

D R A F T
FOR DISCUSSION ONLY

CHOICE OF COURT AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For October 16-17, 2009 Drafting Committee Meeting

With Prefatory Note and Reporters' Notes

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ON UNIFORM STATE LAWS

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October 5, 2009

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TABLE OF CONTENTS

PREFATORY NOTE	4
SECTION 1. SHORT TITLE	1
SECTION 2. PURPOSE	1
SECTION 3. DEFINITIONS	1
SECTION 4. SCOPE	9
SECTION 5. EXCLUSIVE CHOICE OF COURT AGREEMENT AS INDEPENDENT AGREEMENT	18
SECTION 6. WHEN CHOICE OF COURT AGREEMENT DEEMED EXCLUSIVE	18
SECTION 7. RESIDENCE OF AN ORGANIZATION	19
SECTION 8. DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION	20
SECTION 9. DUTY OF COURT NOT CHOSEN TO DECLINE JURISDICTION	23
SECTION 10. RECOGNITION OF JUDGMENT OF CHOSEN COURT OR COURT TO WHICH CASE HAS BEEN TRANSFERRED	24
SECTION 11. EXCEPTIONS TO RECOGNITION OF A JUDGMENT	26
SECTION 12. PRELIMINARY QUESTIONS	29
SECTION 13. NON-COMPENSATORY DAMAGES	30
SECTION 14. RECOGNITION OF JUDGMENTS BASED ON CONTRACTS OF INSURANCE	30
SECTION 15. RECOGNITION OF JUDGMENT RENDERED BY COURT CHOSEN IN NON-EXCLUSIVE CHOICE OF COURT AGREEMENT	31
SECTION 16. DOCUMENTS TO BE PRODUCED IN CONNECTION WITH REQUEST FOR RECOGNITION	32
SECTION 17. ENFORCEMENT OF JUDGMENT RECOGNIZED BY THIS STATE	34
SECTION 18. JUDICIAL SETTLEMENTS (<i>TRANSACTIONS JUDICIAIRES</i>)	34
SECTION 19. SEVERABILITY	36
SECTION 20. PROCEDURE FOR RECOGNITION OF JUDGMENT	36
SECTION 21. STATUTE OF LIMITATIONS APPLICABLE TO RECOGNITION PROCEEDINGS	36
SECTION 22. STAY OF PROCEEDINGS PENDING APPEAL OF JUDGMENT	36
SECTION 23. INTERNATIONAL CHARACTER; UNIFORMITY OF INTERPRETATION	37
SECTION 24. SAVINGS CLAUSE	38
SECTION 25. TRANSITION PROVISIONS	38
SECTION 26. EFFECTIVE DATE	44

CHOICE OF COURT AGREEMENTS ACT

PREFATORY NOTE

I. Introduction

The Hague Choice of Court Agreement Act, in conjunction with federal legislation, will implement the Hague Convention on Choice of Court Agreements in the United States.¹ The Convention, the product of over a decade of multilateral negotiations, validates party autonomy by enforcing exclusive choice of court agreements and the judgments that result from them, as will the Act.² The Convention is an immeasurably valuable treaty that will help create certainty and predictability for transactional planning, validate party autonomy, facilitate the free movement of judgments, and provide a foundation for further cooperation and harmonization of law. Implementation through a federal statute including provisions for states to choose to opt into the Uniform Law will allow this area to continue to incorporate state law, facilitating greater consistency with existing state law in the broader area of judgment recognition and enforcement.

II. History of the Hague Convention on Choice of Court Agreements

The Act is best viewed in the context of the Hague Convention on Choice of Court Agreements and its history. The United States is not a party to any bilateral or multilateral agreements on the recognition and enforcement of foreign civil judgments. Currently, the recognition and enforcement of judgments is a matter of state rather than federal law, and in more than 30 states there is a highly successful Uniform Law that covers foreign money judgments.³ While the Uniform Law and state common law control the recognition and enforcement of incoming foreign judgments, US private parties often are unable to enforce US judgments abroad with the same degree of success as incoming judgments. In light of this, the US encouraged The Hague Conference on Private International Law, beginning in 1992-93, to undertake drafting a multilateral convention on jurisdiction and the recognition and enforcement of judgments. Negotiations continued until 2001, when an Interim Draft was produced at a diplomatic session. Following this session it was clear that no workable comprehensive jurisdiction and judgments convention was likely to result, due to multiple obstacles, including the rise of the internet and electronic commerce, the role of the consumer, and the increased integration of the European Community.

¹ The implementation structure is discussed in more detail below. The final implementation structure has not yet been determined by the US Department of State.

² There is an optional Declaration (Article 22) which allows reciprocal enforcement of judgments resulting from nonexclusive choice of court agreements.

³The reference to “Uniform Law” is to the Uniform Foreign-Money Judgments Recognition Act (1962) or as revised in the Uniform Foreign Country Money-Judgments Recognition Act (2005).

After the stalemate in 2001, some country members of the Hague Conference called for a less inclusive convention, a choice of court/forum convention that would enforce forum selection clauses and the resulting judgments, much as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) does with arbitration clauses and subsequent arbitral awards. A choice of court convention would have a positive impact not only on dispute resolution but also on transactional planning, providing enforcement for exclusive choice of court clauses as well as for the resulting judgments. Following several meetings, a final text was completed and signed at a diplomatic session in June 2005.

III. Structure of the Hague Convention on Choice of Court Agreements

The Convention is broken into four chapters: (1) scope, exclusions, definitions; (2) jurisdiction or what we view as enforcement of choice of forum clauses; (3) recognition and enforcement, in this case of the resulting judgments; and (4) general provisions in international instruments and relationship to other instruments. The Convention applies to exclusive choice of court agreements in civil or commercial matters not excluded from scope under Article 2 or under Declarations. The Convention requires that the chosen court in an “exclusive choice of court agreement”⁴ must accept jurisdiction and thus is obligated to hear the dispute (Article 5). The Convention also requires a nonchosen court “to suspend or dismiss proceedings.” (Article 6). Within this general context, there are exceptions. These are not primarily defined by autonomous terms in the Convention, but instead by reference to the appropriate national (State) law, in some cases including the jurisdiction’s choice of law rules. Since much of the area in US law is governed by state law, especially state substantive law, that law would determine both the scope of the Convention and the exceptions to jurisdiction. The Convention also requires member states to recognize and enforce a judgment given by the chosen court (Article 8), with Article 9 providing exceptions similar to Article 6 and a choice of law rule as well. Recognition and enforcement of a judgment that results from an exclusive choice of court clause designating a member state may be refused generally only if the agreement is null and void according to the chosen court’s whole law, the party lacked capacity under the law of the requested state, the defendant didn’t have sufficient notice, the judgment was obtained by fraud, or the recognition would be “manifestly incompatible” with public policy.

IV. Changes to Existing Law in the United States

There are several aspects of existing U.S. law that will be affected by the Convention. The Act accommodates these and the Reporter’s Notes have highlighted them where possible. The more significant changes are in the jurisdiction or enforcement of the choice of law clauses (Chapter II) rather than in the recognition or enforcement of the resulting judgment (Chapter III).

In some respects, there will be less opportunity for variation among existing state law. For example, many states now vary on aspects of formal validity required in a choice of court/forum clause, such as bold type face or size of font required for the clause to be effective.

⁴ An exclusive choice of court agreement is defined in Article 3, as modified by exclusions under Article 2 (Exclusions from scope).

The Convention defines formal validity as requiring a writing or its equivalent (Article 3(c)) and this is included in the Act in the definitions of a “choice of court agreement” and “record” (Section 3(1) and (12).) Nothing more is or may be required by state law for formal validity, thus limiting existing state variations.

A. Presumption of Exclusivity

The most significant change is the presumption of exclusivity. Under Article 3 (b), the Convention provides that if a choice of court agreement designates the courts of only one country, the agreement is deemed to be exclusive unless otherwise “expressly provided.”⁵ This presumption is contrary to that applied by the majority of state courts or federal courts in diversity which generally requires specific language of exclusion. This presumption has been highlighted by including a separate provision, Section 6, given the significant change from existing law.

B. Exclusion of Forum Non Conveniens

A second significant change is in the area of forum non conveniens. Article 5(2) of the Convention provides that where a court has jurisdiction, the court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.” The doctrine of forum non conveniens exists in federal courts and in most state court systems, providing a mechanism for dismissal of cases that are more appropriately heard by other courts, for reasons which may include the lack of connection to the forum. Approximately 47 states have some version of forum non conveniens and not all are identical to federal doctrine. At least twenty-two states have enacted forum non conveniens statutes or promulgated rules of civil procedure. Some of these statutes are designed to address certain types of cases, many of which are outside the scope of the Convention. The majority of states have been able to avoid hearing cases which are not sufficiently connected or related to the forum through the doctrine of forum non conveniens. This possibility will be circumscribed in connection with those cases that fall under the Convention where the parties have selected an exclusive forum. The application of Article 5(2) then mandates that the chosen court has no discretion to dismiss for forum non conveniens in this circumstance.

The Convention does, however, specifically limit the application of Article 5(2) so that a court without subject matter jurisdiction is not forced to hear a case. Article 5(3) provides:

3. The preceding paragraphs shall not affect rules -
 - a) on jurisdiction related to subject matter or to the value of the claim;
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State.However, where the chosen court has discretion as to whether to transfer a case, due

⁵ Article 3 (b) provides:

- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

consideration should be given to the choice of the parties.

The current draft of the Act provides for these unrelated cases that were often previously avoided by forum non conveniens in state and federal court by doctrines of subject matter jurisdiction in optional Section 8 [c].

C. Validity and Enforceability of Choice of Court Clause

As mentioned above, the Convention only addresses validity in terms of form, not substance. The Convention leaves open to national law questions of substantive validity, but does, however, include choice of law rules for aspects of that decision. The Convention requires that questions of whether an agreement is invalid (null and void) are to be made under “the law of the chosen court,” Article 5 (1), with “law” including the choice of law rules of the chosen court. Thus, in a choice of court agreement with Oslo as the chosen forum, the question of validity by a nonchosen Minnesota court would be determined under the whole law of Norway. This approach could vary from that currently used where the state choice of law rules differ from that of the chosen court’s law. The nonchosen court may decide questions of capacity under its law, with the whole law being implicated. Since there are no federal choice of law rules for contracts, the determination, even by a federal court, will be according to the state in which the court is located. In connection with the Convention, there is the complication of a US state or federal court looking at a choice of court agreement in an international case that selects London for example, being faced with determining the validity of the agreement under English law, including its choice of law rules, and the impact of European Regulation.

V. Existing State and Uniform Law

As mentioned above, the US is not a party to any bilateral or multilateral convention on the recognition and enforcement of civil judgments and is not likely to become one in the near future, other than the Convention once ratified by the US. The recognition and enforcement of judgments is currently a matter of state rather than federal law. The Uniform Law Commission has produced two highly successful and widely adopted Acts covering the area of money judgments from foreign countries, a portion of the area that will be affected by the Convention. Even in those states that have not adopted either the Uniform Foreign-Money Judgments Recognition Act (1962) or the revised Uniform Foreign Country Money-Judgment Recognition Act (2005), the law governing recognition in a federal court is generally state law. Questions of existence, validity, and effect of a choice of court agreement are also matters largely still governed by state law, especially state contract law. Although the National Conference previously drafted a model law covering choice of court agreements, the Model Choice of Forum Act, approved in 1968, was withdrawn in 1975 after only three states had adopted it. Its principles continue to influence the development of the common law in this area.⁶

⁶ For a recent example of its influence, see The American Law Institute, Principles of the Law of Software Contracts §1.14, Reporter’s Notes (Discussion Draft, March 30, 2007) (stating that the test for when an agreed forum may be found unreasonable or unfair is taken from the Model Choice of Forum Act).

The Act is drafted to work in conjunction with the existing UFCMJRA, especially in the area of recognition and enforcement, such as procedures for recognition (Section 20), statutes of limitations (Section 21), and stays (Section 22). There will be some differences, such as when the Act applies, it may limit a state's grounds for nonrecognition of a judgment under the UFCMJRA (e.g., for an inconvenient forum with tag jurisdiction). The Act affects only a small area of judgments -- those that result from exclusive choice of court agreements -- and its application is not limited to money judgments (Section 3(8)). Thus there is only a limited area of overlap with the UFCMJRA.

VI. Drafting Principles

The Act attempts to integrate the Convention into state law. Because of the implementation through conditional preemption and allowing states to opt out of the federal statute into an approved state uniform law, there are multiple documents that have been considered in drafting the Act, not only the Convention and the federal implementing statute, but also existing state uniform laws. The main drafting principle has been to remain as faithful as possible to the Convention text except where variation is necessary, and then while maintaining the integrity of the original text. This approach helps in the application of the Act which will be used by lawyers and judges from other countries who are called upon to interpret our law. In addition, the official Hague Report that accompanies the Convention and commentary from scholars will refer to language and provisions based on that in the Convention. Conforming language will facilitate this process and accord with the requirements under Article 23 of the Convention and Section 23 of the Act for interpretation that is uniform among states and member countries. Language consistency between the Convention, the federal implementing legislation, and the Act will also help insure uniform interpretation of important provisions.

There are, however, areas that reflect the realities of the need for accessibility by judges and lawyers in this country who will not be familiar with international terms or concepts. In some cases the language has been modified to simplify the Convention for a common law tradition; in other cases where the language has been retained, detailed Reporter's Notes call attention to the differences. For example, the concept of residence for entities other than natural persons is provided for in Article 4(2) of the Convention. In Section 7, detailed Reporter's Notes supplement the terms such as "statutory seat" which may not be familiar to common law practitioners. The same is true in Section 18 (Article 12 in the Convention) which introduces the civil law concept of "judicial settlement."

There are also terms and phrases that have an international character or meaning and are not defined in the Convention or Act but have a shared meaning that is "autonomous" to the Convention or other like conventions and does not look first to national law. For example, "civil or commercial matter" has a recognized meaning in Hague Conventions. The phrases "manifestly incompatible with public policy" or "manifest injustice" are to be given an autonomous meaning, that is the reference is not merely to national (or in the US, often state) law.

This form of implementation of an international convention through a uniform state law and federal statute provides the best mechanism for maintaining state law while meeting the

needs for multilateral agreements that increasingly address areas that have been traditionally in the realm of state law. This Act, therefore, strives to maintain the integrity of both existing state law and the international treaty while providing accessible law for bar and bench domestically.

1 **CHOICE OF COURT AGREEMENTS ACT**

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

5 **SECTION 2. PURPOSE.** The purpose of this [act] is to implement the Hague
6 Convention of 30 June 2005 on Choice of Court Agreements in this state.

7 **[SECTION 2. IMPLEMENTATION OF CONVENTION.** This [act] implements the
8 Hague Convention of 30 June 2005 on Choice of Court Agreements in this state.]

9 **Reporters' Notes**

10 1. At its February 2009 drafting committee meeting, the Committee decided to add a
11 statement of purpose to emphasize the role of the Act as the implementation of an international
12 convention. At the 2009 ULC annual meeting, a comment was made that uniform acts normally
13 do not contained statements of purpose. The bracketed language would avoid the style issue.
14

15 **SECTION 3. DEFINITIONS.** In this [act]:

16 (1) "Choice of court agreement" means an agreement between two or more persons,
17 concluded or documented in a record, which designates the court or courts of one or more
18 member countries for the purpose of deciding disputes that have arisen or may arise in
19 connection with a particular legal relationship.

20 (2) "Chosen court" means the court or courts within a member country designated in an
21 exclusive choice of court agreement.

22 (3) "Convention" means the Hague Convention of 30 June 2005 on Choice of Court
23 Agreements.

24 (4) "Country of origin" means the member country in which the court of origin is located.

25 (5) "Court of origin" means the court that granted the judgment.

1 (6) “Exclusive choice of court agreement” means a choice of court agreement that
2 designates the courts of only one member country or one or more specific courts of only one
3 member country, unless the parties expressly provide that the choice of court agreement is not
4 exclusive.

5 (7) “International case”:

6 (A) for purposes of application of the provisions of this [act] relating to
7 enforcement of a choice of court agreement, means any case other than a case in which:

8 (i) all the parties are exclusively residents of the same member country;

9 and

10 (ii) the relationship of the parties and of all other elements relevant to the
11 dispute, regardless of the location of the chosen court, are only with that country; or

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

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

19 (9) “Member country” means a country or regional economic integration organization
20 that is a Contracting State to the Convention.

21 (10) “Non-exclusive choice of court agreement” means a choice of court agreement as
22 defined in Section (3)(1) that is not an exclusive choice of court agreement under Section (3)(6).

23 (11) “Person” means an individual, corporation, business trust, estate, trust, partnership,

1 limited liability company, association, joint venture, government or governmental subdivision,
2 agency or instrumentality, public corporation, or any other legal or commercial entity.

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

5 (13) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
6 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
7 the United States.

8 **Reporters’ Notes**

9
10 1. Subsection (1) is based in part on the requirements of Article 3 of the Convention with
11 regard to exclusive choice of court agreements. Under the Convention, an exclusive choice of
12 court agreement must meet five requirements: (1) there must be an agreement between two or
13 more parties; (2) the agreement must be “concluded or documented” in a record; (3) the
14 agreement must designate the courts of one country or one or more specific courts in one country
15 to the exclusion of all other courts; (4) the designated courts must be the courts of a member
16 country; and (5) the designation must be for the purpose of deciding disputes that have arisen or
17 may arise in connection with a particular legal relationship. Report ¶93. The definition of
18 “choice of court agreement” in this Act meets all of the requirements to be an exclusive choice of
19 court agreement other than the requirement that the agreement must designate the courts, or one
20 or more specific courts, of only one member country. The definition of “choice of court
21 agreement” is important in distinguishing between the exclusive choice of court agreements to
22 which this Act normally applies and those nonexclusive choice of court agreements to which the
23 Act applies between the United States and another member country who has made a reciprocal
24 declaration under Article 22 of the Convention. See section 15 of this Act.

25
26 2. Subsection (2) defines the key term “chosen court.” Under section 8 of this Act, the
27 chosen court, subject to certain exceptions, is the only court entitled to hear the case, and section
28 9 of this Act normally requires other courts to decline jurisdiction in favor of the chosen court.
29 Further, under section 10 of this Act, other member country courts, again subject to certain
30 exceptions, must recognize a judgment rendered by the chosen court.

31
32 3. Subsection (4) is based on the definition of “State of origin” in the Report, page 21.
33 The defined term has been changed to “country of origin” in order to avoid confusion with the
34 term “state,” which refers to a state of the United States.

35
36 4. Subsection (5) is based on the definition of the same term in the Report, page 21, and
37 closely follows that definition.

38
39 5. Subsection (6) defines the key term “exclusive choice of court agreement.” That term

1 is a crucial one in defining the scope of this Act under Section 4. Except with regard to choice of
2 court agreements meeting the requirements of section 15 of this Act, this Act applies only to
3 exclusive choice of court agreements. “Exclusive choice of court agreement” is defined in
4 Article 3 of the Convention. Such agreements must meet five requirements: (1) there must be an
5 agreement between two or more parties; (2) the agreement must be “concluded or documented”
6 in a record; (3) the agreement must designate the courts of one country or one or more specific
7 courts in one country to the exclusion of all other courts; (4) the designated courts must be the
8 courts of a member country; and (5) the designation must be for the purpose of deciding disputes
9 that have arisen or may arise in connection with a particular legal relationship. Report ¶93. The
10 combination of the definition of “choice of court agreement” in subsection 1 and the definition of
11 “exclusive choice of court agreement” in subsection 6 meet these Convention requirements.
12 Each of these requirements is discussed below.
13

14 6. The first requirement for an exclusive choice of court agreement is that it must result
15 from an agreement between two or more parties; it cannot be established unilaterally. The
16 determination as to whether or not there is an agreement is left to state law other than this Act.
17

18 In some instances, this Act designates which state’s law (including its choice of law
19 rules) will apply to the determination of certain matters. Sections 8(b)(1), 9(1), and 11(1) direct
20 the determination as to whether an agreement is “null and void” be determined under the law of
21 the chosen court. Section 9(2) and (3) refer to the law of the court seized with regard to the issues
22 of lack of capacity and public policy. Section 11 (2) and (6) refers to the law of the court asked
23 to recognize a judgment with regard to determination of the issues of capacity and public policy,
24 and section 11(4) refers to that law with regard to fundamental principles concerning service of
25 documents.
26

27 The fundamental question as to whether there was an agreement between the parties,
28 however, is determined by the law of the court asked to apply this Act. The Report states that
29

30 the Convention as a whole comes into operation only if there is a choice of court
31 agreement, and this assumes that the basic factual requirements of consent exist.
32 If, by any normal standards, these do not exist, a court would be entitled to assume
33 that the Convention is not applicable, without having to consider foreign law.
34

35 Report ¶95.

36
37 The Report gives the following example:
38

39 X, who is resident in Panama, sends an unsolicited email to Y, who is resident in
40 Mexico, making an offer on terms that are extremely unfavorable to Y. The offer
41 contains a choice of court clause in favor of the courts of Ruritania . . . and
42 concludes: “If you have not replied within seven days, you will be deemed to have
43 accepted this offer” The email is deleted by Y’s anti-spam software and he never
44 reads it. After seven days, X claims that there is a contract with a choice of court
45 agreement, and brings proceedings in the courts of Ruritania. If, unlike the law of
46 every other State in the world, the law of Ruritania considered that a contract

1 existed and the choice of court “agreement” was valid, other States, including
2 Mexico, would nevertheless be entitled to treat the choice of court agreement as
3 non-existent.
4

5 Report ¶96.
6

7 7. The second requirement for an exclusive choice of court agreement is the formal
8 requirement that it must be “concluded or documented in a record.” A choice of court agreement
9 is “concluded” in a record if a record of it exists at the time at which agreement is entered into.
10 An agreement is “documented” in a record if, although the original agreement was oral, it
11 subsequently was put into a record. *See* Report ¶113. For a discussion of “record,” see
12 Reporters’ Note *** below.
13

14 The requirement that the choice of agreement be “concluded or documented in a record”
15 is both necessary and sufficient under this Act. A choice of court agreement is not covered by
16 this Act if it does not meet this requirement; if the agreement does meet this requirement, no
17 further requirements of a formal nature – for example, that the agreement be written in a
18 particular type or be in a particular language – may be required. Report ¶110. Whether these
19 formal requirements are met is, of course, a different question from whether there was mutual
20 consent to the choice of court agreement.
21

22 8. The third requirement for an exclusive choice of court agreement is that it must
23 designate “the courts of only one member country or one or more specific courts of only one
24 member country.” The designation of courts in only one member country is the requirement that
25 distinguishes and exclusive choice of court agreement from a non-exclusive choice of court
26 agreement under this Act. If an agreement meeting the definition of “choice of court agreement”
27 in this Act also designates courts located in only one member country, then the choice of court
28 agreement will be deemed to be exclusive unless the parties have expressly provided otherwise.
29 *See* Report ¶102. Thus, a choice of court agreement designating “the Commercial Court of Paris
30 or the Commercial Court of Lyon” would be an exclusive choice of court agreement because it
31 designates courts of only one member country (assuming France is a party to the Convention).
32 On the other hand, a choice of court agreement designating “the Commercial Court of Paris or
33 the Commercial Court of London to the exclusion of all other courts” would not be an exclusive
34 choice of court agreement under this Act, even if both France and the United Kingdom are
35 parties to the Convention, and even though the agreement expressly states it is exclusive, because
36 the agreement designates the courts of more than one member country. *See* Report ¶109.
37

38 Under this requirement, an exclusive choice of court agreement may designate “the courts
39 of only one member country” in general, or it may designate “one or more specific courts of only
40 one member country.” A choice of court agreement designating “the courts of France,” a choice
41 of court agreement designating “the Commercial Court of Paris,” and a choice of court
42 agreement designating “either the Commercial Court of Paris or the Commercial Court of Lyons”
43 all would meet this requirement to be an exclusive choice of court agreement. Report ¶¶103,
44 104. Similarly, a choice of court agreement designating “the courts of the United States” and one
45 designating “the courts of New Jersey “ would both meet this requirement. Report ¶107.
46

1 Implicit in the requirement that the parties have designated courts in only one member
2 country is the requirement that both parties be bound by that designation. Thus, a choice of court
3 agreement that is drafted to be exclusive with regard to proceedings brought by one party but not
4 with regard to proceedings brought by another party is not an exclusive choice of court
5 agreement under this Act. For example, a choice of court clause in an international loan
6 agreement providing “Proceedings by borrower against lender may be brought exclusively in the
7 courts of Country Y; proceedings by the lender against the borrower may be brought in the courts
8 of Country Y or in the courts of any other country having jurisdiction under its law” would not be
9 an exclusive choice of court agreement under this Act because the choice of court designation is
10 exclusive only with regard to the borrower. Report ¶¶105-106.

11
12 9. The fourth requirement for an exclusive choice of court agreement is that it must
13 designate the courts of a member country. This Act only applies to choice of court agreements
14 designating the courts of a party to the Convention, and to recognition and enforcement of
15 judgments rendered in a member country. Whether a choice of court agreement designating the
16 courts of a non-member country will be enforced in this state, or a judgment rendered by a
17 chosen court in a non-member country will be recognized and enforced in this state is determined
18 by the law of this state other than this Act. *See* Report ¶100.

19
20 10. The fifth requirement for an exclusive choice of court agreement is that the
21 designation of a court must be “for the purpose of deciding disputes that have arisen or may arise
22 in connection with a particular legal relationship.” Subsection 3(1). The exclusive choice of
23 court agreement may be limited to, or include disputes that have already arisen between the
24 parties, or it may be limited to, or include, future disputes that may arise in connection with a
25 particular relationship. Report ¶101.

26
27 11. The last clause of subsection (6) allows the parties to a choice of court agreement that
28 otherwise would be an exclusive choice of court agreement under subsection (6) to avoid that
29 result by expressly providing that the choice of court agreement is not exclusive. If the parties do
30 not expressly so provide, then a choice of court agreement meeting the subsection (6) definition
31 will be deemed to be exclusive under section 6 of this Act. For further discussion of this issue,
32 *see* section 6.

33
34 12. The definition of “international case” in subsection (7) is based on Article 1(2) and
35 (3) of the Convention. It is a key term in defining the scope of this Act. Section 4 of this Act
36 provides that this Act only applies to a choice of court agreement in an international case. What
37 constitutes an international case depends on the purpose for which the determination is being
38 made. Subsection (7) defines the term differently depending upon whether the purpose is
39 enforcement of the choice of court agreement or recognition and enforcement of a judgment.

40
41 If the determination is being made as to whether enforcement of a choice of court
42 agreement comes within this Act, then a case is an “international case” unless the parties are all
43 resident in one member country and all relevant elements other than the location of the chosen
44 court are connected only with that member country. Report ¶11. In other words, if a case is
45 wholly domestic, the choice of a court in another member country in the choice of court
46 agreement does not make it international. Report ¶11. On the other hand, the provisions of the

1 Act dealing with enforcement of the choice of court agreement will apply if either all the parties
2 are not exclusively residents of one member country or there is some other element relevant to
3 the dispute besides the chosen court that has a connection with some other member country.
4 Report ¶41.
5

6 If, however, the determination is being made as to whether recognition and enforcement
7 of a judgment comes within the Act, then a case is an “international case” if the judgment was
8 rendered by the court of a member country other than the member country asked to recognize and
9 enforce it. Report ¶11. This means that a case that would not be an international case for
10 purposes of enforcement of the choice of court agreement because the only “foreign” element is
11 the chosen court could be an international case for purposes of recognition and enforcement in
12 another member country of a judgment issued by the chosen court. Report ¶11.
13

14 The application of the two definitions of “international case” is illustrated by the
15 following examples:
16

17 **Example 1:** A and B enter a commercial contract that contains an exclusive choice of
18 court provision choosing the California courts to resolve disputes arising under the contract.
19 Both A and B are exclusively residents of Mexico. All relevant elements other than the chosen
20 court relate only to Mexico. When a dispute under the contract subsequently arises, A sues B in a
21 state court in California. Assume both the United States and Mexico are member countries and
22 that California has adopted this Act. B argues that the California court should dismiss the case
23 despite the choice of court agreement on the basis of forum non conveniens. A argues that
24 section 8 of this Act requires the California court to hear the case without regard to the doctrine
25 of forum non conveniens. Section 8 does not apply because the case is not an international case
26 for purposes of the provisions of this Act relating to enforcement of the exclusive choice of court
27 agreement. Whether the California court will dismiss the case will be determined by state law
28 other than this Act. *See* Report ¶42.
29

30 **Example 2:** A and B enter a commercial contract that contains an exclusive choice of
31 court provision choosing the courts of Mexico to resolve disputes arising under the contract.
32 Both A and B are exclusively residents of the United States. All relevant elements other than the
33 chosen court relate only to the United States. Assume both the United States and Mexico are
34 member countries and that California has adopted this Act. When a dispute under the contract
35 subsequently arises, A sues B in state court in California. B argues that section 9 of this Act
36 requires the California court to suspend or dismiss the proceedings because of the choice of the
37 Mexican courts in the exclusive choice of court agreement. Section 9 does not apply because the
38 case will not be considered an international case for purposes of the provisions in this Act
39 relating to enforcement of a choice of court agreement. Whether the California court will
40 dismiss the case on the basis of the choice of court agreement will be determined by state law
41 other than this Act. *See* Report ¶42.
42

43 **Example 3:** Assume in Example 2 that, instead of suing B in California, A sues B in the
44 chosen court in Mexico and obtains a judgment against B. A then seeks recognition of the
45 judgment in a California court. Although both parties are U.S. residents and all other relevant
46 elements other than the chosen court relate only to the United States, this Act will apply to the

1 California court’s obligation to recognize the Mexican judgment. The case is an international
2 case for purposes of this Act’s provisions regarding recognition and enforcement because it was
3 rendered by a court of another member country. See Report ¶46.
4

5 13. The definition of “judgment” in subsection (8) is based on Article 4(1) of the
6 Convention. This term is important in determining what judicial decrees are entitled to
7 recognition and enforcement under this Act. “Judgment” is defined broadly to cover any
8 decision on the merits, regardless of what it is called. It would include, for example, a decision
9 issued by a patent office exercising quasi-judicial functions. Report ¶116, n.146. The definition
10 also covers an order as to costs or expenses if that order relates to a judgment that may be
11 recognized or enforced under this Act, whether that order is issued by an office of the court or be
12 a judge. Report ¶116.
13

14 The definition, however, requires that the decision be “on the merits.” It thus excludes a
15 purely procedural ruling, as well as rulings relating to interim measures of protection, as these are
16 not decisions on the merits. Report ¶116. Interim measures of protection are expressly excluded
17 from the scope of this Act under section 4(g).
18

19 QUERY: Does the definition of “judgment” in the draft adequately capture the intent of the
20 Convention? The Convention says “any decision on the merits given by a court, whatever it may
21 be called, including a decree or order... .” The example of a decision by a patent office, suggests
22 that the “whatever it may be called” language may qualify “court,” not judgment. The definition
23 in the Act says “court decision on the merits, however dominated, including a decree or order”
24 which could suggest the decision has to be that of a “court,” thus possibly excluding decisions by
25 quasi-judicial entities. The brackets in the text are there to flag this issue.
26

27 14. Subsection (9) defines “member country” as the equivalent of the term “Contracting
28 State,” which is the term used in the Convention to designate those countries that are parties to
29 the Convention. Although “Contracting State” is a standard term in treaty practice, this Act uses
30 the term “member country” instead to avoid confusion with the term “state,” meaning a state of
31 the United States and certain other U.S. political subdivisions. See subsection (13).
32

33 15. Subsection (10) defines “non-exclusive choice of court agreement.” This definition
34 is important for application of Article 22 of the Convention. The Report states that a non-
35 exclusive choice of court agreement under Article 22 must satisfy four requirements: (1) it must
36 be in the form required by Article 3(c) of the Convention (that is, it must be, in the language of
37 the Act, “concluded or documented” in a record); (2) the parties must have consented to it (that
38 is, it must be an “agreement”); (3) the chosen court must be designated for the purpose of
39 deciding disputes that have arisen or may arise in connection with a particular legal relationship;
40 and (4) the agreement must designate a court or the courts of one or more member countries.
41 Report ¶242. For purposes of this Act, this means that a non-exclusive choice of court agreement
42 must meet the requirements of subsection 3(1) defining “choice of court agreement,” but not
43 meet the additional requirements of subsection 3(6) defining “exclusive choice of court
44 agreement.”
45

46 16. Subsection (11) is the standard ULC definition of “person.” The term used, but not

1 defined, in the Convention.
2

3 17. Subsection (12) is based on Article 3(c) of the Convention, and is important to the
4 definition of the choice of court agreements that are included within this Act. Only choice of
5 court agreements that meet the formal requirement of being “concluded or documented in a
6 record” are within the scope of this Act. *See* subsections (1) and (6) and section 4 of this Act.
7 The Report states that the wording of the comparable Convention provision in Article 3(c) was
8 “inspired by Art. 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.” Report
9 ¶112, n.144. The definition of “record” in this Act, although not stated in the exact wording of
10 the ULC standard definition of “record,” is intended to have a comparable meaning.
11

12 The definition of “record” does not require that the choice of court agreement be signed,
13 although lack of a signature may make it more difficult to prove the existence of the agreement.
14 Report ¶112. If a choice of court agreement is not in writing, then the definition requires that it
15 be “in any form of communication which renders the information accessible so that it may be
16 used for subsequent reference.” This language is intended to cover all normal electronic means
17 of data transmission or storage, such as email and fax, provided that the data is retrievable so that
18 it can be referred to and understood on future occasions. Report ¶112. For discussion of the
19 phrase “concluded or documented,” see Reporters’ Note **** above.
20

21 18. Subsection 3(13) is the standard ULC definition of “state.”
22
23

24 **SECTION 4. SCOPE.**

25 (a) Except as otherwise provided in this section, this [act] applies to:

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

28 (2) a non-exclusive choice of court agreement in an international case involving a
29 civil or commercial matter to the extent provided in Section 15.

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

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

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

35 (c) Subject to subsection (d), this [act] does not apply to the following matters:

- 1 (1) the status and legal capacity of an individual;
- 2 (2) family law matters, including matters relating to divorce, support,
3 maintenance, property division, child custody, and other rights and obligations arising out of
4 marriage or a similar relationship;
- 5 (3) wills, succession, and administration of estates;
- 6 (4) bankruptcy and insolvency matters;
- 7 (5) the carriage of passengers or goods;
- 8 (6) marine pollution, limitation of liability for maritime claims, general average,
9 and emergency towage and salvage;
- 10 (7) antitrust matters;
- 11 (8) liability for nuclear damage;
- 12 (9) claims for personal injury, wrongful death, and survival brought by or on
13 behalf of individuals;
- 14 (10) tort claims for damage to real property and tangible personal property which
15 do not arise from a contractual relationship;
- 16 (11) interests in real property, including leasehold interests;
- 17 (12) the validity, nullity, or dissolution of persons other than individuals, and the
18 validity of the internal governance decisions of their governing authorities;
- 19 (13) the validity of intellectual property rights other than copyright and related
20 rights;
- 21 (14) infringement of intellectual property rights other than copyright and related
22 rights, except when infringement proceedings are brought for breach of a contract between the
23 parties relating to such rights or could have been brought for breach of that contract;

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

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

4 (d) A proceeding involving a determination relating to a matter listed in subsection (c) is
5 not excluded from the scope of this [act] if that determination is of a question merely preliminary
6 to, or asserted as a defense in connection with, a determination relating to a non-excluded matter
7 that is an object of the proceeding.

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

9 (f) A proceeding is not excluded from the scope of this [act] merely because a
10 government or governmental agency, or other person acting for a government, is a party to the
11 proceeding. This [act] does not affect the privileges and immunities of governments or
12 international organizations in respect of themselves and their property.

13 (g) This [act] does not apply to an interim measure of protection. This [act] neither
14 requires nor precludes the grant, refusal, or termination of an interim measure of protection by a
15 court of this state and does not affect whether a party may request or a court of this state should
16 grant, refuse, or terminate such a measure.

17 (h) A proceeding under a contract of insurance or reinsurance is not excluded from the
18 scope of this [act] on the ground that the contract of insurance or reinsurance is related to a
19 matter to which this [act] does not apply.

20 **Reporters' Notes**

21 1. Subsection (a) excludes non-civil matters, including public law and criminal law
22 matters. The Convention uses the phrase "civil or commercial" law matters because these two
23 categories are regarded as separate and mutually exclusive categories in some legal systems. Art.
24 1 (1); Report, ¶49. This Act also uses that phrase for the same reason. In the U.S., a commercial
25 matter would be a subset of civil matters.
26

1 With regard to determination of the meaning of these terms, the Report states that “[l]ike
2 other concepts used in the Convention, ‘civil or commercial matters’ has an autonomous
3 meaning: it does not entail a reference to national law or other instruments.” Report ¶49. The
4 phrase “civil or commercial matter” appears in other Hague Conference conventions and thus has
5 a specific meaning in the international context. *See, e.g.*, 1965 Hague Convention on the Service
6 Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; 1970 Hague
7 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.
8

9 2. Subsection (b)(1) excludes choice of court agreements when any of the parties to the
10 agreement is a consumer. It covers both an agreement between a consumer and a nonconsumer,
11 and one between two consumers. Art. 2(1)(a); Report ¶50. The phrase “an individual acting
12 primarily for personal, family, or household purposes “ is a common way in which to describe a
13 consumer. *Cf.* Uniform Commercial Code §9-102(23)-(26) (utilizing this phrase in connection
14 with various consumer-related definitions).
15

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

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

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

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

41 **Example 2:** Licensor licenses patent rights to licensee under a license that contains an
42 exclusive choice of court agreement. Subsequently, licensee stops making the royalty payments
43 required under the license. Licensor brings an action under the license to recover the unpaid
44 royalties. Licensee asserts that licensor’s patent is invalid as a defense to payment. Although
45 subsection (c)(13) excludes issues relating to the validity of a patent from the subject matter
46 covered by this Act, the dispute between Licensor and Licensee is within the scope of this Act.

1 The principle issue before the court is whether Licensor can recover its unpaid royalties under the
2 license. Although the court must decide whether Licensor’s patent is valid before it can make
3 that determination, the issue of patent validity is merely a preliminary question to deciding the
4 issue of Licensor’s right to its royalties under the license. *See* Report ¶77.
5

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

14 6. Subsection (c)(1) is based on Article 2(2)(a) of the Convention. The language is almost
15 identical. It excludes issues dealing with status and capacity of natural persons. The Report
16 states that the Convention’s comparable exclusion “includes proceedings for divorce, annulment
17 of marriage or the affiliation of children.” Report ¶54.
18

19 7. Subsection (c)(2) is based on Article 2(2)(b) & (c). It includes language from a similar
20 exclusion in Section (b)(3) of the UFCMJRA. The Convention uses the phrase “maintenance
21 obligations,” which is intended to include child support. Art. 2(2)(b); Report ¶55. The Act
22 expressly lists “support,” which would include spousal and child support. The Convention uses
23 the phrase “matrimonial property regimes,” which includes “the special rights that a spouse has
24 to the matrimonial home in some jurisdictions.” Report ¶55. The Act uses the phrase “property
25 division.”
26

27 The phrase “similar relationships” covers relationships between unmarried couples that
28 are given legal recognition. Report ¶55.
29

30 8. Subsection (c)(3) excludes matters relating to succession. Art. 2(2)(d); Report ¶55.
31 The language “and administration of estates” is not included in the Convention, but is
32 presumably intended to be covered by the Convention term “succession.”
33

34 9. Subsection (c)(4) is based on Convention Article 2(2)(e), which excludes “insolvency,
35 composition, and analogous matters.” The Convention term “composition” is intended to refer to
36 procedures pursuant to which the debtor can enter an agreement with creditors “in respect of a
37 moratorium on the payment of debts or on the discharge of those debts.” Report ¶56. The
38 Convention phrase “analogous matters” “covers a broad range of other methods whereby
39 insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as
40 Chapter 11 of the United States Federal Bankruptcy Code.” Report ¶56. This phrase is left out
41 of the Act because the Drafting Committee decided at its November 2008 meeting to include a
42 separate subsection (c)(16) stating that matters under member country laws analogous to those
43 listed in subsection (c) also are excluded. The term “composition” is left out of the Act as a term
44 that would not convey the intended meaning under U.S. law. The term “bankruptcy” is added,
45 and would cover Chapter 11 proceedings.
46

1 10. The Report states that the Convention’s insolvency exclusion excludes proceedings
2 from the scope of the Convention “if they directly concern insolvency.” Report ¶57. The Report
3 gives the following hypothetical to explain the scope of the exclusion:
4

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

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

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

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

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

44 15. The language of subsection (c)(9) is identical to the Convention language regarding
45 exclusion of personal injury claims. Art. 2(2)(j). As the Report states, choice of court
46 agreements are likely to be rare in this tort context. Report ¶65. The Report indicates that the

1 exclusion is intended to cover not only physical injury but “nervous shock” – presumably what
2 U.S. tort law would call “emotional distress” – even if not accompanied by physical injury.
3 Report ¶65. The exclusion does not, however cover “humiliation or hurt feelings” such as those
4 related to an invasion of privacy or defamation. Report ¶65.
5

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

12 17. The comparable exclusion in the Convention to the exclusion in subsection (c)(11)
13 excludes “rights in rem in immovable property, and tenancies of immovable property” Art.
14 2(2)(l). The Convention does not define either “immovable property” or “rights *in rem*,” leaving
15 the definition of those terms to the internal law of each country. Brand & Herrup, page 66. The
16 language of subsection (c)(11) defines an “immovable” as “real property” and defines “rights *in*
17 *rem*” as “interests in real property.”
18

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

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

31 20. The Convention exclusion refers to “tenancies in immovables,” a concept the
32 definition of which, like that of “immovables,” is left to internal law. Brand & Herrup, page 66.
33 Subsection (c)(11) defines this term as “leasehold interests.”
34

35 21. The Report states two reasons for this exception: (1) in some countries “tenancies in
36 immovables” are subject to special legislation designed to protect the tenant and (2) in some
37 jurisdictions tenancies are considered rights *in rem* that would be covered under the first part of
38 the exclusion so all tenancies were included to provide consistent treatment without regard to
39 their characterization under a particular country’s internal law. Report ¶68.
40

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

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

11
12 24. The exclusion in subsection (c)(12) is focused on matters relating to the internal
13 structure and operation of the legal person, and does not necessarily apply to the consequences of
14 decisions made by the legal person. Brand & Herrup, page 67.

15
16 25. The language of subsection (c)(13) is the same as the language of Article 2(2)(n) of
17 the Convention. Subsection (c)(13) excludes the issue of validity of intellectual property rights,
18 other than copyright and related matters. Thus, proceedings to revoke or for a declaration of
19 validity or invalidity of the excluded intellectual property rights are outside the scope of this Act.
20 Report ¶75. On the other hand, copyright and related rights are fully covered by this Act,
21 including with regard to proceedings to determine the validity of such rights. Report ¶72.

22
23 26. The term “related rights” in subsection (c)(13) refers to “rights in a specific use of an
24 existing work by someone other than the original author, and which use makes an additional
25 contribution to the existing work.” Brand & Herrup, page 68. For example, the writing of a song
26 gives rise to a right in copyright, while the rights a singer may have in a particular rendition of
27 the song is a ‘related right’ under this Act. Brand & Herrup, page 68. “Related rights” include
28 rights of performers in their performances, rights of producers of sound recordings in their
29 recordings, and rights of broadcasting organizations in their radio and television broadcasts.
30 Report ¶73.

31
32 27. The exclusion under subsection (c)(13) only applies when the validity issue is an
33 object of the proceeding. When validity is raised merely as a preliminary matter rather than as an
34 object of the litigation, then the exclusion does not apply. Thus, proceedings to enforce a
35 licensing agreement with regard to a non-copyright intellectual property right would not be
36 outside the scope of this Act just because the defendant raises the invalidity of the intellectual
37 property right as a defense. Report ¶¶75 & 77.

38
39 On the other hand, if instead of raising invalidity as a defense, the defendant
40 counterclaimed for revocation of the intellectual property right, that counterclaim would be
41 excluded under subsection (c)(13) because an object of the counterclaim would be to determine
42 the validity of the right. Report ¶78. The fact the counterclaim was outside the scope of this Act,
43 however, would not alter the fact that the plaintiff’s claim for enforcement of the license would
44 be within this Act. Report ¶78.

45
46 28. This Act applies to contracts dealing with intellectual property rights, such as

1 licensing agreements, distribution agreements, joint venture agreements, agency agreements, and
2 agreements for the development of an intellectual property right. Report ¶76. Proceedings
3 brought under such contracts – for example, proceedings for payment of royalties owed under a
4 licensing agreement – are covered by this Act. Report ¶76
5

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

19 30. The language of subsection (c)(15) is identical to the language of Article 2(2)(p) of
20 the Convention. Traditionally, the state that creates and maintains a public register has exclusive
21 jurisdiction over proceedings concerning the validity of entries in that public register as an aspect
22 of territorial sovereignty. Brand & Herrup, page 70. Therefore, issues relating to the validity of
23 entries in public registers have been excluded from the scope of this Act.
24

25 31. Subsection (c)(16) excludes from the scope of the Act matters that under the law of a
26 member country are analogous to those listed in subsection (c) in recognition of the fact different
27 terms may be used to describe similar concepts in the legal systems of the various member
28 countries.
29

30 32. Subsection (e) excludes arbitration and related proceedings from the scope of this
31 Act. This exclusion is intended to be interpreted broadly, and covers any proceedings in which
32 the court gives assistance to the arbitral process, including deciding whether an arbitration
33 agreement is valid; ordering parties to proceed to, or discontinue, arbitration proceedings;
34 revoking, amending, recognizing, or enforcing arbitral awards; appointing or dismissing
35 arbitrators; fixing the place of arbitration; or extending the time for making awards. Report ¶84.
36 There currently is a functioning international regime with regard to arbitral proceedings,
37 including the United Nations Convention on the Recognition and Enforcement of Arbitral
38 Awards, and this Act is not intended to disturb that regime. Brand & Herrup, page 73. Once
39 arbitration or related proceedings are raised in a case, the case falls outside the scope of this Act.
40 *See* Brand & Herrup, page 73-74.
41

42 33. Subsection (f) is based on Article 2(5) & (6) of the Convention.
43

44 34. Subsection (g) is based on Article 7 of the Convention.
45

46 35. Subsection (h) is based on Article 17(1) of the Convention.

1 QUERY: The Drafting Committee decided at its November 2008 meeting that no declarations
2 should be made under Article 21, which allows a country to add to the subject matters excluded
3 from coverage by declaration when the country has a strong interest in not applying the
4 Convention to a specific matter. Nevertheless, should the exclusions contain a provision to deal
5 with (1) reciprocally excluding from scope a matter when another member country has made an
6 Article 21 exclusion and the choice of court agreement designates the courts of that member
7 country and/or (2) possible future U.S. declarations under Article 21?
8

9 **SECTION 5. EXCLUSIVE CHOICE OF COURT AGREEMENT AS**

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

13 **Reporters' Notes**

14
15 1. This section is based on Article 3(d) of the Convention.
16

17 2. This section provides that an exclusive choice of court agreement contained as a
18 provision in a broader contract must be treated as an agreement that is independent of the other
19 terms of the contract. Thus, the validity of the exclusive choice of court agreement cannot be
20 contest solely on the ground that the contract of which it forms a part is not valid. Instead, the
21 validity of the choice of court agreement must be determined independently according to the
22 criteria set out in this Act. *See e.g.*, sections 8, 9 and 11; Report ¶115. Therefore, it is possible
23 for the chosen court to hold the contract invalid without depriving the choice of court agreement
24 of validity. Of course, it is also possible that the ground on which the chosen court renders a
25 contract invalid is a ground that also renders the choice of court agreement invalid under this Act.
26 Report ¶115.
27

28 **SECTION 6. WHEN CHOICE OF COURT AGREEMENT DEEMED**

29 **EXCLUSIVE.** A choice of court agreement that designates the courts of one member country or
30 one or more specific courts in one member country is exclusive unless the parties to the
31 agreement expressly provide that the agreement is not exclusive.

32 **Reporters' Notes**

33
34 1. This section is based on Article 3(b) of the Convention, and generally follows the
35 Convention language.
36

1 than one location, or even in all four locations. Brand & Herrup, page 51.

2
3 3. “Statutory seat” (“*sie`ge statutaire*”) is a civil law concept used in some civil law
4 jurisdictions to determine the residence of organizations. The Report explains this concept as
5 follows:

6
7 [T]his term does not refer to the corporation’s seat as laid down by some statute
8 (legislation) but as laid down by the *statut*, the document containing the
9 constitution of the company – for example, the articles of association. In the
10 common law, the nearest equivalent is “registered office.” In practice, the State
11 where the corporation has its statutory seat will almost always be the State under
12 whose law it was incorporated or formed; while the State where it has its central
13 administration will usually be that in which it has its principal place of business.

14
15 Report ¶123.

16
17 4. The Report states that “[a] State or a public authority of a State would be resident only
18 in the territory of that State.” Report ¶117 n. 148.

19
20 5. The Committee decided at its November 2008 meeting to adopt the ULC definition of
21 “person” rather than the Convention language “an entity or person other than a natural person.”
22

23 **SECTION 8. DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION.**

24 (a) Except as otherwise provided in this section, a chosen court of this state shall accept
25 jurisdiction over the dispute.

26 (b) A chosen court of this state shall refuse to accept jurisdiction to decide a dispute to
27 which an exclusive choice of court agreement applies if:

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

30 (2) assumption of jurisdiction by the chosen court would violate:

31 (A) jurisdictional limits placed on the chosen court by this state relating to
32 subject matter or amount in controversy; or

33 (B) venue requirements or other rules of this state regarding internal
34 allocation of jurisdiction among its courts.

1 [(c) A chosen court of this state does not have subject matter jurisdiction if, except for the
2 choice of that court, there is no relationship between this state and the parties or the dispute.]

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

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

9 **Reporters' Notes**

10
11 1. Section 8 is based on Article 5 of the Convention.
12

13 2. Subsection (a) sets out one of the key provisions of this Act. It establishes the basic
14 duty of a court of this state designated by the parties to an exclusive choice of court agreement
15 covered by this Act to enforce the parties' exclusive choice of court agreement by accepting
16 jurisdiction over the dispute. An exclusive choice of court agreement would be of little value if
17 the chosen court were not obligated to hear the case when proceedings were brought before it.
18 *See Report §124.*
19

20 3. Subsection (a) is based upon Article 5(1) of the Convention, which states that the
21 chosen court "shall have jurisdiction" to decide the dispute. Subsection (a) instead states that the
22 chosen court "shall accept jurisdiction" over the dispute. It is clear that Article 5 of the
23 Convention does not seek to create subject matter jurisdiction in a chosen court that does not
24 already exist. *See Article 5(3) (rules related to subject matter jurisdiction not affected).* The
25 language of subsection (a) is used instead of the Convention language to avoid confusion
26 regarding that issue.
27

28 4. Subsection (b) is based on Article 5(1) and (3) of the Convention. It sets out the three
29 exceptions to the obligation of a chosen court in this state to hear the case. In these three
30 situations, the chosen court may not hear the case.
31

32 **QUERY: IS IT CORRECT THAT THESE EXCEPTIONS ARE MANDATORY?**
33

34 5. Subsection (b)(1) sets out the first exception to the chosen court's obligation to hear a
35 case – the chosen court cannot hear the case if the exclusive choice of court agreement is null and

1 void under the law of this state. The “null and void” concept also is found in the United Nations
2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York
3 Convention”).
4

5 6. In order to be a choice of court agreement within this Act, an agreement must meet
6 certain formal requirements – it must be “concluded or documented in a record.” Section 3(1);
7 *See* Convention Article 3 (c). In addition, this Act sets out certain substantive exceptions to
8 enforcement of a choice of court agreement. The “null and void” exception is one of these
9 substantive exceptions. The Report explains the “null and void” exception as follows:

10
11 The “null and void” provision applies only to substantive (not formal) grounds of
12 invalidity. It is intended to refer primarily to generally recognized grounds like
13 fraud, mistake, misrepresentation, duress and lack of capacity. It does not qualify,
14 or detract from, the form requirements in Article 3(c), which define the choice of
15 court agreements covered by the Convention and leave no room for national law
16 as far as form is concerned.
17

18 Report §126.
19

20 7. The determination as to whether an exclusive choice of court agreement is “null and
21 void” is determined by the law of this state” other than this Act. The reference to “law” in
22 subsection (b)(1) is to the “whole law” of this state – that is, the law of this state including the
23 applicable conflicts of law rules of this state. Therefore, the ultimate substantive rules that will
24 determine whether an exclusive choice of law agreement is null and void may or may not be the
25 substantive law of this state, depending upon the jurisdiction whose substantive law is chosen in
26 the particular instance by this state’s choice of law rules.
27

28 8. One of the more difficult issues for the Committee has been the question of a chosen
29 court’s obligation to hear a case that has no relation to the state. While some states may be
30 interested in hearing such cases, other states may not wish to do so, or may not be able to do so
31 because of state constitutional restrictions. Article 19 of the Convention allows a party to the
32 Convention to make a declaration giving its courts discretion to decline jurisdiction over
33 unrelated disputes. One alternative would be for the United States to make this declaration.
34 Bracketed subsection (c) presents another alternative. It treats the issue as one of subject matter
35 jurisdiction, rather than one within the discretion of the court. This language would be used in
36 lieu of an Article 19 declaration. A state that does not wish to have its courts hear unrelated
37 cases could adopt this bracketed language, thereby carving unrelated cases out of the subject
38 matter jurisdiction of its state courts, and, thus, under subsection (b), out of its obligation to hear
39 those cases under this Act. The Committee considered another version of the bracketed language
40 that would allow states to list certain circumstances under which its courts would have subject
41 matter jurisdiction over unrelated cases, but the Committee decided at its February 2009 meeting
42 that the possibility of a state creating exceptions could be covered by a legislative note. The

1 Committee continues to discuss this issue.

2
3 9. Subsection (e) is derived from Article 5(3)(b) of the Convention. In addition to
4 transfer pursuant to state law, Article 5 of the Convention would permit removal to a federal
5 court. Report ¶140 n.176. Because that removal would be governed by federal law, however, it
6 is not mentioned in subsection (e).
7

8 **SECTION 9. DUTY OF COURT NOT CHOSEN TO DECLINE JURISDICTION.**

9 A court of this state which is neither the chosen court nor a court to which the chosen court has
10 transferred the action under Section 8 shall suspend or dismiss proceedings to which an exclusive
11 choice of court agreement applies unless the court determines that:

12 (1) the agreement is null and void under the law of the jurisdiction of the chosen court;

13 (2) a party to the agreement lacked capacity to enter into the agreement under the law of
14 this state;

15 (3) giving effect to the agreement would lead to a manifest injustice or would be
16 manifestly contrary to the public policy of this state or of the United States;

17 (4) for exceptional reasons beyond the control of the parties, the agreement cannot
18 reasonably be performed; or

19 (5) the chosen court has declined to hear the case.

20 **Reporters' Notes**

21
22 1. Section 9 is based on Article 6 of the Convention.

23
24 2, Section 9 not only sets out the grounds upon which a court of this State not chosen
25 need not honor the choice of court agreement, but also indicates the law under which those
26 exceptions are to be determined. Under subsection (1), the applicable law is that of the
27 jurisdiction of the chosen court. On the other hand, in subsections (2) and (3) the applicable law
28 is that of this state, including, the law of the United States, which is part of the law of this state
29 under the Supremacy Clause of the United States Constitution. The phrase “public policy of this
30 state or of the United States” in subsection (3) is used to underline the fact that the public policy
31 of this state includes the public policy of the United States, which, under the Supremacy Clause
32 would prevail over any conflicting public policy of this state. As with Section 8, the references
33 in this section are to the “whole law” of this state, including the choice of law rules of this state.

1 Thus, the substantive law that ultimately will apply to these exceptions depends on what
2 jurisdiction’s law is chosen by this state’s choice of law rules in any given case.
3

4 3. Subsection (3) refers to both “manifest injustice” and “manifestly contrary to public
5 policy” to emphasize the exceptional nature of the case to which this exception is to be applied.
6 “The standard is intended to be high; the provision does not permit a court to disregard a choice
7 of court agreement simply because it would not be binding under domestic law.” Report ¶152.
8 The inclusion of both “injustice” and “public policy” reflects the inclusive nature of the
9 exception – the court is to consider both the interests of the individuals and the general public
10 interest.
11

12 4. The words “manifest” and “manifestly” are terms used in a number of Hague
13 Conference conventions, *e.g.* Hague Convention Concerning the Powers of Authorities and the
14 Law Applicable in Respect of the Protection of Infants, art 16, Oct. 5, 1961, 658 U.N.T.S. 143
15 (member countries can refuse application of the Convention only where such application would
16 be “manifestly contrary to public policy”); Hague Convention on the Conflicts of Laws Relating
17 to the Form of Testamentary Disposition, art. 7, Oct. 5, 1961, 510 U.N.T.S. 175 (member
18 countries can refuse application of the Convention only when “manifestly contrary to ‘ordre
19 public”). While the content as to what constitutes “injustice” and “public policy” is determined
20 by the law of this state, the standard for when injustice or incompatibility with public policy of
21 this state rises to the level of grounds for refusing to enforce a choice of court agreement is
22 intended to be developed as an autonomous standard under the Convention. Brand & Herrup at
23 92.
24

25 **SECTION 10. RECOGNITION OF JUDGMENT OF CHOSEN COURT OR**
26 **COURT TO WHICH CASE HAS BEEN TRANSFERRED.**

27 (a) Except as otherwise provided in this [a]ct, a court of this state shall recognize a
28 judgment of a chosen court or a court of a member country to which the chosen court transferred
29 the case pursuant to Section 8.

30 (b) Without prejudice to such review as is necessary for the application of the provisions
31 of this [a]ct regarding recognition, the court shall not review the merits of the judgment given by
32 the court of origin. The court shall be bound by the findings of fact on which the court of origin
33 based its jurisdiction, unless the judgment was given by default.

34 (c) The court shall recognized a judgment under this [act] only if it has effect between the
35 parties in the country of origin, and shall enforce the judgment only if it is enforceable in the

1 country of origin.

2 (d) The court may postpone or refuse to recognize or enforce a judgment if the judgment
3 is the subject of review in the country of origin or if the time for seeking review has not expired.
4 A refusal does not prevent a subsequent application for recognition or enforcement of the
5 judgment.

6 (e) If the judgment is the judgment of a court of a member country to which the chosen
7 court transferred the case pursuant to Section 8 and the chosen court has discretion with regard to
8 the decision to transfer, recognition may be refused against a party who objected to the transfer in
9 a timely manner in the country of origin.

10 **Reporters' Notes**

11
12 1. The Convention places an obligation on a member country to both recognize and
13 enforce a judgment rendered by the chosen court, with certain exceptions. The Report gives the
14 following description of the difference between the concept of recognition and that of
15 enforcement:

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

33
34 Report ¶170.

35
36 2. Section 10(b) is based on Article 8(2) of the Convention, and generally tracks
37 Convention language.

1 3. Section 10(c) is based on Article 8(3) of the Convention. It requires that the judgment
2 be effective in the country of origin as a prerequisite to the recognition of the judgment in this
3 state, and that it be enforceable in the country of origin as a prerequisite to its enforcement in this
4 state.. A judgment has effect in the country of origin if it is legally valid and operative in that
5 country as a valid determination of the parties' rights and obligations. Report ¶171. If the
6 judgment does not have effect in the country of origin, then it should not be given effect in this
7 state through recognition; similarly, if the judgment ceases to have effect in the country of origin
8 the judgment should not continued to be recognized in this state. Report ¶171. Section 10(c) and
9 Article 8(3) of the Convention also provide that if a judgment is not enforceable in the country of
10 origin – for example, because enforcement has been suspended in the country of origin pending
11 appeal – then the judgment should not be enforced in this state. Report ¶172.
12

13 4. Section 10(d) is based on Article 8(4) of the Convention, and generally tracks its
14 language. Section 10(d) gives the court discretion to deny recognition or enforcement if the
15 judgment is either under review in the country of origin or the time for review in that country has
16 not expired. Report ¶173. Thus, even though under the law of the country of origin appeal of the
17 judgment would not suspend its effectiveness or enforceability, and therefore section 10(c) would
18 not apply, a court of this state, in its discretion, nevertheless could postpone or refuse recognition
19 or enforcement under 10(d). The Convention provides that, except as otherwise provided in the
20 Convention, the procedure for recognition and enforcement are governed by the law of the
21 member country asked to recognize and enforce the judgment. Convention, Art. 14. Section 22
22 of the Act provides a procedure for the court to grant a stay in the situations covered by Section
23 10(d).
24

25 5. Section 10(e) is based on Article 8(5) of the Convention. It provides a special
26 discretionary ground upon which the court may deny recognition and enforcement against a party
27 who opposed the transfer when the judgment is the judgment of a court to which the chosen court
28 made a discretionary transfer. Report ¶175.
29

30 **SECTION 11. EXCEPTIONS TO RECOGNITION OF A JUDGMENT.** A court of

31 this state may refuse recognition of a judgment of a chosen court if:

32 (1) the court determines that the exclusive choice of court agreement was null and void
33 under the law of the country of origin, unless the chosen court has determined that the agreement
34 is valid;

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

37 (3) the document instituting the proceedings in the chosen court or an equivalent

1 document including the essential elements of the claim was not notified to the defendant in
2 sufficient time and in such a way as to enable the defendant to arrange for a defense, unless the
3 defendant entered an appearance in the chosen court to present the defendant’s case without
4 contesting notification and the law of the country of origin permits notification to be contested;

5 (4) the defendant in the proceeding in the chosen court was given notice in this state of
6 the proceeding in the chosen court in a manner incompatible with fundamental principles of this
7 state concerning the service of documents;

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

9 (6) recognition of the judgment would be manifestly incompatible with the public policy
10 of this state or of the United States, including a situation where the specific proceedings leading
11 to the judgment in the chosen court were incompatible with fundamental principles of procedural
12 fairness of this state or of the United States;

13 (7) the judgment is inconsistent with a judgment of a court of this state in a dispute
14 between the same parties; or

15 (8) the judgment is inconsistent with an earlier judgment of a court of another jurisdiction
16 between the same parties on the same cause of action, if the earlier judgment fulfils the
17 conditions necessary for its recognition under the law of this state other than this [act].

18 **Reporters’ Notes**

19 1. Subsection 11(3) is based on Article 9(c)(I) of the Convention, and largely tracks the
20 Convention language.

21
22 2. The language of subsection 11(6) follows the language of Article 9(e), except for the
23 addition of the phrase “of the United States.” That phrase, which is found in UFCMJRA
24 subsection 4(c)(3), makes clear that, under the supremacy clause of the U.S. Constitution, the
25 public policy of this state includes the public policy of the United States.

26
27 3. Subsection 11(4) is based on Article 9(c) of the Convention. It deals with the situation
28 in which the defendant to the original proceedings in the chosen court is given notice of those

1 proceedings in this state in a manner that this state would view as incompatible with its
2 fundamental principles regarding service of process. *See* Report ¶187.

3
4 4. Subsection 11(7) is based on Article 9(f) of the Convention. This exception provides
5 that a judgment of this state that is inconsistent with the judgment of the chosen court prevails,
6 whether or not the inconsistent judgment is rendered by this state before or after the judgment of
7 the chosen court. Report ¶192. For this provision to apply, the parties to the inconsistent
8 judgment must be the same, but it is not necessary that the cause of action be the same. Report
9 ¶192.

10
11 5. Subsection 11(8) is based on Article 9(g) of the Convention, and largely tracks the
12 Convention language. Subsection 11(8) deals with the situation when the competing judgments
13 both were rendered by the courts of another jurisdiction. In that situation, the court may deny
14 recognition to the chosen court judgment in favor of an earlier inconsistent judgment rendered in
15 the other jurisdiction between the same parties on the same cause of action.

16
17 6. The language of subsection 11(8) deals with two issues not expressly addressed by the
18 Convention in Article 9(g). First, what does the language in the Convention stating that the
19 judgment of the other jurisdiction must be one that “fulfils the conditions necessary for its
20 recognition in the requested State” mean? If the requirements for recognition in the requested
21 jurisdiction (“this state”) include the Convention, then it seems such a judgment will never
22 comply because it is not the judgment of a chosen court. Subsection 11(8) resolves this
23 ambiguity in the Convention by providing that the relevant law of this state is law “other than
24 this act.”

25
26 Second, Article 9(g) provides that the inconsistent judgment must be one of “another
27 State.” In a federalist State, such as the United States, the Convention language seems to leave a
28 lacuna in the law – what if the inconsistent judgment is neither one of “this state” nor one of a
29 foreign country, but rather is one of another state of the United States? Section 11(8) resolves
30 this ambiguity by providing that the inconsistent judgment must be that of “another jurisdiction,”
31 thus including inconsistent judgments of another U.S. state within the rule of subsection 11(8).
32 This resolution of the issue seems consistent with Article 25(c) of the Convention, which
33 provides that “any reference to the court or courts of a State shall be construed as referring,
34 where appropriate, to the court or courts in the relevant territorial unit.” It also is consistent with
35 full faith and credit principles applicable between states of the United States.

36
37 This second issue also is raised by the Convention language in Article 11(f), which refers
38 to an inconsistent judgment of the “requested State.” Subsection 11(7) resolves this issue by
39 providing that the inconsistent judgment must be one of “a court of this state” (small “s”), rather
40 than a court of the United States (big “S”). Again, this interpretation seems consistent with
41 Article 25(c).

42
43 It should be noted that, while interpreting “State” as including states of the United States
44 in subsection 11(8) gives that subsection a broader reach, the same interpretation in subsection
45 11(7) provides a narrowing interpretation of that section.

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

2 7. As with Sections 8 and 9, the reference to “law” in subsections (1) and (2) is to the
3 whole law, including the choice of law rules, of the relevant jurisdiction.
4

5 **SECTION 12. PRELIMINARY QUESTIONS.**

6 (a) If a matter excluded from the scope of this [act] under Section 4(c) arose as a
7 determination merely preliminary to, or asserted as a defense in connection with, a determination
8 relating to a non-excluded matter that is an object of the proceeding, the ruling on the preliminary
9 question may not be recognized under this [act].

10 (b) Except as otherwise provided in subsection (c), recognition of a judgment may be
11 refused to the extent that the judgment was based on a ruling on a matter excluded from the
12 scope of this [act] under Section 4(c).

13 (c) If the ruling on a matter excluded under Section 4(c) was 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 1. Subsection 12(a) is based on Article 10 (1) of the Convention. Neither a ruling on a
22 matter excluded from the coverage of this [act] under section 3, or such an issue raised as a
23 preliminary question necessary to the court’s ultimate decision of an issue within the scope of
24 this Act, is given preclusive effect under this Act, although the court may recognize such rulings
25 under other law. *See Report ¶194.*

26
27 2. Subsection 12(b) is based on Article 10(2). It provides a discretionary ground for
28 denying recognition to a judgment to the extent the judgment is based on an excluded matter. It

1 is not concerned with non-recognition of rulings on preliminary questions (which is dealt with in
2 subsection 12(a)), but rather with recognition of the judgment resulting from the proceeding in
3 which such rulings were made. Report ¶ 197.
4

5 3. Subsection 12(c) is based on Article 10(3) of the Convention. It provides a special
6 rule with regard to recognition of judgments based on a preliminary ruling regarding the validity
7 of an intellectual property right other than copyright or a related right. Report ¶198.
8

9 **SECTION 13. NON-COMPENSATORY DAMAGES.** A court of this state may
10 refuse to recognize a judgment to the extent that the judgment awards damages, including
11 exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered,
12 taking into account the extent to which damages not otherwise compensatory should be
13 considered compensatory because they compensate a party for costs and expenses relating to the
14 proceedings.

15 **Reporters' Notes**

16 1. Section 13 is based on Article 11 of the Convention.
17

18 2. The standard for refusing to recognize non-compensatory damages is intended to be
19 developed as an autonomous concept – the court should not simply apply the law of this state
20 concerning damages, nor should it use this provision as a back-door way of reviewing the
21 judgment. Brand & Herrup, at 126-127. Those damages subject to nonrecognition under Section
22 13 are only those “that go far beyond the actual loss of the plaintiff.” Report ¶205(b).
23

24 3. Section 13 is a discretionary provision – it does not require a court of this state to deny
25 recognition to the noncompensatory portion of a judgment. [T]he provision in no way limits
26 recognition and enforcement of damages under national law or other international instruments,
27 and it allows (but does not require) recognition and enforcement under [this Act]. Report
28 ¶205(I).
29

30 **SECTION 14. RECOGNITION OF JUDGMENTS BASED ON CONTRACTS OF**
31 **INSURANCE.** A court of this state may not limit or refuse recognition of a judgment in respect
32 of liability under the terms of a contract of insurance or reinsurance on the ground that the
33 liability under that contract includes liability to indemnify the insured or reinsured concerning:

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

1 (2) an award of damages to which Section 13 might apply.

2 **Reporters' Notes**

3
4 1. Section 14 is based on Article 17(2) of the Convention, and closely tracks its language.
5

6 **SECTION 15. RECOGNITION OF JUDGMENT RENDERED BY COURT**
7 **CHOSEN IN NON-EXCLUSIVE CHOICE OF COURT AGREEMENT.**

8 (a) Except as otherwise provided in subsection (b), a court of this state shall recognize
9 and enforce a judgment of the court of another member country designated in a non-exclusive
10 choice of court agreement in the same manner and to the same extent that it would recognize and
11 enforce a judgment of a chosen court of a member country designated in an exclusive choice of
12 court agreement under this [act], if that member country has made a reciprocal declaration
13 pursuant to Article 22 of the Convention.

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

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

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

22 (3) where another proceeding that was pending between the same parties on the
23 same cause of action in any other court has been dismissed before final judgment and the
24 member country court of origin was the court first seized.

25 **Reporters' Notes**

1 1. Section 15 is based on the language of Article 22. It assumes that the United States
2 will take the declaration permitted under Article 22 of the Convention, which provides for
3 reciprocal recognition and enforcement of judgments rendered by the courts of member countries
4 chosen in a non-exclusive choice of court agreement in certain circumstances.
5

6 2. Subsection 15(a) provides that when a reciprocal declaration has been made under
7 Article 22 of the Convention, a court of this state “shall recognize and enforce a judgment
8 rendered by the court of another member country designated in a non-exclusive choice of court
9 agreement in the same manner and to the same extent that it would recognize and enforce a
10 judgment rendered by a chosen court of a member country designated in an exclusive choice of
11 court agreement under this [act].” Thus, a court of this state has the same obligation to recognize
12 and enforce such judgments as it does to recognize and enforce judgments of a chosen court
13 under an exclusive choice of court agreement, and recognition and enforcement of such
14 judgments is subject to all the requirements, limitations, and exceptions applicable to
15 recognition and enforcement of judgments of a chosen court under an exclusive choice of court
16 agreement, including the scope provisions of section 4 of the Act, and the requirements for
17 recognition and exceptions to recognition contained in this Act. In addition, recognition and
18 enforcement of such judgments is subject to the additional exceptions stated in subsection 15(b).
19 See Report, ¶¶243, 245.
20

21 3. Subsection 15(b) states grounds for denying recognition and enforcement applicable
22 only to a judgment rendered by a member country designated in a non-exclusive choice of court
23 agreement. It provides that “recognition or enforcement is not mandatory when there exists a
24 judgment given by any other court before which proceedings could be brought in accordance
25 with the non-exclusive choice of court agreement or where there exists a proceeding pending
26 between the same parties in any other such court on the same cause of action, regardless of
27 whether such proceedings were commenced before or after those before the chosen court or
28 whether such judgment was given before or after that of the chosen court.” Report ¶245. Section
29 15(b)(3) deals with the situation in which there were proceedings before another court that did
30 not result in a final judgment and are not still pending. In that situation, the member country
31 court of origin must have been the first seized with jurisdiction over the action. Report ¶251.
32

33 **SECTION 16. DOCUMENTS TO BE PRODUCED IN CONNECTION WITH**
34 **REQUEST FOR RECOGNITION.**

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

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

37 (2) the choice of court agreement, a certified copy of that agreement, or other
38 evidence of its existence;

39 (3) if the judgment was given by default, the original or a certified copy of a

1 document establishing that the document that instituted the proceedings in the chosen court or an
2 equivalent document was notified to the defaulting party;

3 (4) any documents necessary to establish that the judgment has effect or, if
4 applicable, is enforceable in the country of origin; and

5 (5) in the case of a judicial settlement under section 18, a certificate of the court of
6 the country of origin that the judicial settlement or a part of it is enforceable in the same manner
7 as a judgment in the country of origin.

8 (b) If the terms of a judgment for which recognition is sought are not sufficient for the
9 court to verify whether this [act] has been complied with, the court may require the production of
10 any documents necessary to show compliance.

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

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

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

18 **Reporters' Notes**

19
20 1. Section 16 is based on Article 13 of the Convention, except for subsection (e), which is
21 based on Article 18, and follows the tradition of earlier Hague Conventions. The section
22 substantially tracks the language of the Convention.
23

24 **SECTION 17. ENFORCEMENT OF JUDGMENT RECOGNIZED BY THIS** 25 **STATE.**

26
27 (a) If a court of this state recognizes a judgment of a court of a member country pursuant

1 to this [act], upon request of the party in whose favor the judgment was granted, the court shall
2 enforce the judgment in the same manner and to the same extent as a judgment rendered in this
3 state.

4 (b) A judgment shall be enforced in this state only if it is enforceable in the country of
5 origin.

6 **Reporters' Notes**

7 1. Subsection 17(a) is based on Article 8(1) of the Convention and section 7 of the
8 UFCMJRA.

9 2. Subsection 17(b) is based on Article 8(3) of the Convention.
10
11

12 **SECTION 18. JUDICIAL SETTLEMENTS (*TRANSACTIONS JUDICIAIRES*).**

13 (a) A court of this state shall enforce a judicial settlement in the same manner as a
14 judgment under this [act] if:

15 (1) the judicial settlement has been approved by a chosen court of a member
16 country or concluded before that court in the course of proceedings;

17 (2) the settlement is enforceable in the same manner as a judgment in the country
18 of origin; and

19 (3) the settlement meets the requirements for recognition and enforcement of a
20 judgment under this [act].

21 (b) A court shall not give a judicial settlement preclusive effect through collateral
22 estoppel, issue preclusion, or otherwise.

23 **Reporters' Notes**

24 1. Section 18 is based on Article 12 of the Convention.

25 2. The concept of "judicial settlement" does not exist in common law systems. The
26 Report states:
27

1 In France and other civil law countries they are contracts concluded before a judge
2 by which the parties put an end to litigation, usually by making mutual
3 concessions. Parties submit their agreement to the judge, who records it in an
4 official document. Such agreements usually have some, or even all, of the effects
5 of a final judgment. A judicial settlement is different from a consent order in the
6 common law sense (an order made by the court with the consent of both parties),
7 since a consent order is a judgment and may be recognised and enforced as such
8 under Article 8 of the Convention. On the other hand, a judicial settlement is
9 different from an out-of-court settlement, since it is made before a judge, puts an
10 end to the proceedings and is usually enforceable in the same manner as a
11 judgment. For these reasons, a special provision is devoted to it in the
12 Convention.

13
14 Report ¶207.

15
16 3. Although section 18(a) provides for the enforcement of a judicial settlement meeting
17 the requirements established there in the same manner as a judgment under this [act], section
18 18(b) makes it clear that judicial settlements are not given the same effect as a judgment
19 recognized under this [act]. Unlike a judgment, which is given preclusive effect once
20 recognized, judicial settlements have no preclusive effect.

21
22 4. The following examples illustrate the application of section 18.

23
24 **Example 1.** A and B enter a contract with an exclusive choice of court clause selecting
25 the courts of France to determine disputes under the contract. Subsequently, A sues B in a
26 French court seeking 1000 Euros he asserts is due under the contract. A and B then entered into
27 a judicial settlement pursuant to which B agrees to pay A 800 Euros. B fails to pay the 800
28 Euros and A brings proceedings to enforce the judicial settlement in this state. Assume that the
29 United States and France are both parties to the Convention. If the judicial settlement meets the
30 requirements for enforcement under section 18(a), then it may be enforced in a court of this state.

31
32 **Example 2.** Assume the same facts as Example 1, except that B pays the 800 Euros
33 pursuant to the judicial settlement without the need for enforcement proceedings. If A
34 nevertheless brings a new action for the remaining 200 Euros, B cannot ask a court in this state to
35 recognize the judicial settlement as precluding the action.

36
37 See Report ¶¶ 208, 209.

38
39 **SECTION 19. SEVERABILITY.** A court of this state shall recognize or enforce a
40 severable part of a judgment if recognition or enforcement of only that part is applied for or only
41 part of the judgment is capable of being recognized and enforced under this [act].

42 **Reporters' Notes**

1. Section 19 is based on Article 15 of the Convention, and tracks its language.

SECTION 20. PROCEDURE FOR RECOGNITION OF JUDGMENT.

(a) If recognition of a judgment is sought under this [act] as an original matter, the issue of recognition must be raised by bringing an action seeking recognition of the judgment.

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

Reporters' Notes

1. This section is based on section 6 of the UFCMJRA.

SECTION 21. STATUTE OF LIMITATIONS APPLICABLE TO RECOGNITION

PROCEEDINGS. An action to recognize a judgment under this [act] must be commenced within the time during which the judgment has effect between the parties in the country of origin.

Reporters' Notes

1. This section is based in part on section 9 of the UFCMJRA.

SECTION 22. STAY OF PROCEEDINGS PENDING APPEAL OF JUDGMENT.

If a party establishes that an appeal of a judgment of a chosen court is pending or will be taken in the country of origin, the court may stay any proceedings in this state concerning recognition or enforcement of the judgment until the appeal is concluded, the time for appeal expires with no appeal having been taken, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

Reporters' Notes

1. Section 22 is based on Section 8 of the UFCMJRA.

2. Article 14 of the Convention provides that the procedures for recognition and

1 enforcement are governed by the law of the requested State unless the Convention provides
2 otherwise. The Convention contains no provision with regard to stay of recognition or
3 enforcement proceedings. This section provides for a procedure similar to that available with
4 regard to recognition of foreign country money judgments under the Uniform Foreign Country
5 Money Judgment Recognition Act.
6

7 **SECTION 23. INTERNATIONAL CHARACTER; UNIFORMITY OF**

8 **INTERPRETATION.** In applying and construing this [act], consideration shall be given both
9 to its character as a law implementing an international convention and to its character as a
10 uniform law, and to the need to promote uniformity of interpretation with respect to its subject
11 matter among the states that enact it and among member countries to the convention that it
12 implements.

13 **Reporters' Notes**

14 1. Section 23 is based on the standard ULC language and Article 23 of the Convention.
15

16 2. The language of Article 23 of the Convention or similar language is found in many
17 international conventions, including other Hague Conference conventions and the United Nations
18 Convention on the International Sale of Goods (CISG). The Report states that the uniformity
19 provision of Article 23 requires courts
20

21 to interpret [the Convention] in an international spirit so as to promote uniformity
22 of application. Where reasonably possible, therefore, foreign decisions and
23 writing should be taken into account. It should also be kept in mind that concepts
24 and principles that are regarded as axiomatic in one legal system may be unknown
25 or rejected in another. The objectives of the Convention can be attained only if all
26 courts apply it in an open-minded way.
27

28 Report ¶256. As the implementing legislation for the Convention in this state, this Act should be
29 interpreted in a similar fashion.
30

31 **SECTION 24. SAVINGS CLAUSE.** This [act] does not prevent the enforcement of a
32 choice of court agreement not within the scope of this [act] or recognition and enforcement of a
33 judgment not within the scope of this [act] under principles of comity or otherwise.

34 **Reporters' Notes**

1 chosen court, and the proceedings in the other country must have been filed after the Convention
2 entered into force for that other country. Report ¶¶218, 219. The language of this section differs
3 somewhat from the language of Article 16 because of the need to state the transitions rules in the
4 specific context of courts of a state of the United States. The substance of the provision,
5 however, is intended to be the same as that of Article 16 of the Convention.
6

7 2. The application of subsections (a) and (b) is illustrated by the following examples:
8

9 **Example 1:** A and B entered into an exclusive choice of court agreement on February 3,
10 2011 selecting the courts of New York as their exclusive forum. The Convention enters into
11 force in the United States on July 1, 2011. The New York legislature passes this Act, with an
12 effective date of February 1, 2011. A files an action in New York state court on March 1, 2011.
13 This Act will not apply to the parties' exclusive choice of court agreement because the
14 Convention had not yet entered into force in the United States when the exclusive choice of court
15 agreement was concluded. Therefore, New York will not be under an obligation under this Act
16 to hear the case See Report, ¶220, Example 1. Whether the New York court would hear the case
17 would be determined by other law of New York.
18

19 **Example 2:** Assume the same facts as in Example 1, except that the parties had entered
20 into the exclusive choice of court agreement on July 2, 2011. Because the exclusive choice of
21 court agreement would have been entered into after the Convention entered into force with regard
22 to the United States, then this Act would apply and the New York state court would be under an
23 obligation to hear the case under this Act.
24

25 **Example 3:** A and B entered into an exclusive choice of court agreement selecting the
26 courts of London, England on February 3, 2011. The Convention enters into force in the United
27 States on January 1, 2011. The Convention enters into force in the United Kingdom on August
28 1, 2011. The New York legislature passes this Act, with an effective date of February 1, 2011. B
29 files an action in New York state court on July 15, 2011. This Act will not apply to the parties'
30 exclusive choice of court agreement because, the exclusive choice of court agreement was
31 concluded before the Convention entered into force in the United Kingdom, the country of the
32 chosen court. This will be the result even though the exclusive choice of court agreement was
33 concluded and the proceedings were filed in New York after the Convention had entered into
34 force with regard to the United States. When the question is applicability of the Act to a
35 proceeding filed in a court in a country other than that of the chosen court, both subsection (a)
36 and subsection (b) apply. Therefore, the New York state court will not have an obligation under
37 this Act to dismiss the proceedings filed by B. Whether the New York court would dismiss the
38 proceedings in favor of the chosen forum would be determined by other law of New York.
39

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

1 **Example 5:** A and B entered into an exclusive choice of court agreement on February 3,
2 2010 selecting the courts of London, England as their exclusive forum. Assume that this date is
3 after the date on which the Convention entered into force with regard to the United Kingdom. A
4 obtained a judgment against B in the chosen court in London. The New York legislature passes
5 this Act with an effective date of February 1, 2011. A files an action for recognition and
6 enforcement of the London judgment in New York state court on March 1, 2011. The
7 Convention enters into force with regard to the United States on July 1, 2011. This Act will not
8 apply to A’s action for recognition and enforcement because that action was filed before the
9 Convention entered into force in the United States. Therefore, the New York state court will not
10 be under an obligation under this Act to recognize and enforce the London court judgment.
11 Whether the London court judgment would be entitled to recognition and enforcement would be
12 determined by the other law of New York.

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

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

38
39 4. The Transitional provisions of the Convention do not apply with regard to declarations
40 concerning non-exclusive choice of court agreements under Article 22. Report ¶254.

41
42 NOTE: A separate provision will be needed to address whether declarations cover choice of
43 court agreements made before the declaration entered into force.

44
45 NOTE: At its February 2009 meeting, the Drafting Committee requested that Prof. Ron Brand
46 provide alternative language for this section. His proposal is as follows:

1 **SECTION 21. TRANSITION PROVISIONS; EFFECTIVE DATE.**

2 (a) This [act] shall apply to exclusive choice of court agreements concluded after
3 the entry into force of the Convention for the country of the chosen court.

4 (b) This [act] shall not apply to proceedings instituted before the entry into force
5 of the Convention for the United States.
6

7 This language tracks Article 16 of the Convention. This is necessary because the rules of Article
8 16 are rather precise, and necessarily coordinate with other provisions of the Convention.
9 Having language that would not coordinate with the Convention would run the risk of running
10 afoul of the “uniform interpretation” obligations found in Article 23 of the Convention.
11
12

13 **Notes (From BRAND & HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT**
14 **AGREEMENTS 139-42 (Cambridge, 2008)):**
15

16 Article 16 sets out two timing rules for application of the Convention. Paragraph (1)
17 provides the rule applicable to exclusive choice of court agreements, and paragraph (2) provides
18 the rule applicable to the institution of proceedings. In each case, the rule determines when the
19 agreement or the proceedings fall under the Convention and thus when Convention rules apply.
20

21 **A. Article 16(1): The Date of Conclusion of an Exclusive Choice of Court**
22 **Agreement and the Application of Chapter II Rules on Jurisdiction**
23

24 **1. General application of the rule**
25

26 Article 16(1), by determining when the Convention shall apply to an exclusive choice of
27 court agreement, gives the rule applicable to Chapter II proceedings under the two basic rules
28 found in Articles 5 (the court chosen shall have jurisdiction) and 6 (a court not chosen shall
29 suspend or dismiss proceedings). This is a mandatory rule. The Convention “shall” apply to any
30 exclusive choice of court agreement “concluded after the date of entry into force in the State of
31 the chosen court.” Thus, under the Convention, there can be no “exclusive choice of court
32 agreement” that is entered into on or before the date of entry into force of the Convention in the
33 State of the chosen court. As a result, only an exclusive choice of court agreement concluded
34 after the entry into force of the Convention in the State of the chosen court can trigger the rules
35 of Articles 5 and 6.

36 The date of conclusion of the choice of court agreement is the event which triggers
37 application of the Convention. This may be different from the date of conclusion of the contract
38 which is governed by the choice of court agreement. It almost certainly will be different from the
39 date of the alleged breach or other legal wrong giving rise to legal proceedings.

40 The operative date for mandatory application of the Convention to determining the
41 existence of an exclusive choice of court agreement is not the date of signature, ratification,
42 acceptance, approval or accession (see Article 27), but the date of entry into force of the
43 Convention under Article 31.

44 Article 16(1) only prevents Convention rules from applying to exclusive choice of court
45 agreements concluded prior to entry into force in the State of the chosen court. This does not
46 prevent the chosen court from applying Convention rules to such an agreement as a matter of

1 national law.

2 It is possible that private parties could enter into multiple choice of court agreements in
3 an extended contractual relationship, with the choice of court agreements thus entered into at
4 different times. If some of these agreements are concluded prior to entry into force of the
5 Convention, and others after entry into force in the State of the chosen court, then the application
6 of the Convention to the later agreement(s) would be mandatory as a matter of Convention rule,
7 but application to the earlier agreement(s) would a matter of national law. The matter might
8 become even more complicated if declarations come into play as well.

9 10 **2. Application of the rule to cases involving Convention declarations**

11
12 Under Article 32(5), a declaration under any of Articles 19, 20, 21, and 26(5) “shall not
13 apply to exclusive choice of court agreements concluded before [the declaration] takes effect.”
14 This rule of exclusion does not apply to declarations made under Article 22 (reciprocal
15 declarations on non-exclusive choice of court agreements). Thus, an Article 22 declaration by a
16 State that it will recognize and enforce judgments for which jurisdiction was based on a non-
17 exclusive choice of court agreement may result in recognition and enforcement of the judgment
18 even if the choice of court agreement was concluded prior to the entry into force of the
19 Convention in the State of the chosen court.

20 This distinction in the Article 16 timing rules in regard to available declarations is
21 consistent with the general thrust and purpose of the Convention on two counts. First, Articles
22 19, 20, 21, and 26 allow declarations that limit the scope of application of the Convention, while
23 Article 22 allows a declaration that expands the scope of Chapter III of the Convention.⁷ The
24 effect of Article 32(5) is thus to place timing limitations on declarations that limit the application
25 of the Convention, and not to place timing limitations on declarations that expand the application
26 of the Convention.

27 Second, Articles 19, 20, 21, and 26 provide for declarations that may affect the
28 application of the rules found in both Chapter II (jurisdiction) and Chapter III (recognition and
29 enforcement). Article 22 declarations affect only rules found in Chapter III, and those rules do
30 not hinge on the date of conclusion of the choice of court agreement under Article 16(1). This
31 parallels the distinction found in paragraphs (2) and (3) of Article 1, which determines whether a
32 case is international by providing a higher threshold for application of Chapter II rules on
33 jurisdiction (Article 1(2)) than for Chapter III rules on recognition and enforcement (Article
34 1(3)).

35 36 **B. Article 16(2): The Date Proceedings are Brought**

⁷This distinction demonstrates the logic behind the Article 32(5) rule that such declarations “shall not apply to exclusive choice of court agreements concluded before it takes effect.” A Contracting State may not use a declaration to change the results of a pre-existing choice of court agreement. Doing so would diminish the level of party autonomy otherwise acknowledged by the Convention at the time of conclusion of the agreement. On the other hand, it makes sense that a Contracting State may grant recognition to party autonomy through the application of an Article 22 declaration to pre-existing choice of court agreements. Such a result enhances the purposes of the Convention as well as its respect for party autonomy.

1 As noted above, while paragraph (1) of Article 16 sets forth a timing rule for determining
2 when an “exclusive choice of court agreement” falls under the Convention, the rule in paragraph
3 (2) applies not to agreements but to “proceedings.” The words “court seized” in Article 16(2),
4 while not defined in the Convention, thus refers to the court in which those proceedings are
5 instituted.

6 Article 16(2), by establishing a rule applicable to the timing of proceedings, does not
7 affect the validity of choice of court agreements. It thus will not be a rule applicable in Article 5
8 cases brought in the chosen court. The determination for the chosen court to make under the
9 Convention is whether there exists an “exclusive choice of court agreement.” In terms of
10 Convention timing, that question is governed by the rule found in Article 16(1). If the
11 Convention was not in effect prior to the conclusion of the exclusive choice of court agreement,
12 then Article 16(1) would prevent the application of the Convention. Thus, there would be no
13 need for application of Article 16(2) in such a case.

14 Article 16(2) will apply, however, in Article 6 cases, where the forum court is not the
15 court chosen in an exclusive choice of court agreement, and in Article 8 cases, where the forum
16 court is faced with the question of whether to recognize and enforce the decision of a court
17 chosen in an exclusive choice of court agreement. In such cases, the court seized is prohibited
18 from applying the Convention in proceedings instituted before entry into force of the Convention
19 in the forum State. Such cases will proceed under national law – which may or may not have the
20 same rules as the Convention.

21 The operative date which prohibits application of the Convention as a matter of public
22 international law by the court seized is the date of entry into force of the Convention *within that*
23 *court’s own State*. The Convention does not apply to proceedings in the court seized if the date
24 of institution of the proceeding pre-dates the date of entry into force of the Convention in the
25 State of the court seized. This does not prevent rules of national law similar to those found in the
26 Convention from applying to cases instituted prior to the effective date of the Convention in the
27 forum State.

28 The declarations contemplated by Articles 19 and 21, by depriving the chosen court of
29 jurisdiction or by taking a particular matter outside the scope of the Convention, may have a
30 direct effect on the availability of jurisdiction in a court not chosen. Due attention should be paid
31 in different circumstances to the possible interaction of the rule in Article 16(2) with such
32 declarations made after the original effective date, or of modifications or withdrawals of such
33 declarations.

34 35 **C. Timing and the Scope of Review**

36 Under Article 8(1), a court addressed must recognize or enforce a judgment given by a
37 court of another Contracting State designated in an exclusive choice of court agreement. This
38 obligation exists regardless of whether the jurisdiction of the court of origin was founded in
39 Article 5 of the Convention. Thus, the court addressed has no basis to conduct an inquiry into
40 the time of entry into force of the Convention in the State of origin. It must recognize or enforce
41 the judgment unless some other ground of refusal is explicitly provided in the Convention.
42
43
44

45 **Further Notes (From BRAND & HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF**
46 **COURT AGREEMENTS 158-59 (Cambridge, 2008)):**

1 **4. Planning for Article 22 prior to entry into force**
2

3 Although it would appear that the benefits of Article 22 will be available – and thus need
4 be considered – only after the effective date of the Convention, the transitional timing rules of
5 Article 16 make the potential for Article 22 declarations of importance to transaction planning
6 that occurs even before the Convention comes into effect. The timing rule of Article 16(1)
7 applies only to exclusive choice of court agreements, and provides that such agreements are
8 governed by the Convention only if concluded after the date of entry into force of the Convention
9 in the state of the chosen court. It does not apply to non-exclusive choice of court agreements.
10 Article 16(2) sets forth the transition rule providing that proceedings are governed by Convention
11 rules only if they are brought after the effective date of the Convention in the state of the court
12 seised.

13 Under Article 3, an exclusive choice of court agreement must designate a court or the
14 courts of a single Contracting State. Because a State is not a Contracting State until the
15 Convention enters into force in that State, an agreement that otherwise meets all of the
16 requirements of an exclusive choice of court agreement, but is concluded before the entry into
17 force of the Convention in the State of the chosen court, is a non-exclusive choice of court
18 agreement under Article 3. Thus, such an agreement does not lead to either jurisdiction in the
19 chosen court under Article 5 or an obligation to dismiss in any other court under Article 6, as a
20 result of the timing rule found in Article 16(1). Nonetheless, if an action is brought in the court
21 chosen in such an agreement then Article 22 will apply to proceedings brought to recognize and
22 enforce the resulting judgment if those proceedings are brought after the Convention has entered
23 into force in both the Contracting State from which the judgment originates and the Contracting
24 State in which recognition and enforcement is sought, so long as both of these Contracting States
25 have filed an Article 22 declaration.
26

27 **SECTION 26. EFFECTIVE DATE.** This [act] takes effect