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# The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band

*Matthew H. Adler & Michele Crimaldi Zarychta\**

## I. INTRODUCTION

In 2005, the United States signed a treaty that, if ratified, would be the United States' first-ever international agreement on judgment enforcement. The treaty provides that (a) where two commercial parties elect to resolve disputes between them in a particular forum, and (b) a judgment issues from that forum, then (c) all member states must enforce the judgment.<sup>1</sup> It is a document driven by party autonomy; absent a choice of court agreement (in U.S. parlance, a choice of forum clause), the treaty has no meaning or applicability.

The treaty's signing was the end of a rigorous journey. The United States has been a party to a treaty on arbitration enforcement,<sup>2</sup> and other nations have been parties to regional agreements on court judgments, but until now the twain have not met: there has been no agreement involving both the United States and court judgments.

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<sup>1</sup> See Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) [hereinafter Convention]; Ronald A. Brand, *The New Hague Convention on Choice of Court Agreements*, in ASIL INSIGHTS at 1 (Am. Soc'y Int'l L. 2005), *available at* <http://asil.org/insights/2005/07/insights050726.html> [hereinafter Brand ASIL] (explaining Convention).

<sup>2</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force in the United States on Dec. 29, 1970) (codified in 9 U.S.C. § 201) [hereinafter New York Convention].

The new treaty, called the Convention on Choice of Court Agreements (the "Convention"), is a much scaled-down version of the original U.S. plan. Hoping to build a skyscraper, the United States has succeeded in constructing, at most, a low hut. The goal was to create a treaty that would, with limited exception, allow successful U.S. litigants to collect money by enforcing U.S. judgments against their opponents' foreign assets. The new agreement fulfills this goal, allowing businesses that select a particular forum in their contract and win judgment in that forum to seek to collect on that judgment in the territory of another signatory to the new agreement. All others—non-commercial parties, consumers, human rights advocates, and even those businesses that obtain a court judgment from a forum other than one selected in their contract—remain excluded by any enforcement treaty. The Convention is, in some sense, a great leap forward for the protected few, and in another sense, an admission of failure for a larger international initiative.

This article addresses those successes and failures. Part II of this article outlines the history of the U.S. efforts to make it easier for U.S. litigants to enforce judgments. Part III discusses the drafting and negotiating history of this particular Convention. Part IV analyzes the provisions of the concluded Convention. Part V addresses policy considerations and the question of whether the current text is the first step on the path to a broader enforcement agreement.

## II. JUDGMENT ENFORCEMENT: A HISTORICAL PRIMER

Being able to collect in one jurisdiction, on a judgment rendered in another jurisdiction, is truly a "Revolutionary" concept. Judgment enforcement lay at the very heart of the Founders' vision of an integrated market. This notion finds constitutional voice in the Full Faith and Credit Clause.<sup>3</sup> That clause,<sup>4</sup> however, has a national, continental scope. It does not apply beyond U.S. borders, and consequently, is irrelevant to a litigant in the United States trying to enforce a U.S. judgment abroad (nor, for that

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<sup>3</sup> *Internet and Federal Courts: Issues and Obstacles: Hearing Before the Subcomm. On Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 53 (2000) [hereinafter *Kovar Testimony*] (statement of Jeffrey Kovar, Assistant Legal Advisor for Private International Law, U.S. Dep't of State) ("[T]he framers of the U.S. Constitution included the Full Faith and Credit Clause to ensure that judgments from one state would be enforceable in every other."); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L. L. 387, 418 (2001) (quoting same). See also Peter D. Trooboff, *Foreign Judgments*, 26 NAT'L L.J. 48 (2004) ("Achieving greater uniformity [in enforcement of judgments in the U.S.] is not merely of theoretical significance. In a marketplace that seeks to encourage the free flow of investment and trade, the ability to enforce rights effectively—the free flow of judgments—becomes an important element of commercial security and success.").

<sup>4</sup> U.S. CONST. art. IV, § 4.

matter, does it allow a foreign national to enforce a judgment rendered abroad against assets in the United States).<sup>5</sup>

When trade was largely continental, the Full Faith and Credit Clause sufficed. The growth of the United States as a major international trading power, however, exposed the difficulties of enforcing judgments that resulted when international trade led to disputes between businesses. There was no treaty that provided for enforcement in one country of any decision rendered in another, even as so-called Friendship, Commerce and Navigation (“FCN”) treaties otherwise grew.<sup>6</sup>

This gap was filled in part, for arbitration awards only, in 1970, when the United States became party to the New York Convention. With a few limited exceptions, the treaty requires member states to recognize and enforce arbitration awards rendered in other member states.<sup>7</sup> Left in the cold, however, are parties who do not choose arbitration—either because they have no formalized contract at all, their contract is silent on dispute resolution, or their contract affirmatively chooses litigation in a particular court over arbitration. Beyond these commercial parties who have chosen to arbitrate their claims are an entire class of tort, consumer, human rights, and other litigants who also have no prescribed way to enforce U.S. judgments abroad.

Litigants trying to enforce U.S. judgments abroad have been subject to an ad hoc enforcement regime that relies wholly on the discretion of the particular court involved, unfettered by any international obligation, treaty or otherwise. The result, in some eyes, is a “lose/lose” scenario for U.S. litigants. Generally, the United States recognizes and enforces foreign judgments under its principle of comity<sup>8</sup> (*not reciprocity*).<sup>9</sup> On the other

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<sup>5</sup> *Id.*

<sup>6</sup> Friendship, Commerce & Navigation treaties are bilateral treaties dealing with commercial travelers. For a list of Friendship, Commerce & Navigation treaties entered into force in the United States, see 22 U.S.C. § 503 (2000).

<sup>7</sup> See New York Convention, *supra* note 2, art. 5 (noting exclusions).

<sup>8</sup> Recognition and enforcement of foreign judgments is actually an aspect of choice of law rules of the forum state. See Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1222 (1998) (explaining that the Full Faith and Credit Clause only applies to states within the United States). The dominant principle is *res judicata*. See *id.* In determining whether a court will recognize and enforce a foreign judgment, a court will not re-litigate or examine the merits of the foreign judgment. See *id.* at 1223. The principle of comity determines whether a court will recognize and enforce a foreign judgment. See *id.* (“[A] forum court ought to enforce foreign decrees or laws when it would want its own similar decrees or laws enforced in the foreign court if the situation were reversed.”).

In *Hilton v. Guyot*, the Supreme Court listed several factors for determining whether a court should recognize and enforce a foreign judgment: (1) whether the defendant had a full and fair opportunity to litigate in the foreign court; (2) whether the trial was conducted according to regular proceedings; (3) whether the defendant voluntarily appeared before the

hand, enforcement of U.S. judgments abroad can be refused for any number of reasons, including but not limited to high damages awards in jury trials.<sup>10</sup> Some foreign courts also reexamine the merits of U.S. judgments to determine if they are consistent with the forum's public policy, and if not, refuse to recognize and enforce them.<sup>11</sup>

Perhaps still worse, U.S. litigants are subject to exorbitant bases of jurisdiction abroad when enforcement is sought against their assets in the United States. These bases include jurisdiction founded solely on the nationality of the plaintiff<sup>12</sup> or the location of the defendant's property.<sup>13</sup> Meanwhile, these foreign nations cannot use these same bases to obtain jurisdiction over an alien defendant (just as they could not have used these

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court or "due citation"; (4) whether the foreign judicial system is impartial to foreign litigants; (5) there is no evidence of prejudice in the court or the judicial system; (6) whether there was fraud in the procurement of the judgment; (7) and the enforcing court should not retry the merits of the case. 159 U.S. 113, 202-03 (1894); *see also* Maier, note 8, at 1225 ("As long as there is no systemic or significant cultural prejudice to the defendant and as long as the defendant is treated equally with foreign nationals under that forum's local laws, the United States enforcement forum will usually give effect to the judgment, even if the precise standards of due process have not been met, unless the foreign decree was 'so palpably tainted by fraud or prejudice as to outrage our sense of justice.'" (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 444 (3d Cir. 1971))); *but see* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 98-99 (1999) ("[B]ecause the U.S. court has no guarantee that a foreign judgment, although comporting with the basic requirements of the foreign law, is minimally acceptable to U.S. justice, it will not recognize or enforce a foreign judgment resulting from proceedings that failed to meet the basic American notions of due process." (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1) (1987))).

<sup>9</sup> At the time, *Hilton* also required reciprocity—that the foreign court also would enforce an American judgment—but that aspect has been abandoned in American jurisprudence. 159 U.S. at 228; *see infra* note 26 and accompanying text, discussing reciprocity.

<sup>10</sup> *See* Murphy, *supra* note 3, at 419 (quoting *Kovar Testimony*, *supra* note 3); Linda Silberman, *Symposium: Export/Import: American Civil Justice in a Global Context: Eighth Annual Clifford Symposium on Tort Law and Social Policy Article: Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 319-20 (2002) ("[M]uch of the attack on American-style jurisdiction is not really about jurisdiction at all, but about unhappiness with other aspects of civil litigation in the United States—juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules in U.S. courts.").

<sup>11</sup> *See* Clermont, *supra* note 8, at 93-94.

<sup>12</sup> *See* Silberman, *supra* note 10, at 322 n.13 ("An alien, even if not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France towards a French person; he may be summoned before the courts in France for obligations contracted by him in a foreign country towards French persons." (quoting C. CIV. art. 14 (Fr.))).

<sup>13</sup> *Id.* at 322 n.14 (citing Zivilprozessordnung [ZPO] [Civil Procedure Statute] § 23 (F.R.G.)).

bases against U.S. defendants had the United States been a party to a treaty such as the Brussels or Lugano Conventions discussed below).<sup>14</sup>

Thus, by the 1970s, there were two disparities in enforcement: one, between U.S. and non-U.S. litigants, and the second, between parties to arbitration and parties to litigation. These disparities led to a concentrated effort by the U.S. government to close the gap. On a multilateral level, the United States was party to a 1971 attempt by The Hague Conference on Private International Law (the "Hague Conference")<sup>15</sup> to establish an enforcement convention.<sup>16</sup> The resulting international recognition and enforcement agreement, however, ultimately was only ratified by three countries and never entered into force.<sup>17</sup> Bilaterally, the United States also tried to close the gap by negotiating an agreement with Great Britain in 1976.<sup>18</sup> The attempt failed, due in large part to concerns from the London insurance market about U.S. damages awards.<sup>19</sup>

Away from the United States, however, regional enforcement

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<sup>14</sup> See Clermont, *supra* note 8, at 93 ("The Brussels Convention openly discriminates against outsiders, as it applies only to defendants domiciled in a signatory state.").

<sup>15</sup> The Hague Conference was established in 1893 and the United States became a member in 1964. See Russell J. Weintraub, *Symposium: "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?": Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1269 n.1 (1998) (discussing history of the Hague Conference).

<sup>16</sup> The Hague Conference is an organization of member States that has been successful in creating other multilateral treaties such as Taking of Evidence Abroad, Abolishing the Requirement of Legalization, and International Child Abduction. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17); Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82); Convention Abolishing the Requirement of Legalization for Foreign Public Documents, with annex, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41); Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24).

<sup>17</sup> See Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol, Feb. 1, 1971, 1144 U.N.T.S. 249, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=78](http://www.hcch.net/index_en.php?act=conventions.text&cid=78) and [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=79](http://www.hcch.net/index_en.php?act=conventions.text&cid=79); Russell J. Weintraub, *Symposium Article: How Substantial is our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 169 (1998) (explaining prior treaty).

<sup>18</sup> See Draft Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, U.S.-U.K., initialed Oct. 26, 1976, 16 I.L.M. 71; Maier, *supra* note 8, at 1207 n.2 (citing failed treaty).

<sup>19</sup> The treaty failed when the British insurance industry, fearing large jury awards, protested. Weintraub, *supra* note 17, at 169 (citing failed treaty).

mechanisms proliferated. The European Community nations entered into the Brussels Convention in 1968.<sup>20</sup> In 1988, the Lugano Convention extended the Brussels Convention to non-European Union countries.<sup>21</sup> The Brussels Convention was superseded by the Brussels Regulation in 2000.<sup>22</sup> Both the Lugano Convention and Brussels Regulation provide for judgment enforcement across prescribed borders and sharply circumvent review of the underlying merits of the case.

Because of the disparity between U.S. and non-U.S. litigants, United States efforts picked up again in the early 1990s. In 1992, the United States proposed that the Hague Conference again consider an enforcement convention. The process at The Hague took thirteen years. While the United States hoped that the Hague Conference would yield a comprehensive multilateral treaty on the recognition and enforcement of judgments resembling the Brussels Regulation and Lugano Convention, the resulting treaty was limited to enforcement of judgments solely in the context of a choice of court/choice of forum clause in the parties' contract, as explained more fully below. The Member States of the Hague Conference on Private International Law signed the Final Act of the Twentieth Session of the Hague Conference on Private International Law on June 30, 2005 at the Peace Palace at The Hague, which produced the Convention on Choice of Court Agreements.<sup>23</sup>

### III. NEGOTIATION OF THE CONVENTION

While the Convention is a leap forward from zero, it falls well short of the original U.S. aim. This happened for two primary and quite linked reasons. First, foreign countries were concerned with U.S. notions of

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<sup>20</sup> See Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, *as amended*, 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413, *available at* <http://www.jura.uni-sb.de/convention-bruxelles/en/c-textes/brux-idm.htm> [hereinafter Brussels Convention].

<sup>21</sup> See Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620, *available at* <http://www.curia.europa.eu/common/recdoc/convention/en/c-textes/lug.htm>. Regional treaties like the Brussels Regulation and Lugano Convention and the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, OAS Treaty Ser. No. A/39, *reprinted in* 24 I.L.M. 468, *available at* <http://www.oas.org/juridico/english/treaties/b-50.htm>, which the United States has not signed, have been successful. See Weintraub, *supra* note 17, at 169.

<sup>22</sup> The Brussels Convention has been superseded by Council Regulation (EC) No. 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1, *available at* <http://www.curia.europa.eu/common/recdoc/convention/en/c-textes/02001R0044.pdf> [hereinafter Brussels Regulation].

<sup>23</sup> See generally, Convention, *supra* note 1. See also Brand ASIL, *supra* note 1, at 1.

expansive jurisdiction and damages.<sup>24</sup> Second, the United States lacked bargaining power. In the view of the U.S. State Department, “[s]ince litigants from most developed countries have no substantial difficulties enforcing judgments in the United States, their governments believe they have substantial negotiating leverage over us.”<sup>25</sup> The perception of leverage colored the negotiations, which might have come out differently had the United States insisted or been able to insist on reciprocity.<sup>26</sup>

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<sup>24</sup> See Murphy, *supra* note 3, at 419 (quoting *Kovar Testimony*, *supra* note 3); Silberman, *supra* note 10, at 319–20 (“[M]uch of the attack on American-style jurisdiction is not really about jurisdiction at all, but about unhappiness with other aspects of civil litigation in the United States—juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules in US courts.”).

<sup>25</sup> *Id.* at 420 (quoting *Kovar Testimony*, *supra* note 3). See *supra* note 8 (discussing America’s view of comity and liberal enforcement policy of foreign judgments).

Unfortunately, participating countries are paying less attention to the global advantage of an international treaty governing recognition and enforcement than to their own specific national goals, which are not aligned and inevitably run counter to one another. For example, the United States is largely interested in increasing recognition of its judgments abroad, while other countries’ interests are focused exclusively on limiting the exposure of their nationals to exorbitant foreign jurisdiction and what is deemed to be excessive compensation and damages awarded by U.S. courts. These clashes in national goals, together with difficult power dynamics, potential conflicts with U.S. [C]onstitutional law, and past failure of the United States to achieve even bilateral consensus on key recognition issues, have led many scholars and practitioners to doubt that the Hague Convention in its current form will ever be finalized.

Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing Reciprocity Requirement into US International Recognition and Enforcement Law*, 35 GEO. J. INT’L L. 239, 259 (2004).

<sup>26</sup> Murphy, *supra* note 3, at 420 (quoting *Kovar Testimony*, *supra* note 3); see also Silberman, *supra* note 10, at 321–22 (explaining that because the European Union and EFTA states already receive the benefit of judgment recognition in the United States, they used recognition and enforcement of American judgments abroad as a bargaining tool to limit the U.S. ability to exercise what they saw as “exorbitant” bases of jurisdiction).

Some U.S. states, however, make reciprocity mandatory or at least discretionary in deciding whether they will enforce a foreign judgment. See Linda J. Silberman and Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L. J. 635, 636 (2000) [hereinafter Silberman and Lowenfeld]. Examples of discretionary use of reciprocity are FLA. STAT. § 55.605(2)(g) (2005), IDAHO CODE ANN. § 10-1404(2)(g) (2005), OHIO REV. CODE ANN. § 2329.92(B) (West 2005), TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (Vernon 2005). See Silberman and Lowenfeld, *supra*, at 636 n.9 (citing states with discretionary reciprocity provisions). Massachusetts and Georgia, however, have mandatory reciprocity provisions. See *id.* (citing MASS. GEN. LAWS ch. 235, § 23A (West 2005) and GA. CODE ANN. § 9-12-132 (West 2005)).

In May 2005, the American Law Institute (“ALI”) approved the final draft of the



The path to the Convention has been a rocky one. In May of 1992, the United States proposed that the Hague Conference create a multilateral treaty on the international recognition and enforcement of judgments.<sup>27</sup> Negotiation sessions at the Hague resulted in the Preliminary Draft (the "1999 Draft") in October 1999, which was based on provisions that received a majority vote.<sup>28</sup>

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Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute. PROPOSED FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (REVISED) XXII (Proposed Final Draft, Am. Law. Inst. 2005) [hereinafter ALI Proposed Statute]. The proposed federal statute started as implementing legislation for the Convention but when the Convention refocused on a more limited scope, the ALI continued with its project. See *Foreign Judgments* 8/23/04, *supra* note 3, at 1. If adopted, the ALI federal statute would preempt the uniform act recently finalized by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). *Id.* at 2.

This proposed federal statute is more like the original Hague drafts in that it is very comprehensive. "As approved, the project incorporates a creative approach to encouraging other nations to enter into reciprocal agreements with the United States to enforce foreign judgments, including many not within the scope of the new Hague Convention." Peter D. Trooboff, *Foreign Judgments*, 28 NAT'L L. J. 7, 2 (Oct. 17, 2005) [hereinafter *Foreign Judgments* 10/17/05] (noting value of the form). The proposal also includes a compendium of research by Andreas Lowenfeld and Linda Silberman, New York University School of Law Professors, and explains issues such as how to handle the public policy exception in connection with the First Amendment. *Id.* (citing Reporters' Note 6(d), § 5). For a complete discussion on the history of the ALI proposed federal statute, see generally Miller, *supra* note 25.

In July 2005, the NCCUSL approved the Uniform Foreign-Country Judgments Recognition Act (2005), at the 114th meeting, which amends the 1962 Uniform Foreign Money-Judgments Recognition Act enacted in thirty states. *Foreign Judgments* 10/17/05, *supra* note 26, at 3. See UNIFORM FOREIGN-COUNTRY JUDGMENTS RECOGNITION ACT (NCCUSL 2005), available at <http://www.law.upenn.edu/bll/ulc/ufmjra/2005final.htm> [hereinafter NCCUSL Act].

While the ALI Proposed Statute includes a reciprocity requirement, the NCCUSL Act does not, stating, "while recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act." *Foreign Judgments* 10/17/05, *supra* note 26, at 3 (quoting NCCUSL Act, *supra*, Prefatory Note).

<sup>27</sup> See 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. & COM. 191, 192 (2002) [hereinafter Brand I] (citing Letter from Edwin D. Williamson, Legal Advisor, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference doc. L.C. ON No. 15 (1992)) (explaining history of convention)). The United States was persuaded to propose such a convention by Harvard Law Professor Arthur T. von Mehren. *Foreign Judgments* 10/17/05, *supra* note 26, at 1.

<sup>28</sup> See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Prelim. Doc. No. 11 Oct. 19, 1999, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3494&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3494&dtid=35) [hereinafter 1999 Draft]; Brand I, *supra* note 27, at 193 (explaining history of the 1999 Draft).

The United States, however, found the 1999 Draft unacceptable. Assistant Legal Advisor for Private International Law at the U.S. State Department, Jeffrey Kovar, wrote a letter to the Secretary General of the Hague Conference noting four major problems with the 1999 Draft. First, the draft looked more like the Brussels and Lugano Conventions than the United States desired because of the majoritarian voting process used to approve its provisions.<sup>29</sup> Second, the Brussels Convention was unacceptable to the United States because it failed to consider the due process limitations in the U.S. Constitution. Third, forcing all jurisdictional bases into either the white list or black list<sup>30</sup> created “unnecessary ‘canonization’ and ‘demonization’ of jurisdictional bases.”<sup>31</sup> Fourth, the draft included provisions covering areas of law that were not yet firmly established in states’ own legal systems, such as intellectual property, e-commerce, and other new technology utilized in commercial transactions.<sup>32</sup>

To facilitate a more globally acceptable draft, the United States proposed a consensus rather than a majoritarian approach.<sup>33</sup> The delegates forged another draft called the Interim Text (“2001 Draft”) at a diplomatic conference in June 2001.<sup>34</sup> Although a consensus approach was approved,

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<sup>29</sup> See Letter from Jeffrey D. Kovar, Assistant Legal Advisor, U.S. Dep’t of State, to Alasdair Wallace, Head of International and Common Law Services Division, U.K. Lord Chancellor’s Dep’t, at 1 (Sept. 10, 2000) available at <http://www.cptech.org/ecom/jurisdiction/kovarletter.html> [hereinafter Kovar Letter of 9/10/00] (“[W]e note that the October 1999 text follows too closely the structure and content of the Brussels Convention. Neighboring countries with common legal, cultural, and political traditions to be an essential part of their common effort to build a greater economic and political union developed the Brussels Convention. The regional success of this convention does not necessarily project it as a global solution because its context and objectives are very different from those of a worldwide convention.”).

<sup>30</sup> For a discussion on the white list and black list, see *infra* notes 43–44 and accompanying text.

<sup>31</sup> Brand I, *supra* note 27, at 198. See also Letter from Jeffrey D. Kovar, Assistant Legal Advisor, U.S. Dep’t of State, to J.H.A. van Loon, Secretary General, Hague Conference on Private International Law, at 5 (Sept. 10, 2000) available at <http://legalminds.lp.findlaw.com/list/intpil/doc00003.doc> [hereinafter Kovar Letter of 2/22/00] (“[T]he current draft creates rigid principles and factors for prohibiting jurisdiction that will lead to excessive litigation and to conflict among parties over the resulting lack of uniformity of application. The result is likely to be substantially diminished support for the convention.”).

<sup>32</sup> See Brand I, *supra* note 27, at 197–198; Kovar Letter of 2/22/00, *supra* note 31, at 4, 6 (addressing e-commerce and intellectual property concerns); see also *infra* notes 124–145 (discussing Internet and e-commerce issues).

<sup>33</sup> Kovar Letter of 2/22/00, *supra* note 31. See Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 193 (2001) (discussing Kovar Letter of 2/22/00, *supra* note 31).

<sup>34</sup> Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Summary of the Outcome of the

the delegates adhered to the majoritarian voting method, resulting in a myriad of alternative provisions appearing in brackets, yielding no consensus text with which to work.<sup>35</sup>

In January 2003, at the suggestion of the Chair, and because the convention was not making headway, the Hague Conference decided to refocus the discussions. The new goal was to negotiate a more limited convention on choice of court clauses in business-to-business contracts.<sup>36</sup> The end result of these discussions was the Convention on Choice of Court Agreements concluded on June 30, 2005.

The Convention's negotiation revealed sharp debates among countries on a number of issues. This article focuses on the three primary ones: jurisdiction, damages, and particular causes of action covered.

## A. Jurisdiction

### 1. *Compromising on a Mixed Convention*

Because enforcement means that one state will treat another state's judgment as its own, the enforcing state must treat another's jurisdiction as its own. Absent jurisdiction, there is no case and thus no judgment to enforce. Central to the debate about enforcement, then, is the question of the jurisdictional inquiry that must take place before a case proceeds, and central to *this* question is in which forum that inquiry occurs.

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Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3499&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35) [hereinafter 2001 Draft]; see Brand I, *supra* note 27, at 193 (discussing 2001 Draft, *supra*).

<sup>35</sup> *Id.* at 198.

<sup>36</sup> See *id.* at 195 (citing Hague Conference on Private International Law, *Commission I on General Affairs and Policy: Summary report prepared by the Permanent Bureau* (Apr. 22–24, 2002)) (discussing a shift in focus); see *id.* at 198 (citing Hague Conference on Private International Law, *Commission II: Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Working Doc. No. 97 (June 18, 2001)); Hague Conference on Private International Law, *Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, at 4 n.2, Prelim. Doc. 16 (Feb. 2002) (noting that Argentina, Australia, New Zealand and Norway proposed that the convention focus on areas of consensus); Hague Conference on Private International Law, *Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at its Third Meeting—25–28 March 2003*, at 4–5, Prelim. Doc. 22 (June 2003) (proposing that a draft of a Convention on Exclusive Choice of Court Clauses be made at the January 6–9, 2003 meeting); Hague Conference on Private International Law, *Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Draft Convention on Exclusive Choice of Court Agreements*, Prelim. Doc. 25 (Mar. 2004) (containing first draft of the new convention).

The European states wanted a so-called “double convention” modeled after the Brussels Regulation and Lugano Convention.<sup>37</sup> The United States, however, proposed a so-called “mixed convention” from the outset because it would provide the United States with more flexibility.<sup>38</sup> The Special Commission did not vote to adopt a mixed convention until June 14, 1999.<sup>39</sup> This debate was reflected in the language of the 2001 Draft, essentially a double convention model.<sup>40</sup>

A “single convention” applies exclusively to the enforcing court.<sup>41</sup> The enforcing court will inquire whether the rendering court had jurisdiction to render the judgment.<sup>42</sup> A “double convention,” on the other hand, applies to both the rendering court and the enforcing court. The rendering court only has jurisdiction if it can satisfy one of the permitted jurisdictional bases enumerated in the convention (the “white list”).<sup>43</sup> There is also a list of prohibited bases of jurisdiction that participating states may

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<sup>37</sup> See von Mehren, *supra* note 33, at 199. See also Peter Nygh & Fausto Pocar, *Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Enforcement of Judgments, Prelim. Doc. 11 (Aug. 11, 2000), available at <http://www.hcch.net/upload/wop/jdgmpd11.pdf>.

<sup>38</sup> See Kovar Letter of 9/10/00, *supra* note 29, at 2 (“Unlike the Brussels Convention, a global convention must necessarily leave substantial room for national practices to continue outside the limited core jurisdictional provisions of the convention.”); Kovar Letter of 2/22/00, *supra* note 31, at 5 (“We believe that unless there is a clear, well-defined permitted area of jurisdiction that allows for growth and development in the future, the convention will not have the flexibility it needs to meet the requirements of a changing world.”).

<sup>39</sup> See von Mehren, *supra* note 33, at 199 (“[S]everal experts noted that the very fact of providing for jurisdiction based on national law indicated that the present negotiations were moving towards the conclusion of a mixed rather than a double convention. Several experts affirmed that they still aspired to a double convention; others noted, however, that it was merely being realistic to recognize that in a global context only a mixed convention could be achieved.”) (quoting Article 17 of the Sixty-fifth Plenary Meeting of the Special Commission, Report of Meeting No. 65, at 1)). See also Brand I, *supra* note 27, at 196–97.

<sup>40</sup> See Brand I, *supra* note 27, at 197. See von Mehren, *supra* note 33, at 200 (“The Special Commission in its work premised a higher degree of consensus among the Hague Conference Members than existed and ignored the full implication of the fundamental differences in the economic, political, and institutional situation that made the Brussels and Lugano conventions workable, and the global setting of a Hague Convention.”).

<sup>41</sup> See Brand I, *supra* note 27, at 195 (discussing single conventions).

<sup>42</sup> See *id.*; Ronald A. Brand, *Symposium Article: Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT’L L. 125, 143 (1998) [hereinafter Brand II] (“The enforcing court does not question whether the court of origination properly exercised its own jurisdiction. Rather, the jurisdictional analysis conducted by the enforcing court deals only with whether the court of origination exercised jurisdiction in a manner recognized as appropriate either by the recognizing state or in the applicable convention.”).

<sup>43</sup> See von Mehren, *supra* note 33, at 197 (explaining double conventions).

not use (the “black list”).<sup>44</sup> The enforcing court then must enforce the judgment unless one of the bases for refusal of recognition and enforcement apply, eliminating the need to inquire whether the rendering court had jurisdiction.<sup>45</sup> Accordingly, the court must look to both the white list to ensure the basis is allowed and then to the black list to make sure the basis is not prohibited. The double convention works well if the states involved have similar legal traditions and if there is a neutral oversight institution established to oversee the uniform interpretation of the convention, like the European Court of Justice in the Brussels Regulation.<sup>46</sup>

A “mixed convention” combines the two types of conventions. It contains both a white and a black list, like a double convention, but also has a “gray” list, which includes any basis for jurisdiction that a state’s law would allow that is not on either the white list or the black list.<sup>47</sup> If a rendering court assumes jurisdiction based on the gray list, an enforcing court does not have to recognize the rendering court’s authority and may review the rendering court’s authority under the enforcing court’s own

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<sup>44</sup> Prohibited bases of jurisdiction are akin to violations of the Due Process Clause of the U.S. Constitution. See Silberman, *supra* note 10, at 337. See also *id.* at 338 (noting that the prohibited bases listed in Article 18(2) of the 2001 Draft are also likely unconstitutional in the United States).

<sup>45</sup> See von Mehren, *supra* note 33, at 197–98. The U.S. federal system is similar to a double convention because it provides prohibited bases of jurisdiction and the constitutional minimum test enunciated in *International Shoe Co. v. Washington* provides permissible bases for exercising personal jurisdiction. 326 U.S. 310, 316 (1945). See von Mehren, *supra* note 33, at 197, n.15 (“There is . . . a marked tendency for each state to claim adjudicatory authority to the extent constitutionally permitted. Accordingly, in American practice, constitutionally permitted bases can be seen as equivalent to bases in the sense that, generally speaking, nearly all states take jurisdiction where the Constitution of the United States permits. States are required to recognize and enforce judgments rendered on such constitutionally permitted jurisdictional bases under the Full Faith and Credit Clause of the Constitution.”).

<sup>46</sup> Because the law in the Contracting States has evolved over the years, to understand and regulate fairly, the law now requires specialists in areas of law. See Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 200 (2001). Drafting provisions that all the states would understand would be hard to do, especially without an adjudicatory or institutional entity to oversee the uniform interpretation of the Convention. See *id.* In fact, the Special Commission considered whether it should have an institutional body to govern the Convention; however, nothing materialized from these discussions. Catherine Kessedjian, *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, at 45 no. 118, Hague Conference on Private International Law, Enforcement of Judgments, Prelim. Doc. No. 9 (July 1998), available at [http://www.hcch.net/upload/wop/jdgm\\_pd9.pdf](http://www.hcch.net/upload/wop/jdgm_pd9.pdf) [hereinafter Kessedjian Report]. See von Mehren, *supra* note 33, at 200 n.23 (citing the Kessedjian Report, *supra*, and noting that it might be possible to have meetings from time to time and exchange information on the uniform interpretation of the Convention).

<sup>47</sup> See Brand I, *supra* note 27, at 196 (explaining mixed conventions).

rules.<sup>48</sup> This review of the rendering court's authority may lead the enforcing court to refuse recognition and enforcement of the judgment.

For example, assume Company XYZ manufactures bicycles. John Smith buys a bicycle in State A. The brakes on the bicycle do not work and Smith falls down a hill, injuring himself. Smith sues XYZ in State A. State A may assume jurisdiction, pursuant to the white list, if XYZ is incorporated under State A's laws. Smith may then go to State B, where XYZ's assets are located, and have the courts of State B enforce the judgment rendered in State A against XYZ's assets. If XYZ is instead incorporated under State B's laws, and has no other connection with State A, but comes to State A for a meeting, and Smith serves the president of XYZ with process while he is visiting State A, State A may *not* assume jurisdiction over XYZ based on transient jurisdiction, as this basis is on the black list. Under the gray list's jurisdictional basis of general doing business unrelated to the action, if XYZ, who resides in State B, advertises and solicits business from 300 individuals in State A and attends meetings in State A, State A may obtain general jurisdiction over XYZ. As this area is on the gray list, however, if State A renders a judgment and Smith tries to enforce it in State B, where XYZ's assets are located, State B may question State A's authority to render the judgment, may inquire into the merits of the case, and may refuse to recognize and enforce the judgment.

Adopting a mixed convention provides several advantages in pursuing a larger agreement on judgment enforcement, such as allowing the convention delegates to openly debate issues of jurisdiction, while still making progress by simply putting areas in which the delegates do not agree onto the gray list and moving the discussions along to bases on which the delegates *do* agree.<sup>49</sup> Some argue that had the Special Commission adopted such a process from the beginning, the convention would have

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<sup>48</sup> See *id.* at 196. In the United States, this would mean that the court would apply the *Hilton* doctrine of comity. See *supra* note 8 (discussing the American doctrine of comity).

<sup>49</sup> See Brand I, *supra* note 27, at 196 (discussing benefits of a mixed convention). See also Kovar Letter of 2/22/00, *supra* note 31, at 5 (“[T]here should be carefully defined bases of required jurisdiction reflecting all delegations’ legal traditions, a limited list of well-known exorbitant grounds of jurisdiction, and a substantial permitted area that will provide the flexibility for the convention to adapt to changing circumstances.”).

Some argue, however, that leaving areas in the gray zone makes the treaty useless because foreign courts still will not recognize and enforce United States judgments. See Patrick J. Borchers, *Symposium: “Could a Treaty Trump Supreme Court Jurisdictional Doctrine?”: Judgments, Conventions, and Minimum Contacts*, 61 ALB. L. REV. 1161, 1163–64 (1998) (“Leaving important subjects such as tort jurisdiction in an unregulated gray zone could deprive any convention of a good deal of its usefulness, and might make other nations—already wary of United States institutions such as jury trials and punitive damages—reluctant to sign.”). In fact, “[i]t may well be that United States insistence on negotiating around its domestic jurisdictional law makes it impossible to reach agreement.” *Id.* at 1164.

been broader and the negotiations more expeditious.<sup>50</sup> A mixed convention may also have the potential long-term benefit of clarifying currently unsettled rules as to jurisdiction, for example, those on e-commerce.<sup>51</sup>

Another benefit to the mixed convention is that it provides information to plaintiffs about which bases of jurisdiction an enforcing court would most likely enforce a judgment, thereby encouraging plaintiffs and their attorneys to use only the permitted bases and stay away from bases on the gray list.<sup>52</sup> In this way, maintaining a gray list would harmonize international bases of jurisdiction as plaintiffs abandoned exorbitant bases of jurisdiction in favor of jurisdictional bases on the white list.<sup>53</sup>

While purporting to expressly adopt a mixed convention, the 1999 and 2001 Drafts appeared to follow more of a double convention model because of the majoritarian voting process used to approve the drafts, and because fifteen of the convention member states were Member States of the European Union that wanted the new convention to be similar to the Brussels Regulation and Lugano Convention.<sup>54</sup> The problem with a double convention, however, is that it cannot be applied as easily in a global context.<sup>55</sup> Most European Union states are civil law jurisdictions that have different legal cultures than common law jurisdictions.<sup>56</sup> The United States,

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<sup>50</sup> See von Mehren, *supra* note 33, at 198–99 (discussing benefits of a mixed convention).

<sup>51</sup> See Brand I, *supra* note 27, at 196 (“This is particularly important in regard to jurisdiction for matters involving intellectual property rights and electronic commerce; issues for which no legal system has yet developed a satisfactory, fixed set of rules, and for which it would be presumptuous to believe a global solution could be found and then imposed by treaty within the near future.”). See *infra* notes 124–145 (discussing intellectual property and e-commerce).

<sup>52</sup> See von Mehren, *supra* note 33, at 201 (quoting Arthur von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT’L L. 17, 28 (1998)) (discussing possible benefits to mixed conventions).

<sup>53</sup> See Silberman, *supra* note 10, at 349 (“If foreign enforcement appeared to be necessary, lawyers would gravitate toward using one of the Convention’s accepted bases of jurisdiction. Lawyers could still bring suit using other bases of jurisdiction (as long as they were outside the prohibited list), but if they did so they would take their chances on having that judgment enforced elsewhere. The Convention could go even further by authorizing States to declare certain bases of gray area jurisdiction that would support judgments that their courts would regard as entitled to recognition. Such a provision would offer flexibility for maximizing recognition and enforcement between particular countries that share similar legal cultures and traditions with respect to jurisdictional regimes, and such declaration would create greater certainty with respect to enforcement and recognition.”).

<sup>54</sup> See Brand I, *supra* note 27, at 196–97 (explaining format of 1999 and 2001 Drafts).

<sup>55</sup> See *id.* at 197 (noting problems with double conventions).

<sup>56</sup> Civil law, which is based on Roman law, generally required the plaintiff to bring claims against the defendant in the defendant’s domicile. See Clermont, *supra* note 8, at 91 (explaining civil law). It was not until later that civil law expanded its long arm jurisdiction in cases such as torts and contracts to allow the plaintiff to bring a cause of action where the wrongful conduct occurred. See *id.* at 91.

specifically, had problems with the 2001 Draft because of the constitutional limitations of the Due Process Clauses of the Fifth and Fourteenth Amendments, as discussed in more detail below.<sup>57</sup>

Although the convention was unable to reach a consensus on the majority of the text, several areas of the 2001 Draft had reached consensus, such as common bases for exercising jurisdiction.<sup>58</sup> These common bases included: (1) the court where the parties agreed to litigate, (2) the defendant's habitual residence,<sup>59</sup> (3) in the context of physical torts, the place where the act that caused the injury occurred and where the injury manifests itself, as long as that jurisdiction is reasonable and the defendant engaged in conduct there, (4) where the defendant has a branch, agency, or

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<sup>57</sup> See Brand I, *supra* note 27, at 197 (discussing problems with the 1999 and 2001 Draft). See also Maier, *supra* note 8, at 1209–10 (“Both the rationales and holdings in United States Supreme Court cases and the lack of any sufficiently compelling practical reason to change that constitutional analysis in favor of new conventional requirements supports the conclusion that these long-standing constitutional limitations would remain controlling. A [double] convention . . . would, therefore, be unenforceable in the United States unless its jurisdictional requirements came within the ambit of United States constitutional limitations.”).

The U.S. Constitution does not explicitly require certain criteria for a court to exercise jurisdiction over a defendant. See also *id.* The Due Process Clause, however, as interpreted by the Supreme Court, requires certain principles of fairness to be met before a defendant can be haled into court. See also Maier, *supra* note 8, at 1211. See *Int'l Shoe Co.*, 326 U.S. at 316 (1945) (requiring that the defendant have sufficient “minimum contacts” with the forum such that exercising jurisdiction over the defendant “does not offend traditional notions of fair play and substantial justice”). Moreover, because the U.S. Constitution is the supreme law of the land, a treaty cannot trump constitutional requirements. See *id.* at 1211–12 (noting that treaties are held under the Supremacy Clause of the U.S. Constitution and subject to its limitations); see *infra* notes 57, 80–84 (discussing constitutionality of the treaty).

In interpreting a double convention, the U.S. Supreme Court would not allow the treaty to trump constitutional due process requirements. See Maier, *supra* note 8, at 1215. It is also unlikely that two-thirds of the Senate would vote to ratify a treaty that violated due process requirements. See *id.* See also U.S. CONST. art. II, § 2, cl. 2 (requiring the advice and consent of the Senate and two-thirds of the Senate's approval to ratify a treaty). Consequently, the United States had to object to the drafts which required it to violate due process requirements. See Maier, *supra* note 8, at 1215–16 (explaining that the U.S. Department of State would be unlikely to negotiate or sign an international agreement which would supersede individual protections of the U.S. Constitution).

Some have argued that one way to mitigate concerns over constitutionality of a double convention would be for Congress to enact implementing legislation giving federal courts exclusive jurisdiction over recognition and enforcement of foreign judgments and requiring a nationwide contacts test for personal jurisdiction. See *id.* at 1216, 1218–19 (explaining that this approach makes sense because “[s]uch an agreement . . . invoke[s] the status of the United States as a sovereign state in the international sense.”). See also ALI Proposed Statute, *supra* note 26.

<sup>58</sup> See Brand I, *supra* note 27, at 199 (noting areas of consensus).

<sup>59</sup> This is similar to the U.S. concept of citizenship and domicile.



establishment as long as that branch, agency, or establishment was involved in the activities from which the claim arose, and (5) counterclaims in the original action as long as there is an independent permitted basis for the counterclaim as well.<sup>60</sup>

## 2. Court/Defendant v. Court/Claim Nexus

In addition to the double convention/mixed convention debate, the Hague Conference addressed the debate over establishing jurisdiction on the connection between the court and the defendant, or the court and the claim. The U.S. approach and the approach taken in Article 2 of the Brussels Regulation base jurisdiction on a connection between the court and the *defendant*, known as “general jurisdiction” in the Brussels Regulation.<sup>61</sup> A second type of jurisdiction available under the Brussels Regulation is called “special jurisdiction,” based on a connection between the court and the *claim*.<sup>62</sup>

The Brussels Regulation, the 1999 Draft, and the 2001 Draft combine both types of jurisdictional rules.<sup>63</sup> The core framework of both the Brussels Regulation and the Hague Drafts is that of general jurisdiction.<sup>64</sup> The special jurisdictional rules are exceptions to the general jurisdictional framework.<sup>65</sup> European courts construing the Brussels Regulation and the predecessor Brussels Convention have held that the general jurisdiction nexus between court and defendant takes precedence over special

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<sup>60</sup> See Brand I, *supra* note 27, at 199. These bases, however, would also require the delegates to consider other topics such as *forum non conveniens*, *lis pendens*, and damage awards where there is not currently a consensus. See *id.* at 199 (noting areas of disagreement).

<sup>61</sup> See Brussels Regulation, *supra* note 22, ch. 2, art. 2 (basing jurisdiction on the domiciliary of the defendant); U.S. CONST. amends. V, XIV (noting that Due Process Clause limits where the defendant can be haled into court); Brand I, *supra* note 27, at 200 (explaining personal jurisdiction in Brussels Regulation and Hague Drafts).

<sup>62</sup> See Brand I, *supra* note 27, at 200; Brussels Regulation, *supra* note 22, ch. 2, arts. 5–16 (most provisions in the convention are based on special jurisdiction).

<sup>63</sup> See *id.* General jurisdictional rules can be seen in Article 3 of the Hague drafts basing jurisdiction on the habitual residence of the defendant, Article 9 basing jurisdiction on the branch, agency, or establishment of the defendant and Article 4 basing jurisdiction on where the defendant has voluntarily agreed to appear in a choice of court clause. See *id.* at 200. Special jurisdictional rules appear in Article 6 on contracts, Article 7 on consumer contracts, Article 8 on employment contracts, Article 10 on torts, Article 11 on trusts, and Article 12 on exclusive jurisdiction. See *id.*

<sup>64</sup> See 1999 Draft, *supra* note 28, art. 3; see also 2001 Draft, *supra* note 34, art. 3; see also Brussels Regulation, *supra* note 22, ch. 2, art. 2 (“persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”); Brand I, *supra* note 27, at 200–01 (explaining basic jurisdictional concepts of Brussels Regulation and Hague Drafts).

<sup>65</sup> Brand I, *supra* note 27 at 201.

jurisdiction nexus between the court and claim.<sup>66</sup> Yet the Hague Drafts provided for a court/claim nexus without any connection to the defendant. This is mostly because civil law Member States base their jurisdictional rules on a court/claim nexus.<sup>67</sup> The special jurisdictional rules in the Hague Drafts, however, would have violated the Due Process Clauses of the U.S. Constitution<sup>68</sup> because, while civil law countries focus bases of jurisdiction on the nexus between the court and the claim, the U.S. Due Process Clause requires that there also be a connection between the court and the defendant.<sup>69</sup> For example, allowing tort jurisdiction based on where the injury occurred may violate the Due Process Clause if the defendant has not had sufficient minimum contacts with the state.<sup>70</sup>

An example of the historical progression of the court/claim and court/defendant nexus dilemma can be seen in Article 5 of the Brussels Regulation and Articles 6 and 10 of the 1999 Draft.<sup>71</sup> Article 5 of the Brussels Regulation allows a rendering court to exercise jurisdiction “in the courts for the place of performance of the obligation in question” for

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<sup>66</sup> *Id.* at 202.

<sup>67</sup> *Id.* (expressing surprise at permitting a court/claim nexus unrelated to a court/defendant nexus).

<sup>68</sup> *Id.*

<sup>69</sup> See Silberman, *supra* note 10, at 330 (explaining differences between civil law and common law jurisdictions).

<sup>70</sup> *Id.* Compare *Int'l Shoe Co.*, 326 U.S. at 316 (1945) (establishing minimum contacts test to satisfy due process requirements) and *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 116 (1987) (denying jurisdiction over foreign defendant because of due process requirements) with *Case 21/76, Handelswekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735, 1745–48 (1976) (discussing tort jurisdiction). See *supra* note 57; see *infra* notes 80–84 and accompanying text (discussing constitutionality of the treaty).

For a comparison of *Bier* and *Asahi*, see Weintraub, *supra* note 15, at 1271–73. In *Bier*, the European Court of Justice liberally construed the tort jurisdiction provision in Article 5(3) of the Brussels Convention holding that “the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it.” *Id.* (quoting *Bier*, 1976 E.C.R. at 1747). In *Asahi*, the U.S. Supreme Court held that, although the defendant may have foreseen that its product would end up in California, *Asahi* did not “purposefully avail itself of the California market.” *Asahi*, 480 U.S. at 112. Because European states did not like the broad interpretation of Article 5(3) in *Bier*, some argue that the European states would not oppose a “purposeful availment” requirement, like that articulated in *Asahi*, in the Convention. See Weintraub, *supra* note 15, at 1272 (commenting that one of Europe’s leaders in international law, Professor Schlosser of the University of Munich, has stated that European nations would not object to the purposeful availment requirement). While the Due Process clause requires a close connection between the defendant and the court, *Bier* required a close connection between the claim and the court. See Brand II, *supra* note 42, at 144 (citing *Bier*, 1976 E.C.R. at 1746). The court held that the connecting factor is where the damage occurred and “where the event giving rise to the damage occurred.” See *id.* (citing *Bier*, 1976 E.C.R. at 1746). See *id.* at 145–51 (discussing the cases from the European Court of Justice interpreting Article 5(3) after *Bier*).

<sup>71</sup> See Brand I, *supra* note 27, at 203 (comparing Brussels Regulation and 1999 Draft).

contracts, such as where the goods were delivered, and “in the courts for the place where the harmful event occurred” for torts.<sup>72</sup> Similarly, Article 6 of the 1999 Draft permitted contract case jurisdiction where “performance of the principal obligation took place” or where the goods or services were supplied.<sup>73</sup> Article 10 of the 1999 Draft permitted tort case jurisdiction where the act or commission occurred or where the injury occurred as long as it was foreseeable.<sup>74</sup> While these provisions are similar to many U.S. long arm statutes, which permit jurisdiction where the injury occurred or the place of contract performance,<sup>75</sup> the United States also requires the defendant to have sufficient minimum contacts with the forum such that the exercise of jurisdiction would not offend the traditional notions of fair play and substantial justice.<sup>76</sup> Consequently, the overriding test in the United States is whether there is a court/defendant nexus rather than a court/claim nexus.<sup>77</sup>

The 2001 Draft tried to reconcile the court/claim nexus with the court/defendant nexus approach by putting the U.S. approach to contract jurisdiction as Alternative A.<sup>78</sup> Although the bracketed language in the 2001 Draft shows that the delegates were uncertain about the preferred jurisdictional basis, it does show a concerted effort to combine both the

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<sup>72</sup> Brussels Regulation, *supra* note 22, arts. 5 (1), 5(3). See Brand I, *supra* note 27, at 203 (discussing contract and tort jurisdiction).

<sup>73</sup> 1999 Draft, *supra* note 28, art. 6. See Brand I, *supra* note 27, at 204 (discussing contract jurisdiction in 1999 Draft).

<sup>74</sup> 1999 Draft, *supra* note 28, art. 10. See Brand I, *supra* note 27, at 204 (discussing tort jurisdiction in 1999 Draft). According to Jeffrey Kovar, Article 6 of the 1999 Draft was too narrow because it lacked a provision for non-performance of contracts, which could be satisfied by including a provision for “substantial commercial activity” of the defendant. Kovar Letter of 2/22/00, *supra* note 31, at 6.

<sup>75</sup> See Brand I, *supra* note 27, at 204–05 (comparing 1999 Draft to U.S. long arm statutes).

<sup>76</sup> See *Int'l Shoe Co.*, 326 U.S. at 316 (defining due process test); Brand I, *supra* note 27, at 204–05. See also Murphy, *supra* note 3, at 420 (“[T]he United States is unable to accept certain grounds of jurisdiction as they are applied in Europe under the Brussels and Lugano Conventions. . . . [W]e cannot, consistent with the Constitution, accept tort jurisdiction based solely on the place of the injury, or contract jurisdiction based solely on [the] place of performance stated in the contract.” (quoting Kovar Testimony, *supra* note 3, at 26)).

<sup>77</sup> Brand I, *supra* note 27, at 205.

<sup>78</sup> 2001 Draft, *supra* note 34, art. 6, Alternative A; see Silberman, *supra* note 10, at 333 & n.80. Alternative B to Article 6 of the 2001 Draft allows contract jurisdiction where the goods or services are to be supplied in whole or in part, or if the contract involved both goods and services, where “performance of the principal obligation took place.” 2001 Draft, *supra* note 34, art. 6, Alternative B(a)–(c). “From the American viewpoint, this formulation for a jurisdictional provision for contract cases is narrow and formalistic” because many contracts do not fit exactly into one category or other and discerning whether the contract is for goods or services or both is an unnecessary step in the process. Silberman, *supra* note 10, at 333 (citing Kovar Letter of 2/22/00, *supra* note 31).

civil law court/claim nexus and the common law court/defendant nexus.<sup>79</sup> Ultimately, there are no specific provisions for tort and contract dispute jurisdiction in the final Convention because, by determination, when the parties affirmatively choose a forum in a contractual selection clause, they agree on jurisdiction. The contractual forum selection clause requirement leaves tort victims without a robust international judgment enforcement mechanism, as they do not enter into contractual choice of court clauses before becoming victims.

### 3. Multiple Defendants and Third Party Defendants

The 1999 Draft presented additional jurisdictional court/claim nexus areas with constitutional due process problems for the United States.<sup>80</sup> In Article 14 of the 1999 Draft, the white list authorized jurisdiction over multiple defendants when one of the defendants habitually resided in the forum.<sup>81</sup> Article 16 permitted jurisdiction over third-party defendants for claims for indemnity and contribution if the rendering court had jurisdiction over the original claim.<sup>82</sup> The United States objected to both of these bases of jurisdiction as violative of the Due Process Clause because a court/defendant nexus was not required for each defendant before the rendering court.<sup>83</sup> As a result of U.S. objections, both bases of jurisdiction were moved to the gray list in the 2001 Draft.<sup>84</sup>

### 4. Exorbitant Bases of Jurisdiction

Examination of the prohibited list reveals other areas of compromise in jurisdiction. “Reciprocal compromises” are evident in Article 18 of the 1999 Draft, where four countries gave up different bases of exorbitant jurisdiction that are currently recognized in their states.<sup>85</sup> For example, the

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<sup>79</sup> Brand I, *supra* note 27, at 207.

<sup>80</sup> See von Mehren, *supra* note 33, at 196 (explaining due process concerns). Derivative jurisdiction is when a court bases jurisdiction over codefendants where one of the defendants is domiciled or allows jurisdiction over third-party defendants. See Clermont, *supra* note 8, at 96 (explaining that derivative jurisdiction is derived from French law and citing Nouveau code de procédure civile [N.C.P.C.] art. 42, para. 2 (Fr.) (codefendants) and art. 333 (third parties)).

<sup>81</sup> 1999 Draft, *supra* note 28, art. 14. This is sometimes referred to as derivative jurisdiction. Specifically, derivative jurisdiction is when a court bases jurisdiction over codefendants where one of the defendants is domiciled or allows jurisdiction over third-party defendants. See Clermont, *supra* note 8, at 96 (explaining that derivative jurisdiction is derived from French law and citing Nouveau code de procédure civile [N.C.P.C.] art. 42, para 2. (Fr.) (codefendants) and art. 333 (third parties)).

<sup>82</sup> 1999 Draft, *supra* note 28, art. 16.

<sup>83</sup> See Silberman, *supra* note 10, at 330–31 (discussing problems with 1999 Draft).

<sup>84</sup> See *id.* at 331.

<sup>85</sup> See von Mehren, *supra* note 33, at 195–96 (citing exorbitant bases of unlimited general

United States and the United Kingdom relinquished transient jurisdiction, Germany abandoned jurisdiction based solely on the fact that the defendant had property present in the forum,<sup>86</sup> and France abandoned jurisdiction based solely on the nationality of the plaintiff.<sup>87</sup>

The United States, while succeeding in not having general jurisdiction based on “doing business” on the prohibited list, failed to get the basis on the permitted list.<sup>88</sup> The 2001 Draft left this basis in brackets, implying that the United States might be able to argue around it. This language, however, is ultimately unnecessary because the final draft requires a defendant to voluntarily accept jurisdiction of the rendering court in a choice of court clause.

### 5. *Transient Jurisdiction and Human Rights Exception*

Another prohibited basis in the prior drafts is what is often referred to as “tag” jurisdiction. Tag or transient jurisdiction has a long history in both the United States and the United Kingdom.<sup>89</sup> Tag jurisdiction permits a court to exercise jurisdiction over a defendant served with process in the particular jurisdiction. This requires no court/claim nexus and very little court/defendant nexus other than the presence of the defendant in the forum

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jurisdiction).

<sup>86</sup> See ZIVILPRESSORDNUNG [ZPO] art. 23 (F.R.G.).

<sup>87</sup> C. CIV. art. 14 (Fr.). See also Clermont, *supra* note 8, at 92 (“The forum-shopping potential of jurisdiction based on the plaintiff’s nationality is evident, even though in practice this exorbitant jurisdiction may not be abused all that often.”).

<sup>88</sup> See von Mehren, *supra* note 33, at 196; Murphy, *supra* note 3, at 420 (“[C]ivil law attorneys (and their clients) are profoundly uncomfortable with jurisdiction based on doing business or minimum contacts, which they find vague and unpredictable.” (quoting Kovar *Testimony*, *supra* note 3, at 26)); Clermont, *supra* note 8, at 95–96 (“The Europeans’ principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant’s physical presence, property ownership, or doing business in the forum.”). Because doing business has a long history in the United States, Jeffrey Kovar felt that doing business must be at least on the gray list because “the U.S. Bar will be extremely critical of any convention that would not allow this basic notion of jurisdiction to continue in the gray area as a matter of national law.” Kovar Letter of 9/10/00, *supra* note 29, at 6.

Some argue that giving up doing business general jurisdiction should not be a problem for the United States, however, because “*Helicopteros* reined in the concept of general jurisdiction by holding it unconstitutional to exercise jurisdiction over a company that not only negotiated a contract in the forum, the faulty performance of which resulted in the cause of action, but also purchased most of its equipment and trained its personnel there.” Weintraub, *supra* note 15, at 1278 (citing *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 410–11 (1984)).

<sup>89</sup> But cf. Clermont, *supra* note 8, at 112 (“Formerly the most important basis of U.S. jurisdiction, but today far from essential, [transient jurisdiction] is occasionally used to sue foreigners in the United States, even though the resulting judgments would be unlikely to receive recognition or enforcement abroad.”).

when process is served.

The European Union was hostile to tag jurisdiction and sought to prohibit it from the Convention.<sup>90</sup> The United States agreed to eliminate tag jurisdiction as a basis, but advocated retaining it in special cases of human rights violations, war crimes, and actions against those who profited from the Holocaust.<sup>91</sup> Article 18(3) of the 2001 Draft evinced a willingness to compromise, as tag jurisdiction for human rights violations had been moved to the gray list.<sup>92</sup> This effort, while showing encouraging prospects for a future comprehensive draft, was ultimately rendered unnecessary for purposes of the final draft, because tag jurisdiction is not necessary if the defendant has voluntarily agreed to have a certain court exercise jurisdiction over the dispute.<sup>93</sup> Eliminating tag jurisdiction from the final treaty presents problems for the United States, which sometimes obtains jurisdiction over foreign defendants who are merely passing through the United States, but have nonetheless hurt U.S. citizens.

#### 6. *Forum Non Conveniens* and *Lis Pendens*

When one of the jurisdictional bases on the white list is satisfied, the next question is whether the court *has* to assume jurisdiction, or whether it may decline jurisdiction based on *forum non conveniens* or *lis pendens*. While the E.U. member states wanted to exclude *forum non conveniens* and allow a court to decline jurisdiction only when parallel proceedings occur (*lis pendens*), the United States advocated including a *forum non conveniens* provision.

Civil law countries fear the type of discretion given to a court by *forum non conveniens* because it allows too much variety in application and because civil law countries do not trust individual courts the way the United States does.<sup>94</sup> While the United States vests adjudicatory authority in its

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<sup>90</sup> See Silberman, *supra* note 10, at 345. The Restatement of Foreign Relations states that transient jurisdiction “is not generally acceptable under international law.” Weintraub, *supra* note 15, at 1279 (quoting Restatement (Third) of Foreign Relations § 421 cmt. e (1987)). Consequently, the Supreme Court, if confronted with transient jurisdiction in an international context, may not follow its decision in *Burnham v. Superior Court*, which permitted transient jurisdiction between United States citizens because of international concerns. See Weintraub, *supra* note 15, at 1279 (citing *Burnham v. Super. Ct.*, 495 U.S. 604, 607–08 (1990)).

<sup>91</sup> See Silberman, *supra* note 10, at 345 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)). See also Kovar Letter of 9/10/00, *supra* note 29, at 6 (expressing concern that American human rights advocates will be unhappy with the 1999 Draft because it does not “adequately cover[] fundamental human rights claims”).

<sup>92</sup> See 2001 Draft, *supra* note 34, art. 18(3); Silberman, *supra* note 10, at 345 (discussing transient jurisdiction and human rights litigation internationally).

<sup>93</sup> See generally Convention, *supra* note 1 (lacking a provision discussing tag jurisdiction or human rights violations).

<sup>94</sup> See Silberman, *supra* note 10, at 329–30. An example of diversity in application is

courts, E.U. member states vest adjudicatory authority in non-judicial bodies because of the people's fear of judicial discretion.<sup>95</sup> Similarly, civil law jurisdictions dislike the doctrine of *forum non conveniens*<sup>96</sup> because it permits a trial court to exercise discretion in applying a multifactor balancing test.<sup>97</sup> The Brussels Regulation and Lugano Convention do not mention *forum non conveniens* and the European Court of Justice continues to hold that *forum non conveniens* cannot be invoked under the Brussels Regulation.<sup>98</sup> Although the Brussels Regulation and Lugano Convention do

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that the United States jurisdictional rules allow forum shopping to some extent because the plaintiff can choose from a list of jurisdictional bases and sue in the court that is the most convenient or provides the best possible judgment for them. European and civil law countries discourage forum shopping by allowing jurisdiction only where the defendant is domiciled or, under the special jurisdiction rules, several enumerated bases on the list of acceptable bases of jurisdiction. *See id.* at 328. For example, under the Brussels Convention and Regulation created by civil law countries, the special jurisdictional rules mandate that a contract action may only be brought in the "place of performance of the obligation." Brussels Convention, *supra* note 20, art. 5(1); *Id.* art. 5(1)(b) (contracts for goods and services). *See also* Silberman, *supra* note 10, at 328 (explaining Brussels Convention and Regulation's deterrence of forum shopping). *But see* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L. J. 467, 468 (2002) [hereinafter "Brand III"] (noting that civil law countries do not ask whether another forum is clearly more appropriate, rather, they apply a strict first-to-file rule, thus giving the most consideration to the plaintiff's choice of fora).

<sup>95</sup> *See* von Mehren, *supra* note 33, at 195 (discussing differences between civil and common law jurisdictions). States that vest more adjudicatory authority in their courts trust their courts with discretion while states who fear discretion severely limit it by rule making. *See id.*

Because forum shopping measures, such as antisuit injunctions, have gotten out of control, some argue that *lis pendens* and *forum non conveniens* provisions in the Convention would be a better way to handle the situation. *See* Andreas F. Lowenfeld, Editorial Comment, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 314 (1997) (explaining that forum shopping has turned into an art, first focusing on plaintiff's choice, and then focusing on countermeasures by defendants, such as, motions to stay, dismissal for *forum non conveniens*, suits for declaratory judgment of nonliability, antisuit injunctions and temporary restraining orders).

<sup>96</sup> For a detailed history of the doctrine of *forum non conveniens*, starting in Scotland and England, *see* Brand III, *supra* note 94, at 469–74. For a detailed history discussing the history of the doctrine of *forum non conveniens* in the United States, Brand III, *supra* note 94, at 474–82. For a comparison between common law countries' doctrine of *forum non conveniens* and similar doctrines in civil law countries, *see* Brand III, *supra* note 94, at 469–88 (discussing doctrines in England, Scotland, the United States, Canada, Australia, Germany and Japan).

<sup>97</sup> *But see* Lowenfeld, *supra* note 95, at 318 ("[B]ecause I have been brought up in a system where judges are not thought of as officials, and indeed are supposed to be chosen for their sound discretion, I find the fear of judicial discretion unpersuasive. In any event, I detect a softening of the traditional European opposition to *forum non conveniens*, attributable at least in part to recognition of the problems of parallel litigation.").

<sup>98</sup> *See* Silberman, *supra* note 10, at 329 (citing Case C-288/92, Custom Made

not permit *forum non conveniens*, they do allow the doctrine of *lis pendens* for parallel proceedings, but even then judicial discretion is curtailed because only the court first seised has jurisdiction to hear the case.<sup>99</sup> Because civil law countries fear placing discretion in adjudicatory bodies, they prefer more rigid rules. In the context of *forum non conveniens* and *lis pendens*, these philosophical tensions created difficulty early in the Convention in procuring a provision acceptable to both types of legal systems.<sup>100</sup>

The 2001 Draft, however, shows the delegates' willingness to compromise.<sup>101</sup> Article 21 of the 2001 Draft contains a *lis pendens* provision while Article 22 contains a modified version of *forum non conveniens*.<sup>102</sup> Article 21 of the 2001 Draft follows the Brussels Regulation in that it requires the court second seised to stay the proceedings in favor of the court first seised.<sup>103</sup> This provision, however, is more limited than the Brussels Regulation because paragraph three permits the court second seised to continue with the proceedings if the court first seised has taken an unreasonably long time to make a decision or the plaintiff has not taken steps to facilitate the process.<sup>104</sup> Paragraph seven links the *lis pendens*

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Commercial Ltd. v. Stawa Metallbau GmbH, 1994 E.C.R. I-2913).

<sup>99</sup> See Brussels Regulation, *supra* note 22, art. 28. See also Silberman, *supra* note 10, at 329–30. While the *lis pendens* provision in Article 28 of the Brussels Regulation deters parallel proceedings, it encourages a race to the courthouse. See Lowenfeld, *supra* note 95, at 319–20. But because the Brussels Regulation jurisdictional rules are exclusive, inconvenient fora should be less of a concern. See *id.* (explaining that the exclusivity of the regulation makes forum shopping less of an issue).

<sup>100</sup> See Silberman, *supra* note 10, at 329–30. See Clermont, *supra* note 8, at 118 (“[Europeans] detest explicit discretion. . . . [Therefore,] [t]he United States [] should be willing to abandon the doctrine [of *forum non conveniens*].”). Some argue that the United States should abandon the doctrine of *forum non conveniens* because it is not even useful to American plaintiffs. See *id.* at 119 (explaining that 180 transnational cases were dismissed for *forum non conveniens* between 1947 and 1984 and of those 180 plaintiffs attorneys who were sent a questionnaire, the 85 who replied all lost in the foreign court with most cases being abandoned or settled for little). Moreover, *forum non conveniens* is unnecessary under the public policy exception because the reasonableness test in the Due Process Clause will allow the court to decline jurisdiction if it feels that it would be an unreasonable burden on the defendant to litigate in the forum. See *id.* at 120–21 (“The Constitution prevails over treaty obligations.”).

<sup>101</sup> See Silberman, *supra* note 10, at 346.

<sup>102</sup> 2001 Draft, *supra* note 34, arts. 21–22; see Brand III, *supra* note 94, at 492–94 (discussing 2001 Draft).

<sup>103</sup> Compare 2001 Draft, *supra* note 34, art. 21, with Brussels Regulation, *supra* note 22, arts. 28, 29. See also Brand III, *supra* note 94, at 492–94 (discussing 2001 Draft).

<sup>104</sup> 2001 Draft, *supra* note 34, art. 21(3); see also Brand III, *supra* note 94, at 492–93; Silberman, *supra* note 10, at 346–47 (discussing the *lis pendens* doctrine). The Brussels Convention/Regulation applies the *lis pendens* doctrine, but because problems with the application of the rule arose, the Hague Convention modified the doctrine. See Silberman, *supra* note 10, at 346–47 (discussing problems with the Brussels Convention/Regulation and



doctrine to the modified *forum non conveniens* doctrine in Article 22 by permitting the court second seised to continue with proceedings if the court first seised declines to hear the case because another forum is clearly more appropriate.<sup>105</sup>

Article 22 of the 2001 Draft contains a limited provision allowing courts to decline jurisdiction in exceptional circumstances.<sup>106</sup> Under Article 22, the doctrine of *forum non conveniens* has been modified and requires four elements: exclusive jurisdiction of the court, the exceptional circumstances surrounding the case, clear inappropriateness of the present forum, and clear appropriateness of another forum.<sup>107</sup> Like the U.S. balancing test, there are four factors that the court must consider in making a determination: inconvenience to the parties based on their habitual residence, the location of the evidence including witnesses and the procedures to attain the evidence, "limitation or prescription periods" applicable to the instant action, and whether the decision is likely to be recognized and enforced.<sup>108</sup>

The Special Commission emphasized that Article 22 is not the same as the doctrine of *forum non conveniens* and should apply only if the court knows that another court will accept jurisdiction.<sup>109</sup> The 2001 Draft also limits the traditional doctrine of *forum non conveniens* by adopting a more stringent standard, permitting a court to decline jurisdiction only if "it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute."<sup>110</sup> Even with these limitations, the discretion remaining in these provisions shows the civil law countries' willingness to compromise.<sup>111</sup>

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the *lis pendens* doctrine).

<sup>105</sup> 2001 Draft, *supra* note 34, art. 22; *see also* Brand III, *supra* note 94, at 493.

<sup>106</sup> 2001 Draft, *supra* note 34, art. 22; *see also* Silberman, *supra* note 10, at 346 (discussing 2001 Draft and *forum non conveniens*). *See generally* Hague Conference on Private International Law, *Note on the Question of "Forum Non Conveniens" in Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions*, Hague Conf. Prelim. Doc. No. 3 (Apr. 1996), available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3486&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3486&dtid=35) (discussing *forum non conveniens* and *lis pendens* doctrines in common law and civil law countries).

<sup>107</sup> 2001 Draft, *supra* note 34, art. 22(1); *see also* Brand III, *supra* note 94, at 493.

<sup>108</sup> 2001 Draft, *supra* note 34, art. 22(2); *see also* Brand III, *supra* note 94, at 493.

<sup>109</sup> *See* Silberman, *supra* note 10, at 346 (citing Nygh & Pocar Report, *supra* note 37, at 89).

<sup>110</sup> 2001 Draft, *supra* note 34, art. 22(1); Silberman, *supra* note 10, at 346 n.146.

<sup>111</sup> *See* Silberman, *supra* note 10, at 347-48 ("The discretion built into the Hague is particularly appropriate given the wide disparity of potential parties to this worldwide effort and the absence of any supranational tribunal to preside over its implementation. The Hague Draft of these provisions reflects the blending of the quite different regimes of its constituents."); *see also* Kovar Letter of 2/22/00, *supra* note 31, at 9 (discussing the 1999 Draft and mentioning that while the compromise is admirable, it may be harder to achieve

The final treaty, however, requires an explicit choice of forum clause. Thus, the progress made is ultimately futile as a court will reject a *forum non conveniens* argument when a choice of court clause is present.<sup>112</sup>

## B. Damages

Because European states fear jury verdicts and excessive or punitive damages, the United States compromised in Article 33 of the 1999 Draft and the 2001 Draft, allowing an enforcing court to recognize and enforce an award of damages only to “the extent that similar or comparable damages could have been awarded in the State addressed.”<sup>113</sup> The U.S. concession in Article 33 is surprising, considering that the U.S. refusal to include a similar provision in the attempted recognition and enforcement treaty between the United States and the United Kingdom in the 1970s halted the process and ultimately resulted in the dissolution of the treaty-making process.<sup>114</sup>

The Convention also includes a limitation on damages in Article 11, allowing a court to refuse to recognize and enforce non-compensatory damages. This provision seems unnecessary though, because a party could easily avoid a country’s excessive damage award by simply agreeing to a different jurisdiction with more favorable laws in the choice of court agreement.<sup>115</sup> Including such a superfluous provision in the final convention shows how much foreign countries fear U.S. damage awards. On the other hand, it allows parties to choose to litigate in U.S. courts without the fear of an excessive damage award. Thus, litigants can take advantage of other benefits of the U.S. system without reservation.

## C. Subject Matter

The negotiation of the Convention forced the member states to decide whether to include, or expressly exclude, certain causes of action.

### 1. Antitrust

The Member States compromised by eliminating antitrust or competition law cases from the 2001 Draft.<sup>116</sup> Foreign countries dislike U.S. antitrust law because of the broad U.S. discovery rules, treble damage

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acceptance in the United States).

<sup>112</sup> See Brand III, *supra* note 94, at 494 (citing 2001 Draft, *supra* note 34, arts. 4, 22 and explaining that “a choice of court clause would both create jurisdiction and prevent a *forum non conveniens* claim from allowing divergence from the chosen forum”).

<sup>113</sup> 1999 Draft, *supra* note 34, art. 33(1). See also von Mehren, *supra* note 33, at 195 n.9.

<sup>114</sup> See Silberman, *supra* note 10, at 327 (discussing the failed U.S.-U.K. treaty).

<sup>115</sup> Convention, *supra* note 1, art. 11.

<sup>116</sup> See Silberman, *supra* note 10, at 335 (discussing antitrust compromises).

awards,<sup>117</sup> and bases for jurisdiction including the so-called “effects” test.<sup>118</sup> Because of harsh damage awards, other countries enacted blocking statutes to prevent enforcement of American antitrust judgments, including Australia, Belgium, Canada, France, Germany, the Netherlands, Norway, Sweden, South Africa, and the United Kingdom.<sup>119</sup> Some of these jurisdictions wanted the Hague Convention to cover antitrust simply so that they could further limit the U.S. application of its antitrust laws.<sup>120</sup> In a prior draft, antitrust cases generally fell within the gray area and foreign courts were not obligated to enforce them.<sup>121</sup> The United States, however, wanted to completely remove antitrust cases from the scope of the Convention,<sup>122</sup> so that it could still use prohibited bases, such as general business dealings, to obtain jurisdiction over a defendant in antitrust matters (although the judgment would not necessarily be enforceable abroad).<sup>123</sup> The United States succeeded in excluding antitrust matters from the final Convention.

## 2. Intellectual Property

Two areas of law that are still being developed by each Member State

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<sup>117</sup> See Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT’L L. 219, 251 (2001) (“Moreover, not sharing the contingent fee system supported by our multiple damages provisions, they view such awards as nothing more than rank exorbitance.”).

<sup>118</sup> See Buxbaum, *supra* note 117, at 250. However, the United States has made some progress by entering into agreements with Germany, Canada, Australia, Brazil, Israel, Japan, Australia, and European Communities.

<sup>119</sup> *Id.* at 251; William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL’Y INT’L BUS. 363 (2001) (discussing blocking statutes). See also Foreign Proceedings (Excess of Jurisdiction) Act 1984, c. 3, § 9 (Austl.); Foreign Extraterritorial Measures Act 1984, R.S.C., c. 49 § 9, amended by 1996 S.C. 8(1), c. 28 (Can.); Protection of Trading Interests Act 1980, c. 11, § 6(2) (Eng.) (allowing defendants to recoup the multiple damages awarded against them under the Clayton Act).

<sup>120</sup> See Dodge, *supra* note 119, at 364. See also 1999 Draft, *supra* note 28, art. 10 (implicitly including antitrust litigation in the scope of the Draft). Jeffrey Kovar, in his letter to the Hague, explained that excluding antitrust from the white list will deter acceptance and ratification of the convention. Kovar Letter of 2/22/00, *supra* note 31, at 7–8. Accordingly, the United States wanted to entirely exclude antitrust law from the convention. Kovar Letter of 9/10/00, *supra* note 29, at 4; see also Dodge, *supra* note 119, at 364 n.8 (citing Interview with Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, in S.F., Cal. (Sept. 12, 2000)) (noting that the United States sought exclusion of antitrust).

<sup>121</sup> See Silberman, *supra* note 10, at 335 n.91 (discussing 1999 Draft).

<sup>122</sup> See *id.* (discussing the U.S. position).

<sup>123</sup> See *id.* (citing 2001 Draft, *supra* note 34, art. (1)(2)(i)) (explaining benefits and disadvantages of gray list); but see Dodge, *supra* note 119, at 377 (arguing that excluding general jurisdiction based on doing business will not affect the U.S. ability to apply its antitrust laws extraterritorially because Article 18(2) of the 1999 Draft states that a jurisdiction may not obtain jurisdiction based “solely” on a prohibited method; therefore, the United States could use a combination of bases).

are intellectual property and e-commerce. Because of this lack of established law, creating uniform rules to apply globally was difficult to achieve.<sup>124</sup> A major difficulty with international intellectual property litigation is the problem of multiple proceedings. For example, there may be multiple companies who own the same trademark and have similar products but in different legal systems.<sup>125</sup> These companies may sue for trademark infringement in different places, resulting in inconsistent judgments because of varying substantive law.<sup>126</sup> Moreover, treaties like the Berne Convention,<sup>127</sup> the Paris Convention,<sup>128</sup> and the TRIPS Agreement<sup>129</sup> fail to address the problem of multiple proceedings.<sup>130</sup> The intellectual property community hoped that the Hague Conference would help resolve this problem by providing uniform rules, such as claim and issue preclusion, and perhaps eventually consolidation of proceedings.<sup>131</sup>

Another problem with intellectual property litigation is that it is territorial.<sup>132</sup> In infringement cases, the injury occurs where the infringement occurs.<sup>133</sup> This means that if a foreign company engages in trademark infringement of a U.S. trademark in Japan, the injury occurred in Japan and Japanese trademark rules would govern, not the U.S. rules.<sup>134</sup> Moreover, if the injury occurred in both the United States and Japan, U.S.

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<sup>124</sup> See Notice of Hearing and Request for Comments on Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 66 Fed. Reg. 43,575, 43,576 (Aug. 20, 2001) ("One of the primary flaws asserted about the October 1999 draft was that international developments such as the advent of the Internet and e-commerce have called into question some of the jurisdictional rules that serve as the basis for the proposed Convention.").

<sup>125</sup> See Rochelle C. Dreyfuss, *Symposium: Intellectual Property Challenges in the Next Century: Article an Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 U. ILL. L. REV. 421, 422 (2001) (discussing intellectual property concerns).

<sup>126</sup> See *id.* at 423.

<sup>127</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised, July 24, 1971 (amended 1979), 828 U.N.T.S. 221.

<sup>128</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised, July 14, 1967 (amended 1979), 21 U.S.T. 1583.

<sup>129</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Legal Instruments—Results of the Uruguay Round vol. 31 (1994), 33 I.L.M. 81 (1994).

<sup>130</sup> See Dreyfuss, *supra* note 125, at 423 ("These agreements impose minimum standards, not uniform law and, therefore, do not prevent conflicting outcomes."). For a discussion on the problems with multiple proceedings in the Internet context, see N. Jansen Calamita, ed., *International Litigation*, 38 INT'L LAW. 303, 314 (2004) ("Global forum shopping with parallel proceedings has become a global problem requiring more than unilateral actions to resolve.").

<sup>131</sup> See Dreyfuss, *supra* note 125, at 424–25.

<sup>132</sup> See *id.* at 432.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* (noting that there are some limited exceptions to this rule).

courts would likely dismiss the Japanese cause of action on the basis of *forum non conveniens* because of the difficulty in applying Japanese law and other considerations.<sup>135</sup> This dismissal forces the trademark holder to pursue separate proceedings to obtain complete relief.<sup>136</sup>

The delegates encountered problems developing provisions that would resolve issues of multiple proceedings and incomplete relief, as the national laws of Member States were not clearly defined. Because of these issues, intellectual property was excluded from the Convention, with the exception of copyright issues. Exclusion of intellectual property issues, while leaving a hole in international judgment enforcement, allows Member States to develop their own internal laws. If and when the delegates meet again to create a comprehensive international enforcement of judgments treaty, the delegates will be able to speak from a more educated and experienced view, which may help to yield a workable and comprehensive agreement.

### 3. E-commerce

E-commerce has become a huge industry over the last several years.<sup>137</sup> The e-commerce community had problems with the Hague Conference because national laws for e-commerce are not fully developed, making it difficult to achieve consensus.<sup>138</sup> The e-commerce community also had problems with the Hague Conference's authorization of enforcement of click wrap agreements which some organizations feel "have an adverse impact on current electronic commerce."<sup>139</sup>

Yet another problem was the coverage of business-to-consumer ("B2C") contracts in the 1999 Draft and the 2001 Draft. Under the Brussels Regulation or the proposed Hague Drafts for tort jurisdiction in B2C contracts, a company doing business over the Internet may be subject to suits all over the world, because it is hard to tell where the defendant acted

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<sup>135</sup> See *id.* at 433.

<sup>136</sup> See *id.*

<sup>137</sup> See generally Benjamin C. Elacqua, *The Hague Runs into B2B: Why Restructuring the Hague Convention of Foreign Judgments in Civil and Commercial Matters to Deal with B2B Contracts is Long Overdue*, 3 J. HIGH TECH. L. 93, 94 (2004) (discussing Internet statistics). E-commerce, as defined by Congress, is "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." Internet Tax Freedom Act, 47 U.S.C. § 151 (2000); see also Elacqua, *supra*, at 94 (quoting same).

<sup>138</sup> See generally Kovar Letter of 2/22/00, *supra* note 31 (discussing problems with e-commerce and the 1999 Draft).

<sup>139</sup> See Elacqua, *supra* note 137, at 95 (citing Letter from Affect: Americans for Fair Electronic Commerce Transactions to Jeffrey Kovar on Feb. 5, 2003, available at <http://www.cptech.org/ecom/jurisdiction/affecthague.pdf>). See *id.* at 95 n.13 (explaining that click wrap agreements are the "I Agree" buttons that consumers push when conducting transactions online).

when basing contacts on Internet activity.<sup>140</sup> Because a company can reach nearly anywhere in the world through the Internet, it is also difficult to tell where the injury occurred and thus where jurisdiction is proper. This problem of multiple places of injury encourages forum shopping, creating a burden on smaller companies who reach foreign countries solely through their Internet sites but cannot afford to defend suits internationally.<sup>141</sup> If a comprehensive Hague Conference convention did cover e-commerce and companies were subject to suits anywhere their Internet sites could be accessed, e-commerce companies would have to avoid certain jurisdictions with unfavorable laws such as France, who recently imposed a fine on Yahoo! for selling Nazi paraphernalia on its website,<sup>142</sup> an activity protected under the First Amendment in the United States but illegal under French law.<sup>143</sup>

The Convention has not helped the e-commerce industry because choice of court clauses impede the spread of global technology and because parties fear being haled before a court in a foreign jurisdiction.<sup>144</sup> Small

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<sup>140</sup> See Dreyfuss, *supra* note 125, at 454 (“Communication sometimes depends on only the unilateral activity of viewers—accessing an Internet site, for example, involves no meaningful activities on the part of the its proprietors.”); see also Elacqua, *supra* note 137, at 110 (advocating that the Hague adopt a targeting approach to personal jurisdiction in the context of Internet use so as to eliminate the need to alter the choice of court provision).

[E]-business groups generally favor a ‘country of origin’ approach, under which companies would be subject only to the laws and courts of their home country. They argue that this approach is needed to encourage the growth of electronic commerce, as the ‘country of destination approach’ would be too costly for businesses. Of course in this case, the argument of consumer groups is that large companies could pick the most favorable jurisdiction and force consumers to litigate in inconvenient forums.

*Online Consumers and the Consequences of Jurisdiction Policies*, Internet Business Law Services, May 1, 2005, at 1. The United States delegation expressed concern over e-commerce in the area of consumer contracts in Article 7 of the 1999 Draft. See Kovar Letter 2/22/00, *supra* note 31, at 6–7 (“These formulations have raised a storm of controversy in the electronic commerce world.”).

<sup>141</sup> See Elacqua, *supra* note 137, at 98–99 (“Businesses would be able to find jurisdictions with favorable laws, enforceable in all member countries.”).

<sup>142</sup> UEJF et LICRA v. Yahoo! Inc. et Yahoo France, Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, D. 2000, inf. rap. 172. For a summary of the Yahoo! case and related links, see Richard Salis, *A Look at how U.S. Based Yahoo! was Condemned by French Law*, Juriscom.net, Jan. 11, 2001, <http://www.juriscom.net/txt/jurisfr/cti/yauctions.htm> (last visited Oct. 31, 2006).

<sup>143</sup> See Elacqua, *supra* note 137, at 99–100 (“The draft treaty is not meant for a global economy that supports e-commerce, and some argue that the treaty is an attempt by the Europeans to put their mark on an area of law they have no control over.”).

<sup>144</sup> See *id.* at 111–12 (“Choice of court clauses are a potential hindrance to the spread of global technology and business, evidenced by a recent survey, indicating that, many

companies in particular attempt to avoid entering into contracts because they lack bargaining power and do not want to subject themselves to contractual choice of court clauses. E-commerce law has not been fully developed in each country. Consequently, the Member States were ultimately unable to agree on specialized rules for dealing with e-commerce issues.<sup>145</sup>

#### IV. THE CONVENTION'S TERMS

The final Convention on Choice of Court Agreements is only a slice of the original draft. The much narrower Convention is limited to "international" and "civil or commercial" cases.<sup>146</sup> A case is deemed "international" unless the parties involved are both from the same Contracting State and all issues relating to the dispute involve only the Contracting State.<sup>147</sup> Other than a natural person, a "person" or entity is a resident where it has its statutory seat, its central administration, its principle place of business, or was otherwise formed under the laws of that jurisdiction.<sup>148</sup> In applying the recognition and enforcement rules, a case is "international" where recognition and enforcement is sought.<sup>149</sup>

All of the debate about the white list, the black list, a mixed or double convention, judicial discretion, etc., was ultimately unnecessary for purposes of the Convention. In order for the Convention to have force, the choice of court agreement must be between at least two parties, be in writing or another acceptable means of communication, and designate a certain State exclusively for resolution of disputes arising under the agreement.<sup>150</sup> The "judgment" must be a decision on the merits, rather than an injunction or other "interim measures for protection."<sup>151</sup> Approved

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companies forgo entering into contracts because they could be subject to jurisdiction in a number of courts.").

<sup>145</sup> See Kovar Letter of 9/10/00, *supra* note 29, at 5 ("The overriding concern of the U.S. delegation is that delegations not cripple the convention by trying to do what is unattainable. In areas like intellectual property, the risk is very high that we will not be able to reach an adequate compromise on jurisdiction that will satisfy the very different litigation, technology, and business interests at stake.").

<sup>146</sup> See Convention, *supra* note 1, art. 1(1).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* art. 4(2).

<sup>149</sup> See *id.* art. 1(3).

<sup>150</sup> See *id.* art. 3. Choice of court agreements are exclusive "unless the parties expressly provided otherwise. . . ." See *id.* at art. 3(b). The United States will have to be careful because United States common law courts tend to hold that a choice of court clause is *nonexclusive* unless expressly indicated otherwise, while foreign countries tend to hold that a choice of court clause *is* exclusive unless expressly indicated otherwise. See Peter D. Trooboff, *Choice-of-Court Clauses*, NAT'L L. J., Vol. 26, No. 20, at 14 (Jan. 19, 2004) [hereinafter *Choice-of-Court*].

<sup>151</sup> See Convention, *supra* note 1, art. 4(1); see also *supra* note 1, art. 7 (excluding issues

judicial settlements by a chosen court will also be recognized and enforced if the state of origin would recognize and enforce them in the same manner it would a judgment.<sup>152</sup>

### A. Exclusions

The Convention is primarily commercial; it specifically excludes agreements involving consumers.<sup>153</sup> Accordingly, personal injury actions, which motivated so much concern over the U.S. jury system, are not covered by the Convention. Also excluded as a similarly “individual” issue are cases involving employment agreements.<sup>154</sup>

The Convention also excludes other specific subjects including: issues as to the status and legal capacity of natural persons; maintenance obligations; family law issues; wills and succession; insolvency and related matters; common carriers (“carriage of passengers and goods”); “marine pollution, limitations on liability for maritime claims, general average, and emergency towage and salvage”; antitrust;<sup>155</sup> nuclear damage; personal injury;<sup>156</sup> tort for damage to property not arising out of a contractual relationship; real property and tenancies; “validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;” validity of intellectual property<sup>157</sup> other than copyright; intellectual property infringement except copyright, unless the infringement is brought for a breach of contract; public registers; and arbitrations.<sup>158</sup>

### B. Jurisdiction

Article 5 provides the Convention’s jurisdictional base. The court that

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relating to interim measures for relief).

<sup>152</sup> See Convention, *supra* note 1, art. 12.

<sup>153</sup> See *id.* at art. 2(1)(a). See also Brand I, note 27 at 200 (discussing provision of the 1999 and 2001 Drafts, including consumers and employment contracts).

<sup>154</sup> See Convention, *supra* note 1, art. 2(1)(a).

<sup>155</sup> See *supra* notes 116–123 and accompanying text (discussing antitrust issues in the Hague Conference). Some foreign jurisdictions call antitrust “competition law.”

<sup>156</sup> But see *supra* notes 70–77 (discussing scope of 1999 and 2001 Drafts including personal injury in the text).

<sup>157</sup> Intellectual property rights concerned many states because intellectual property rights are usually determined exclusively by the state that issued the patent, copyright, etc. See Brand ASIL, *supra* note 1, at 2. Many international agreements, however, deal with the transfer of property rights. See *id.* at 1. Accordingly, excluding intellectual property entirely would have thwarted the purpose of the Convention for many. See *id.* at 2. The delegates, consequently, agreed to exclude infringement and intellectual property rights validity from the convention but allowed them to be included when the issue is only a preliminary matter. See *id.* at 2. See *supra* notes 124–36 and accompanying text (discussing intellectual property concerns and the Hague Convention).

<sup>158</sup> See Convention, *supra* note 1, arts. 2(2), 2(4).



the parties designate has jurisdiction over the dispute and may not decline jurisdiction because it believes that another state should decide the case, unless the exclusive choice of court agreement is null and void under that state's law.<sup>159</sup> The jurisdictional rules do not affect the subject matter, the value of the claim, or the state's internal rules for jurisdiction.

Claims brought before forums other than that chosen by the parties must be dismissed.<sup>160</sup> The dismissal requirement does not apply where the contractual choice of court clause agreement is null and void under the chosen court's state law; under the law of the seised court, a party lacked legal capacity to enter into the agreement; enforcing the agreement would be manifestly unjust or manifestly contrary to the public policy of the seised court's state law; the agreement cannot reasonably be performed due to reasons beyond the parties' control; or, the chosen court has declined to hear the case.<sup>161</sup>

A chosen court may also refuse jurisdiction if it determines that the state has no connection with the defendant or the claim other than the choice of court agreement.<sup>162</sup> In other words, "random" choice of forum clauses, are discouraged—a French seller and Spanish buyer should not choose Berlin as the forum.

### C. Enforcement

Article 8 is the heart of the Convention. It mandates that if a judgment is issued pursuant to the Convention's rules and can be recognized and enforced in the chosen court, then other Member States must recognize and enforce the judgment unless the judgment falls within one of the permissible bases to refuse recognition and enforcement.<sup>163</sup>

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<sup>159</sup> See *id.* at art. 5(1)–(2).

<sup>160</sup> See *id.* at art. 6.

<sup>161</sup> See *id.* at art. 6. Some commentators fear that the Convention did not go far enough and allows too many exclusions. See *infra* note 189, and accompanying text.

<sup>162</sup> See Convention, *supra* note 1, art. 19. See *supra* notes 66–79 and accompanying text (discussing the court/claim, court/defendant nexus dilemma during Hague Convention negotiations).

<sup>163</sup> See Convention, *supra* note 1, arts. 8(1), 8(3). The conference also included a form for a court granting the judgment to fill out. See Hague Conference on Private International Law: Convention on June 30, 2005 Choice of Court Agreements, Annex to the Convention, Recommended Form, available at <http://www.hcch.net/upload/form37e.pdf>. See also *Foreign Judgments* 10/17/05, *supra* note 26, at 13. Some argue that a downfall to mandatory enforcement will be that the United States, however, also would be required to enforce "distasteful foreign judgments." See Clermont, *supra* note 8 at 111. While United States courts are comfortable enforcing sister state judgments because the Due Process Clause applies, ensuring fairness to the defendant, foreign courts' procedural fairness requirements remain less certain. See *id.* ("Accordingly, the treaty must have . . . a provision giving each signatory country broad control over which countries can sign on vis-à-vis that country, as well as narrowly drawn public policy exceptions for procedural due process violations and

The key to this provision, and for that matter *any* enforcement regime, is the insulation of the judgment's merits from review. Other than reviewing the chosen court's decision to determine whether the Convention's rules were followed, an enforcing court may not review the merits of the case and is bound by the findings of fact of the rendering court unless the judgment was by default.<sup>164</sup> The enforcing court may refuse or postpone recognition and enforcement if the chosen court is reviewing the case or the time limit to seek review in the state of origin has not expired.<sup>165</sup>

As with the Brussels Regulation, Lugano Convention and the New York Convention, the enforcement obligation comes with specific exceptions:

1. the agreement is null and void under the chosen court's state law;
2. a party lacked legal capacity to enter into the agreement under the enforcing state's law;
3. the documents instituting the proceedings did not provide the defendant adequate time to defend (unless the defendant did not contest and his or her state permits contestation);
4. there was fraud in the procedure procuring the judgment;
5. it would be manifestly incompatible with the public policy of the enforcing court's state law to recognize and enforce the judgment;
6. the judgment from the chosen court is inconsistent with another judgment by the enforcing state between the same parties; or
7. an earlier judgment of a contracting state, which is enforceable under the convention, is inconsistent with the current judgment between the same parties on the same cause of action.<sup>166</sup>

Many of these bases for enforcement jurisdiction were excluded so that parties to contracts could not thwart government interests in Member

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other repugnancies.") (citation omitted).

<sup>164</sup> See Convention, *supra* note 1, art. 8(2); see also Choice-of-Court, *supra* note 150, at 14 (noting that "[t]he key to the effectiveness of the proposed convention is the prohibition of any review of the merits of the judgment by the courts of another party to the convention.").

<sup>165</sup> See Convention, *supra* note 1, art. 8(4).

<sup>166</sup> See *id.* art. 9.

States,<sup>167</sup> while others have their root in fundamental due process concerns.<sup>168</sup>

#### D. Damages

The Convention's special treatment of damages reflects concerns with U.S. jury verdicts and excessive and punitive damages.<sup>169</sup> Under Article 11, an enforcing court may refuse recognition and enforcement of a judgment for exemplary or punitive damages "that do not compensate a party for actual loss or harm suffered."<sup>170</sup> The article essentially adopts standard practices of foreign countries who refuse to recognize and enforce damage awards that they believe are excessive under their public policy.<sup>171</sup>

Under Article 15, however, if a party so requests, recognition and enforcement of a severable part of a judgment shall be granted.<sup>172</sup> Thus, for example, in a breach of contract action for compensatory damages of \$5 million and punitive damages of \$50 million, the compensatory portion would be enforced.

#### E. Non-Exclusive Choice of Court Clauses

A choice of forum provision need not be exclusive to qualify for enforcement. Article 22 permits a Member State to declare that it will recognize and enforce judgments for non-exclusive choice of court agreements that meet the criteria for the Convention.<sup>173</sup> In doing so, the declaring Member State must recognize and enforce a judgment from another Member State if (1) the chosen court was designated in a non-exclusive choice of court agreement, (2) the chosen court was the first seised, and (3) a judgment does not already exist and is not pending in a another court that would be permitted to hear such a case under the non-exclusive choice of court agreement on the same cause of action.<sup>174</sup>

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<sup>167</sup> See Brand ASIL, *supra* note 1, at 2 (noting reasons for exclusions).

<sup>168</sup> See *supra* note 57 and accompanying text (describing due process concerns).

<sup>169</sup> See Convention, *supra* note 1, art. 11. See *supra* notes 113–115 and accompanying text (discussing foreign countries' concerns with American damage awards). Some question whether this provision is really necessary when the parties have agreed to a certain jurisdiction fully knowing the state's law on damages. Cf. Choice-of-Court, *supra* note 150.

<sup>170</sup> Convention, *supra* note 1, art. 11(1). "The Convention also makes clear that the awarded amount of compensatory damages in a judgment is not reviewable." *Foreign Judgments* 10/17/05, *supra* note 26, at 13. Moreover, "[t]he final report on the convention will include a negotiated and agreed-upon narrow interpretation on th[e] critical point" of limiting or excluding excessive damages. *Foreign Judgments* 10/17/05, *supra* note 26, at 13.

<sup>171</sup> See Brand ASIL, *supra* note 1, at 2 (explaining damages under Convention).

<sup>172</sup> See Convention, *supra* note 1, art. 15.

<sup>173</sup> See *id.* art. 22(1).

<sup>174</sup> See *id.* art. 22(2).

“This provision is potentially the most significant benefit for harmonization, as the likely effect of any Member States making this declaration will be to restrict the effect of the *forum non conveniens* doctrine for defendants challenging jurisdiction in the context of recognition and enforcement of foreign judgments.”<sup>175</sup> This provision is predicted to expand the scope of the Convention and provide greater uniformity in the recognition and enforcement of judgments internationally, if adopted by the Member States.<sup>176</sup>

#### F. The Convention’s Relationship to Present and Future Treaties

The Convention provides that it should be interpreted in a way that is compatible with other treaties in existence between Member States.<sup>177</sup> If, however, applying the Convention would be inconsistent with an existing treaty with a non-member State, then the Convention will not apply to matters involving the non-member state.<sup>178</sup> Where two member states are already mutually party to an existing treaty on the recognition and enforcement of judgments (such as a regional convention like Lugano), the Convention will not disturb the other treaty so long as recognition and enforcement will not be less than under the Convention.<sup>179</sup>

Moreover, if the parties to the Convention create a new treaty or treaties concerning a specific matter, the Convention will not be disturbed nor will it disturb the provisions of the new treaty unless the new treaty provides otherwise.<sup>180</sup> This provision allows the Member States to continue negotiations and work towards a more comprehensive treaty or at least piecemeal treaties on specific issues.<sup>181</sup>

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<sup>175</sup> Antonin I. Pribetic, *The Hague Convention on Choice of Court Agreements*, THE GLOBETROTTER, Vol. 10, No. 1, Sept. 2005, at 3.

<sup>176</sup> See Brand ASIL, *supra* note 1, at 1 (The value in the non-exclusive choice of court provision is that “it recognizes that, once the parties have agreed that a tribunal is acceptable, there is value in the free movement of its judgment.”).

<sup>177</sup> For a discussion on how the Convention will work in conjunction with other treaties, see Hague Conference on Private International Law, *The Future Convention on Exclusive Choice of Court Agreements and Arbitration*, Prelim. Doc. 32 (June 2005), available at [http://www.hcch.net/upload/wop/jdgm\\_pd32e.pdf](http://www.hcch.net/upload/wop/jdgm_pd32e.pdf).

<sup>178</sup> See Convention, *supra* note 1, art. 26(3).

<sup>179</sup> See *id.* art. 26(4).

<sup>180</sup> See *id.* art. 26(5).

<sup>181</sup> See *supra* Part III (discussing the 1999 and 2001 Drafts which were much more comprehensive but had to be, at least temporarily, abandoned as the member states could not agree on certain provisions).

## V. ASSESSMENT

Currently, no Member State has signed the Convention.<sup>182</sup> Countries are awaiting a draft report before deliberating on ratification.<sup>183</sup> Some argue that it will be left to the private sector to persuade Member States to ratify the treaty.<sup>184</sup> Others have voiced that, because the United States proposed the Convention, other Member States will wait to see if the United States ratifies the treaty before taking any action.<sup>185</sup>

The ratification debate may hinge in part on whether the Convention is considered to be a “success.” There are different camps. On the positive side, some have argued that the mere fact that the issue of an international treaty on the recognition and enforcement of judgments was even considered is major progress for the Member States, especially the United States.<sup>186</sup> There is of course the undeniable practical benefit of enforcement of judgments resulting from choice of forum/court clauses in commercial contracts. Beyond this, some predict that the Convention will result in unifying jurisdictional rules internationally<sup>187</sup> and clarification of jurisdiction within the United States in an international context.<sup>188</sup>

On the negative side, the limitations of the Convention have caused some—including those close to its creation—to question its likely effectiveness. Catherine Kessedjian, the former Deputy Secretary General

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<sup>182</sup> See Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last visited Oct. 8, 2006).

<sup>183</sup> See CP Tech’s Page on the Hague Conference on Private International Law’s Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, <http://www.cptech.org/ecom/jurisdiction/hague.html> (last visited Dec. 8, 2005). In fact, Congress is not expected to entertain ratification of the treaty until 2007. See Andrew C. Schneider, *New Treaty Will Help Firms Operate Abroad*, Kiplinger Business Forecasts, Oct. 14, 2005, at 1.

<sup>184</sup> See *Litigation Convention Needs Private Backing*, IBA DAILY NEWS, Sept. 28, 2005, at 13 [hereinafter *Litigation convention*] (“It will be up to the private sector to convince governments that ratification would not only be in the interest of the legal profession, but also of private enterprises doing business in the global market. . .”).

<sup>185</sup> See Foreign Judgments 10/17/05, *supra* note 26, at 13.

<sup>186</sup> See Silberman, *supra* note 10, at 349 (“[O]ne should not lose sight of the important lessons that have been learned from the experience and the insights gained in attempting to understand the wide gap that separates common law and civil law approaches to these issues. Even a limited convention with quite limited parameters is a first step and is one worth striving for.”) (internal citation omitted).

<sup>187</sup> See Clermont, *supra* note 8, at 89 (“Rethinking jurisdiction through the process of treaty-making would permit the United States to improve its own interstate law.”). In fact, the ALI just completed a proposed federal statute which was to accompany the treaty but will still be important even if the treaty is ratified with its much more limited scope. See ALI Proposed Statute, *supra* note 26. The NCCUSL also approved the Uniform Foreign-Country Judgments Recognition Act (2005). NCCUSL Act, *supra* note 26.

<sup>188</sup> See Silberman, *supra* note 10, at 333–34.

of the Hague Conference, expressed concern over the Convention: "I am not convinced [the Convention] will work. . . . The scope is limited and it may be a case of death by a thousand exemptions. The five grounds [of Article 5] for challenge will trigger a flood of litigation."<sup>189</sup> There is the further potential downside that if the United States does not ratify the current Convention, other countries would, in turn, enforce U.S. judgments even less frequently than they do currently.<sup>190</sup>

The Convention should not be labeled as a failure merely because the reach of the United States exceeded its grasp. The classes of litigants excluded by the Convention is a point that may figure heavily in Senate consideration of the Convention. However, the limitations of the Convention should motivate future amendments. It should not be a basis for avoiding either ratification or use of the Convention. Generally accepted principles of international law develop slowly, with trust and with practice. The Convention is a first step toward that development. It provides predictability, fills a major current gap, and could generate the confidence necessary for further expansion of an enforcement regime. That the light might not burn as brightly as first intended should not result in a return to the total darkness of a pre-Convention regime.

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<sup>189</sup> *Litigation convention*, *supra* note 184, at 13 (quoting Catherine Kessedjian, the former deputy secretary general of the Hague Conference). *But see Foreign Judgments* 10/17/05, *supra*, note 26, at 13 ("The negotiators strongly supported, and the report on the convention will emphasize, the limited scope that they intended for the public policy exception to enjoy.").

<sup>190</sup> *See* Miller, *supra* note 25, at 261 ("Failure to ratify the final version would establish the United States as an opponent to the Convention, which could in turn result in retributive decrease in recognition of U.S. judgments.") (internal citation omitted).

