

DRAFT
FOR DISCUSSION ONLY

CHOICE OF COURT ~~AGREEMENT~~AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For ~~February 27 - March 1~~October 16-17, 2009 Drafting Committee Meeting

~~Without~~With Prefatory Note and ~~With~~ Reporters' Notes

REDLINE SHOWING CHANGES FROM FEBRUARY 2009 MEETING DRAFT

Copyright © 2009
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments of Reporter's Notes, have not been passed upon by the National Conference of Commissioners on Uniform state laws of the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

October 5, 2009

DRAFTING COMMITTEE ON CHOICE OF COURTS AGREEMENT COURT AGREEMENTS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

REX- BLACKBURN, P.O. Box 70 (83707), 1221 W. Idaho St., Boise, ID 83702, *Chair*

C. ARLEN BEAM, U.S. Court of Appeals, 435 Federal Bldg., Lincoln, NE 68508

RHODA B. BILLINGS, 5525 Williams Rd., Lewisville, NC 27023

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910

ROBERT H. CORNELL, 573 Arkansas, San Francisco, CA 94107

HENRY DEEB GABRIEL, JR., 201 North Greene St., Greensboro, NC 27401

HARRIET- LANSING, 313 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155

RYAN -LEONARD, 116 E. Sheridan, Suite 207, Oklahoma City, OK 73104

HARVEY S. PERLMAN, University of Nebraska-Lincoln, Nebraska – Lincoln, 201 Canfield Administration Bldg.,

Lincoln, NE 68588-0419

DANIEL -ROBBINS, 15301 Ventura Blvd., Bldg. E, Sherman Oaks, CA 91403

H. KATHLEEN PATCHEL, Indiana University, School of Law-Indianapolis, Law – Indianapolis, 5715 E. 56th St.,-

Indianapolis, IN 46226, *National Conference Reporter*

LOUISE ELLEN TEITZ, Roger Williams University School of Law, Ten Metacom Ave., Bristol,

RI 02809, *Co-Reporter*

EX OFFICIO

~~MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563,~~

~~*President*~~

~~WILLIAM R. BREETZ, JR. ROBERT A. STEIN, University of Connecticut School of Law, Knight Hall Room 202,~~

~~35 Elizabeth St., Hartford, CT 06105, *Division Chair*~~

Minnesota Law School, 229 19th Ave. S., Minneapolis, MN

55455, *President*

MARILYN E. PHELAN, Texas Tech University, 1802 Hartford, Lubbock, TX 79409, *Division*

Chair

AMERICAN BAR ASSOCIATION ADVISOR

KEITH MCLENNAN, 3770 Ridge Pike, 2nd 2nd Flr., Collegeville, PA 19426, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

_____ 111 N. Wabash Ave., Suite 1010
_____ Chicago, Illinois IL 60602
_____ 312/450-6600
_____ www.nccusl.org

CHOICE OF COURTS AGREEMENT COURT AGREEMENTS ACT

TABLE OF CONTENTS

<u>PREFATORY NOTE</u>	4
SECTION 1. SHORT TITLE	1
<u>SECTION 2. PURPOSE</u>	1
SECTION 23 . DEFINITIONS	1
SECTION 34 . SCOPE	29
SECTION 45 . EXCLUSIVE CHOICE OF COURT AGREEMENT AS INDEPENDENT AGREEMENT	11
SECTION 518	
<u>SECTION 6. WHEN CHOICE OF COURT AGREEMENT DEEMED EXCLUSIVE</u>	18
SECTION 7 . RESIDENCE OF AN ORGANIZATION	119
SECTION 68 . DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION	1220
SECTION 79 . DUTY OF COURT NOT CHOSEN TO DECLINE JURISDICTION	1423
SECTION 810 . RECOGNITION OF JUDGMENT OF CHOSEN COURT OR COURT TO WHICH CASE HAS BEEN TRANSFERRED	1424
SECTION 911 . EXCEPTIONS TO RECOGNITION OF A JUDGMENT	15
SECTION 1026	
<u>SECTION 12. PRELIMINARY QUESTIONS</u>	29
<u>SECTION 13. NON-COMPENSATORY DAMAGES</u>	30
SECTION 14. RECOGNITION OF JUDGMENTS BASED ON CONTRACTS OF INSURANCE	1930
SECTION 115 . RECOGNITION OF JUDGMENT RENDERED BY COURT CHOSEN IN A NON-EXCLUSIVE CHOICE OF COURT AGREEMENT	19
31	
SECTION 116 . DOCUMENTS TO BE PRODUCED IN CONNECTION WITH REQUEST FOR RECOGNITION	2132
SECTION 117 . ENFORCEMENT OF JUDGMENT RECOGNIZED BY THIS STATE ..	2234
SECTION 118 . JUDICIAL SETTLEMENTS (<i>TRANSACTIONS JUDICIAIRES</i>)	2334
SECTION 119 . SEVERABILITY	2336
{SECTION 120 . PROCEDURE FOR RECOGNITION OF JUDGMENT}	2336
{SECTION 121 . STATUTE OF LIMITATIONS APPLICABLE TO RECOGNITION PROCEEDINGS}	2436
SECTION 122 . STAY OF PROCEEDINGS PENDING APPEAL OF JUDGMENT	2436
SECTION 123 . INTERNATIONAL CHARACTER; UNIFORMITY OF INTERPRETATION	2537
SECTION 2024 . SAVINGS CLAUSE	2538
<u>SECTION 2125. TRANSITION PROVISIONS;</u>	38
<u>SECTION 26. EFFECTIVE DATE</u>	2644

CHOICE OF COURT AGREEMENT 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 AgreementAgreements Act:].

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

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

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

10 ~~(c) “Convention” means~~PURPOSE. The purpose of this [act] is to implement the
11 Hague Convention of 30 June 2005 on Choice of Court Agreements in this state.

12 [SECTION 2. IMPLEMENTATION OF CONVENTION. This [act] implements the
13 Hague Convention of 30 June 2005 on Choice of Court Agreements:

14 ~~(d in this state.)~~

15 Reporters’ Notes

16 1. At its February 2009 drafting committee meeting, the Committee decided to add a
17 statement of purpose to emphasize the role of the Act as the implementation of an international
18 convention. At the 2009 ULC annual meeting, a comment was made that uniform acts normally
19 do not contained statements of purpose. The bracketed language would avoid the style issue.
20

21 SECTION 3. DEFINITIONS. In this [act]:

22 (1) “Choice of court agreement” means an agreement between two or more persons,
23 concluded or documented in a record, which designates the court or courts of one or more
24 member countries for the purpose of deciding disputes that have arisen or may arise in
25 connection with a particular legal relationship.

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

3 (3) “Convention” means the Hague Convention of 30 June 2005 on Choice of Court
4 Agreements.

5 (4) “Country of origin” means the member country in which athe court of origin is
6 located.

7 (e5) “Court of origin” means the court that granted athe judgment.

8 (f6) “Exclusive choice of court agreement” means a choice of court agreement;
9 ~~concluded or documented in a record,~~ that designates the courts of only one member country or
10 one or more specific courts of only one member country ~~for the purpose of deciding disputes~~
11 ~~which have arisen or may arise in connection with a particular legal relationship,~~ unless the
12 parties expressly provide that the choice of court agreement is not exclusive.

13 (g7) “International case”;

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

16 (Ai) all the parties are exclusively residents of the same member country;
17 and

18 (Bii) the relationship of the parties and of all other elements relevant to the
19 dispute, regardless of the location of the chosen court, ~~are connected~~ only with that country; or

20 (2B) for purposes of application of the provisions of this [act] relating to
21 recognition and enforcement of a judgment, means any case in which the judgment was rendered
22 in a country other than the member country in which recognition and enforcement is sought.

23 (h8) “Judgment” means a [court decision] on the merits, however denominated,

1 including a decree or order, and also a determination of costs or expenses relating to a decision
2 on the merits, that may be recognized or enforced under this [act]. The term does not include an
3 interim measure of protection.

4 (i9) “Member country” means a party country or regional economic integration
5 organization that is a Contracting State to the Convention.

6 (j10) “Non-exclusive choice of court agreement” means a choice of court agreement as
7 defined in Section (3)(1) that is not an exclusive choice of court agreement under Section (3)(6).

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

11 (k12) “Record” means information that is in writing or in any form of communication
12 which renders the information accessible so that it may be used for subsequent reference.

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

16 Reporters’ Notes

17
18 1. ~~Subsections 2(a), (b), (d), and (e) are based on definitions in the Report.~~

19
20 ~~2. Subsection 2(f) is based on Article 3(a)~~ Subsection (1) is based in part on the
21 requirements of Article 3 of the Convention with regard to exclusive choice of court agreements.
22 Under the Convention, an exclusive choice of court agreement must meet five requirements: (1)
23 there must be an agreement between two or more parties; (2) the agreement must be “concluded
24 or documented” in a record; (3) the agreement must designate the courts of one country or one or
25 more specific courts in one country to the exclusion of all other courts; (4) the designated courts
26 must be the courts of a member country; and (5) the designation must be for the purpose of
27 deciding disputes that have arisen or may arise in connection with a particular legal relationship.
28 Report ¶93. The definition of “choice of court agreement” in this Act meets all of the
29 requirements to be an exclusive choice of court agreement other than the requirement that the
30 agreement must designate the courts, or one or more specific courts, of only one member
31 country. The definition of “choice of court agreement” is important in distinguishing between

1 the exclusive choice of court agreements to which this Act normally applies and those
2 nonexclusive choice of court agreements to which the Act applies between the United States and
3 another member country who has made a reciprocal declaration under Article 22 of the
4 Convention. See section 15 of this Act.
5

6 ~~3. Subsection 2(g)~~2. Subsection (2) defines the key term “chosen court.” Under section 8
7 of this Act, the chosen court, subject to certain exceptions, is the only court entitled to hear the
8 case, and section 9 of this Act normally requires other courts to decline jurisdiction in favor of
9 the chosen court. Further, under section 10 of this Act, other member country courts, again
10 subject to certain exceptions, must recognize a judgment rendered by the chosen court.
11

12 3. Subsection (4) is based on the definition of “State of origin” in the Report, page 21.
13 The defined term has been changed to “country of origin” in order to avoid confusion with the
14 term “state,” which refers to a state of the United States.
15

16 4. Subsection (5) is based on the definition of the same term in the Report, page 21, and
17 closely follows that definition.
18

19 5. Subsection (6) defines the key term “exclusive choice of court agreement.” That term
20 is a crucial one in defining the scope of this Act under Section 4. Except with regard to choice of
21 court agreements meeting the requirements of section 15 of this Act, this Act applies only to
22 exclusive choice of court agreements. “Exclusive choice of court agreement” is defined in
23 Article 3 of the Convention. Such agreements must meet five requirements: (1) there must be an
24 agreement between two or more parties; (2) the agreement must be “concluded or documented”
25 in a record; (3) the agreement must designate the courts of one country or one or more specific
26 courts in one country to the exclusion of all other courts; (4) the designated courts must be the
27 courts of a member country; and (5) the designation must be for the purpose of deciding disputes
28 that have arisen or may arise in connection with a particular legal relationship. Report ¶93. The
29 combination of the definition of “choice of court agreement” in subsection 1 and the definition of
30 “exclusive choice of court agreement” in subsection 6 meet these Convention requirements.
31 Each of these requirements is discussed below.
32

33 6. The first requirement for an exclusive choice of court agreement is that it must result
34 from an agreement between two or more parties; it cannot be established unilaterally. The
35 determination as to whether or not there is an agreement is left to state law other than this Act.
36

37 In some instances, this Act designates which state’s law (including its choice of law
38 rules) will apply to the determination of certain matters. Sections 8(b)(1), 9(1), and 11(1) direct
39 the determination as to whether an agreement is “null and void” be determined under the law of
40 the chosen court. Section 9(2) and (3) refer to the law of the court seized with regard to the issues
41 of lack of capacity and public policy. Section 11 (2) and (6) refers to the law of the court asked
42 to recognize a judgment with regard to determination of the issues of capacity and public policy,
43 and section 11(4) refers to that law with regard to fundamental principles concerning service of
44 documents.
45

46 The fundamental question as to whether there was an agreement between the parties,

1 however, is determined by the law of the court asked to apply this Act. The Report states that

2
3 the Convention as a whole comes into operation only if there is a choice of court
4 agreement, and this assumes that the basic factual requirements of consent exist.
5 If, by any normal standards, these do not exist, a court would be entitled to assume
6 that the Convention is not applicable, without having to consider foreign law.

7
8 Report ¶95.

9
10 The Report gives the following example:

11
12 X, who is resident in Panama, sends an unsolicited email to Y, who is resident in
13 Mexico, making an offer on terms that are extremely unfavorable to Y. The offer
14 contains a choice of court clause in favor of the courts of Ruritania . . . and
15 concludes: “If you have not replied within seven days, you will be deemed to have
16 accepted this offer” The email is deleted by Y’s anti-spam software and he never
17 reads it. After seven days, X claims that there is a contract with a choice of court
18 agreement, and brings proceedings in the courts of Ruritania. If, unlike the law of
19 every other State in the world, the law of Ruritania considered that a contract
20 existed and the choice of court “agreement” was valid, other States, including
21 Mexico, would nevertheless be entitled to treat the choice of court agreement as
22 non-existent.

23
24 Report ¶96.

25
26 7. The second requirement for an exclusive choice of court agreement is the formal
27 requirement that it must be “concluded or documented in a record.” A choice of court agreement
28 is “concluded” in a record if a record of it exists at the time at which agreement is entered into.
29 An agreement is “documented” in a record if, although the original agreement was oral, it
30 subsequently was put into a record. See Report ¶113. For a discussion of “record,” see
31 Reporters’ Note *** below.

32
33 The requirement that the choice of agreement be “concluded or documented in a record”
34 is both necessary and sufficient under this Act. A choice of court agreement is not covered by
35 this Act if it does not meet this requirement; if the agreement does meet this requirement, no
36 further requirements of a formal nature – for example, that the agreement be written in a
37 particular type or be in a particular language – may be required. Report ¶110. Whether these
38 formal requirements are met is, of course, a different question from whether there was mutual
39 consent to the choice of court agreement.

40
41 8. The third requirement for an exclusive choice of court agreement is that it must
42 designate “the courts of only one member country or one or more specific courts of only one
43 member country.” The designation of courts in only one member country is the requirement that
44 distinguishes and exclusive choice of court agreement from a non-exclusive choice of court
45 agreement under this Act. If an agreement meeting the definition of “choice of court agreement”
46 in this Act also designates courts located in only one member country, then the choice of court

1 agreement will be deemed to be exclusive unless the parties have expressly provided otherwise.
2 See Report ¶102. Thus, a choice of court agreement designating “the Commercial Court of Paris
3 or the Commercial Court of Lyon” would be an exclusive choice of court agreement because it
4 designates courts of only one member country (assuming France is a party to the Convention).
5 On the other hand, a choice of court agreement designating “the Commercial Court of Paris or
6 the Commercial Court of London to the exclusion of all other courts” would not be an exclusive
7 choice of court agreement under this Act, even if both France and the United Kingdom are
8 parties to the Convention, and even though the agreement expressly states it is exclusive, because
9 the agreement designates the courts of more than one member country. See Report ¶109.

10
11 Under this requirement, an exclusive choice of court agreement may designate “the courts
12 of only one member country” in general, or it may designate “one or more specific courts of only
13 one member country.” A choice of court agreement designating “the courts of France,” a choice
14 of court agreement designating “the Commercial Court of Paris,” and a choice of court
15 agreement designating “either the Commercial Court of Paris or the Commercial Court of Lyons”
16 all would meet this requirement to be an exclusive choice of court agreement. Report ¶¶103,
17 104. Similarly, a choice of court agreement designating “the courts of the United States” and one
18 designating “the courts of New Jersey “ would both meet this requirement. Report ¶107.

19
20 Implicit in the requirement that the parties have designated courts in only one member
21 country is the requirement that both parties be bound by that designation. Thus, a choice of court
22 agreement that is drafted to be exclusive with regard to proceedings brought by one party but not
23 with regard to proceedings brought by another party is not an exclusive choice of court
24 agreement under this Act. For example, a choice of court clause in an international loan
25 agreement providing “Proceedings by borrower against lender may be brought exclusively in the
26 courts of Country Y; proceedings by the lender against the borrower may be brought in the courts
27 of Country Y or in the courts of any other country having jurisdiction under its law” would not be
28 an exclusive choice of court agreement under this Act because the choice of court designation is
29 exclusive only with regard to the borrower. Report ¶¶105-106.

30
31 9. The fourth requirement for an exclusive choice of court agreement is that it must
32 designate the courts of a member country. This Act only applies to choice of court agreements
33 designating the courts of a party to the Convention, and to recognition and enforcement of
34 judgments rendered in a member country. Whether a choice of court agreement designating the
35 courts of a non-member country will be enforced in this state, or a judgment rendered by a
36 chosen court in a non-member country will be recognized and enforced in this state is determined
37 by the law of this state other than this Act. See Report ¶100.

38
39 10. The fifth requirement for an exclusive choice of court agreement is that the
40 designation of a court must be “for the purpose of deciding disputes that have arisen or may arise
41 in connection with a particular legal relationship.” Subsection 3(1). The exclusive choice of
42 court agreement may be limited to, or include disputes that have already arisen between the
43 parties, or it may be limited to, or include, future disputes that may arise in connection with a
44 particular relationship. Report ¶101.

45
46 11. The last clause of subsection (6) allows the parties to a choice of court agreement that

1 otherwise would be an exclusive choice of court agreement under subsection (6) to avoid that
2 result by expressly providing that the choice of court agreement is not exclusive. If the parties do
3 not expressly so provide, then a choice of court agreement meeting the subsection (6) definition
4 will be deemed to be exclusive under section 6 of this Act. For further discussion of this issue,
5 *see* section 6.
6

7 12. The definition of “international case” in subsection (7) is based on Article 1(2)& and
8 (3) of the Convention. It is a key term in defining the scope of this Act. Section 4 of this Act
9 provides that this Act only applies to a choice of court agreement in an international case. What
10 constitutes an international case depends on the purpose for which the determination is being
11 made. Subsection (7) defines the term differently depending upon whether the purpose is
12 enforcement of the choice of court agreement or recognition and enforcement of a judgment.
13

14 If the determination is being made as to whether enforcement of a choice of court
15 agreement comes within this Act, then a case is an “international case” unless the parties are all
16 resident in one member country and all relevant elements other than the location of the chosen
17 court are connected only with that member country. Report ¶11. In other words, if a case is
18 wholly domestic, the choice of a court in another member country in the choice of court
19 agreement does not make it international. Report ¶11. On the other hand, the provisions of the
20 Act dealing with enforcement of the choice of court agreement will apply if either all the parties
21 are not exclusively residents of one member country or there is some other element relevant to
22 the dispute besides the chosen court that has a connection with some other member country.
23 Report ¶41.
24

25 If, however, the determination is being made as to whether recognition and enforcement
26 of a judgment comes within the Act, then a case is an “international case” if the judgment was
27 rendered by the court of a member country other than the member country asked to recognize and
28 enforce it. Report ¶11. This means that a case that would not be an international case for
29 purposes of enforcement of the choice of court agreement because the only “foreign” element is
30 the chosen court could be an international case for purposes of recognition and enforcement in
31 another member country of a judgment issued by the chosen court. Report ¶11.
32

33 The application of the two definitions of “international case” is illustrated by the
34 following examples:
35

36 **Example 1:** A and B enter a commercial contract that contains an exclusive choice of
37 court provision choosing the California courts to resolve disputes arising under the contract.
38 Both A and B are exclusively residents of Mexico. All relevant elements other than the chosen
39 court relate only to Mexico. When a dispute under the contract subsequently arises, A sues B in a
40 state court in California. Assume both the United States and Mexico are member countries and
41 that California has adopted this Act. B argues that the California court should dismiss the case
42 despite the choice of court agreement on the basis of forum non conveniens. A argues that
43 section 8 of this Act requires the California court to hear the case without regard to the doctrine
44 of forum non conveniens. Section 8 does not apply because the case is not an international case
45 for purposes of the provisions of this Act relating to enforcement of the exclusive choice of court
46 agreement. Whether the California court will dismiss the case will be determined by state law

1 other than this Act. See Report ¶42.

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

15
16 **Example 3:** Assume in Example 2 that, instead of suing B in California, A sues B in the
17 chosen court in Mexico and obtains a judgment against B. A then seeks recognition of the
18 judgment in a California court. Although both parties are U.S. residents and all other relevant
19 elements other than the chosen court relate only to the United States, this Act will apply to the
20 California court’s obligation to recognize the Mexican judgment. The case is an international
21 case for purposes of this Act’s provisions regarding recognition and enforcement because it was
22 rendered by a court of another member country. See Report ¶46.

23
24 13. The definition of “judgment” in subsection (8) is based on Article 4(1) of the
25 Convention. This term is important in determining what judicial decrees are entitled to
26 recognition and enforcement under this Act. “Judgment” is defined broadly to cover any
27 decision on the merits, regardless of what it is called. It would include, for example, a decision
28 issued by a patent office exercising quasi-judicial functions. Report ¶116, n.146. The definition
29 also covers an order as to costs or expenses if that order relates to a judgment that may be
30 recognized or enforced under this Act, whether that order is issued by an office of the court or be
31 a judge. Report ¶116.

32
33 The definition, however, requires that the decision be “on the merits.” It thus excludes a
34 purely procedural ruling, as well as rulings relating to interim measures of protection, as these are
35 not decisions on the merits. Report ¶116. Interim measures of protection are expressly excluded
36 from the scope of this Act under section 4(g).

37
38 QUERY: Does the definition of “judgment” in the draft adequately capture the intent of the
39 Convention? The Convention says “any decision on the merits given by a court, whatever it may
40 be called, including a decree or order... .” The example of a decision by a patent office, suggests
41 that the “whatever it may be called” language may qualify “court,” not judgment. The definition
42 in the Act says “court decision on the merits, however dominated, including a decree or order”
43 which could suggest the decision has to be that of a “court,” thus possibly excluding decisions by
44 quasi-judicial entities. The brackets in the text are there to flag this issue.

45
46 14. Subsection (9) defines “member country” as the equivalent of the term “Contracting

1 State,” which is the term used in the Convention to designate those countries that are parties to
2 the Convention. Although “Contracting State” is a standard term in treaty practice, this Act uses
3 the term “member country” instead to avoid confusion with the term “state,” meaning a state of
4 the United States and certain other U.S. political subdivisions. See subsection (13).
5

6 15. Subsection (10) defines “non-exclusive choice of court agreement.” This definition
7 is important for application of Article 22 of the Convention. The Report states that a non-
8 exclusive choice of court agreement under Article 22 must satisfy four requirements: (1) it must
9 be in the form required by Article 3(c) of the Convention (that is, it must be, in the language of
10 the Act, “concluded or documented” in a record); (2) the parties must have consented to it (that
11 is, it must be an “agreement”); (3) the chosen court must be designated for the purpose of
12 deciding disputes that have arisen or may arise in connection with a particular legal relationship;
13 and (4) the agreement must designate a court or the courts of one or more member countries.
14 Report ¶242. For purposes of this Act, this means that a non-exclusive choice of court agreement
15 must meet the requirements of subsection 3(1) defining “choice of court agreement,” but not
16 meet the additional requirements of subsection 3(6) defining “exclusive choice of court
17 agreement.”
18

19 16. Subsection (11) is the standard ULC definition of “person.” The term used, but not
20 defined, in the Convention.
21

22 17. Subsection (12) is based on Article 3(c) of the Convention, and is important to the
23 definition of the choice of court agreements that are included within this Act. Only choice of
24 court agreements that meet the formal requirement of being “concluded or documented in a
25 record” are within the scope of this Act. See subsections (1) and (6) and section 4 of this Act.
26 The Report states that the wording of the comparable Convention provision in Article 3(c) was
27 “inspired by Art. 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.” Report
28 ¶112, n.144. The definition of “record” in this Act, although not stated in the exact wording of
29 the ULC standard definition of “record,” is intended to have a comparable meaning.
30

31 The definition of “record” does not require that the choice of court agreement be signed,
32 although lack of a signature may make it more difficult to prove the existence of the agreement.
33 Report ¶112. If a choice of court agreement is not in writing, then the definition requires that it
34 be “in any form of communication which renders the information accessible so that it may be
35 used for subsequent reference.” This language is intended to cover all normal electronic means
36 of data transmission or storage, such as email and fax, provided that the data is retrievable so that
37 it can be referred to and understood on future occasions. Report ¶112. For discussion of the
38 phrase “concluded or documented,” see Reporters’ Note **** above.
39

40 18. Subsection 3(13) is the standard ULC definition of “state.”
41

42 **SECTION 34. SCOPE.**

43
44 (a) Except as otherwise ~~provide~~provided in this section, this [act] applies to:

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

3 (2) a non-exclusive choice of court agreement in an international case involving a
4 civil or commercial matter to the extent provided in ~~section 11 of this [act]~~Section 15.

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

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

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

10 (c) ~~This~~Subject to subsection (d), this [act] does not apply to a ~~proceeding involving a~~
11 ~~determination relating to the following subject matter, if that determination is a primary object of~~
12 ~~the proceeding:~~ the following matters:

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

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

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

18 (4) bankruptcy and insolvency matters;

19 (5) the carriage of passengers or goods;

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

22 (7) antitrust matters;

23 (8) liability for nuclear damage;

1 (9) claims for personal injury, wrongful death, and survival brought by or on
2 behalf of individuals;

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

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

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

8 (13) the validity of intellectual property rights other than copyright and related
9 rights;

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

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

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

16 (d) A proceeding involving a determination relating to a ~~subject~~ matter listed in
17 subsection (c) is not excluded from the scope of this [act] if that determination is of a question
18 merely preliminary to, or asserted as a defense in connection with, a determination relating to a
19 non-excluded matter that is a ~~primary~~ an object of the proceeding.

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

21 (f) ~~Proceedings are~~ A proceeding is not excluded from the scope of this [act] merely
22 because a government or governmental agency, or other person acting for a government, is a
23 party to the proceeding. ~~Nothing in this~~ This [act] affects does not affect the privileges and

1 immunities of governments or international organizations in respect of themselves and their
2 property.

3 (g) This [act] does not apply to an interim measuresmeasure of protection. This [act]
4 neither requires nor precludes the grant, refusal, or termination of an interim measuresmeasure of
5 protection by a court of this state and does not affect whether a party may request; or a court of
6 this state should grant, refuse, or terminate such measuresa measure.

7 (h) ~~Proceedings~~ A proceeding under a contract of insurance or reinsurance areis not
8 excluded from the scope of this [act] on the ground that the contract of insurance or reinsurance
9 is related to a matter to which this [act] does not apply.

10 Reporters' Notes

11 1. Subsection (a) excludes non-civil matters, including public law and criminal law
12 matters. The Convention uses the phrase “civil or commercial” law matters because these two
13 categories are regarded as separate and mutually exclusive categories in some legal systems. Art.
14 1 (1); Report, ¶49. This Act also uses that phrase for the same reason. In the U.S., a commercial
15 matter would be a subset of civil matters.

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

23
24
25 2. Subsection (b)(1) excludes choice of court agreements when any of the parties to the
26 agreement is a consumer. It covers both an agreement between a consumer and a nonconsumer,
27 and one between two consumers. Art. 2(1)(a); Report ¶50. The phrase “an individual acting
28 primarily for personal, family, or household purposes “ is a common way in which to describe a
29 consumer. Cf. Uniform Commercial Code §9-102(23)-(26) (utilizing this phrase in connection
30 with various consumer-related definitions).

31
32 3. Subsection (b)(2) excludes all choice of court agreements in employment contracts,
33 whether an individual contract between an employer and an employee or a collective contract of
34 employment between an employer and a group of employees or an organization such as a labor
35 union representing employees. Art. 2(1)b); Report ¶ 51.

1 4. ~~Subsection~~Subsections (c) ~~is~~and (d) are based on Article 2(2) & (3), which exclude
2 proceedings involving certain subject matter from the scope of the Convention, but only when
3 the matter is “an object (the subject or one of the subjects) of the proceedings,” rather than “a
4 preliminary question in proceedings that have some other matter as their object/subject.” Report
5 ¶52. Article 2(3) expressly states that “the mere fact that a matter excluded under paragraph 2
6 arises by way of defense does not exclude proceedings from the Convention, if that matter is not
7 an object of the proceedings.”
8

9 — ___ The application of this distinction is illustrated by the following examples:
10

11 **Example 1:** A and B enter a contract that contains an exclusive choice of court provision.
12 A sues B for breach of contract. B asserts by way of defense that the contract is void because it
13 violates the antitrust laws. Although subsection (c)(7) excludes antitrust from the subject matter
14 covered by this Act, the dispute between A and B would be within the scope of this Act. The
15 primary object of the action is to determine the breach of contract claim asserted by A. The
16 principal issue before the court is whether judgment should be given against B for breach of
17 contract. That antitrust issue is merely a defense to B’s liability which must be determined as a
18 preliminary question to deciding the primary object of the action, whether A is entitled to recover
19 from B for breach of contract. *See* Report ¶63.
20

21 **Example 2:** Licensor licenses patent rights to licensee under a license that contains an
22 exclusive choice of court agreement. Subsequently, licensee stops making the royalty payments
23 required under the license. Licensor brings an action under the license to recover the unpaid
24 royalties. Licensee asserts that licensor’s patent is invalid as a defense to payment. Although
25 subsection (c)(13) excludes issues relating to the validity of a patent from the subject matter
26 covered by this Act, the dispute between Licensor and Licensee is within the scope of this Act.
27 The principle issue before the court is whether Licensor can recover its unpaid royalties under the
28 license. Although the court must decide whether Licensor’s patent is valid before it can make
29 that determination, the issue of patent validity is merely a preliminary question to deciding the
30 issue of Licensor’s right to its royalties under the license. *See* Report ¶77.
31

32 5. Subject matter under subsection (c) is excluded for various reasons. In some cases, the
33 parties may not have the right to dispose of the matter for themselves because the public interest
34 or that of third parties is involved. In those cases, a particular court often will have exclusive
35 jurisdiction that cannot be ousted by a choice of court agreement. In other cases, other
36 multilateral legal regimes apply and thus the Convention is not needed. Further, exclusion of
37 these areas removes the need to resolve questions of conflict between the Convention and these
38 other regimes. Report ¶53.
39

40 6. Subsection (c)(1) is based on Article 2(2)(a) of the Convention. The language is almost
41 identical. It excludes issues dealing with status and capacity of natural persons. The Report
42 states that the Convention’s comparable exclusion “includes proceedings for divorce, annulment
43 of marriage or the affiliation of children.” Report ¶54.
44

45 7. Subsection (c)(2) is based on Article 2(2)(b) & (c).It includes language from a similar
46 exclusion in Section (b)(3) of the UFCMJRA. The Convention uses the phrase “maintenance

1 obligations,” which is intended to include child support. Art. 2(2)(b); Report ¶55. The Act
2 expressly lists “support,” which would include spousal and child support. The Convention uses
3 the phrase “matrimonial property regimes,” which includes “the special rights that a spouse has
4 to the matrimonial home in some jurisdictions.” Report ¶55. The Act uses the phrase “property
5 division.”-

6
7 The phrase “similar relationships” covers relationships between unmarried couples that
8 are given legal recognition. Report ¶55.

9
10 8. Subsection (c)(3) excludes matters relating to succession. Art. 2(2)(d); Report ¶55.
11 The ~~bracketed~~ language “and administration of estates” is not included in the Convention, but is
12 presumably ~~was~~ intended to be covered by the Convention term “succession.”

13
14 9. Subsection (c)(4) is based on Convention Article 2(2)(e), which excludes
15 ~~“insolvency”~~ “insolvency, composition, and analogous matters.” The Convention term
16 “composition” is intended to refer to procedures pursuant to which the debtor can enter an
17 agreement with creditors “in respect of a moratorium on the payment of debts or on the discharge
18 of those debts.” Report ¶56. The Convention phrase “analogous matters” “covers a broad range
19 of other methods whereby insolvent persons or entities can be assisted to regain solvency while
20 continuing to trade, such as Chapter 11 of the United States Federal Bankruptcy Code.” Report
21 ¶56. This phrase is left out of the Act because the Drafting Committee decided at its November
22 2008 meeting to include a separate subsection (c)(16) stating that matters under member country
23 laws analogous to those listed in subsection (c) also are excluded. The term “composition” is left
24 out of the Act as a term that would not convey the intended meaning under U.S. law. The term
25 “bankruptcy” is added, and would cover Chapter 11 proceedings.

26
27 10. The Report states that the Convention’s insolvency exclusion excludes proceedings
28 from the scope of the Convention “if they directly concern insolvency.” Report ¶57. The Report
29 gives the following hypothetical to explain the scope of the exclusion:

30
31 A (resident in State X) and B (resident in State Y) enter into a contract under
32 which B owes A a sum of money. The contract contains a choice of court
33 agreement in favor of the courts of State Z. A is then declared bankrupt as a result
34 of proceedings in State X. The Convention would apply to any proceedings
35 against B to recover the debt, even if they were brought by the person appointed to
36 administer A’s bankrupt estate: provided that the appointment under the
37 insolvency law of State X is recognized in State Z, that person would be standing
38 in the shoes of A and would be bound by the choice of court agreement.
39 However, the Convention would not apply to questions concerning the
40 administration of the bankrupt estate – for example, the ranking of different
41 creditors.

42
43 11. Subsection (c)(5) is the same as Convention Article 2(2)(f), which excludes contracts
44 for the national and international carriage of passengers and goods by land, sea, air or any
45 combination of the three. Report ¶58. This exclusion avoids the possibility of conflict with
46 other conventions, such as the Hague Rules on Bills of Lading, which deal with ~~this~~ aspects of

1 this area.

2
3 12. Subsection (c)(6) excludes five specific maritime matters – marine pollution;
4 limitation of liability for maritime claims; general average; emergency towage; and emergency
5 salvage. Art. 2(2)(g); Report ¶59. Other maritime matters, such as marine insurance, non-
6 emergency towage and salvage, shipbuilding and ship mortgages and liens, are included. Report
7 ¶59.
8

9 13. Subsection (c)(7) excludes antitrust law matters. The Convention version of this
10 exclusion refers to “anti-trust (competition) matters” to take into account the fact different terms
11 are used in different legal systems to refer to similar laws – what the U.S. refers to as antitrust
12 law is called “competition law” in Europe. Art. 2(2)(h); Report ¶60. The exclusion is not
13 intended to cover unfair competition law, such as that relating to misleading advertising or
14 passing goods off as those of a competitor – presumably what would be referred to as unfair trade
15 practices in the United States. Report ¶60.
16

17 14. The language of subsection (c)(8) is identical to the Convention language regarding
18 exclusion of liability for nuclear damage. Art. 2(2)(i). Liability for nuclear damage is excluded
19 because it is the subject of other conventions and because in some states, like the United States,
20 that are not a party to a nuclear liability convention, a comprehensive scheme under internal law
21 exists that requires a single collective procedure in order to have a uniform solution with regard
22 to liability and an equitable distribution of a limited fund among those injured. Report ¶64.
23

24 15. The language of subsection (c)(9) is identical to the Convention language regarding
25 exclusion of personal injury claims. Art. 2(2)(j). As the Report states, choice of court
26 agreements are likely to be rare in this tort context. Report ¶65. The Report indicates that the
27 exclusion is intended to cover not only physical injury but “nervous shock” – presumably what
28 U.S. tort law would call “emotional distress” – even if not accompanied by physical injury.
29 Report ¶65. The exclusion does not, however cover “humiliation or hurt feelings” such as those
30 related to an invasion of privacy or defamation. Report ¶65.
31

32 16. The language of subsection (c)(10) is largely based on the Convention language. The
33 Convention refers to “tort or delict claims” rather than just tort claims. Art. 2(2)(k). “Delict” is
34 the civil-law concept analogous to “tort” in common law legal systems. Report ¶66, n. 95. Only
35 tort claims for damage to tangible property that do not arise from a contractual relationship are
36 excluded. Report ¶66.
37

38 17. The comparable exclusion in the Convention to the exclusion in subsection (c)(11)
39 excludes “rights in rem in immovable property, and tenancies of immovable property” Art.
40 2(2)(l). The Convention does not define either “immovable property” or “rights *in rem*,” leaving
41 the definition of those terms to the internal law of each country. Brand & Herrup, page 66. The
42 language of subsection (c)(11) defines an “immovable” as “real property” and defines “rights *in*
43 *rem*” as “interests in real property.”
44

45 18. The exclusion in subsection (c)(11) reflects ~~that~~the fact that, as a matter of territorial
46 sovereignty, a country in which real property is situated customarily asserts exclusive jurisdiction

1 to determine who has interests in that real property; an order from a foreign court purporting to
2 determine these matters likely would not be given effect in the country in which the real property
3 is located as an intrusion on territorial sovereignty. See Brand & Herrup, page 66.
4

5 19. The Report states that “[t]he reference to rights *in rem* should be interpreted as
6 relating only to proceedings concerning ownership of, or other rights *in rem* in, the immovable,
7 not proceedings about immovables which do not have as their object/subject a right *in rem*.
8 Thus, it would not cover proceedings for damage to an immovable ... nor would it cover a claim
9 for damages for breach of a contract for the sale of land.” Report ¶67.
10

11 20. ~~The bracketed language in subsection (c)(11) of the November 2008 draft referring to~~
12 ~~real property related items has been deleted. The Drafting Committee decided that the issue of~~
13 ~~the extent to which these items fell within the exclusion should be left for decision by the courts.~~
14 The Convention exclusion refers to “tenancies in immovables,” a concept the definition of
15 which, like that of “immovables,” is left to internal law. Brand & Herrup, page 66. Subsection
16 (c)(11) defines this term as “leasehold interests.”
17

18 21. The Report states two reasons for this exception: (1) in some countries “tenancies in
19 immovables” are subject to special legislation designed to protect the tenant and (2) in some
20 jurisdictions tenancies are considered rights *in rem* that would be covered under the first part of
21 the exclusion so all tenancies were included to provide consistent treatment without regard to
22 their characterization under a particular country’s internal law. Report ¶68.
23

24 22. Only proceedings directly involving “immovables” are excluded. For example, a
25 proceeding concerning rights and obligations of a seller and buyer under a contract for sale of a
26 business would not be excluded, even if the sale includes an undertaking to transfer a lease of the
27 business premises because the “immovables” issue would be involved only indirectly. Report
28 ¶69. On the other hand, a proceeding between a landlord and tenant on the terms of the lease
29 would be excluded. Report ¶69.
30

31 23. The language of subsection (c)(12) is substantively the same as the language of
32 Article 2(2)(m) of the Convention, but has been rephrased using terminology more consistent
33 with that used in U.S. law . These matters were excluded because they often involve the rights of
34 third parties and in some countries are decided by courts that have exclusive jurisdiction with
35 regard to these issues. Report ¶70. As a general rule, a legal person comes into being because of
36 action of a particular territorial sovereign, its powers as a legal person are demarcated by the
37 rules of that territorial sovereign, and it passes out of existence in accordance with rules
38 established by that sovereign. Brand & Herrup, page 67. The matters excepted by subsection
39 (c)(12) thus are traditionally matters of exclusive jurisdiction of the state that created the legal
40 person. Brand & Herrup, page 67.
41

42 24. The exclusion in subsection (c)(12) is focused on matters relating to the internal
43 structure and operation of the legal person, and does not necessarily apply to the consequences of
44 decisions made by the legal person. Brand & Herrup, page 67.
45

46 25. The language of subsection (c)(13) is the same as the language of Article 2(2)(n) of

1 the Convention. Subsection (c)(13) excludes the issue of validity of intellectual property rights,
2 other than copyright and related matters. Thus, proceedings to revoke or for a declaration of
3 validity or invalidity of the excluded intellectual property rights are outside the scope of this Act.
4 Report ¶75. On the other hand, copyright and related rights are fully covered by this Act,
5 including with regard to proceedings to determine the validity of such rights. Report ¶72.
6

7 26. The term “related rights” in subsection (c)(13) refers to “rights in a specific use of an
8 existing work by someone other than the original author, and which use makes an additional
9 contribution to the existing work.” Brand & Herrup, page 68. For example, the writing of a song
10 gives rise to a right in copyright, while the rights a singer may have in a particular rendition of
11 the song is a ‘related right’ under this Act. Brand & Herrup, page 68. “Related rights” include
12 rights of performers in their performances, rights of producers of sound recordings in their
13 recordings, and rights of broadcasting organizations in their radio and television broadcasts.
14 Report ¶73.
15

16 27. The exclusion under subsection (c)(13) only applies when the validity issue is a
17 primary object of the proceeding. When validity is raised merely as a preliminary matter rather
18 than as the primary object of the litigation, then the exclusion does not apply. Thus,
19 proceedings to enforce a licensing agreement with regard to a non-copyright intellectual property
20 right would not be outside the scope of this Act just because the defendant raises the invalidity of
21 the intellectual property right as a defense. Report ¶¶75 & 77.
22

23 — On the other hand, if instead of raising invalidity as a defense, the defendant
24 counterclaimed for revocation of the intellectual property right, that counterclaim would be
25 excluded under subsection (c)(13) because the primary object of the counterclaim would be to
26 determine the validity of the right. Report ¶78. The fact the counterclaim was outside the scope
27 of this Act, however, would not alter the fact that the plaintiff’s claim for enforcement of the
28 license would be within this Act. Report ¶78.
29

30 28. This Act applies to contracts dealing with intellectual property rights, such as
31 licensing agreements, distribution agreements, joint venture agreements, agency agreements, and
32 agreements for the development of an intellectual property right. Report ¶76. Proceedings
33 brought under such contracts – for example, proceedings for payment of royalties owed under a
34 licensing agreement – are covered by this Act. Report ¶76
35

36 29. The language of subsection (c)(14) is identical to the language of Article 2(2)(o) of
37 the Convention. As with the exclusion in subsection (c)(13), the exclusion applies only with
38 regard to intellectual property rights other than “copyright and related rights.” For a discussion
39 of the meaning of “related rights,” see note 23. In addition, the exclusion applies only when the
40 infringement action could not have been brought as an action for breach of contract, whether or
41 not it in fact was brought as a contract action. This latter condition greatly limits the scope of
42 this exclusion. The only situations in which subsection (c)(13) will exclude subject matter from
43 this Act are those in which the exclusive choice of court agreement applies to infringements that
44 do not constitute a breach of the contract in which the exclusive choice of court agreement is
45 contained or of any other contract between the parties, or where the parties concluded a choice of
46 court agreement relating to an infringement that had already arisen and that was not related to any

1 contract between the parties; such agreements will be rare. Report ¶79, n.109.

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

8
9 31. ~~The bracketed subsection (c)(16) found in the November 2008 draft has been deleted.~~
10 ~~The Drafting Committee decided at its November 2008 meeting that no declarations should be~~
11 ~~made under Article 21, which allows a country to add to the subject matters excluded from~~
12 ~~coverage by declaration when the country has a strong interest in not apply the Convention to a~~
13 ~~specific matter. The new subsection Subsection (c)(16) excludes from the scope of the Act~~
14 matters that under the law of a member country are analogous to those listed in subsection (c) in
15 recognition of the fact different terms may be used to describe similar concepts in the legal
16 systems of the various member countries.

17
18 32. Subsection (de) excludes arbitration and related proceedings from the scope of this
19 Act. This exclusion is intended to be interpreted broadly, and covers any proceedings in which
20 the court gives assistance to the arbitral process, including deciding whether an arbitration
21 agreement is valid; ordering parties to proceed to, or discontinue, arbitration proceedings;
22 revoking, amending, recognizing, or enforcing arbitral awards; appointing or dismissing
23 arbitrators; fixing the place of arbitration; or extending the time for making awards. Report ¶84.
24 There currently is a functioning international regime with regard to arbitral proceedings,
25 including the United Nations Convention on the Recognition and Enforcement of Arbitral
26 Awards, and this Act is not intended to disturb that regime. Brand & Herrup, page 73. Once
27 arbitration or related proceedings are raised in a case, the case falls outside the scope of this Act.
28 *See* Brand & Herrup, page 73-74.

29
30 33. Subsection (ef) is based on Article 2(5) & (6) of the Convention.

31
32 34. Subsection (fg) is based on Article 7 of the Convention.

33
34 35. Subsection (gh) is based on Article 17(1) of the Convention.

35
36 QUERY: The Drafting Committee decided at its November 2008 meeting that no declarations
37 should be made under Article 21, which allows a country to add to the subject matters excluded
38 from coverage by declaration when the country has a strong interest in not applying the
39 Convention to a specific matter. Nevertheless, should the exclusions contain a provision to deal
40 with (1) reciprocally excluding from scope a matter when another member country has made an
41 Article 21 exclusion and the choice of court agreement designates the courts of that member
42 country and/or (2) possible future U.S. declarations under Article 21?
43

44 **SECTION 45. EXCLUSIVE CHOICE OF COURT AGREEMENT AS**

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

5 **Reporters' Notes**

6
7 1. This section is based on Article 3(d) of the Convention.

8
9 2. ~~The other material previously included in Section 4 has been moved to the definition of~~
10 ~~“exclusive”~~ This section provides that an exclusive choice of court agreement” in Section 2 per
11 Committee decision at the November 2008 meeting.

12 ~~QUERY: WILL PLACING THE PRESUMPTION OF EXCLUSIVITY IN A~~ 13 ~~DEFINITIONAL SECTION PROVIDE SUFFICIENT NOTICE?~~

14
15
16 ~~SECTION 5. RESIDENCE OF AN ORGANIZATION.~~ For purposes of this [act],

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

19 ~~(A) where it has its statutory seat;~~

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

21 ~~(C) where it has its central administration; or~~

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

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

25 ~~agreement contained as a provision in a broader contract must be treated as an agreement that is~~
26 ~~independent of the other terms of the contract. Thus, the validity of the exclusive choice of court~~
27 ~~agreement cannot be contest solely on the ground that the contract of which it forms a part is not~~
28 ~~valid. Instead, the validity of the choice of court agreement must be determined independently~~
29 ~~according to the criteria set out in this Act. See e.g., sections 8, 9 and 11; Report ¶115.~~

30 ~~Therefore, it is possible for the chosen court to hold the contract invalid without depriving the~~
31 ~~choice of court agreement of validity. Of course, it is also possible that the ground on which the~~
32 ~~chosen court renders a contract invalid is a ground that also renders the choice of court agreement~~
33 ~~invalid under this Act. Report ¶115.~~

34 35 SECTION 6. WHEN CHOICE OF COURT AGREEMENT DEEMED

36 EXCLUSIVE. A choice of court agreement that designates the courts of one member country or
37 one or more specific courts in one member country is exclusive unless the parties to the
38 agreement expressly provide that the agreement is not exclusive.

Reporters' Notes

1
2
3 1. Section 5 This section is based on Article 43(2b) of the Convention:
4

5
6 Text Was Moved From Here: 1

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

10
11 ~~5. The Committee decided at its November 2008 meeting to adopt the ULC definition of~~
12 ~~“person” rather than, and generally follows the Convention language “an entity or person other~~
13 ~~than a natural person.”~~

14 ~~SECTION 62. DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION.~~

15 ~~(a) Except as otherwise provided in this~~ This section, ~~a court of this state designated as~~
16 ~~reverses the chosen court to decide a dispute~~ law in the United States pursuant to which ~~an~~
17 ~~exclusive~~ a choice of court agreement ~~applies shall accept jurisdiction over~~ is presumed to be
18 ~~nonexclusive unless it expressly states that dispute.~~

19
20 ~~(b) A chosen court shall refuse to accept jurisdiction to decide a dispute to which an~~ it is
21 ~~exclusive. Instead, a choice of court agreement applies if:~~

22 ~~(1) the~~ that designates courts in only one member country is deemed exclusive
23 ~~unless the parties expressly provide that the choice of court agreement is null and void~~ not
24 ~~exclusive. Thus, the following choice of court agreements would be deemed exclusive under this~~
25 ~~Act although they do not expressly state that they are exclusive:~~

26
27 “The courts of Mexico shall have jurisdiction to hear proceedings under this contract.”

28
29 “Proceedings under this contract may be brought before the courts of Mexico”

30
31 See Report ¶108. On the other hand, the following choice of court agreements would be
32 considered nonexclusive because they expressly provide that the agreement is not exclusive:

33
34 “The courts of Mexico shall have non-exclusive jurisdiction to hear proceedings under
35 this contract.”

36
37 “Proceedings under this contract may be brought before the courts of Mexico, but this
38 shall not preclude proceedings before the courts of any other country having jurisdiction under its
39 law.”

40
41 See Report ¶109.

42
43 SECTION 7. RESIDENCE OF AN ORGANIZATION. For purposes of this [act], a
44 person other than an individual is considered to be a resident of any country:

1 (1) where it has its statutory seat;

2 (2) under the law of this state which it was incorporated or formed;

3 (3) where it has its central administration; or

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

7 ~~——[(c) A chosen court shall decline to exercise jurisdiction if, except for the choice where it~~
8 ~~has its principal place of that court, there is no connection between this state and the parties or~~
9 ~~the dispute, unless]~~

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

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

16 Reporters' Notes

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

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

1 Text Was Moved From Here: 2

2 ~~— (2) a party to the agreement lacked capacity to enter into the agreement under the law of~~
3 ~~this state;~~

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

6 ~~— (4) for exceptional reasons beyond the control of the parties, the agreement cannot~~
7 ~~reasonably be performed; or~~

8 ~~— (5) the chosen court has declined to hear the case.~~

9 ~~—————~~ **Reporters' Notes**

10 1. Section 7 is based on Article 64(2) of the Convention.

11
12 ~~—————~~ **SECTION 8. RECOGNITION OF JUDGMENT OF CHOSEN COURT OR**
13 ~~**COURT TO WHICH CASE HAS BEEN TRANSFERRED.**~~

14 ~~— (a) Except as otherwise provided in this section and section 9, a court of this state shall~~
15 ~~recognize a judgment rendered by a chosen court of a member country designated in an exclusive~~
16 ~~choice of court agreement or a court of a member country to which the chosen court transferred~~
17 ~~the case pursuant to section 6.~~

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

21 ~~—————~~ **Reporters' Notes**

22
23 ~~— 1. The Convention places an obligation on a member country to both recognize and~~
24 ~~enforce a judgment rendered by the chosen court, with Conditions (1), (3) and (4) also are used~~
25 ~~in the EU Regulation, Article 60.~~

26
27
28 Text Moved Here: 1

29 2. ~~-~~Section 57 defines “residence” for entities other than natural persons ~~and~~
30 ~~governmental entities~~. The concept of “residence” is important with regard to determining
31 whether a case is an “international case” for purposes of determining the scope of application of
32 this Act, as well as with regard to certain exceptions to recognition and enforcement. Report
33 ¶118. The section states four possible residences for an organization, and it is possible for an
34 organization to have a ~~“residence~~residence in more than one location, or even in all four
35 ~~locations~~. Brand & Herrup, page 51.

36
37 3. “Statutory seat” (“*sie`ge statutaire*”) is a civil law concept used in some civil law
38 jurisdictions to determine the residence of organizations. The Report explains this concept as
39 follows:

40
41 [T]his term does not refer to the corporation’s seat as laid down by some statute
42 (legislation) but as laid down by the *statut*, the document containing the
43 constitution of the company – for example, the articles of association. In the
44 common law, the nearest equivalent is “registered office.” In practice, the State
45 where the corporation has its statutory seat will almost always be the State under
46 whose law it was incorporated or formed; while the State where it has its central

1 administration will usually be that in which it has its principal place of business.

2
3 Report ¶123.

4
5 End Of Moved Text

6 ~~certain exceptions. Sections 8 and 9 of the Act deal with the obligation of the court asked to~~
7 ~~recognize the judgment. Section 10 deals with the obligation of the court asked to enforce the~~
8 ~~judgment once recognized~~ 4. The Report gives the following description of the difference
9 ~~between the concept of recognition and that of enforcement:~~

10
11 states

12 ~~Text Was Moved From Here: 3~~

13
14 that “[a] State or a public authority of a State would be resident only in the territory of that
15 State.” Report ¶170 ¶117 n. 148.

16
17 ~~25. Section 8(b) is based on Article 8(3) of~~The Committee decided at its November 2008
18 ~~meeting to adopt the ULC definition of “person” rather than the Convention. It requires that the~~
19 ~~judgment be effective in the country of origin~~ language “an entity or person other than a natural
20 person.”
21

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

23 ~~(a) Except as a prerequisite to the recognition of the judgment in this state. A judgment~~
24 ~~has effect in the country of origin if it is legally valid and operative in that country as a valid~~
25 ~~determination of the parties’ rights and obligations. Report ¶171. If the judgment does not have~~
26 ~~effect in the country of origin, then it should not be given effect in this state through recognition;~~
27 ~~similarly, if the judgment ceases to have effect in the country of origin the judgment should not~~
28 ~~continued to be recognized~~otherwise provided in this state. Report ¶171. The bracketed
29 ~~language, which is not found in the text of the Convention~~section, reflects this latter concept. It
30 ~~is based on language in the 1999 Convention. See Report ¶171 n.207.~~

31
32 ~~**SECTION 9. EXCEPTIONS TO RECOGNITION OF A JUDGMENT.**~~

33 ~~(a) Aa chosen court of this state may refuse recognition of a judgment of a~~shall accept

1 jurisdiction over the dispute.

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

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

6 (2) assumption of the chosen court; provided, however, that a
7 determinationjurisdiction by the chosen court ~~that the agreement is valid is~~
8 ~~binding on~~would violate:

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

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

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

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

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

21 **Reporters' Notes**

22
23 1. Section 8 is based on Article 5 of the Convention.

24
25 2. Subsection (a) sets out one of the key provisions of this Act. It establishes the basic

1 duty of a court of this state designated by the parties to an exclusive choice of court agreement
2 covered by this Act to enforce the parties' exclusive choice of court agreement by accepting
3 jurisdiction over the dispute. An exclusive choice of court agreement would be of little value if
4 the chosen court were not obligated to hear the case when proceedings were brought before it.
5 See Report §124.
6

7 3. Subsection (a) is based upon Article 5(1) of the Convention, which states that the
8 chosen court "shall have jurisdiction" to decide the dispute. Subsection (a) instead states that the
9 chosen court "shall accept jurisdiction" over the dispute. It is clear that Article 5 of the
10 Convention does not seek to create subject matter jurisdiction in a chosen court that does not
11 already exist. See Article 5(3) (rules related to subject matter jurisdiction not affected). The
12 language of subsection (a) is used instead of the Convention language to avoid confusion
13 regarding that issue.
14

15 4. Subsection (b) is based on Article 5(1) and (3) of the Convention. It sets out the three
16 exceptions to the obligation of a chosen court in this state to hear the case. In these three
17 situations, the chosen court may not hear the case.
18

19 QUERY: IS IT CORRECT THAT THESE EXCEPTIONS ARE MANDATORY?
20

21 5. Subsection (b)(1) sets out the first exception to the chosen court's obligation to hear a
22 case – the chosen court cannot hear the case if the exclusive choice of court agreement is null and
23 void under the law of this state. The "null and void" concept also is found in the United Nations
24 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York
25 Convention").
26

27 6. In order to be a choice of court agreement within this Act, an agreement must meet
28 certain formal requirements – it must be "concluded or documented in a record." Section 3(1);
29 See Convention Article 3 (c). In addition, this Act sets out certain substantive exceptions to
30 enforcement of a choice of court agreement. The "null and void" exception is one of these
31 substantive exceptions. The Report explains the "null and void" exception as follows:
32

33 The "null and void" provision applies only to substantive (not formal) grounds of
34 invalidity. It is intended to refer primarily to generally recognized grounds like
35 fraud, mistake, misrepresentation, duress and lack of capacity. It does not qualify,
36 or detract from, the form requirements in Article 3(c), which define the choice of
37 court agreements covered by the Convention and leave no room for national law
38 as far as form is concerned.
39

40 Report §126.
41

42 7. The determination as to whether an exclusive choice of court agreement is "null and

1 void” is determined by the law of this state” other than this Act. The reference to “law” in
2 subsection (b)(1) is to the “whole law” of this state – that is, the law of this state including the
3 applicable conflicts of law rules of this state. Therefore, the ultimate substantive rules that will
4 determine whether an exclusive choice of law agreement is null and void may or may not be the
5 substantive law of this state, depending upon the jurisdiction whose substantive law is chosen in
6 the particular instance by this state’s choice of law rules.
7

8 8. One of the more difficult issues for the Committee has been the question of a chosen
9 court’s obligation to hear a case that has no relation to the state. While some states may be
10 interested in hearing such cases, other states may not wish to do so, or may not be able to do so
11 because of state constitutional restrictions. Article 19 of the Convention allows a party to the
12 Convention to make a declaration giving its courts discretion to decline jurisdiction over
13 unrelated disputes. One alternative would be for the United States to make this declaration.
14 Bracketed subsection (c) presents another alternative. It treats the issue as one of subject matter
15 jurisdiction, rather than one within the discretion of the court. This language would be used in
16 lieu of an Article 19 declaration. A state that does not wish to have its courts hear unrelated
17 cases could adopt this bracketed language, thereby carving unrelated cases out of the subject
18 matter jurisdiction of its state courts, and, thus, under subsection (b), out of its obligation to hear
19 those cases under this Act. The Committee considered another version of the bracketed language
20 that would allow states to list certain circumstances under which its courts would have subject
21 matter jurisdiction over unrelated cases, but the Committee decided at its February 2009 meeting
22 that the possibility of a state creating exceptions could be covered by a legislative note. The
23 Committee continues to discuss this issue.
24

25 Text Moved Here: 2
26

27 39. Subsection (e) is derived from Article 5(3)(b) of the Convention. In addition to
28 transfer pursuant to state law, Article 5 of the Convention would permit removal to a federal
29 court. Report ¶140 n.176. Because that removal would be governed by federal law, however, it
30 is not mentioned in subsection (e).
31

32 **SECTION 79. DUTY OF COURT NOT CHOSEN TO DECLINE**

33 **JURISDICTION.** A court of this state which is ~~not~~neither the chosen court ~~or~~nor a court to
34 which the chosen court has transferred the action under ~~section 6~~Section 8 shall suspend or
35 dismiss proceedings to which an exclusive choice of court agreement applies unless the court
36 determines that:

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

1 End Of Moved Text

2 ;

3 ~~_____~~ (2) a party to the agreement lacked ~~the capacity to conclude~~enter into the
4 agreement under the law of this state;

5 ~~_____~~ ~~(3) the defendant in the proceeding in~~(3) giving effect to the agreement would
6 lead to a manifest injustice or would be manifestly contrary to the public policy of this state or of
7 the United States;

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

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

13 ~~_____~~ ~~(A) the defendant enter an appearance in~~has declined to hear the case.

14 Reporters' Notes

15 _____
16 1. Section 9 is based on Article 6 of the Convention.

17 _____
18 2. Section 9 not only sets out the grounds upon which a court of this State not chosen
19 need not honor the choice of court agreement, but also indicates the law under which those
20 exceptions are to be determined. Under subsection (1), the applicable law is that of the
21 jurisdiction of the chosen court. On the other hand, in subsections (2) and (3) the applicable law
22 is that of this state, including, the law of the United States, which is part of the law of this state
23 under the Supremacy Clause of the United States Constitution. The phrase "public policy of this
24 state or of the United States" in subsection (3) is used to underline the fact that the public policy
25 of this state includes the public policy of the United States, which, under the Supremacy Clause
26 would prevail over any conflicting public policy of this state. As with Section 8, the references
27 in this section are to the "whole law" of this state, including the choice of law rules of this state.
28 Thus, the substantive law that ultimately will apply to these exceptions depends on what
29 jurisdiction's law is chosen by this state's choice of law rules in any given case.

30 _____
31 3. Subsection (3) refers to both "manifest injustice" and "manifestly contrary to public
32 policy" to emphasize the exceptional nature of the case to which this exception is to be applied.
33 "The standard is intended to be high; the provision does not permit a court to disregard a choice

1 of court agreement simply because it would not be binding under domestic law.” Report ¶152.
2 The inclusion of both “injustice” and “public policy” reflects the inclusive nature of the
3 exception – the court is to consider both the interests of the individuals and the general public
4 interest.

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

18
19 **SECTION 10. RECOGNITION OF JUDGMENT OF CHOSEN COURT OR**
20 **COURT TO WHICH CASE HAS BEEN TRANSFERRED.**

21 (a) Except as otherwise provided in this [a]ct, a court of this state shall recognize a
22 judgment of a chosen court or a court of a member country to which the chosen court to present
23 his case without contesting lack of sufficient notice; and

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

26 _____ transferred the case pursuant to Section 8.

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

31 (c) The court shall recognized a judgment under this [act] only if it has effect between the
32 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
18 Text Moved Here: 3

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

35 End Of Moved Text

36
37 Report ¶170.

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

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

15
16 4. Section 10(d) is based on Article 8(4) of the Convention, and generally tracks its
17 language. Section 10(d) gives the court discretion to deny recognition or enforcement if the
18 judgment is either under review in the country of origin or the time for review in that country has
19 not expired. Report ¶173. Thus, even though under the law of the country of origin appeal of the
20 judgment would not suspend its effectiveness or enforceability, and therefore section 10(c) would
21 not apply, a court of this state, in its discretion, nevertheless could postpone or refuse recognition
22 or enforcement under 10(d). The Convention provides that, except as otherwise provided in the
23 Convention, the procedure for recognition and enforcement are governed by the law of the
24 member country asked to recognize and enforce the judgment. Convention, Art. 14. Section 22
25 of the Act provides a procedure for the court to grant a stay in the situations covered by Section
26 10(d).

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

32
33 **SECTION 11. EXCEPTIONS TO RECOGNITION OF A JUDGMENT.** A court of

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

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

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

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

6 (4) the defendant in the proceeding in the chosen court was given notice in this state of
7 the proceeding in this state, and that notice did not comply the chosen court in a manner
8 incompatible with the fundamental principles of this state concerning the service of documents;

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

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

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

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

19 ~~—————(9) to the extent.~~

20 Reporters’ Notes

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

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

1 public policy of this state includes the public policy of the United States.

2
3 3. Subsection 11(4) is based on Article 9(c) of the Convention. It deals with the situation
4 in which the defendant to the original proceedings in the chosen court is given notice of those
5 proceedings in this state in a manner that this state would view as incompatible with its
6 fundamental principles regarding service of process. See Report ¶187.

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

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

20
21
22 Text Moved Here: 4

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

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

43
44 This second issue also is raised by the Convention language in Article 911(f), which
45 refers to an inconsistent judgment of the “requested State.” Subsection ~~9(a)~~11(7) resolves this
46 issue by providing that the inconsistent judgment must be one of “a court of this state” (small

1 “s”), rather than a court of the United States (big “S”). Again, this interpretation seems
2 consistent with Article 25(c).
3

4 It should be noted that, while interpreting “State” as including states of the United States
5 in subsection 9(a)11(8) gives that subsection a broader reach, the same interpretation in
6 subsection 9(a)11(7) provides a narrowing interpretation of that section.
7

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

9 **End Of Moved Text**

10 ~~that 7. As with Sections 8 and 9, the judgment awards damagesreference to “law” in~~
11 ~~subsections (1) and (2) is to the whole law, including exemplary or punitive damagethe choice~~
12 ~~of law rules, that do not compensate a party for actual loss or harm suffered, taking into~~
13 ~~accountof the extent to which damages otherwise not compensatory should be deemed~~
14 ~~compensatory because they compensate a party for costs and expensesrelevant jurisdiction.~~
15

16 **SECTION 12. PRELIMINARY QUESTIONS.**

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

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

24 ~~— (c) If a preliminary question under Section 3(c) is~~ruling on a matter excluded from the
25 scope of this [act] under Section 4(c).

26 (c) If the ruling on a matter excluded under Section 4(c) was a ruling on the validity of an
27 intellectual property right other than copyright or a related right, recognition of the judgment may
28 be refused or postponed only if:

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

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

3 Reporters' Notes

4
5 ~~1. Subsection 9(a)(3) is based on Article 9(c) of the Convention. The language is based~~
6 ~~in part on the language of the Convention, and in part upon comparable language in Subsection~~
7 ~~4(c)(1) of the UFCMJRA.~~

8
9 ~~2. The language of subsection 9(a)(6) is identical to the language of Article 9(c), except~~
10 ~~for the addition of the phrase "of the United States." That phrase, which is found in UFCMJRA~~
11 ~~subsection 4((c)(3), makes clear that, under the supremacy clause of the U.S. Constitution, the~~
12 ~~public policy of this state includes the public policy of the United States.~~

13
14 ~~3. Subsection 9(a)(4) is based on Article 9(c) of the Convention. It deals with the~~
15 ~~situation in which the defendant to the original proceedings in the chosen court is given notice of~~
16 ~~those proceedings in this state in a manner that this state would view as incompatible with its~~
17 ~~fundamental principles regarding service of process. See Report ¶187.~~

18
19 ~~4. Subsection 9(a)(7) is based on Article 9((f) of the Convention. This exception~~
20 ~~provides that a judgment of this state that is inconsistent with the judgment of the chosen court~~
21 ~~prevails, whether or not the inconsistent judgment is rendered by this state before or after the~~
22 ~~judgment of the chosen court. Report ¶192. For this provision to apply, the parties to the~~
23 ~~inconsistent judgment must be the same, but it is not necessary that the cause of action be the~~
24 ~~same. Report ¶192.~~

25
26 ~~5. Subsection 9(a)(8) is based on Article 9(g) of the Convention, and largely tracks the~~
27 ~~Convention language. Subsection 9(a)(8) deals with the situation when the competing judgments~~
28 ~~both were rendered by the courts of another jurisdiction. In that situation, the court may deny~~
29 ~~recognition to the chosen court judgment in favor of an earlier inconsistent judgment rendered in~~
30 ~~the other jurisdiction between the same parties on the same cause of action.~~

31
32
33 Text Was Moved From Here: 4

34
35 ~~7. Subsection 9(a)(9) is based on Article 11 of the Convention.~~

36
37 ~~8. Subsection 9(b)(1~~ 1. Subsection 12(a) is based on Article 10 (1)&(2) of the
38 Convention. Neither a ruling on a matter excluded from the coverage of this [act] under section
39 3, or such an issue raised as a preliminary question necessary to the court's ultimate decision of
40 an issue within the scope of this Act, is given preclusive effect under this Act, although the court
41 may recognize such rulings under other law. See Report ¶194.

42
43 2. Subsection 12(b) is based on Article 10(2). It provides a discretionary ground for

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

5
6 3. Subsection 12(c) is based on Article 10(3) of the Convention. It provides a special
7 rule with regard to recognition of judgments based on a preliminary ruling regarding the validity
8 of an intellectual property right other than copyright or a related right. Report ¶198.
9

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

16 **Reporters' Notes**

17 91. ~~Subsection 9(b)(2)~~ Section 13 is based on Article ~~10(3)~~11 of the Convention.
18
19

20 **SECTION 10**
21

22 2. The standard for refusing to recognize non-compensatory damages is intended to be
23 developed as an autonomous concept – the court should not simply apply the law of this state
24 concerning damages, nor should it use this provision as a back-door way of reviewing the
25 judgment. Brand & Herrup, at 126-127. Those damages subject to nonrecognition under Section
26 13 are only those “that go far beyond the actual loss of the plaintiff.” Report ¶205(b).
27

28 3. Section 13 is a discretionary provision – it does not require a court of this state to deny
29 recognition to the noncompensatory portion of a judgment. [T]he provision in no way limits
30 recognition and enforcement of damages under national law or other international instruments,
31 and it allows (but does not require) recognition and enforcement under [this Act]. Report
32 ¶205(I).
33

34 **SECTION 14. RECOGNITION OF JUDGMENTS BASED ON CONTRACTS OF**
35 **INSURANCE.** RecognitionA court of this state may not limit or refuse recognition of a
36 judgment regardingin respect of liability under the terms of a contract of insurance or reinsurance

1 ~~may not be limited or refused~~ on the ground that the liability under that contract includes liability
2 to indemnify the insured or reinsured ~~in respect of~~concerning:

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

4 (2) an award of damages to which ~~subsection 9(a)(9)~~Section 13 might apply.

5 **Reporters' Notes**

6
7 1. Section ~~10~~14 is based on Article 17(2) of the Convention, and closely tracks its
8 language.
9

10 11 **SECTION ~~11~~15. RECOGNITION OF JUDGMENT RENDERED BY COURT** 12 **CHOSEN IN ~~A~~ NON-EXCLUSIVE CHOICE OF COURT AGREEMENT.**

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

18 ~~—(b) Except as otherwise provided in subsection (c),~~ a court of this state shall recognize
19 and enforce a judgment ~~rendered by~~of the court of another member country designated in a non-
20 exclusive choice of court agreement in the same manner and to the same extent that it would
21 recognize and enforce a judgment ~~rendered by~~of a chosen court of a member country designated
22 in an exclusive choice of court agreement under this [act], if that member country has made a
23 reciprocal declaration pursuant to Article 22 of the Convention ~~that its courts will recognize and~~
24 ~~enforce judgments given by courts [of other member countries] [of the United States or a state of~~
25 ~~the United States] when such courts are designated in a non-exclusive choice of court agreement.~~

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

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

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

9 (iii**3**) ~~in the situation~~ where another proceeding that was pending between the
10 same parties on the same cause of action in any other court has been dismissed before final
11 judgment; and the member country court of origin was the court first seized.

12 Reporters' Notes

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

17
18 ~~2. Subsection 11(a) defines “non-exclusive choice of court agreement.” The Report~~
19 ~~states that a non-exclusive choice of court agreement under Article 22 must satisfy four~~
20 ~~requirements: (1) it must be in the form required by Article 3(c) of the Convention (that is, it~~
21 ~~must be, in the language of the Act, “concluded or documented in a record”); (2) the parties must~~
22 ~~have consented to it (that is, it must be an “agreement”); (3) the chosen court must be designated~~
23 ~~for the purpose of deciding disputes that have arisen or may arise in connection with a particular~~
24 ~~legal relationship; and (4) the agreement must designate a court or the courts of one or more~~
25 ~~member countries. Report ¶242.~~

26
27 32. Subsection ~~H~~15(ba) provides that when a reciprocal declaration has been made under
28 Article 22 of the Convention, a court of this state “shall recognize and enforce a judgment
29 rendered by the court of another member country designated in a non-exclusive choice of court
30 agreement in the same manner and to the same extent that it would recognize and enforce a
31 judgment rendered by a chosen court of a member country designated in an exclusive choice of
32 court agreement under this [act].” Thus, a court of this state has the same obligation to recognize
33 and enforce such judgments as it does to recognize and enforce judgments of a chosen court
34 under an exclusive choice of court agreement, and recognition and enforcement of such

1 judgments is subject to all the requirements, limitations, and exceptions applicable to
2 recognition and enforcement of judgments of a chosen court under an exclusive choice of court
3 agreement, including the scope provisions of section 24 of the Act, and the requirements for
4 recognition of ~~section 8~~, and ~~the~~ exceptions to recognition contained in ~~section 9~~ this Act. In
5 addition, recognition and enforcement of such judgments is subject to the additional exceptions
6 stated in subsection 115(eb). See Report, ¶¶243, 245.

7
8 43. Subsection 115(eb) states grounds for denying recognition and enforcement
9 applicable only to a judgment rendered by a member country designated in a non-exclusive
10 choice of court agreement. It provides that “recognition or enforcement is not mandatory when
11 there exists a judgment given by any other court before which proceedings could be brought in
12 accordance with the non-exclusive choice of court agreement or where there exists a proceeding
13 pending between the same parties in any other such court on the same cause of action, regardless
14 of whether such proceedings were commenced before or after those before the chosen court or
15 whether such judgment was given before or after that of the chosen court.” Report ¶245. Section
16 115(eb)(iii) deals with the situation in which there were proceedings before another court that
17 did not result in a final judgment and are not still pending. In that situation, the member country
18 court of origin must have been the first seized with jurisdiction over the action. Report ¶251.

19
20 **SECTION 116. DOCUMENTS TO BE PRODUCED IN CONNECTION WITH**
21 **REQUEST FOR RECOGNITION.**

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

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

24 (2) the ~~exclusive~~ choice of court agreement, a certified copy of that agreement, or
25 other evidence of its existence;

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

29 (4) any documents necessary to establish that the judgment has effect or, ~~whereif~~
30 applicable, is enforceable in the country of origin:

31 ; and

32 (5) in the case of a judicial settlement under section 18, a certificate of the court of
33 the country of origin that the judicial settlement or a part of it is enforceable in the same manner

1 as a judgment in the country of origin.

2 (b) If the terms of a judgment for which recognition is sought ~~do~~are not ~~permitted~~sufficient
3 for the court to verify whether ~~the conditions of this [act] have~~has been complied with, the court
4 may require the production of any documents necessary to show compliance.

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

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

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

12 **Reporters' Notes**

13
14 1. Section ~~12~~16 is based on Article 13 of the Convention, except for subsection (e), which
15 is based on Article 18, and follows the tradition of earlier Hague Conventions. The section
16 substantially tracks the language of those articles~~the~~ Convention.

17 _____
18 _____
19 **SECTION ~~13~~17. ENFORCEMENT OF JUDGMENT RECOGNIZED BY THIS**
20 **STATE.**

21 (~~1a~~1a) If a court of this state recognizes a judgment ~~rendered by~~of a ~~chosen~~ court of a
22 member country pursuant to this [act], upon request of the party in whose favor the judgment was
23 granted, the court shall enforce the judgment in the same manner and to the same extent as a
24 judgment rendered in this state.

25 (~~2b~~2b) A judgment ~~may~~shall be enforced in this state only if it is enforceable in the country
26 of origin.

27 **Reporters' Notes**

1 1. Subsection ~~13~~17(~~1a~~) is based on Article 8(1) of the Convention and section 7 of the
2 UFCMJRA.

3
4 2. Subsection ~~13~~17(~~2b~~) is based on Article 8(3) of the Convention.
5

6 **SECTION ~~14~~18. JUDICIAL SETTLEMENTS. ~~Judicial settlements that have~~
7 (TRANSACTIONS JUDICIAIRES).**

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

10 (1) the judicial settlement has been approved by a chosen court of a member
11 country; or that have been concluded before that court in the course of proceedings, and which
12 are;

13 (2) the settlement is enforceable in the same manner as a judgment in the country
14 of origin, must be enforced; and

15 (3) the settlement meets the requirements for recognition and enforcement of a
16 judgment under this [act] in the same manner as a judgment.

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

19 **Reporters' Notes**

20 1. Section ~~14~~18 is based on Article 12 of the Convention and largely tracks its language.
21

22 SECTION 15.
23

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

27 In France and other civil law countries they are contracts concluded before a judge
28 by which the parties put an end to litigation, usually by making mutual
29 concessions. Parties submit their agreement to the judge, who records it in an
30 official document. Such agreements usually have some, or even all, of the effects
31 of a final judgment. A judicial settlement is different from a consent order in the

1 common law sense (an order made by the court with the consent of both parties),
2 since a consent order is a judgment and may be recognised and enforced as such
3 under Article 8 of the Convention. On the other hand, a judicial settlement is
4 different from an out-of-court settlement, since it is made before a judge, puts an
5 end to the proceedings and is usually enforceable in the same manner as a
6 judgment. For these reasons, a special provision is devoted to it in the
7 Convention.

8
9 Report ¶207.

10
11 3. Although section 18(a) provides for the enforcement of a judicial settlement meeting
12 the requirements established there in the same manner as a judgment under this [act], section
13 18(b) makes it clear that judicial settlements are not given the same effect as a judgment
14 recognized under this [act]. Unlike a judgment, which is given preclusive effect once
15 recognized, judicial settlements have no preclusive effect.

16
17 4. The following examples illustrate the application of section 18.

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

26
27 **Example 2.** Assume the same facts as Example 1, except that B pays the 800 Euros
28 pursuant to the judicial settlement without the need for enforcement proceedings. If A
29 nevertheless brings a new action for the remaining 200 Euros, B cannot ask a court in this state to
30 recognize the judicial settlement as precluding the action.

31
32 See Report ¶¶ 208, 209.

33
34 **SECTION 19. SEVERABILITY.** A court of this state shall recognize or enforce a
35 severable part of a judgment if recognition or enforcement of only that part is applied for or only
36 part of the judgment is capable of being recognized and enforced under this [act].

37 **Reporters' Notes**

38
39 1. Section ~~15~~19 is based on Article 15 of the Convention, and tracks its language.

40
41 ~~{~~SECTION 1620. PROCEDURE FOR RECOGNITION OF JUDGMENT.

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

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

5 **Reporters' Notes**

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

10
11 **{SECTION ~~17~~21. STATUTE OF LIMITATIONS APPLICABLE TO**
12 **RECOGNITION PROCEEDINGS.** An action to recognize a judgment under this [act] must
13 be commenced within the ~~earlier of the~~ time during which the judgment has effect between the
14 parties in the country of origin ~~or 15 years from the date the judgment became effective between~~
15 ~~the parties in the country of origin.}]~~

16 **Reporters' Notes**

17
18 1. This section is based in part on section 9 of the UFCMJRA. ~~It is included here as a~~
19 ~~bracketed section for discussion at the request of the Drafting Committee at its November 2008~~
20 ~~meeting.~~

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

28 **Reporters' Notes**

1 a choice of court agreement not within the scope of this [act] or recognition and enforcement of a
2 judgment not within the scope of this [act] under principles of comity or otherwise.

3 **Reporters' Notes**
4

5 1. Section ~~19~~24 is based in part on Section 11 of the UFCMJRA. It reflects the limited
6 scope of the Convention and the intention of member countries not to prevent enforcement of a
7 choice of court agreement or recognition and enforcement of the resulting judgment under
8 national law.
9

10 **SECTION ~~21~~25. TRANSITION PROVISIONS; ~~EFFECTIVE DATE.~~**

11 (a) This [act] ~~shall apply~~applies to ~~enforcement of~~ an exclusive choice of court agreement
12 that designates a court or courts of this state as the chosen court or courts if the parties concluded
13 the exclusive choice of court agreement after entry into force of the Convention in the United
14 States.

15 (b) This [act] ~~shall~~does not apply to proceedings filed in a court of this state that is not the
16 chosen court unless:

17 (i~~1~~) the Convention entered into force in the country of the chosen court before
18 the parties concluded the exclusive choice of court agreement; and

19 (ii~~2~~) the proceedings in this state were commenced after entry into force of the
20 Convention in the United States.

21 ~~(c) This [act] takes effect ...~~

22 (c) This section does not apply to non-exclusive choice of court agreements under Section
23 15 of this [act].

24 **Reporters' Notes**

25 1. Subsections (a) and (b) are based on Article 16 of the Convention. Article 16 provides
26 that the Convention applies to exclusive choice of court agreements concluded after its entry into
27 force for the country of the chosen court, but does not apply to proceedings instituted before its
28 entry into force with respect to the country of the court seized. When proceedings are filed in the

1 country of the chosen court, the first part of this rule applies – the relevant inquiry is whether the
2 parties entered into the exclusive choice of court agreement after the date on which the
3 Convention entered into force with regard to the country of the chosen court. When proceedings
4 are instead filed in another country – the country of the “court seized” – then both parts of the
5 rule become relevant. Proceedings may be filed in another country in two situations under the
6 Act – (1) when a party to the exclusive choice of court agreement files an action covered by the
7 exclusive choice of court agreement in a court of a country other than that of the chosen court or
8 (2) when a party files an action for recognition and enforcement of a judgment of the chosen
9 court in the courts of another country. In these situations, the exclusive choice of court
10 agreement must have been concluded after the Convention’s entry into force in the country of the
11 chosen court, and the proceedings in the other country must have been filed after the Convention
12 entered into force for that other country. Report ¶¶218, 219. The language of this section differs
13 somewhat from the language of Article 16 because of the need to state the transitions rules in the
14 specific context of courts of a state of the United States. The substance of the provision,
15 however, is intended to be the same as that of Article 16 of the Convention.

16
17 2. The application of subsections (a) and (b) is illustrated by the following examples:
18

19 **Example 1:** A and B entered into an exclusive choice of court agreement on February 3,
20 2011 selecting the courts of New York as their exclusive forum. The Convention enters into
21 force in the United States on July 1, 2011. The New York legislature passes this Act, with an
22 effective date of February 1, 2011. A files an action in New York state court on March 1, 2011.
23 This Act will not apply to the parties’ exclusive choice of court agreement because the
24 Convention had not yet entered into force in the United States when the exclusive choice of court
25 agreement was concluded. Therefore, New York will not be under an obligation under this Act
26 to hear the case See Report, ¶220, Example 1. Whether the New York court would hear the case
27 would be determined by other law of New York.
28

29 **Example 2:** Assume the same facts as in Example 1, except that the parties had entered
30 into the exclusive choice of court agreement on July 2, 2011. Because the exclusive choice of
31 court agreement would have been entered into after the Convention entered into force with regard
32 to the United States, then this Act would apply and the New York state court would be under an
33 obligation to hear the case under this Act.
34

35 **Example 3:** A and B entered into an exclusive choice of court agreement selecting the
36 courts of London, England on February 3, 2011. The Convention enters into force in the United
37 States on January 1, 2011. The Convention enters into force in the United Kingdom on August
38 1, 2011. The New York legislature passes this Act, with an effective date of February 1, 2011. B
39 files an action in New York state court on July 15, 2011. This Act will not apply to the parties’
40 exclusive choice of court agreement because, the exclusive choice of court agreement was
41 concluded before the Convention entered into force in the United Kingdom, the country of the
42 chosen court. This will be the result even though the exclusive choice of court agreement was
43 concluded and the proceedings were filed in New York after the Convention had entered into
44 force with regard to the United States. When the question is applicability of the Act to a
45 proceeding filed in a court in a country other than that of the chosen court, both subsection (a)
46 and subsection (b) apply. Therefore, the New York state court will not have an obligation under

1 this Act to dismiss the proceedings filed by B. Whether the New York court would dismiss the
2 proceedings in favor of the chosen forum would be determined by other law of New York.
3

4 **Example 4:** Assume the same facts as in Example 3, except that the Convention enters
5 into force with regard to the United Kingdom on January 1, 2011 and with regard to the United
6 States on August 1, 2011. The result would be the same as in Example 3 because, although in
7 this example the exclusive choice of court agreement was concluded after the Convention entered
8 into force with regard to the country of the chosen court, the proceeding was commenced in the
9 New York court before the Convention entered into force with regard to the United States. See
10 Report ¶220, Example 2.
11

12 **Example 5:** A and B entered into an exclusive choice of court agreement on February 3,
13 2010 selecting the courts of London, England as their exclusive forum. Assume that this date is
14 after the date on which the Convention entered into force with regard to the United Kingdom. A
15 obtained a judgment against B in the chosen court in London. The New York legislature passes
16 this Act with an effective date of February 1, 2011. A files an action for recognition and
17 enforcement of the London judgment in New York state court on March 1, 2011. The
18 Convention enters into force with regard to the United States on July 1, 2011. This Act will not
19 apply to A’s action for recognition and enforcement because that action was filed before the
20 Convention entered into force in the United States. Therefore, the New York state court will not
21 be under an obligation under this Act to recognize and enforce the London court judgment.
22 Whether the London court judgment would be entitled to recognition and enforcement would be
23 determined by the other law of New York.
24

25 **Example 6:** Assume the same facts as in Example 5, except that the Convention enters
26 into force with regard to the United States on February 15, 2011. Because the Convention had
27 entered into force in the United Kingdom – the country of the chosen court -- when the parties
28 concluded their exclusive choice of court agreement, and had entered into force in the United
29 States – the country of the court seized – when A filed the action seeking recognition and
30 enforcement of the London judgment in the New York state court, this Act will apply to A’s
31 action for recognition and enforcement, and the New York state court will be under an obligation
32 to recognize and enforce the London judgment in accordance with this Act. See Report ¶220,
33 Example 2.
34

35 3. A convention enters into force with regard to the United States at the time designated
36 in the convention after the time when the President deposits the instrument of ratification with
37 the depositary designated in the convention, if the convention also is in force internationally. A
38 convention enters into force internationally at the time designated in the convention. If the
39 United States deposits its instrument of ratification before the convention is in force
40 internationally, then the convention enters into force with regard to the United States at the time
41 that it enters into force internationally. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF
42 THE FOREIGN RELATIONS LAW OF THE UNITED STATES §312 cmt. *j*. Article 31 of the Convention
43 provides that the Convention enters into force internationally “on the first day of the month
44 following the expiration of three months after deposit of the second instrument of ratification,
45 acceptance, approval or accession” to the Convention. For countries becoming parties to the
46 Convention after it enters into force internationally, the Convention enters into force “on the first

1 day of the month following the expiration of three months after the deposit of its instrument of
2 ratification, acceptance, approval or accession.” Art. 31(2)(a).–

3
4 4. ~~Section 21(c) is based on Section 12 of the UFCMJRA.~~

5
6 ~~QUERY: DID I GET THIS RIGHT?~~

7
8 ~~NOTE: THE REPORT STATES THAT THE ARTICLE 16~~ The Transitional provisions of
9 the Convention do not apply with regard to declarations concerning non-exclusive choice of
10 court agreements under Article 22. Report ¶254.

11
12 NOTE: A separate provision will be needed to address whether declarations cover choice of
13 court agreements made before the declaration entered into force.

14
15 NOTE: At its February 2009 meeting, the Drafting Committee requested that Prof. Ron Brand
16 provide alternative language for this section. His proposal is as follows:

17
18 ~~SECTION 21. TRANSITION PROVISIONS DO NOT APPLY TO ARTICLE 22~~
19 ~~(SECTION 11 OF THE ACT) DEALING WITH RECIPROCAL RECOGNITION~~
20 ~~AND ENFORCEMENT OF NON-EXCLUSIVE CHOICE OF COURT~~
21 ~~AGREEMENTS. REPORT ¶254. INSTEAD, IT WAS CONTEMPLATED THAT~~
22 ~~THE DECLARATION UNDER ARTICLE 22 WOULD SPECIFY THE EXTENT~~
23 ~~OF ANY RETROACTIVE EFFECT. WE THUS WILL NEED TO KNOW THE~~
24 ~~TERMS OF THE U.S. DECLARATION BEFORE ESTABLISHING~~
25 ~~TRANSITIONS PROVISIONS FOR SECTION 11.; EFFECTIVE DATE.~~

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

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

30
31 This language tracks Article 16 of the Convention. This is necessary because the rules of Article
32 16 are rather precise, and necessarily coordinate with other provisions of the Convention.

33 Having language that would not coordinate with the Convention would run the risk of running
34 afoul of the “uniform interpretation” obligations found in Article 23 of the Convention.

35
36
37 Notes (From BRAND & HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT
38 AGREEMENTS 139-42 (Cambridge, 2008)):

39
40 Article 16 sets out two timing rules for application of the Convention. Paragraph (1)
41 provides the rule applicable to exclusive choice of court agreements, and paragraph (2) provides
42 the rule applicable to the institution of proceedings. In each case, the rule determines when the
43 agreement or the proceedings fall under the Convention and thus when Convention rules apply.

44
45 A. Article 16(1): The Date of Conclusion of an Exclusive Choice of Court
46 Agreement and the Application of Chapter II Rules on Jurisdiction

1 Article 22 allows a declaration that expands the scope of Chapter III of the Convention.⁷ The
2 effect of Article 32(5) is thus to place timing limitations on declarations that limit the application
3 of the Convention, and not to place timing limitations on declarations that expand the application
4 of the Convention.

5 Second, Articles 19, 20, 21, and 26 provide for declarations that may affect the
6 application of the rules found in both Chapter II (jurisdiction) and Chapter III (recognition and
7 enforcement). Article 22 declarations affect only rules found in Chapter III, and those rules do
8 not hinge on the date of conclusion of the choice of court agreement under Article 16(1). This
9 parallels the distinction found in paragraphs (2) and (3) of Article 1, which determines whether a
10 case is international by providing a higher threshold for application of Chapter II rules on
11 jurisdiction (Article 1(2)) than for Chapter III rules on recognition and enforcement (Article
12 1(3)).

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

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

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

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

34 The operative date which prohibits application of the Convention as a matter of public
35 international law by the court seised is the date of entry into force of the Convention *within that*
36

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 court's own State. The Convention does not apply to proceedings in the court seised if the date
2 of institution of the proceeding pre-dates the date of entry into force of the Convention in the
3 State of the court seised. This does not prevent rules of national law similar to those found in the
4 Convention from applying to cases instituted prior to the effective date of the Convention in the
5 forum State.

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

12 13 **C. Timing and the Scope of Review**

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

20 21 22 23 **Further Notes (From BRAND & HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF** 24 **COURT AGREEMENTS 158-59 (Cambridge, 2008)):**

25 26 **4. Planning for Article 22 prior to entry into force**

27
28 Although it would appear that the benefits of Article 22 will be available – and thus need
29 be considered – only after the effective date of the Convention, the transitional timing rules of
30 Article 16 make the potential for Article 22 declarations of importance to transaction planning
31 that occurs even before the Convention comes into effect. The timing rule of Article 16(1)
32 applies only to exclusive choice of court agreements, and provides that such agreements are
33 governed by the Convention only if concluded after the date of entry into force of the Convention
34 in the state of the chosen court. It does not apply to non-exclusive choice of court agreements.
35 Article 16(2) sets forth the transition rule providing that proceedings are governed by Convention
36 rules only if they are brought after the effective date of the Convention in the state of the court
37 seised.

38 Under Article 3, an exclusive choice of court agreement must designate a court or the
39 courts of a single Contracting State. Because a State is not a Contracting State until the
40 Convention enters into force in that State, an agreement that otherwise meets all of the
41 requirements of an exclusive choice of court agreement, but is concluded before the entry into
42 force of the Convention in the State of the chosen court, is a non-exclusive choice of court
43 agreement under Article 3. Thus, such an agreement does not lead to either jurisdiction in the
44 chosen court under Article 5 or an obligation to dismiss in any other court under Article 6, as a
45 result of the timing rule found in Article 16(1). Nonetheless, if an action is brought in the court
46 chosen in such an agreement then Article 22 will apply to proceedings brought to recognize and

1 enforce the resulting judgment if those proceedings are brought after the Convention has entered
2 into force in both the Contracting State from which the judgment originates and the Contracting
3 State in which recognition and enforcement is sought, so long as both of these Contracting States
4 have filed an Article 22 declaration.
5

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