition of awards rendered by foreign legal systems that lack independence or impartiality.<sup>237</sup> The vital

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<sup>234</sup> INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY & TRANSPARENCY INTERNATIONAL, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 74 (2009) (“By definition corruption is covert and leaves no paper trail. Collecting evidence is therefore a major challenge.”).

<sup>235</sup> Evidence is difficult to obtain due to a lack of cooperation by foreign courts, immunities officials and judges and the fact that “[i]llegitimate political influence on judges take different forms, some [of which] are clearly illegal (bribes, blackmail, threats, violence/murder), while other forms of undue influence stem from the ways in which relations between the judiciary and other arms of government are organized, or reflect a legal culture where judges are expected to defer to political authorities. Structural sources of political bias in the judiciary are related to procedures for *appointment* of judges and judicial leadership; terms and conditions of *tenure* for judges; and budgetary and *financial* regulations, including salaries and benefits[.]” GLOPPEN, *supra* note 161, at 71 (emphasis in original).

<sup>236</sup> See, e.g., ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 368 (1993) (“[T]he United States . . . appears to be the most receptive of any major country to recognition and enforcement of foreign judgments”); Statement of Professor Linda J. Silberman before the Subcommittee on Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, February 12, 2009 at 5 (“[R]ecognition and enforcement of foreign country judgments has tended to be much more generous than the treatment given by foreign courts to U.S. judgments.”).

<sup>237</sup> Moreover, existing U.S. procedural protections against fundamentally unfair foreign judicial proceedings have been criticized as inadequate. Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1230–31, 1234–36 (2007) (criticizing UFMJRA and ALI Statute for not providing for non-recognition where proceedings were procedurally unfair); RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(a) (Proposed Final Draft 2005).

importance of these procedural protections is underscored by the Supreme Court's classic treatment of common law standards in *Hilton v. Guyot*:

[W]here there has been opportunity for a *full and fair trial* abroad before a court of competent jurisdiction, *conducting the trial upon regular proceedings*, after due citation or voluntary appearance of the defendant, and *under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries*, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . .<sup>238</sup>

Similar requirements are imposed by the UFMJRA and UFCMJRA.<sup>239</sup>

These requirements of existing U.S. law underscore the fact that U.S. and other courts will not recognize foreign judgments that were not rendered following a “full and fair trial,” upon regular proceedings, by a legal system that could “secure an impartial administration of justice” for foreign parties.<sup>240</sup> These safeguards, paralleling those of Articles V(1)(b) and V(1)(d) of the New York Convention are not incidental or merely “nice to have”: they are essential attributes of any foreign ruling that is to be given binding effect in a legal system that respects the rule of law.

Despite the vital importance of procedural fairness and regularity, the Choice of Court Convention very significantly dilutes the procedural protections of both existing private international law rules in the United States (and elsewhere) and the New York Convention. As discussed above, there are serious grounds for questioning whether the New York Convention's protections, tailored to consensual proceedings designed principally by the parties themselves, and subject to external review in annulment and recognition proceedings for fairness, are appropriate models for proceedings conducted in national courts, without external scrutiny.<sup>241</sup>

<sup>238</sup> *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895) (emphasis added).

<sup>239</sup> See UFCMJRA *supra* note 231, § 4(b) (“A court of this state may not recognize a foreign-country judgment if: (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law”), § 4(c)(7) (permissive exception to deny recognition where “judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the foreign-country judgment”); *id.* at (8) (permissive exception to deny recognition where “the specific proceeding in the foreign court leading to the foreign-country judgment was not compatible with the requirements of due process”); UFMJRA *supra* note 230 § 4(b) (“A foreign judgment need not be recognized if (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend”; or if the “(2) the judgment was obtained by fraud”).

<sup>240</sup> *Hilton*, *supra* note 233, 159 U.S. at 202.

<sup>241</sup> See *supra* pp. 24–42.

Even if the New York Convention model were considered appropriate, however, it is extremely difficult to accept the proposition that its procedural protections should be materially diluted for foreign judicial proceedings.

As with matters of consent, the Choice of Court Convention's dilution of safeguards for the procedural fairness of foreign adjudicative proceedings is unwise. That is particularly true given the unfortunate, but widespread, lack of judicial integrity, independence, and competence in many regions of the globe. In these circumstances, there is no justification for diluting the procedural protections of the New York Convention or other private international law regimes; instead, the historic private international law approach, in the United States and elsewhere, of subjecting the procedural fairness of foreign court judgments to greater scrutiny and reserve than that provided by the New York Convention for arbitral awards is both appropriate and necessary.

The Choice of Court Convention's tepid concern with the procedural rights of litigants contrasts markedly with its solicitude for notions of state sovereignty. As discussed above, Article 9(c) of the Convention provides that a judgment may be denied recognition where the document instituting proceedings in the parties' chosen court "was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents."<sup>242</sup> As also noted above, this limb of Article 9(c) has no parallel in either the New York Convention or other international arbitration treaties.<sup>243</sup>

It is surprising that, while diluting the due process protections of individual litigants, the Convention gives international effect to the domestic rules of a few European states, which have historically asserted that the sending of notice of foreign proceedings offends their judicial sovereignty. Those rules, and the continued insistence of (a few) European jurisdiction on application of those rules in an era of email and courier services, has rightly been criticized as archaic and protectionist.<sup>244</sup> It is unfortunate that the Choice of Court Convention failed to take the opportunity to ameliorate the unfairness and inefficiencies resulting from such rules; that the Convention failed to do so while also diluting protections against genuine procedural unfairness is yet more puzzling.

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<sup>242</sup> Convention, Art. 9(c).

<sup>243</sup> *Id.*

<sup>244</sup> Samuel Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 44. N.Y.U. J. of Int'l L. & Pol. 965, 982–84 (2013).

## CONCLUSION

The Choice of Court Convention aspires to status as a worldwide charter governing international forum selection agreements and national court judgments and is promoted as a significant milestone in the development of international civil procedure and global governance. Despite these ambitions, there are grave and fundamental defects in the Convention's structure and terms, which make it unsuitable for ratification by either the United States or other jurisdictions.

The Choice of Court Convention purports to transplant basic principles from the New York Convention to the context of cross-border choice-of-court agreements, notwithstanding substantial, and often decisive, differences between the international arbitral process and proceedings in (many) national courts. These differences raise serious doubts as to the suitability of the Convention's basic structure and objective. The Convention also omits or dilutes critical safeguards that the New York Convention guarantees for both the parties' autonomy and the procedural integrity of the adjudicative process. In doing so, the terms of the Convention again suffer from serious flaws which make it unsuitable for adoption on a global scale.

More fundamentally, the Choice of Court Convention does not advance, and instead undermines, the autonomy of commercial parties with respect to international dispute resolution. The Convention also does not ensure, and instead jeopardizes, the fairness of international dispute resolution mechanisms. In reality, the Convention seeks to replicate controversial EU paradigms, based upon rigid conceptions of state sovereignty and judicial cooperation, in a wholly different context. That does not advance, and instead threatens, both the objectives of contemporary private international law regimes and the free flow of international trade and investment.