

# Contents

*Preface*

*page xv*

## PART I: A BASIC INTRODUCTION TO THE 2005 HAGUE CHOICE OF COURT CONVENTION

<b>1</b>	<b>The Context and History of the Hague Negotiations . . . . .</b>	<b>3</b>
I.	Introduction	3
II.	The Context of the Hague Negotiations	3
III.	The History of the Hague Negotiations	5
A.	The Pre-existing International Legal Framework for a New Convention	5
B.	The Negotiations	6
<b>2</b>	<b>The Convention Structure and Content . . . . .</b>	<b>11</b>
I.	Introduction	11
II.	The Three Basic Rules	11
A.	Article 5: The Chosen Court Shall Have Jurisdiction	11
B.	Article 6: Courts Not Chosen Shall Suspend or Dismiss the Case	12
C.	Article 8: A Judgment Given on Jurisdiction Based on an Exclusive Choice of Court Agreement Shall Be Recognized and Enforced	13
D.	The Optional Fourth Rule: Recognition and Enforcement of Judgments Based on Non-exclusive Choice of Court Agreements	15
III.	Convention Scope	15
A.	The Three Basic Limitations	15
1.	The International Case Limitation	15
2.	The Exclusive Choice of Court Agreement Limitation	16
3.	The Civil or Commercial Matters Limitation	17
B.	Article 2 Exclusions from Scope	18
C.	Adjustments to the Article 2 Exclusions	18
IV.	Specific Additional Issues	19
A.	Consent and Validity	19
B.	Damages	21
C.	Special Mention for Insurance Contracts	22
V.	Creating a Sense of Balance: The Process of Negotiation and the Final Result	22
A.	Advantages and Disadvantages of a Consensus Process	22

B. Tensions, Choices, and Compromises	23
1. Party Autonomy and State Interest	23
2. Specificity and Flexibility	24
3 Interpretation and Use of the Convention . . . . .	26
I. Interpretation of the Convention	26
A. Introduction	26
B. Sources Establishing Consensus	27
1. The Text	27
2. The Preamble	27
3. Extra-textual Sources of Consensus	29
a. The Interpretive Report	29
b. Statements in the Plenary of the Diplomatic Conference	30
c. Consensus from sources other than the plenary session of the Conference	31
II. Use of the Convention	32
A. Transactional Lawyers	33
B. Litigators	34
C. Judges	35
D. Avoiding the Homeward Trend	35
PART II: ARTICLE-BY-ARTICLE COMMENTARY ON THE CONVENTION	
4 Scope and Definitions (Articles 1–4) . . . . .	39
I. General Matters	39
II. Article 1: The Three Basic Elements of Scope	39
A. An Exclusive Choice of Court Agreement	40
1. Article 3(a) and (b): Defining Exclusive Choice of Court Agreements	40
a. An agreement	40
b. Designating a court or courts	41
c. To the exclusion of any other courts	42
1) Agreements deemed to be exclusive	42
2) Examples	43
d. For the purpose of deciding particular classes of disputes	44
2. Article 3(c): Other Aspects of “Exclusive Choice of Court Agreements”	45
a. Requirements of form	45
b. Parties to the agreement	46
c. The severability rule	46
B. Concluded in Civil or Commercial Matters	47
C. In International Cases	49
1. “Case”	49
2. “International”	50
a. “International” for purposes of jurisdiction (Article 1(2))	50
1) The “not international” test	50
2) The importance of national law	50
3) The time at which international status is determined	51
4) Application in non-unified legal systems	52
5) Consequences of a case that is not international	52

b. “International” for purposes of recognition and enforcement (Article 1(3))	53
1) General issues	53
2) Defining “judgment” (Article 4(1))	54
D. A General Observation	54
III. Article 2: Exclusions from Scope	54
A. Article 2(1): Exclusions for Protective Purposes Based on the Type of Agreement	55
B. Article 2(2): Exclusions Based on Subject Matter	56
1. General Issues	56
2. Family and Domestic Law Matters	58
a. Status and legal capacity of natural persons	58
b. Maintenance obligations	58
c. “Other family law matters”	59
d. Wills and succession	59
3. Bankruptcy Matters	60
4. Transportation Exclusions	61
5. Antitrust Matters	62
6. Liability for Nuclear Damage	63
7. Certain Tort Claims	63
8. Rights in Rem and Tenancies of Immovable Property	65
9. Certain Internal Matters of Legal Persons	67
10. Intellectual Property Matters	67
a. Generally	67
b. Validity of intellectual property rights	68
c. Infringement of intellectual property rights	69
11. Entries in Public Registers	70
IV. Clarifications to, Amplifications of, and Exceptions to Exclusions from Scope in Chapter I	71
A. Preliminary Matters (Article 2(3))	71
B. Arbitration and Related Proceedings (Article 2(4))	73
C. States as Parties	74
1. States as Parties to Civil or Commercial Matters (Article 2(5))	74
2. States as Defendants (Article 2(6))	75
D. Other Matters	76
1. Provisions in Other Chapters Which May Affect Scope	76
2. Other Limitations on the Effect and Operation of the Convention	76
3. The Mandatory Nature of the Convention	76
5 Jurisdiction (Articles 5–7) . . . . .	78
I. Introduction	78
II. Exclusive Jurisdiction of the Chosen Court	78
A. Article 5(1): The Court Chosen Shall Have Jurisdiction	78
1. The Basic Rule	78
2. The Validity Exception	79
a. Existence of an agreement	79
b. Determining whether the agreement is “null and void”	79
c. The autonomous Convention choice of law rule	80



3. The Rule Against Declining Jurisdiction	82
4. Internal Rules of Subject Matter Jurisdiction and Transfer	84
B. Article 6: A Court Not Chosen Shall Not Exercise Jurisdiction	87
1. The Basic Rule	87
2. The Exceptions	89
a. The validity exception	90
b. Lack of capacity	90
c. Public policy	91
d. The agreement cannot reasonably be performed	94
e. The chosen court has decided not to hear the case	95
III. Article 7: Avoiding Interference with Interim Measures of Protection	95
IV. Final Comments on the Jurisdictional Rules and Interim Measures	96
<b>6 Recognition and Enforcement (Articles 8–15)</b>	<b>98</b>
I. Introduction	98
II. Article 8(1): A Judgment Shall Be Recognized and Enforced	98
A. Defining “Recognition” and “Enforcement”	98
B. The Three Conditions of Article 8(1)	99
C. The Consequences of Meeting the Three Conditions	101
D. Bases for Refusal of Recognition or Enforcement	101
III. Article 8(2): Prohibitions on Review of Decisions of the Court of Origin	102
A. No Review on the Merits	102
B. Bound by the Findings of Fact	103
1. The General Rule	103
a. Findings of fact and jurisdictional determinations	103
b. Findings of fact and scope of the Convention	104
c. Summarizing the effect of the general rule	104
2. The Qualification to the General Rule	105
3. The Convention and the Traditional Approach to Review by the Court Addressed	105
IV. Article 8(3): Effect and Enforceability in the Originating Court	106
V. Article 8(4): Postponement or Refusal of Recognition or Enforcement	107
VI. Article 8(5): The Effect of Internal Transfer Rules on Recognition and Enforcement	109
VII. Article 9: Grounds for Denial of Recognition or Enforcement	110
A. Revisiting the Question of Validity	111
B. Party Capacity	111
C. Lack of Notice to the Defendant	112
1. Documents Covered	113
2. Notice Sufficient to Enable the Defendant to Arrange for His Defense	113
3. Effect if Defendant Fails to Challenge Notice in the Court of Origin	114
4. Protection of State Interests	115
5. Impact on Article 2(6)	116
D. Extrinsic Fraud	116
E. Public Policy and Fundamental Principles of Procedural Fairness	117

1. “Manifestly Incompatible with the Public Policy of the Requested State”	117
2. “Incompatible with Fundamental Principles of Procedural Fairness”	118
3. Substantive Public Policy	118
4. Relationship to Other Provisions of Article 9	119
5. Application in Non-unified Legal Systems	119
F. Inconsistent Judgments From Courts in the Requested State	119
1. Timing Issues	120
2. Inconsistent Judgments Between the Same Parties	120
3. The Relationship Between Article 9(f) and Article 6	120
4. The Discretionary Nature of Article 9(f)	121
G. Inconsistent Judgments From Other Courts	121
VIII. Article 10: Preliminary Questions	122
A. Article 10(1): Non-recognition of Rulings on Preliminary Questions	123
B. Article 10(2): Non-recognition of Judgments Based on Rulings on Preliminary Questions	123
C. Article 10(3): Special Rule for Intellectual Property Rights Rulings	124
D. Article 10(4): Preliminary Questions Implicating Article 21 Declarations	126
IX. Article 11: Discretionary Non-Recognition of Non-Compensatory Damages	126
X. Article 12: Judicial Settlements in Civil Law Systems	130
XI. Article 13: Documents to be Produced	132
A. General Requirements	133
B. Article 13(1): Documents to be Produced	133
C. Article 13(2): Additional Documents That Might be Required	135
D. Article 13(3): Standard Form to Accompany Documents	135
E. Article 13(4): Translation Requirements	135
XII. Article 14: Procedure for Recognition	136
XIII. Article 15: Severability	137
<b>7 General Clauses (Articles 16–26) . . . . .</b>	<b>139</b>
I. Introduction	139
II. Article 16: Transitional Provisions	139
A. Article 16(1): The Date of Conclusion of an Exclusive Choice of Court Agreement and the Application of Chapter II Rules on Jurisdiction	140
1. General Application of the Rule	140
2. Application of the Rule to Cases Involving Convention Declarations	140
B. Article 16(2): The Date Proceedings Are Brought	141
C. Timing and the Scope of Review	142
III. Article 17: Insurance and Reinsurance Contracts	142
IV. Article 18: No Legalization Requirements	144
V. The Declaration System	145
A. Declarations in General	145
B. Article 19: Declarations Limiting Jurisdiction	146

1. The Substance of Article 19	146
2. The Potential Article 19 Interpretation Problem	148
C. Article 20: Declarations Limiting Recognition and Enforcement	149
D. Article 21: Declarations to Exclude Specific Matters from Scope on a State-by-State Basis	150
1. Article 21(1): Making the Declaration	151
2. Article 21(2): Reciprocal Treatment	152
E. Article 22: Reciprocal Declarations to Recognize and Enforce Judgments Based Upon Non-Exclusive Choice of Court Agreements	153
1. The General Contours of Article 22 Declarations	154
2. Conditions Required by Article 22(2)	155
3. Special Issues	158
4. Planning for Article 22 Prior to Entry into Force	158
VI. Article 23: Uniform Interpretation	159
VII. Article 24: Review of Operation of the Convention	161
VIII. Article 25: Non-Unified Legal Systems	161
A. References to the Law or Procedure of a State	162
B. References to Residence in a State	163
C. References to the Court or Courts of a State	164
D. References to a Connection with a State	164
E. The Insulation of Internal Legal Orders from Convention Rules	164
IX. Article 26: Relationship of the Convention to Other Sets of Rules	165
A. General Concerns	167
B. The Convention and Other Treaties	167
1. Article 26(1): The Rule of Compatible Interpretation	167
2. Article 26(2)-(5): Priority Rules in the Event of an Inconsistency with Another Treaty	168
a. Article 26(2): Priority when all parties are resident in States that are party to the other treaty	168
b. Article 26(3): Priority to an earlier treaty with a non-Contracting State	169
c. Article 26(4): Priority to recognition and enforcement provisions in other treaties	170
d. Article 26(5): Priority to treaties dealing with specific subject matters when a declaration has been made	170
3. Article 26(6): Priority Rules in the Event of an Inconsistency with the Rules of a Regional Economic Integration Organization	172
8 Final Clauses (Articles 27-34) . . . . .	174
I. Introduction	174
II. Article 27: Signature, Ratification, Acceptance, Approval or Accession	174
III. Article 28: Declarations with Respect to Non-Unified Legal Systems	175
IV. Article 29: Regional Economic Integration Organizations	176
V. Article 30: REIO Accession Without Its Member States	177
VI. Article 31: Entry Into Force	178



VII. Article 32: Declarations	179
VIII. Reservations Under the Convention	180
IX. Article 33: Denunciation	180
X. Article 34: Notifications by the Depositary	181

PART III: CHOICE OF COURT IN THE ABSENCE OF A MULTILATERAL  
CONVENTION

9 Treatment of Choice of Court Clauses in U.S. Courts . . . . .	185
I. From Outcast to Accepted Practice	185
II. The <i>Bremen</i> Standard	185
III. The New York Statute on Choice of Court	189
IV. Comparison with the Brussels Regulation	189
V. From Current Practice to the Hague Convention	191
10 Recognition and Enforcement of Judgments in the United States: With and Without Choice of Court Agreements . . . . .	192
I. Introduction	192
II. Federalism and the Foundations of U.S. Judgment Recognition Practice	193
A. The General Problem of Federal Courts Applying State Law	193
B. Constitutional Foundations for Sister State Judgments Recognition	193
C. Foreign Nation Judgments in a Federal System	195
1. Common Law Foundations	195
2. The Uniform Foreign Money-Judgments Recognition Act and the Restatement of Common Law	196
a. Basic rules of recognition and enforcement	196
b. Grounds for denial of recognition	197
1) Finality and conclusiveness of the judgment	197
2) Due process	198
3) In personam and in rem jurisdiction	198
4) Subject matter jurisdiction	199
5) Notice and opportunity to be heard	200
6) Fraud	200
7) Public policy	201
8) Inconsistent judgments	202
9) Judgments contrary to party agreement	202
10) Inconvenient forum	202
D. Sorting Out the Issues in a Federal System	203
III. Enforcement of Judgments: The Procedural Sibling to Recognition	204
IV. Recent Developments	207
A. The 2005 Uniform Foreign-Country Money Judgments Recognition Act	207
B. The 2005 American Law Institute Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments	208
V. Specific Issues Regarding the Recognition and Enforcement of Judgments Based on Choice of Court Agreements	210

PART IV: LITIGATION AND ARBITRATION CHOICES AFTER  
THE HAGUE CONVENTION

11	Planning the Choice of Forum: Choice of Court under the Hague Convention and Arbitration under the New York Convention . . . .	215
	I. Introduction	215
	II. Comparing Arbitration and Litigation	216
	III. The Contribution of the Convention on Choice of Court Agreements to Balanced Decision-Making in International Transactions	218
	A. General Similarities Between the Two Conventions	218
	B. Distinctions that May Affect the Choice of Forum	218
	1. Matters of Scope	218
	2. Obligations of a Court that Is Not the Chosen Forum	219
	3. Grounds for Non-Recognition of the Resulting Award or Judgment	219
	4. The Effect of Available Declarations	220
	IV. Final Comments	221
	Appendix A: Explanatory Report by Trevor Hartley & Masato Dogauchi (including the text of the 2005 Hague Convention on Choice of Court Agreements) . . . . .	223
	Appendix B: Cited Excerpts from the Nygh-Pocar Report . . . . .	306
	<i>Index</i>	313