

D R A F T
FOR DISCUSSION ONLY

CHOICE OF COURT AGREEMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For February 27 - March 1, 2009 Drafting Committee Meeting

Without Prefatory Note and With Reporters' Notes

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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CHOICE OF COURTS AGREEMENT

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1 **CHOICE OF COURT AGREEMENT ACT**

2
3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the [Choice of Court
4 Agreement Act.].

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (a) “Choice of court agreement” means an agreement between two or more parties which
7 designates the court or courts for the purpose of deciding disputes.

8 (b) “Chosen court” means the court or courts within a member country designated in an
9 exclusive choice of court agreement.

10 (c) “Convention” means the Hague Convention of 30 June 2005 on Choice of Court
11 Agreements.

12 (d) “Country of origin” means the member country in which a court of origin is located.

13 (e) “Court of origin” means the court that granted a judgment.

14 (f) “Exclusive choice of court agreement” means a choice of court agreement, concluded
15 or documented in a record, that designates the courts of only one member country or one or more
16 specific courts of only one member country for the purpose of deciding disputes which have
17 arisen or may arise in connection with a particular legal relationship, unless the parties expressly
18 provide that the choice of court agreement is not exclusive.

19 (g) “International case”

20 (1) for purposes of application of the provisions of this [act] relating to
21 enforcement of a choice of court agreement, means any case other than a case in which

22 (A) the parties are residents of the same country; and

23 (B) the relationship of the parties and all other elements relevant to the

1 dispute, regardless of the chosen court, are connected only with that country; or

2 (2) for purposes of application of the provisions of this [act] relating to
3 recognition and enforcement of a judgment, means any case in which the judgment was rendered
4 in a country other than the country in which recognition and enforcement is sought.

5 (h) “Judgment” means a court decision on the merits, however denominated, including a
6 decree or order, and a determination of costs or expenses relating to a decision on the merits, that
7 may be recognized or enforced under this [act]. The term does not include an interim measure of
8 protection.

9 (i) “Member country” means a party to the Convention.

10 (j) “Person” means an individual, corporation, business trust, estate, trust, partnership,
11 limited liability company, association, joint venture, government, governmental subdivision,
12 agency or instrumentality, public corporation, or any other legal or commercial entity.

13 (k) “Record” means information that is in writing or in any form of communication which
14 renders the information accessible so that it may be used for subsequent reference.

15 **Reporters’ Notes**

- 16
- 17 1. Subsections 2(a), (b), (d), and (e) are based on definitions in the Report.
 - 18 2. Subsection 2(f) is based on Article 3(a) of the Convention.
 - 19 3. Subsection 2(g) is based on Article 1(2)&(3) of the Convention.
- 20
21
22

23 **SECTION 3. SCOPE.**

24 (a) Except as otherwise provide in this section, this [act] applies to

25 (1) an exclusive choice of court agreement in an international case involving a
26 civil or commercial matter; and

27 (2) a non-exclusive choice of court agreement in an international case involving a

1 civil or commercial matter to the extent provided in section 11 of this [act].

2 (b) This [act] does not apply to an exclusive choice of court agreement if:

3 (1) any party to the agreement is an individual acting primarily for personal,
4 family or household purposes; or

5 (2) the agreement relates primarily to an individual or collective contract of
6 employment.

7 (c) This [act] does not apply to a proceeding involving a determination relating to the
8 following subject matter, if that determination is a primary object of the proceeding:

9 (1) the status and legal capacity of an individual;

10 (2) family law matters, including matters relating to divorce, support,
11 maintenance, property division, child custody and other rights and obligations arising out of
12 marriage or a similar relationship;

13 (3) wills, succession, and administration of estates;

14 (4) bankruptcy and insolvency matters;

15 (5) the carriage of passengers or goods;

16 (6) marine pollution, limitation of liability for maritime claims, general average,
17 and emergency towage and salvage;

18 (7) antitrust matters;

19 (8) liability for nuclear damage;

20 (9) claims for personal injury brought by or on behalf of individuals;

21 (10) tort claims for damage to real property and tangible personal property which
22 do not arise from a contractual relationship;

23 (11) interests in real property, including leasehold interests;

1 (12) the validity, nullity, or dissolution of persons other than individuals, and the
2 validity of the internal governance decisions of their governing authorities;

3 (13) the validity of intellectual property rights other than copyright and related
4 rights;

5 (14) infringement of intellectual property rights other than copyright and related
6 rights, except when infringement proceedings are brought for breach of a contract between the
7 parties relating to such rights, or could have been brought for breach of that contract;

8 (15) the validity of entries in public registers; and

9 (16) matters under the law of a member country that are analogous to those listed
10 in this subsection.

11 (d) A proceeding involving a determination relating to a subject matter listed in
12 subsection (c) is not excluded from the scope of this [act] if that determination is of a question
13 merely preliminary to, or asserted as a defense in connection with, a determination that is a
14 primary object of the proceeding.

15 (e) This [act] does not apply to arbitration and related proceedings.

16 (f) Proceedings are not excluded from the scope of this [act] merely because a
17 government or governmental agency, or other person acting for a government, is a party to the
18 proceeding. Nothing in this [act] affects the privileges and immunities of governments or
19 international organizations in respect of themselves and their property.

20 (g) This [act] does not apply to interim measures of protection. This [act] neither requires
21 nor precludes the grant, refusal, or termination of interim measures of protection by a court of
22 this state and does not affect whether a party may request, or a court of this state should grant,
23 refuse, or terminate such measures.

1 (h) Proceedings under a contract of insurance or reinsurance are not excluded from the
2 scope of this [act] on the ground that the contract of insurance or reinsurance is related to a
3 matter to which this [act] does not apply.

4 **Reporters' Notes**

5 1. Subsection (a) excludes non-civil matters, including public law and criminal law
6 matters. The Convention uses the phrase “civil or commercial” law matters because these two
7 categories are regarded as separate and mutually exclusive categories in some legal systems. Art.
8 1 (1); Report, ¶49. This Act also uses that phrase for the same reason. In the U.S., a commercial
9 matter would be a subset of civil matters. With regard to determination of the meaning of these
10 terms, the Report states that “[l]ike other concepts used in the Convention, ‘civil or commercial
11 matters’ has an autonomous meaning: it does not entail a reference to national law or other
12 instruments.” Report ¶49.

13
14 2. Subsection (b)(1) excludes choice of court agreements when any of the parties to the
15 agreement is a consumer. It covers both an agreement between a consumer and a nonconsumer,
16 and one between two consumers. Art. 2(1)(a); Report ¶50.

17
18 3. Subsection (b)(2) excludes all choice of court agreements in employment contracts,
19 whether an individual contract between an employer and an employee or a collective contract of
20 employment between an employer and a group of employees or an organization such as a labor
21 union representing employees. Art. 2(1)(b); Report ¶ 51.

22
23 4. Subsection (c) is based on Article 2(2) & (3), which exclude proceedings involving
24 certain subject matter from the scope of the Convention, but only when the matter is “an object
25 (the subject or one of the subjects) of the proceedings,” rather than “a preliminary question in
26 proceedings that have some other matter as their object/subject.” Report ¶52. Articles 2(3)
27 expressly states that “the mere fact that a matter excluded under paragraph 2 arises by way of
28 defense does not exclude proceedings from the Convention, if that matter is not an object of the
29 proceedings.”

30
31 The application of this distinction is illustrated by the following examples:

32
33 **Example 1:** A and B enter a contract that contains an exclusive choice of court provision.
34 A sues B for breach of contract. B asserts by way of defense that the contract is void because it
35 violates the antitrust laws. Although subsection (c)(7) excludes antitrust from the subject matter
36 covered by this Act, the dispute between A and B would be within the scope of this Act. The
37 primary object of the action is to determine the breach of contract claim asserted by A. The
38 principal issue before the court is whether judgment should be given against B for breach of
39 contract. That antitrust issue is merely a defense to B’s liability which must be determined as a
40 preliminary question to deciding the primary object of the action, whether A is entitled to recover
41 from B for breach of contract. *See* Report ¶63.

1 **Example 2:** Licensor licenses patent rights to licensee under a license that contains an
2 exclusive choice of court agreement. Subsequently, licensee stops making the royalty payments
3 required under the license. Licensor brings an action under the license to recover the unpaid
4 royalties. Licensee asserts that licensor’s patent is invalid as a defense to payment. Although
5 subsection (c)(13) excludes issues relating to the validity of a patent from the subject matter
6 covered by this Act, the dispute between Licensor and Licensee is within the scope of this Act.
7 The principle issue before the court is whether Licensor can recover its unpaid royalties under the
8 license. Although the court must decide whether Licensor’s patent is valid before it can make
9 that determination, the issue of patent validity is merely a preliminary question to deciding the
10 issue of Licensor’s right to its royalties under the license. *See Report ¶77.*
11

12 5. Subject matter under subsection (c) is excluded for various reasons. In some cases, the
13 parties may not have the right to dispose of the matter for themselves because the public interest
14 or that of third parties is involved. In those cases, a particular court often will have exclusive
15 jurisdiction that cannot be ousted by a choice of court agreement. In other cases, other
16 multilateral legal regimes apply and thus the Convention is not needed. Further, exclusion of
17 these areas removes the need to resolve questions of conflict between the Convention and these
18 other regimes. Report ¶53.
19

20 6. Subsection (c)(1) is based on Article 2(2)(a) of the Convention. The language is almost
21 identical. It excludes issues dealing with status and capacity of natural persons. The Report
22 states that the Convention’s comparable exclusion “includes proceedings for divorce, annulment
23 of marriage or the affiliation of children.” Report ¶54.
24

25 7. Subsection (c)(2) is based on Article 2(2)(b) & (c). It includes language from a similar
26 exclusion in Section (b)(3) of the UFCMJRA. The Convention uses the phrase “maintenance
27 obligations,” which is intended to include child support. Art. 2(2)(b); Report ¶55. The Act
28 expressly lists “support,” which would include spousal and child support. The Convention uses
29 the phrase “matrimonial property regimes,” which includes “the special rights that a spouse has
30 to the matrimonial home in some jurisdictions.” Report ¶55. The Act uses the phrase “property
31 division.” The phrase “similar relationships” covers relationships between unmarried couples
32 that are given legal recognition. Report ¶55.
33

34 8. Subsection (c)(3) excludes matters relating to succession. Art. 2(2)(d); Report ¶55.
35 The bracketed language is not included in the Convention, but is presumably was intended to be
36 covered by the Convention term “succession.”
37

38 9. Subsection (c)(4) is based on Convention Article 2(2)(e), which excludes “insolvency,
39 composition, and analogous matters.” The Convention term “composition” is intended to refer to
40 procedures pursuant to which the debtor can enter an agreement with creditors “in respect of a
41 moratorium on the payment of debts or on the discharge of those debts.” Report ¶56. The
42 Convention phrase “analogous matters” “covers a broad range of other methods whereby
43 insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as
44 Chapter 11 of the United States Federal Bankruptcy Code.” Report ¶56. This phrase is left out
45 of the Act because the Drafting Committee decided at its November 2008 meeting to include a
46 separate subsection (c)(16) stating that matters under member country laws analogous to those

1 listed in subsection (c) also are excluded. The term “composition” is left out of the Act as a term
2 that would not convey the intended meaning under U.S. law. The term “bankruptcy” is added,
3 and would cover Chapter 11 proceedings.
4

5 10. The Report states that the Convention’s insolvency exclusion excludes proceedings
6 from the scope of the Convention “if they directly concern insolvency.” Report ¶57. The Report
7 gives the following hypothetical to explain the scope of the exclusion:
8

9 A (resident in State X) and B (resident in State Y) enter into a contract under
10 which B owes A a sum of money. The contract contains a choice of court
11 agreement in favor of the courts of State Z. A is then declared bankrupt as a result
12 of proceedings in State X. The Convention would apply to any proceedings
13 against B to recover the debt, even if they were brought by the person appointed to
14 administer A’s bankrupt estate: provided that the appointment under the
15 insolvency law of State X is recognized in State Z, that person would be standing
16 in the shoes of A and would be bound by the choice of court agreement.
17 However, the Convention would not apply to questions concerning the
18 administration of the bankrupt estate – for example, the ranking of different
19 creditors.
20

21 11. Subsection (c)(5) is the same as Convention Article 2(2)(f), which excludes contracts
22 for the national and international carriage of passengers and goods by land, sea, air or any
23 combination of the three. Report ¶58. This exclusion avoids the possibility of conflict with
24 other conventions, such as the Hague Rules on Bills of Lading, which deal with this aspects of
25 this area.
26

27 12. Subsection (c)(6) excludes five specific maritime matters – marine pollution;
28 limitation of liability for maritime claims; general average; emergency towage; and emergency
29 salvage. Art. 2(2)(g); Report ¶59. Other maritime matters, such as marine insurance, non-
30 emergency towage and salvage, shipbuilding and ship mortgages and liens, are included. Report
31 ¶59.
32

33 13. Subsection (c)(7) excludes antitrust law matters. The Convention version of this
34 exclusion refers to “anti-trust (competition) matters” to take into account the fact different terms
35 are used in different legal systems to refer to similar laws – what the U.S. refers to as antitrust
36 law is called “competition law” in Europe. Art. 2(2)(h); Report ¶60. The exclusion is not
37 intended to cover unfair competition law, such as that relating to misleading advertising or
38 passing goods off as those of a competitor – presumably what would be referred to as unfair trade
39 practices in the United States. Report ¶60.
40

41 14. The language of subsection (c)(8) is identical to the Convention language regarding
42 exclusion of liability for nuclear damage. Art. 2(2)(i). Liability for nuclear damage is excluded
43 because it is the subject of other conventions and because in some states, like the United States,
44 that are not a party to a nuclear liability convention, a comprehensive scheme under internal law
45 exists that requires a single collective procedure in order to have a uniform solution with regard
46 to liability and an equitable distribution of a limited fund among those injured. Report ¶64.

1 15. The language of subsection (c)(9) is identical to the Convention language regarding
2 exclusion of personal injury claims. Art. 2(2)(j). As the Report states, choice of court
3 agreements are likely to be rare in this tort context. Report ¶65. The Report indicates that the
4 exclusion is intended to cover not only physical injury but “nervous shock” – presumably what
5 U.S. tort law would call “emotional distress” – even if not accompanied by physical injury.
6 Report ¶65. The exclusion does not, however cover “humiliation or hurt feelings” such as those
7 related to an invasion of privacy or defamation. Report ¶65.
8

9 16. The language of subsection (c)(10) is largely based on the Convention language. The
10 Convention refers to “tort or delict claims” rather than just tort claims. Art. 2(2)(k). “Delict” is
11 the civil-law concept analogous to “tort” in common law legal systems. Report ¶66, n. 95. Only
12 tort claims for damage to tangible property that do not arise from a contractual relationship are
13 excluded. Report ¶66.
14

15 17. The comparable exclusion in the Convention to the exclusion in subsection (c)(11)
16 excludes “rights in rem in immovable property, and tenancies of immovable property” Art.
17 2(2)(l). The Convention does not define either “immovable property” or “rights *in rem*,” leaving
18 the definition of those terms to the internal law of each country. Brand & Herrup, page 66. The
19 language of subsection (c)(11) defines an “immovable” as “real property” and defines “rights *in*
20 *rem*” as “interests in real property.”
21

22 18. The exclusion in subsection (c)(11) reflects that fact that, as a matter of territorial
23 sovereignty, a country in which real property is situated customarily asserts exclusive jurisdiction
24 to determine who has interests in that real property; an order from a foreign court purporting to
25 determine these matters likely would not be given effect in the country in which the real property
26 is located as an intrusion on territorial sovereignty. *See* Brand & Herrup, page 66.
27

28 19. The Report states that “[t]he reference to rights *in rem* should be interpreted as
29 relating only to proceedings concerning ownership of, or other rights *in rem* in, the immovable,
30 not proceedings about immovables which do not have as their object/subject a right *in rem*.
31 Thus, it would not cover proceedings for damage to an immovable ... nor would it cover a claim
32 for damages for breach of a contract for the sale of land.” Report ¶67.
33

34 20. The bracketed language in subsection (c)(11) of the November 2008 draft referring to
35 real property related items has been deleted. The Drafting Committee decided that the issue of
36 the extent to which these items fell within the exclusion should be left for decision by the courts.
37 The Convention exclusion refers to “tenancies in immovables,” a concept the definition of
38 which, like that of “immovables,” is left to internal law. Brand & Herrup, page 66. Subsection
39 (c)(11) defines this term as “leasehold interests.”
40

41 21. The Report states two reasons for this exception: (1) in some countries “tenancies in
42 immovables” are subject to special legislation designed to protect the tenant and (2) in some
43 jurisdictions tenancies are considered rights *in rem* that would be covered under the first part of
44 the exclusion so all tenancies were included to provide consistent treatment without regard to
45 their characterization under a particular country’s internal law. Report ¶68.
46

1 22. Only proceedings directly involving “immovables” are excluded. For example, a
2 proceeding concerning rights and obligations of a seller and buyer under a contract for sale of a
3 business would not be excluded, even if the sale includes an undertaking to transfer a lease of the
4 business premises because the “immovables” issue would be involved only indirectly. Report
5 ¶¶69. On the other hand, a proceeding between a landlord and tenant on the terms of the lease
6 would be excluded. Report ¶¶69.

7
8 23. The language of subsection (c)(12) is substantively the same as the language of
9 Article 2(2)(m) of the Convention, but has been rephrased using terminology more consistent
10 with that used in U.S. law . These matters were excluded because they often involve the rights of
11 third parties and in some countries are decided by courts that have exclusive jurisdiction with
12 regard to these issues. Report ¶¶70. As a general rule, a legal person comes into being because of
13 action of a particular territorial sovereign, its powers as a legal person are demarcated by the
14 rules of that territorial sovereign, and it passes out of existence in accordance with rules
15 established by that sovereign. Brand & Herrup, page 67. The matters excepted by subsection
16 (c)(12) thus are traditionally matters of exclusive jurisdiction of the state that created the legal
17 person. Brand & Herrup, page 67.

18
19 24. The exclusion in subsection (c)(12) is focused on matters relating to the internal
20 structure and operation of the legal person, and does not necessarily apply to the consequences of
21 decisions made by the legal person. Brand & Herrup, page 67.

22
23 25. The language of subsection (c)(13) is the same as the language of Article 2(2)(n) of
24 the Convention. Subsection (c)(13) excludes the issue of validity of intellectual property rights,
25 other than copyright and related matters. Thus, proceedings to revoke or for a declaration of
26 validity or invalidity of the excluded intellectual property rights are outside the scope of this Act.
27 Report ¶¶75. On the other hand, copyright and related rights are fully covered by this Act,
28 including with regard to proceedings to determine the validity of such rights. Report ¶¶72.

29
30 26. The term “related rights” in subsection (c)(13) refers to “rights in a specific use of an
31 existing work by someone other than the original author, and which use makes an additional
32 contribution to the existing work.” Brand & Herrup, page 68. For example, the writing of a song
33 gives rise to a right in copyright, while the rights a singer may have in a particular rendition of
34 the song is a ‘related right’ under this Act. Brand & Herrup, page 68. “Related rights” include
35 rights of performers in their performances, rights of producers of sound recordings in their
36 recordings, and rights of broadcasting organizations in their radio and television broadcasts.
37 Report ¶¶73.

38
39 27. The exclusion under subsection (c)(13) only applies when the validity issue is a
40 primary object of the proceeding. When validity is raised merely as a preliminary matter rather
41 than as the primary object of the litigation, then the exclusion does not apply. Thus, proceedings
42 to enforce a licensing agreement with regard to a non-copyright intellectual property right would
43 not be outside the scope of this Act just because the defendant raises the invalidity of the
44 intellectual property right as a defense. Report ¶¶75 & 77.

45
46 On the other hand, if instead of raising invalidity as a defense, the defendant counterclaimed

1 for revocation of the intellectual property right, that counterclaim would be excluded under
2 subsection (c)(13) because the primary object of the counterclaim would be to determine the
3 validity of the right. Report ¶78. The fact the counterclaim was outside the scope of this Act,
4 however, would not alter the fact that the plaintiff’s claim for enforcement of the license would
5 be within this Act. Report ¶78.
6

7 28. This Act applies to contracts dealing with intellectual property rights, such as
8 licensing agreements, distribution agreements, joint venture agreements, agency agreements, and
9 agreements for the development of an intellectual property right. Report ¶76. Proceedings
10 brought under such contracts – for example, proceedings for payment of royalties owed under a
11 licensing agreement – are covered by this Act. Report ¶76
12

13 29. The language of subsection (c)(14) is identical to the language of Article 2(2)(o) of
14 the Convention. As with the exclusion in subsection (c)(13), the exclusion applies only with
15 regard to intellectual property rights other than “copyright and related rights.” For a discussion
16 of the meaning of “related rights,” see note 23. In addition, the exclusion applies only when the
17 infringement action could not have been brought as an action for breach of contract, whether or
18 not it in fact was brought as a contract action. This latter condition greatly limits the scope of
19 this exclusion. The only situations in which subsection (c)(13) will exclude subject matter from
20 this Act are those in which the exclusive choice of court agreement applies to infringements that
21 do not constitute a breach of the contract in which the exclusive choice of court agreement is
22 contained or of any other contract between the parties, or where the parties concluded a choice of
23 court agreement relating to an infringement that had already arisen and that was not related to any
24 contract between the parties; such agreements will be rare. Report ¶79, n.109.
25

26 30. The language of subsection (c)(15) is identical to the language of Article 2(2)(p) of
27 the Convention. Traditionally, the state that creates and maintains a public register has exclusive
28 jurisdiction over proceedings concerning the validity of entries in that public register as an aspect
29 of territorial sovereignty. Brand & Herrup, page 70. Therefore, issues relating to the validity of
30 entries in public registers have been excluded from the scope of this Act.
31

32 31. The bracketed subsection (c)(16) found in the November 2008 draft has been deleted.
33 The Drafting Committee decided at its November 2008 meeting that no declarations should be
34 made under Article 21, which allows a country to add to the subject matters excluded from
35 coverage by declaration when the country has a strong interest in not apply the Convention to a
36 specific matter. The new subsection (c)(16) excludes from the scope of the Act matters that
37 under the law of a member country are analogous to those listed in subsection (c) in recognition
38 of the fact different terms may be used to describe similar concepts in the legal systems of the
39 various member countries.
40

41 32. Subsection (d) excludes arbitration and related proceedings from the scope of this
42 Act. This exclusion is intended to be interpreted broadly, and covers any proceedings in which
43 the court gives assistance to the arbitral process, including deciding whether an arbitration
44 agreement is valid; ordering parties to proceed to, or discontinue, arbitration proceedings;
45 revoking, amending, recognizing, or enforcing arbitral awards; appointing or dismissing
46 arbitrators; fixing the place of arbitration; or extending the time for making awards. Report ¶84.

1 There currently is a functioning international regime with regard to arbitral proceedings,
2 including the United Nations Convention on the Recognition and Enforcement of Arbitral
3 Awards, and this Act is not intended to disturb that regime. Brand & Herrup, page 73. Once
4 arbitration or related proceedings are raised in a case, the case falls outside the scope of this Act.
5 *See* Brand & Herrup, page 73-74.

6
7 33. Subsection (e) is based on Article 2(5) & (6) of the Convention.

8
9 34. Subsection (f) is based on Article 7 of the Convention.

10
11 35. Subsection (g) is based on Article 17(1) of the Convention.
12
13

14 **SECTION 4. EXCLUSIVE CHOICE OF COURT AGREEMENT AS**

15 **INDEPENDENT AGREEMENT.** An exclusive choice of court agreement that forms part of a
16 contract must be treated as independent of the other terms of the contract. The validity of the
17 exclusive choice of court agreement cannot be contested solely on the ground that the contract is
18 not valid.

19 **Reporters' Notes**

20
21 1. This section is based on Article 3(d) of the Convention.
22

23 2. The other material previously included in Section 4 has been moved to the definition of
24 "exclusive choice of court agreement" in Section 2 per Committee decision at the November
25 2008 meeting.
26

27 **QUERY: WILL PLACING THE PRESUMPTION OF EXCLUSIVITY IN A**
28 **DEFINITIONAL SECTION PROVIDE SUFFICIENT NOTICE?**
29

30 **SECTION 5. RESIDENCE OF AN ORGANIZATION.** For purposes of this [act],

31 (1) A person other than an individual or a government, governmental agency, or other
32 person acting for a government is considered to be a resident of any country:

33 (A) where it has its statutory seat;

34 (B) under the law of which it was incorporated or formed;

35 (C) where it has its central administration; or

1 (D) where it has its principal place of business.

2 (2) A government, governmental agency, or other person acting for a government is
3 considered to be a resident only of that country.

4 **Reporters' Notes**

5 1. Section 5 is based on Article 4(2) of the Convention.

6
7 2. Section 5 defines “residence” for entities other than natural persons and governmental
8 entities. The concept of “residence” is important with regard to determining whether a case is an
9 “international case” for purposes of determining the scope of application of this Act, as well as
10 with regard to certain exceptions to recognition and enforcement. Report ¶118. The section
11 states four possible residences for an organization, and it is possible for an organization to have a
12 “residence in all four locations. Brand & Herrup, page 51.

13
14 3. “Statutory seat” (“*siège statutaire*”) is a civil law concept used in some civil law
15 jurisdictions to determine the residence of organizations. The Report explains this concept as
16 follows:

17
18 [T]his term does not refer to the corporation’s seat as laid down by some statute
19 (legislation) but as laid down by the *statut*, the document containing the
20 constitution of the company – for example, the articles of association. In the
21 common law, the nearest equivalent is “registered office.” In practice, the State
22 where the corporation has its statutory seat will almost always be the State under
23 whose law it was incorporated or formed; while the State where it has its central
24 administration will usually be that in which it has its principal place of business.

25
26 Report ¶123.

27
28 4. Subsection 5(b) is not found in the text of the Convention. The Report, however, states
29 that “[a] State or a public authority of a State would be resident only in the territory of that
30 State.” Report ¶117 n. 148.

31
32 5. The Committee decided at its November 2008 meeting to adopt the ULC definition of
33 “person” rather than the Convention language “an entity or person other than a natural person.”
34

35 **SECTION 6. DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION.**

36 (a) Except as otherwise provided in this section, a court of this state designated as the
37 chosen court to decide a dispute to which an exclusive choice of court agreement applies shall
38 accept jurisdiction over that dispute.

1 (b) A chosen court shall refuse to accept jurisdiction to decide a dispute to which an
2 exclusive choice of court agreement applies if:

3 (1) the exclusive choice of court agreement is null and void under the law of this
4 state; or

5 (2) assumption of jurisdiction by the chosen court would violate jurisdictional
6 limits placed on the chosen court by this state relating to subject matter or amount in controversy,
7 or venue requirements.

8 [(c) A chosen court shall decline to exercise jurisdiction if, except for the choice of that
9 court, there is no connection between this state and the parties or the dispute, unless]

10 (d) A chosen court may not decline to exercise jurisdiction over a dispute under the
11 doctrine of *forum non conveniens* or otherwise because the dispute should be decided in the courts
12 of another state or country.

13 (e) A chosen court may transfer a case to another court pursuant to a law of this state
14 permitting such transfer. In determining a discretionary transfer, the court shall give due
15 consideration to the choice of court of the parties.

16 Reporters' Notes

17
18 1. Section 6 is based on Article 5 of the Convention.

19
20 2. Bracketed subsection (c) of the November 2008 draft was based on Article 19 of the
21 Convention, which allows a party to the Convention to make a declaration giving its courts
22 discretion to decline jurisdiction over unrelated disputes. The Drafting Committee requested at
23 its meeting in Spring 2008 that Article 19 language be included for consideration. At its
24 November 2008 meeting, the Committee decided to make the language mandatory and to include
25 it as an alternative for states that do not wish to (or for state constitutional reasons cannot) have
26 their courts hear unrelated actions. This bracketed language would be used in lieu of the United
27 States making an Article 19 declaration. The “unless” clause would give the states the flexibility
28 to allow unrelated actions in certain situations – for example, when the amount in controversy is
29 over a certain amount – rather than prohibiting them entirely, if they so chose.
30

1 (b) A judgment must be recognized under this [act] only if it has effect between the
2 parties in the country of origin[, and only for so long as its effectiveness in the country of origin
3 continues.]

4 **Reporters' Notes**

5
6 1. The Convention places an obligation on a member country to both recognize and
7 enforce a judgment rendered by the chosen court, with certain exceptions. Sections 8 and 9 of
8 the Act deal with the obligation of the court asked to recognize the judgment. Section 10 deals
9 with the obligation of the court asked to enforce the judgment once recognized. The Report
10 gives the following description of the difference between the concept of recognition and that of
11 enforcement:

12
13 Recognition means that the court addressed gives effect to the determination of
14 the legal rights and obligations made by the court of origin. For example, if the
15 court of origin held that the plaintiff had, or did not have, a given right, the court
16 addressed accepts that this is the case. Enforcement means the application of the
17 legal procedures of the court addressed to ensure that the defendant obeys the
18 judgment given by the court of origin. Thus, if the court of origin rules that the
19 defendant must pay the plaintiff 1000 Euros, the court addressed will ensure that
20 the money is handed over to the plaintiff. Since this would be legally indefensible
21 if the defendant did not owe 1000 Euros to the plaintiff, a decision to enforce the
22 judgment must logically be preceded or accompanied by the recognition of the
23 judgment. In contrast, recognition need not be accompanied or followed by
24 enforcement. For example, if the court of origin held that the defendant did not
25 owe any money to the plaintiff, the court addressed may simply recognize this
26 finding. Therefore, if the plaintiff sues the defendant again on the same claim
27 before the court addressed, the recognition of the foreign judgment will be enough
28 to dispose of the case.

29
30 Report ¶170.

31
32 2. Section 8(b) is based on Article 8(3) of the Convention. It requires that the judgment
33 be effective in the country of origin as a prerequisite to the recognition of the judgment in this
34 state. A judgment has effect in the country of origin if it is legally valid and operative in that
35 country as a valid determination of the parties' rights and obligations. Report ¶171. If the
36 judgment does not have effect in the country of origin, then it should not be given effect in this
37 state through recognition; similarly, if the judgment ceases to have effect in the country of origin
38 the judgment should not continued to be recognized in this state. Report ¶171. The bracketed
39 language, which is not found in the text of the Convention, reflects this latter concept. It is based
40 on language in the 1999 Convention. *See* Report ¶171 n.207.

41 42 **SECTION 9. EXCEPTIONS TO RECOGNITION OF A JUDGMENT.**

1 (a) A court of this state may refuse recognition of a judgment of a chosen court of a
2 member country if:

3 (1) the exclusive choice of court agreement was null and void under the law of the
4 country of the chosen court; provided, however, that a determination by the chosen court that the
5 agreement is valid is binding on a court of this state;

6 (2) a party to the agreement lacked the capacity to conclude the agreement under
7 the law of this state;

8 (3) the defendant in the proceeding in the chosen court did not receive notice of
9 the proceeding in sufficient time and in such form as to enable the defendant to arrange for a
10 defense; provided, however, that this defense does not apply if

11 (A) the defendant enter an appearance in the chosen court to present his
12 case without contesting lack of sufficient notice; and

13 (B) the chosen court is located in a jurisdiction whose law permits lack of
14 adequate notice to be contested;

15 (4) the defendant in the proceeding in the chosen court was given notice of the
16 proceeding in this state, and that notice did not comply with the fundamental principles of this
17 state concerning the service of documents;

18 (5) the judgment was obtained by fraud in connection with a matter of procedure;

19 (6) recognition of the judgment would be manifestly incompatible with the public
20 policy of this state or of the United States, including situations where the specific proceedings
21 leading to the judgment in the chosen court were incompatible with fundamental principles of
22 procedural fairness of this state or of the United States;

23 (7) the judgment is inconsistent with a judgment of a court of this state in a

1 dispute between the same parties;

2 (8) the judgment is inconsistent with an earlier judgment rendered by a court of
3 another jurisdiction between the same parties on the same cause of action, if the earlier judgment
4 fulfils the conditions necessary for its recognition under the law of this state other than this [act];

5 (9) to the extent that the judgment awards damages, including exemplary or
6 punitive damages, that do not compensate a party for actual loss or harm suffered, taking into
7 account the extent to which damages otherwise not compensatory should be deemed
8 compensatory because they compensate a party for costs and expenses relating to the
9 proceedings;

10 (b) Except as otherwise provided in subsection (c), recognition of a judgment of a
11 chosen court of a member country must be refused, to the extent that the judgment is based on a
12 determination of matter that is a preliminary question under Section 3(c) of this [act];

13 (c) If a preliminary question under Section 3(c) is a ruling on the validity of an
14 intellectual property right other than copyright or a related right, recognition of the judgment may
15 be refused or postponed only if:

16 (1) the ruling is inconsistent with a judgment or decision of a competent authority
17 under the law of which the intellectual property right arose; or

18 (2) proceedings concerning the validity of the intellectual property right are
19 pending in the country under the law of which the intellectual property right arose.

20 **Reporters' Notes**

21
22 1. Subsection 9(a)(3) is based on Article 9(c) of the Convention. The language is based
23 in part on the language of the Convention, and in part upon comparable language in Subsection
24 4(c)(1) of the UFCMJRA.

25
26 2. The language of subsection 9(a)(6) is identical to the language of Article 9(e), except
27 for the addition of the phrase "of the United States." That phrase, which is found in UFCMJRA

1 subsection 4((c)(3), makes clear that, under the supremacy clause of the U.S. Constitution, the
2 public policy of this state includes the public policy of the United States.
3

4 3. Subsection 9(a)(4) is based on Article 9(c) of the Convention. It deals with the
5 situation in which the defendant to the original proceedings in the chosen court is given notice of
6 those proceedings in this state in a manner that this state would view as incompatible with its
7 fundamental principles regarding service of process. *See* Report ¶187.
8

9 4. Subsection 9(a)(7) is based on Article 9((f) of the Convention. This exception
10 provides that a judgment of this state that is inconsistent with the judgment of the chosen court
11 prevails, whether or not the inconsistent judgment is rendered by this state before or after the
12 judgment of the chosen court. Report ¶192. For this provision to apply, the parties to the
13 inconsistent judgment must be the same, but it is not necessary that the cause of action be the
14 same. Report ¶192.
15

16 5. Subsection 9(a)(8) is based on Article 9(g) of the Convention, and largely tracks the
17 Convention language. Subsection 9(a)(8) deals with the situation when the competing judgments
18 both were rendered by the courts of another jurisdiction. In that situation, the court may deny
19 recognition to the chosen court judgment in favor of an earlier inconsistent judgment rendered in
20 the other jurisdiction between the same parties on the same cause of action.
21

22 6. The language of subsection 9(a)(8) deals with two issues not expressly addressed by
23 the Convention in Article 9(g). First, what does the language in the Convention stating that the
24 judgment of the other jurisdiction must be one that “fulfils the conditions necessary for its
25 recognition in the requested State” mean? If the requirements for recognition in the requested
26 jurisdiction (“this state”) include the Convention, then it seems such a judgment will never
27 comply because it is not the judgment of a chosen court. Subsection 9(a)(8) resolves this
28 ambiguity in the Convention by providing that the relevant law of this state is law “other than
29 this act.”
30

31 Second, Article 9(g) provides that the inconsistent judgment must be one of “another
32 State.” In a federalist State, such as the United States, the Convention language seems to leave a
33 lacuna in the law – what if the inconsistent judgment is neither one of “this state” nor one of a
34 foreign country, but rather is one of another state of the United States? Section 9(a)(8) resolves
35 this ambiguity by providing that the inconsistent judgment must be that of “another jurisdiction,”
36 thus including inconsistent judgments of another U.S. state within the rule of subsection 9(a)(8).
37 This resolution of the issue seems consistent with Article 25(c) of the Convention, which
38 provides that “any reference to the court or courts of a State shall be construed as referring,
39 where appropriate, to the court or courts in the relevant territorial unit.” It also is consistent with
40 full faith and credit principles applicable between states of the United States.
41

42 This second issue also is raised by the Convention language in Article 9(f), which refers
43 to an inconsistent judgment of the “requested State.” Subsection 9(a)(7) resolves this issue by
44 providing that the inconsistent judgment must be one of “a court of this state” (small “s”), rather
45 than a court of the United States (big “S”). Again, this interpretation seems consistent with
46 Article 25(c).

1 It should be noted that, while interpreting “State” as including states of the United States
2 in subsection 9(a)(8) gives that subsection a broader reach, the same interpretation in subsection
3 9(a)(7) provides a narrowing interpretation of that section.
4

5 Note: These issues were discussed by the Committee at its November 2008 meeting.
6

7 7. Subsection 9(a)(9) is based on Article 11 of the Convention.
8

9 8. Subsection 9(b)(1) is based on Article 10 (1)&(2) of the Convention. Neither a ruling
10 on a matter excluded from the coverage of this [act] under section 3, or such an issue raised as a
11 preliminary question necessary to the court’s ultimate decision of an issue within the scope of
12 this Act, is given preclusive effect under this Act. *See* Report ¶194.
13

14 9. Subsection 9(b)(2) is based on Article 10(3) of the Convention.
15
16

17 **SECTION 10. RECOGNITION OF JUDGMENTS BASED ON CONTRACTS OF**
18 **INSURANCE.** Recognition of a judgment regarding liability under the terms of a contract of
19 insurance or reinsurance may not be limited or refused on the ground that the liability under that
20 contract includes liability to indemnify the insured or reinsured in respect of:

21 (1) a matter to which this [act] does not apply; or

22 (2) an award of damages to which subsection 9(a)(9) might apply.

23 **Reporters’ Notes**
24

25 1. Section 10 is based on Article 17(2) of the Convention.
26
27

28 **SECTION 11. RECOGNITION OF JUDGMENT RENDERED BY COURT**
29 **CHOSEN IN A NON-EXCLUSIVE CHOICE OF COURT AGREEMENT.**

30 (a) “Non-exclusive choice of court agreement” means a choice of court agreement,
31 concluded or documented in a record, that designates the courts, or one or more specific courts,
32 of one or more member countries as fora in which an action may be brought for the purpose of
33 deciding disputes which have arisen or may arise in connection with a particular legal
34 relationship.

1 (b) Except as otherwise provided in subsection (c), a court of this state shall recognize
2 and enforce a judgment rendered by the court of another member country designated in a non-
3 exclusive choice of court agreement in the same manner and to the same extent that it would
4 recognize and enforce a judgment rendered by a chosen court of a member country designated in
5 an exclusive choice of court agreement under this [act], if that member country has made a
6 declaration pursuant to Article 22 of the Convention that its courts will recognize and enforce
7 judgments given by courts [of other member countries] [of the United States or a state of the
8 United States] when such courts are designated in a non-exclusive choice of court agreement.

9 (c) A judgment of a member country court designated in a non-exclusive choice of court
10 agreement shall be recognized under this [act] only if:

11 (i) there is no other existing judgment between the same parties on the same cause
12 of action given by another court before which proceedings could have been brought in
13 accordance with the non-exclusive choice of court agreement;

14 (ii) there is no other proceeding pending between the same parties on the same
15 cause of action in any other court before which proceedings could have been brought accordance
16 with the non-exclusive choice of court agreement; and

17 (iii) in the situation where another proceeding that was pending between the same
18 parties on the same cause of action in any other court has been dismissed before final judgment,
19 the member country court of origin was the court first seized.

20 **Reporters' Notes**

21 1. Section 11 is based on the language of Article 22. It assumes that the United States
22 will take the declaration permitted under Article 22 of the Convention, which provides for
23 reciprocal recognition and enforcement of judgments rendered by the courts of member countries
24 chosen in a non-exclusive choice of court agreement in certain circumstances.

25
26 2. Subsection 11(a) defines "non-exclusive choice of court agreement." The Report

1 states that a non-exclusive choice of court agreement under Article 22 must satisfy four
2 requirements: (1) it must be in the form required by Article 3(c) of the Convention (that is, it
3 must be, in the language of the Act, “concluded or documented in a record”); (2) the parties must
4 have consented to it (that is, it must be an “agreement”); (3) the chosen court must be designated
5 for the purpose of deciding disputes that have arisen or may arise in connection with a particular
6 legal relationship; and (4) the agreement must designate a court or the courts of one or more
7 member countries. Report ¶242.
8

9 3. Subsection 11(b) provides that when a reciprocal declaration has been made under
10 Article 22 of the Convention, a court of this state “shall recognize and enforce a judgment
11 rendered by the court of another member country designated in a non-exclusive choice of court
12 agreement in the same manner and to the same extent that it would recognize and enforce a
13 judgment rendered by a chosen court of a member country designated in an exclusive choice of
14 court agreement under this [act].” Thus, a court of this state has the same obligation to recognize
15 and enforce such judgments as it does to recognize and enforce judgments of a chosen court
16 under an exclusive choice of court agreement, and recognition and enforcement of such
17 judgments is subject to all the requirements, limitations, and exceptions applicable to
18 recognition and enforcement of judgments of a chosen court under an exclusive choice of court
19 agreement, including the scope provisions of section 2 of the Act, the requirements for
20 recognition of section 8, and the exceptions to recognition contained in section 9. In addition,
21 recognition and enforcement of such judgments is subject to the additional exceptions stated in
22 subsection 11(c). See Report, ¶¶243, 245.
23

24 4. Subsection 11(c) states grounds for denying recognition and enforcement applicable
25 only to a judgment rendered by a member country designated in a non-exclusive choice of court
26 agreement. It provides that “recognition or enforcement is not mandatory when there exists a
27 judgment given by any other court before which proceedings could be brought in accordance
28 with the non-exclusive choice of court agreement or where there exists a proceeding pending
29 between the same parties in any other such court on the same cause of action, regardless of
30 whether such proceedings were commenced before or after those before the chosen court or
31 whether such judgment was given before or after that of the chosen court.” Report ¶245. Section
32 11(c)(iii) deals with the situation in which there were proceedings before another court that did
33 not result in a final judgment and are not still pending. In that situation, the member country
34 court of origin must have been the first seized with jurisdiction over the action. Report ¶251.
35

36 **SECTION 12. DOCUMENTS TO BE PRODUCED IN CONNECTION WITH**
37 **REQUEST FOR RECOGNITION.**

38 (a) A party seeking recognition of a judgment under this [act] shall produce:

39 (1) a complete and certified copy of the judgment;

40 (2) the exclusive choice of court agreement, a certified copy of that agreement, or

1 other evidence of its existence;

2 (3) if the judgment was given by default, the original or a certified copy of a
3 document establishing that the document which instituted the proceedings in the chosen court or
4 an equivalent document was notified to the defaulting party; and

5 (4) any documents necessary to establish that the judgment has effect or, where
6 applicable, is enforceable in the country of origin.

7 (b) If the terms of a judgment for which recognition is sought do not permit the court to
8 verify whether the conditions of this [act] have been complied with, the court may require any
9 documents necessary to show compliance.

10 (c) An application for recognition of a judgment may be accompanied by a document
11 issued by a court or an officer of a court of the country of origin, in the form recommended and
12 published by the Hague Conference on Private International Law.

13 (d) If the documents required to be produced under this section are not in English, they
14 must be accompanied by a certified translation into English.

15 (e) All documents forwarded or delivered under this [act] are exempt from legalization or
16 any analogous formality, including Apostille.

17 **Reporters' Notes**

18
19 1. Section 12 is based on Article 13 of the Convention, except for subsection (e), which is
20 based on Article 18. The section tracks the language of those articles.
21

22 **SECTION 13. ENFORCEMENT OF JUDGMENT RECOGNIZED BY THIS** 23 **STATE.**

24 (1) If a court of this state recognizes a judgment rendered by a chosen court of a member
25 country pursuant to this [act], upon request of the party in whose favor the judgment was granted,

1 the court shall enforce the judgment in the same manner and to the same extent as a judgment
2 rendered in this state.

3 (2) A judgment may be enforced in this state only if it is enforceable in the country of
4 origin.

5 **Reporters' Notes**

6 1. Subsection 13(1) is based on Article 8(1) of the Convention and section 7 of the
7 UFCMJRA.

8 2. Subsection 13(2) is based on Article 8(3) of the Convention.
9
10

11 **SECTION 14. JUDICIAL SETTLEMENTS.** Judicial settlements that have been
12 approved by a chosen court of a member country, or that have been concluded before that court in
13 the course of proceedings, and which are enforceable in the same manner as a judgment in the
14 country of origin, must be enforced under this [act] in the same manner as a judgment.

15 **Reporters' Notes**

16 1. Section 14 is based on Article 12 of the Convention and largely tracks its language.
17

18 **SECTION 15. SEVERABILITY.** A court of this state shall recognize or enforce a
19 severable part of a judgment if recognition or enforcement of only that part is applied for or only
20 part of the judgment is capable of being recognized and enforced under this [act].

21 **Reporters' Notes**

22 1. Section 15 is based on Article 15 of the Convention, and tracks its language.
23

24 **[SECTION 16. PROCEDURE FOR RECOGNITION OF JUDGMENT.**

25 (a) If recognition of a judgment is sought as an original matter, the issue of recognition

1 must be raised by bringing an action seeking recognition of the judgment.

2 (b) If recognition of a judgment is sought in a pending action, the issue of recognition may
3 be raised by counterclaim, cross-claim or affirmative defense.]

4 **Reporters' Notes**

5 1. This section is based on section 6 of the UFCMJRA. It is included here as a bracketed
6 section for discussion at the request of the Drafting Committee at its November 2008 meeting.
7

8 **[SECTION 17. STATUTE OF LIMITATIONS APPLICABLE TO RECOGNITION**
9 **PROCEEDINGS.** An action to recognize a judgment under this [act] must be commenced
10 within the earlier of the time during which the judgment has effect between the parties in the
11 country of origin or 15 years from the date the judgment became effective between the parties in
12 the country of origin.]

13 **Reporters' Notes**

14 1. This section is based on section 9 of the UFCMJRA. It is included here as a bracketed
15 section for discussion at the request of the Drafting Committee at its November 2008 meeting.
16

17 **SECTION 18. STAY OF PROCEEDINGS PENDING APPEAL OF JUDGMENT.**
18 If a party establishes that an appeal of a judgment of a chosen court is pending or will be taken in
19 the country of origin, the court may stay any proceedings with regard to recognition or
20 enforcement of the judgment until the appeal is concluded, the time for appeal expires with no
21 appeal having been taken, or the appellant has had sufficient time to prosecute the appeal and has
22 failed to do so.

23 **Reporters' Notes**

24 1. Section 18 is based on Section 8 of the UFCMJRA.
25
26 2. Article 14 of the Convention provides that the procedures for recognition and
27 enforcement are governed by the law of the requested State unless the Convention provides

1 otherwise. The Convention contains no provision with regard to stay of recognition or
2 enforcement proceedings. This section provides for a procedure similar to that available with
3 regard to recognition of foreign country money judgments under the Uniform Foreign Country
4 Money Judgment Recognition Act.
5

6 **SECTION 19. INTERNATIONAL CHARACTER; UNIFORMITY OF**
7 **INTERPRETATION.** The purpose of this [act] is to implement the Hague Convention of 30
8 June 2005 on Choice of Court Agreements in this state. In applying and construing this [act],
9 consideration shall be given both to its character as a law implementing an international
10 convention and to its character as a uniform law, and to the need to promote uniformity of
11 interpretation with respect to its subject matter among the states that enact it, and among member
12 countries to the convention that it implements.

13 **Reporters' Notes**

- 14 1. Section 19 is based on the standard ULC language and Article 23 of the Convention.
15
16 2. The Report states that the uniformity provision of Article 23 requires courts
17
18 to interpret [the Convention] in an international spirit so as to promote uniformity
19 of application. Where reasonably possible, therefore, foreign decisions and writing
20 should be taken into account. It should also be kept in mind that concepts and
21 principles that are regarded as axiomatic in one legal system may be unknown or
22 rejected in another. The objectives of the Convention can be attained only if all
23 courts apply it in an open-minded way.
24
25 Report ¶256. As the implementing legislation for the Convention in this state, this Act should be
26 interpreted in a similar fashion.
27

28 **SECTION 20. SAVINGS CLAUSE.** This [act] does not prevent the enforcement of a
29 choice of court agreement not within the scope of this [act] or recognition and enforcement of a
30 judgment not within the scope of this [act] under principles of comity or otherwise.

31 **Reporters' Notes**

- 32 1. Section 19 is based in part on Section 11 of the UFCMJRA.

1 **Example 1:** A and B entered into an exclusive choice of court agreement on February 3,
2 2011 selecting the courts of New York as their exclusive forum. The Convention enters into force
3 in the United States on July 1, 2011. The New York legislature passes this Act, with an effective
4 date of February 1, 2011. A files an action in New York state court on March 1, 2011. This Act
5 will not apply to the parties' exclusive choice of court agreement because the Convention had not
6 yet entered into force in the United States when the exclusive choice of court agreement was
7 concluded. Therefore, New York will not be under an obligation under this Act to hear the case
8 See Report, ¶220, Example 1. Whether the New York court would hear the case would be
9 determined by other law of New York.

10
11 **Example 2:** Assume the same facts as in Example 1, except that the parties had entered
12 into the exclusive choice of court agreement on July 2, 2011. Because the exclusive choice of
13 court agreement would have been entered into after the Convention entered into force with regard
14 to the United States, then this Act would apply and the New York state court would be under an
15 obligation to hear the case under this Act.

16
17 **Example 3:** A and B entered into an exclusive choice of court agreement selecting the
18 courts of London, England on February 3, 2011. The Convention enters into force in the United
19 States on January 1, 2011. The Convention enters into force in the United Kingdom on August 1,
20 2011. The New York legislature passes this Act, with an effective date of February 1, 2011. B
21 files an action in New York state court on July 15, 2011. This Act will not apply to the parties'
22 exclusive choice of court agreement because, the exclusive choice of court agreement was
23 concluded before the Convention entered into force in the United Kingdom, the country of the
24 chosen court. This will be the result even though the exclusive choice of court agreement was
25 concluded and the proceedings were filed in New York after the Convention had entered into
26 force with regard to the United States. When the question is applicability of the Act to a
27 proceeding filed in a court in a country other than that of the chosen court, both subsection (a) and
28 subsection (b) apply. Therefore, the New York state court will not have an obligation under this
29 Act to dismiss the proceedings filed by B. Whether the New York court would dismiss the
30 proceedings in favor of the chosen forum would be determined by other law of New York.

31
32 **Example 4:** Assume the same facts as in Example 3, except that the Convention enters
33 into force with regard to the United Kingdom on January 1, 2011 and with regard to the United
34 States on August 1, 2011. The result would be the same as in Example 3 because, although in this
35 example the exclusive choice of court agreement was concluded after the Convention entered into
36 force with regard to the country of the chosen court, the proceeding was commenced in the New
37 York court before the Convention entered into force with regard to the United States. See Report
38 ¶220, Example 2.

39
40 **Example 5:** A and B entered into an exclusive choice of court agreement on February 3,
41 2010 selecting the courts of London, England as their exclusive forum. Assume that this date is
42 after the date on which the Convention entered into force with regard to the United Kingdom. A
43 obtained a judgment against B in the chosen court in London. The New York legislature passes
44 this Act with an effective date of February 1, 2011. A files an action for recognition and
45 enforcement of the London judgment in New York state court on March 1, 2011. The Convention
46 enters into force with regard to the United States on July 1, 2011. This Act will not apply to A's

1 action for recognition and enforcement because that action was filed before the Convention
2 entered into force in the United States. Therefore, the New York state court will not be under an
3 obligation under this Act to recognize and enforce the London court judgment. Whether the
4 London court judgment would be entitled to recognition and enforcement would be determined by
5 the other law of New York.
6

7 **Example 6:** Assume the same facts as in Example 5, except that the Convention enters
8 into force with regard to the United States on February 15, 2011. Because the Convention had
9 entered into force in the United Kingdom – the country of the chosen court -- when the parties
10 concluded their exclusive choice of court agreement, and had entered into force in the United
11 States – the country of the court seized – when A filed the action seeking recognition and
12 enforcement of the London judgment in the New York state court, this Act will apply to A’s
13 action for recognition and enforcement, and the New York state court will be under an obligation
14 to recognize and enforce the London judgment in accordance with this Act. See Report ¶220,
15 Example 2.
16

17 3. A convention enters into force with regard to the United States at the time designated in
18 the convention after the time when the President deposits the instrument of ratification with the
19 depositary designated in the convention, if the convention also is in force internationally. A
20 convention enters into force internationally at the time designated in the convention. If the United
21 States deposits its instrument of ratification before the convention is in force internationally, then
22 the convention enters into force with regard to the United States at the time that it enters into force
23 internationally. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS
24 LAW OF THE UNITED STATES §312 cmt. *j*. Article 31 of the Convention provides that the
25 Convention enters into force internationally “on the first day of the month following the
26 expiration of three months after deposit of the second instrument of ratification, acceptance,
27 approval or accession” to the Convention. For countries becoming parties to the Convention after
28 it enters into force internationally, the Convention enters into force “on the first day of the month
29 following the expiration of three months after the deposit of its instrument of ratification,
30 acceptance, approval or accession.” Art. 31(2)(a).
31

32 4. Section 21(c) is based on Section 12 of the UFCMJRA.
33

34 **QUERY: DID I GET THIS RIGHT?**
35

36 **NOTE: THE REPORT STATES THAT THE ARTICLE 16 TRANSITION PROVISIONS**
37 **DO NOT APPLY TO ARTICLE 22 (SECTION 11 OF THE ACT) DEALING WITH**
38 **RECIPROCAL RECOGNITION AND ENFORCEMENT OF NON-EXCLUSIVE**
39 **CHOICE OF COURT AGREEMENTS. REPORT ¶254. INSTEAD, IT WAS**
40 **CONTEMPLATED THAT THE DECLARATION UNDER ARTICLE 22 WOULD**
41 **SPECIFY THE EXTENT OF ANY RETROACTIVE EFFECT. WE THUS WILL NEED**
42 **TO KNOW THE TERMS OF THE U.S. DECLARATION BEFORE ESTABLISHING**
43 **TRANSITIONS PROVISIONS FOR SECTION 11.**