

DISCUSSION DRAFT – ~~Redline 7/22/~~ 9/8/09

FOR PURPOSES OF THE STUDY GROUP ON THE HAGUE CONVENTION  
ON CHOICE OF COURT AGREEMENTS

NO STATUS WITHIN THE U.S. GOVERNMENT

NOT FOR ATTRIBUTION

Hague Convention on Choice of Court Agreements

Proposed Federal Implementing Legislation

[Possible preambular language/Congressional findings.]

Chapter 1. Definitions and Scope

Section 101. Short Title

This Act may be cited as the “Choice of Court Agreements Convention Implementation Act.”

Section 102. Application of Convention

[The Hague Convention on Choice of Court Agreements of June 30, 2005 shall be applied in courts in the United States in accordance with this Act.]

~~**Comment: The phrase “courts in the United States” is meant to encompass both federal and state courts. (Section 201 of the Federal Arbitration Act uses “United States courts”, which is not defined therein.)**~~

~~**Comment: It was suggested that clarification is needed here regarding the extent to which U.S. courts should be looking to the Convention itself versus the legislation. The extent to which the Convention might be considered to be self-executing is relevant here and has not yet been determined. We suggest, therefore, leaving this in brackets for now and revisiting it later as the proposed implementing legislation takes shape. It might be considered whether this provision, which was derived from section 201 of the Federal Arbitration Act, is necessary at all.**~~

Section 103. Definitions

In this Act:

- (a) “Choice of court agreement” means an agreement between two or more parties, concluded or documented in a record, that designates a court or courts of one or more Contracting States for the purpose of deciding disputes that have arisen or may arise in connection with a particular legal relationship.
- (b) “Chosen court” means the court or courts within a Contracting State designated in an exclusive choice of court agreement, as well as the court to which a case was transferred in accordance with section 201(c)(2) of this Act.
- (c) “Contracting State” means a Party to the Convention.
- (d) “Convention” means the Convention on Choice of Court Agreements done at The Hague June 30, 2005.
- (e) “Court” means any body, however named, authorized by a Contracting State to exercise judicial functions and acting in that capacity.
- (f) “Court addressed” means the court in which recognition or enforcement of the judgment is sought.
- (g) “Court of origin” means the court that issued ~~granted~~ the judgment.
- (h) “Exclusive choice of court agreement” means a choice of court agreement that designates the courts of one Contracting State or one or more specific courts of one Contracting State, to the exclusion of the jurisdiction of any other courts.
- (i) “International case” means:
  - (1) For purposes of chapter 2 of this Act, any case unless
    - (A) the parties ~~are~~ reside not [exclusively] in the same Contracting State, and
    - (B) the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
  - (2) For purposes of chapter 3 of this Act, any case in which the judgment was rendered in a country other than the Contracting State in which recognition and enforcement of the judgment is sought.
- (j) “Judgment” means any court decision on the merits, including a decree or order, and also a determination of costs or expenses relating to a decision on the merits

that may be recognized or enforced under this Act. It does not include an interim measure of protection.

- (k) “Non-exclusive choice of court agreement” means a choice of court agreement that is not exclusive as defined in subsection (h) above. ~~designates a court or courts of one or more Contracting States.~~
- (l) “Person” means any natural person, legal person, or other entity that might claim rights or be subject to obligations capable of determination in a case by a court.
- (m) [“Preliminary question” means an issue, including an issue raised as a defense, which does not appear on the face of the complaint, but which must be decided in order for the court to determine whether it can grant some or all of the relief requested.] [IT WAS SUGGESTED THAT THIS DEFINITION NEEDS REVISION.]
- (n) “Record” means information that is in writing or in any form of communication which renders the information accessible so that it may be used for subsequent reference.
- (o) “State” (capitalized) means a nation-state and its various organs of government, political subdivisions of nation-states and constituent units of federal States, agencies or instrumentalities ~~or~~ other entities insofar as they perform acts in the exercise of sovereign authority, and officials of the State acting in that capacity.
- (p) “State” (uncapitalized) means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States. . . . [Do we need a definition that encompasses the District of Columbia and U.S. territories/possessions?] [FROM 28 U.S.C. 1738.]
- (q) “State of origin” means the Contracting State in which the court of origin is located.

~~Comment: Many of these terms are not directly defined in the Convention itself.~~

Comment: In subsection (i), insertion of “exclusively” would mean that, where a natural person or a legal person had more than one residence, the case would still be considered “international” where there was coincidence between one of the residences of the natural person or legal person and the residence of the other party in the case. Are other Contracting States likely to share this interpretation?

#### Section 104. Scope

- (a) Except as otherwise provided in this section, this Act applies to -

- (1) an exclusive choice of court agreement in an international case concluded in a civil or commercial matter or a judgment of another Contracting State resulting from such an exclusive choice of court agreement; or
  - (2) a judgment of another Contracting State resulting from a non-exclusive choice of court agreement in an international case concluded in a civil or commercial matter to the extent provided in section 309 of this Act.
- (b) This Act does not apply to an exclusive choice of court agreement if -
- (1) any party to the agreement is a natural person acting primarily for personal, family or household purposes, i.e., a consumer; or
  - (2) the agreement relates to an individual or collective contract of employment.
- (c) Subject to subsection (d) of this section, this Act does not apply to the following:
- (1) the status and legal capacity of a natural person;
  - (2) maintenance obligations;
  - (3) other family law matters, including [matrimonial] [marital] property regimes and other rights or obligations arising out of marriage or similar relationships;
  - (4) wills and succession;
  - (5) insolvency, bankruptcy, and analogous matters;
  - (6) the carriage of passengers or goods;
  - (7) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
  - (8) antitrust matters;
  - (9) liability for nuclear damage;
  - (10) claims for personal injury brought by or on behalf of natural persons;
  - (11) tort claims for damage to tangible property that do not arise from a contractual relationship;
  - (12) rights *in rem* in immovable property, and tenancies of immovable property;
  - (13) the validity, nullity or dissolution of legal persons, and the validity of decisions of their [organs] [internal authorities];

- (14) the validity of intellectual property rights other than copyright and related rights;
- (15) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; or
- (16) the validity of entries in public registers.
- (d) A proceeding involving a matter listed in subsection (c) of this section is not excluded from the scope of this Act where the matter arises as a preliminary question, and not as an object of the proceedings.
- (e) This Act does not apply to arbitration and related proceedings.
- (f) A proceeding is not excluded from the scope of this Act merely because a State, including a government, governmental agency or any person acting for a State, is a party to the proceeding.
- (g) Nothing in this Act affects the privileges and immunities of States or international organizations in respect of themselves or their property.
- (h) This Act does not apply to interim measures of protection. This Act neither requires nor precludes the grant, refusal, or termination of interim measures of protection by a court of a Contracting State and does not affect whether a party may request or a court should grant, refuse, or terminate such measures.
- (i) A proceeding under a contract of insurance or reinsurance is not excluded from the scope of this Act on the ground that the contract of insurance or reinsurance relates to a matter to which this Act does not apply.
- (j) [Where the United States has made a declaration under Article 21 of the Convention, the specific matters identified therein shall be excluded from the scope of this Act.]
- (k) Where another Contracting State has made a declaration under Article 21 of the Convention that it will not apply the Convention to a specific matter, the Convention shall not apply in the United States with regard to such matter in respect of that Contracting State.
- (⊕)

**Comment:**

**1. In (c)(3) and (13), alternative terms are suggested that might be more familiar to U.S. practitioners.**

**2. In (c)(10), it was suggested that the Senate transmittal/legislative history explain that this exclusion encompasses wrongful death claims.**

**3. In (e), it's not clear what the Senate transmittal/legislative history might say about judicial actions in aid of arbitration, in light of paragraph 84 of the Report.**

**4. It was suggested that, if the United States elects not to make a declaration under Article 21 at the time of deposit of its instrument, subsection (j) (and other provisions in the text like it regarding declarations under other articles) be removed, as inclusion might send a negative signal to treaty partners. It was further suggested that, if the United States were to decide later to make a declaration under Article 21 or another article, this might be accomplished by deeming the articles on declarations to be self-executing.]**

**5. New subsection (k) was formerly section 403.**

#### Section 105. Exclusivity; Severability

(a) A choice of court agreement that designates the courts of a Contracting State or one or more specific courts of a Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.

(b) An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

**(c) Where the United States has made a declaration under Article 22 of the Convention, subsection (b) shall apply equally to a non-exclusive choice of court agreement.**

**~~Comment: Regarding (b), query whether this might be extended to cover also non-exclusive choice of court agreements. (The Convention does not address this.)~~**

**Comment: It's not clear whether proposed subsection (c) is necessary, since non-exclusive choice of court agreements are addressed in the Convention only with regard to the recognition and enforcement of judgments, and not with regard to the interpretation/validity of choice of court clauses.**

#### Section 106. Residence of legal persons

For purposes of this Act, an entity or person other than a natural person shall be considered to be a resident in the State –

- (a) where it has its statutory seat;
- (b) under whose law it was incorporated or formed;
- (c) where it has its central administration; or
- (d) where it has its principal place of business.

**Comment:**

- 1. Regarding (a), the concept of “statutory seat” might be explained in the Senate transmittal/legislative history.**
- 2. In response to a question whether residence of natural persons should be defined, it was suggested that this could not easily be done and that it might be preferable to leave it to domestic law.**

Chapter 2. Jurisdiction and related matters

Section 201. Jurisdiction of the chosen court

- (a) Except as otherwise provided in this chapter, a court in the United States designated as the chosen court to decide a dispute to which an exclusive choice of court agreement applies shall [have] [exercise] jurisdiction over that dispute, unless the agreement is null and void under ~~applicable the~~ federal or state law applicable in that court. -
- (b) A chosen court in the United States shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State or state [, as applicable].
- (c) Subsections (a) and (b) do not affect rules on –
  - (1) jurisdiction related to subject matter or the {value of the claim} ~~[amount in controversy]~~; or
  - (2) the internal allocation of jurisdiction among the courts of the United States. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

(d) Where the United States has made a declaration under Article 19 of the Convention, a court in the United States designated as the chosen court may decline to exercise jurisdiction if, except for the location of the chosen court, there is no connection between –

- (1) on the one hand, the United States or the state in which the court is located, as applicable; and
- (2) on the other hand, the parties ~~for~~and the dispute.

**Comment:**

1. Regarding (b), specific reference to the term “forum non conveniens”, which does not appear in the Convention, could be reserved for the article-by-article analysis in the transmittal package for the Senate.
2. Does (c)(2) satisfactorily address venue requirements? This might be mentioned in the transmittal to the Senate.
3. Subsection (d) would apply if the United States elects to make a declaration under Article 19. As Article 25(1)(d) of the Convention (non-unified legal systems) expressly pertains to “any reference to a connection with a State,” it would seem to allow the construction in (d)(1), if desired. There is at least potential brackets in (d)(2) reflect an ambiguity in the drafting of Article 19, as reflected in (d)(2). Note that the Hartley/Dogauchi Report describes Article 19 as applying to cases that are “wholly *foreign*” (italics in the original). Perhaps this might be addressed in the Senate transmittal/legislative history.
4. Regarding (a), it was suggested that “have” (the term used in the Convention) be replaced by “exercise” to underscore that the chosen court does not have discretion to not hear the case. However, it was noted that doctrines other than forum non conveniens, e.g., justiciability or political question, might lead the court to decline to exercise jurisdiction in a particular case.
5. Regarding (c)(1), it was suggested that we stick with the Convention language and that the Senate transmittal/legislative history note that, in the United States, amount in controversy is an element of subject matter jurisdiction in federal courts.
6. Regarding (c)(2), it was suggested that the Senate transmittal/legislative history make a cross-reference to section 301(f) below and the possibility of refusal of recognition/enforcement of a judgment.

Section 202. Obligations of the non-chosen ~~E~~court

(a) A court in the United States that is not the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies. ~~unless—~~

(b) Notwithstanding subsection (a), the non-chosen court may proceed with the case if it determines that –

~~(a)~~(1) the exclusive choice of court agreement is null and void under the law of the State of the chosen court;

~~(b)~~(2) A party lacked the capacity to conclude the agreement under ~~applicable the~~ federal or state law applicable in that court;

~~(c)~~(3) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law;

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

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

(c) Nothing in this Act precludes the non-chosen court from suspending or dismissing proceedings on other grounds.

**Comment:**

**1. — ~~Regarding the scope of (c), Article 25(1)(a) of the Convention refers to “law or procedure”. Was this intended to apply also to questions of “public policy”?~~**

**2.1. The Convention does not address whether, if one of the criteria above does apply, the court may nonetheless decline to hear the case. This would be governed by national law. Subsection (c) was added to clarify this point.**

**3.2. The Convention does not address available remedies if a non-chosen court accepts a case in apparent violation of these rules. This would be governed by national law.**

Section 203. Federal subject matter jurisdiction

**OPTION 1:**

- (a) An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.
- (b) The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding in the federal courts, concurrently with the courts of the states, without regard to the citizenship or residence of the parties or the amount in controversy.

**OPTION 2:**

The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over an action or proceeding falling under the Convention, concurrently with the courts of the states, only insofar as jurisdiction otherwise exists under section 1331 of title 28, section 1332 of title 28, or other relevant provisions of law.

**OPTION 3:**

The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over an action or proceeding falling under the Convention, concurrently with the courts of the states, only insofar as jurisdiction otherwise exists under section 1331 of title 28, section 1332 of title 28, or other relevant provision of law, except that an action or proceeding with respect to the recognition or enforcement of a judgment of the chosen court shall be deemed to arise under the laws and treaties of the United States.

- (c) [Where a question arises under section 405 of this Act whether there is an inconsistency between the Uniform Choice of Court Agreement Act as enacted by a state and this Act, the district court of the United States for the district and division embracing the place of the relevant state court shall have jurisdiction to determine the existence and extent of any such inconsistency.]

**Comment:**

- 1. Under Option 1, s**Subsections (a) and (b) are derived from section 203 of the Federal Arbitration Act. (Section 460 of title 28 refers to the U.S. Court of Federal Claims or other courts created by Congress with the jurisdiction of a federal court.) ~~Federal question jurisdiction may exist here anyway under 28 U.S.C. 1331 (“civil actions arising under the Constitution, laws, or treaties of the United States”).~~ **This option would establish federal subject matter jurisdiction over all actions/proceedings arising under the Convention, including disputes in the chosen court and actions to recognize/enforce**

judgments. The Convention does not mandate this result; rather, this would be a policy choice.

2. Under Option 2, existing federal subject matter jurisdiction would not be expanded. Thus, choice of court clauses identifying a federal district court would fail if there were not a federal question involved or the requisite diversity elements.

3. Under Option 3, existing federal subject matter jurisdiction would – as in chapter 2 of the Federal Arbitration Act – be expanded to make recognition/enforcement actions a federal question, but not disputes before the chosen court.

1.

2.4. If the “cooperative federalism” approach is adopted for implementation of this Convention (see section 405), (c) provides a possible review mechanism. Alternatively, it has been suggested that such questions might be addressed in the state courts, ultimately with potential review by the U.S. Supreme Court. Another approach might be to direct the state courts that, whenever questions arise regarding- whether there is an inconsistency between the Uniform Choice of Court Agreement Act as enacted by a state and this Act, the USG shall be notified and provided an opportunity to submit its views to the court.

3.5. To distinguish it from questions of jurisdiction, the availability of a cause of action for recognition/enforcement cases (~~if needed~~) is addressed in section 307 below.

[Section 203 bis. In personam jurisdiction]

Comment: It was suggested that a section be added setting forth the requirements for personal jurisdiction in actions under the Convention. We understand that members of the Study Group are considering possible language. This issue will be revisited later.

[Section 204. Venue

An action or proceeding with respect to the recognition or enforcement of a judgment over which the district courts have jurisdiction pursuant to section 203 of this Act may be brought in any such court in which save for the relevant choice of court agreement an action or proceeding with respect to the controversy between the parties could be brought.]

**Comment: This is derived from section 204 of the Federal Arbitration Act. Does it work here? The view was expressed that such a provision is not necessary.**

Section 205: Removal of cases from state court

**OPTION 1:**

[Where the subject matter of an action or proceeding pending in a state court relates to an exclusive choice of court agreement falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending, without regard to the citizenship or residence of the parties or the amount in controversy. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.]

**OPTION 2:**

Insofar as it is consistent with the choice of the parties expressed in the choice of court agreement, if applicable, an action or proceeding brought in a state court may be removed to U.S. federal court to the extent permitted by and in accordance with the procedures established under applicable law.

**Comment:**

**1. This language is derived from section 205 of the Federal Arbitration Act. It assumes (as the FAA separately provides) that the district court would have subject matter jurisdiction to hear the matter without regard to the citizenship or residence of the parties or the amount in controversy.**

**2. Alternative approaches to the availability of removal might be considered in the context of this Convention, which concerns choice of a particular forum to resolve a dispute as well as the recognition and enforcement of resulting judgments. Query whether removal from the chosen court would be consistent with respect for party autonomy. Alternatives that might be considered:**

- (a) Authorize removal only in matters involving the recognition or enforcement of a judgment, and not for adjudication of a contract dispute by the chosen court; or**
- (b) Authorize removal insofar as it is available under existing law.**

**3. Under Option 2, removal would be permitted where (1) it would be consistent with the choice of court made by the parties (e.g., at the dispute stage, where the choice of court clause identifies “courts in the state of New York”), and (2) the federal court has subject matter jurisdiction.**

### Chapter 3. Recognition and enforcement

#### Section 301. Recognition and enforcement of judgments

(a) Except as otherwise provided in this chapter, a judgment issued by the chosen court in another Contracting State shall be recognized and enforced in courts in the United States.

(b) Without prejudice to such review as is necessary for the application of this chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

(c) A judgment shall be recognized under this Act only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

(d) Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. Such a refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

(e) The provisions of this ~~{section}~~ ~~{chapter}~~ shall also apply to a judgment issued by a court of ~~a~~ the State of origin pursuant to a transfer of the case from the chosen court of the State of origin in accordance with the rules on the internal allocation of jurisdiction among the courts of that State. as permitted under Article 5(3) of the Convention.

(f) Where the case was transferred in the State of origin in accordance with the rules on the internal allocation of jurisdiction among the courts of that State and the chosen court had discretion as to whether to transfer the case, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

**Comment: Regarding (c), it was suggested that the United States might liberalize this to provide a specific statute of limitations that would prevail if that period were longer in a particular case than the period described in (c). Concerns were expressed, however, about doing this unilaterally without reciprocal benefits in other jurisdictions for U.S. persons seeking to obtain recognition/enforcement there.**

#### Section 302. Exceptions to recognition or enforcement of judgments

(a) Recognition or enforcement of a judgment may be refused if –

(1) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

(2) a party to the agreement lacked the capacity to conclude the agreement under ~~the applicable~~ federal or state law applicable in that court;

(3) ~~the defendant in the proceeding in the court of origin the document that instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant did not receive notice of the proceeding~~ in sufficient time and in such a way as to enable the defendant to arrange for a defense, unless -

~~(i) the law of the State of origin permits adequacy of notice to be contested; and~~

\_\_\_\_\_ (ii) the defendant entered an appearance in the court of origin to present ~~a~~ its case without contesting the adequacy of the notice; ~~and~~

~~(ii) the law of the State of origin permits adequacy of notice to be contested;~~

(4) ~~the defendant in the proceeding in the court of origin the document that instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant received notice~~ in the United States ~~of the proceeding~~ in a manner that is incompatible with fundamental principles of the United States concerning service of documents;

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

(6) recognition or enforcement of the judgment would be manifestly incompatible with the public policy of the United States, or with the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law;

(7) the judgment is inconsistent with a judgment given in the United States in a dispute between the same parties; or

(8) the judgment is inconsistent with an earlier judgment by a court in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the United States.

- (b) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. ¶ Damages awarded by the court of origin that serve to cover costs and expenses relating to the proceedings shall be considered compensatory. ‡
- (c) ¶ Where the United States has made a declaration under Article 20 of the Convention, recognition or enforcement of a judgment may be refused where the parties were resident in the United States, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the United States. ¶

**Comment:**

**1. Regarding (a)(5), it was suggested that the Convention language be retained and that the relationship of this ground for refusal to “extrinsic fraud” as known in U.S. jurisprudence be addressed in the Senate transmittal/legislative history.**

**2. Regarding (c), see comment 2 above under section 104.**

**~~1. Regarding (a)(4), as noted above in section 202, the provision in Article 25(1)(a) of the Convention refers to “law or procedure”. Was this intended to apply also to questions of “fundamental principles”?~~**

**~~2. Regarding (a)(5), the phrase “extrinsic fraud” might be substituted here or, alternatively, introduced in the transmittal to the Senate.~~**

**~~3. Regarding (a)(6), see discussion above in section 202 regarding the application of Article 25(1)(a) to “public policy”.~~**

**~~4. Query whether the bracketed text in (b) should be included instead in the transmittal to the Senate, as the relevant provision in the Convention is more ambiguous.~~**

Section 303. Preliminary questions

- (a) Where a matter excluded under section 104 of this Act arose as a preliminary question, the ruling of the court on that question shall not be recognized or enforced under the Convention.
- (b) Except as otherwise provided in subsection (c) of this section, recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under section 104 of this Act.

- (c) If the ruling on a preliminary question concerns the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment based on such ruling may be refused or postponed only if –
- (1) the ruling is inconsistent with a judgment or decision of a competent authority in the State under whose law the intellectual property right arose; or
  - (2) proceedings concerning the validity of the intellectual property right are pending in that State.

#### Section 304. Judgments based on contracts of insurance

Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance shall not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –

- (a) a matter to which this Act does not apply; or
- (b) an award of [damages to which section ~~13302~~(b) of this Act may apply] [damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered].

**Comment: In (b), might the second bracketed alternative be more clear?**

#### Section 305. Judicial settlements

Judicial settlements that have been approved by a chosen court of a Contracting State, or that have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Act in the same manner as a judgment.

**Comment: Here the Convention expressly addresses only enforcement, and not recognition.**

#### Section 306. Documentary requirements

- (a) A party seeking recognition or enforcement of a judgment under this Act shall produce –
  - (1) a complete and certified copy of the judgment;

- (2) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
- (3) if the judgment was issued by default, the original or certified copy of a document establishing that the document that instituted the proceedings or an equivalent document was notified to the defaulting party;
- (4) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; and
- (5) in a case involving a judicial settlement as provided in section 16 of this Act, a certificate of a court of the State of origin that the judicial settlement or a part thereof is enforceable in the same manner as a judgment in the State of origin.

(b) If the terms of the judgment do not permit the court addressed to verify whether the conditions of this chapter have been complied with, that court may require any necessary documents.

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

(d) If the documents referred to in this section are not in English, they shall be accompanied by a certified translation into English.

**Comment: It was suggested that guidance may be desirable on what constitutes acceptable "certification" for purposes of (a) and (d) above.**

Section 307. ~~Procedure~~ Means of enforcement

A foreign judgment entitled to recognition or enforcement under this Act may be enforced by means of a civil action, in accordance with the applicable law of the forum.

~~(a) Insofar as a judgment issued by the court of origin continues to have effect in the State of origin, a party to the proceeding may apply to any court having jurisdiction under this Act for an order recognizing the judgment as against any other party to the proceeding.~~

~~(b) Insofar as a judgment issued by the court of origin continues to be enforceable in the State of origin, a party to the proceeding may apply to any court having jurisdiction under this Act for an order enforcing the judgment as against any other party to the proceeding.~~

~~(c) The procedure for recognition or enforcement of the judgment shall be governed by applicable law.~~

**~~Comment: Do we need (a) and (b) to provide a cause of action for recognition and enforcement proceedings?~~**

**Comment: Is this formulation, derived from the ALI project, adequate? It was suggested that, as a matter of expediency, enforcement actions should be allowed to proceed on the basis of motion only, without requiring a complaint.**

#### Section 308. Severability

Courts in the United States shall recognize or enforce ~~Recognition or enforcement of~~ a severable part of a judgment ~~shall be granted~~ where recognition or enforcement of that part is applied for, or where only part of the judgment is capable of being recognized or enforced under this Act.

Section 309. Recognition and enforcement of judgments arising from non-exclusive choice of court agreements [ALTHOUGH THE QUESTION OF WHETHER TO MAKE A DECLARATION UNDER ARTICLE 22 WAS DISCUSSED AT THE JULY 27 MEETING, THE TEXT OF THIS SECTION WAS NOT CONSIDERED. COMMENTS WELCOME.]

(a) Where the United States has made a declaration under Article 22 of the Convention, the provisions of this chapter with regard to the recognition or enforcement of a judgment issued by the chosen court shall apply *mutatis mutandis* to a judgment issued by a court designated in a non-exclusive choice of court agreement where the State of origin has made a declaration of reciprocity pursuant to Article 22 of the Convention and –

- (1) there is no other existing judgment issued by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement;
- (2) there is no proceeding pending between the same parties in any other such court on the same cause of action; and
- (3) the court of origin was the court first seised [among those courts designated in the non-exclusive choice of court agreement].

(b) Subsection (a) of this section [shall not apply to non-exclusive choice of court agreements concluded before the effective date of the declaration by the United States under Article 22] OR [shall apply to non-exclusive choice of court agreements whether concluded before or after the effective date of the declaration by the United States under Article 22].

**Comment:**

- 1. Is the “mutatis mutandis” approach sufficient?**
- 2. In (a)(3), would it be preferable to include the bracketed language, which does not appear in the Convention, in the transmittal to the Senate?**
- 3. As the limitation in Article 32(5) does not apply to declarations under Article 22, clarification would be needed as to the application of such a declaration to non-exclusive choice of court agreements concluded either before or after the effective date of the declaration. Subsection (b) is included for this purpose. This appears to be a policy choice. The first bracketed alternative is the rule that applies to declarations under Articles 19, 20, 21 and 26.**

Chapter 4. General

## Section 401. Legalization

All documents forwarded or delivered under this Act shall be exempt from legalization or any analogous formality, including an Apostille.

## Section 402. Transition

- (a) This Act shall apply only to exclusive choice of court agreements concluded after the entry into force of the Convention for the State of the chosen court.
- (b) This Act shall not apply to proceedings instituted before the entry into force of the Convention for the State of the court seised.

~~Section 403. Effect of declaration under Article 21~~

~~Where another Contracting State has made a declaration under Article 21 of the Convention that it will not apply the Convention to a specific matter, the Convention shall not apply in the United States with regard to such matter in respect of that Contracting State. [MOVED TO SECTION 104(K).]~~

## Section 404. Relationship of Convention to other international instruments

- (a) The Convention shall be interpreted so far as possible to be compatible with other treaties and international agreements in force for the United States, whether concluded before or after the Convention.
- (b) Where each of the parties is resident in a Contracting State that is a Party to another treaty or international agreement, this Act shall not affect the application by the United States of such treaty or international agreement, whether it was concluded before or after the Convention.
- (c) This Act shall not affect the application by the United States of a treaty or international agreement that was concluded before the Convention entered into force for the United States, if applying the Convention would be inconsistent with the obligations of the United States under such treaty or international agreement to a non-Contracting State. This subsection shall apply equally to treaties or international agreements that revise or replace a treaty or international agreement concluded before the Convention entered into force for the United States, except to the extent that the revision or replacement creates new inconsistencies with the Convention.
- (d) This Act shall not affect the application by the United States of a treaty or international agreement, whether concluded before or after the Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of Contracting State that is also a Party to that treaty or international agreement, provided that such judgment shall not be recognized or enforced to a lesser extent than under the Convention.
- (e) Where the United States has made a declaration under Article 26(5) of the Convention, the Convention shall not affect the application by the United States of a treaty or international agreement that, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after the Convention and even if all States concerned are Parties to the Convention.
- (f) Where another Contracting State has made a declaration under Article 26(5) of the Convention, the United States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

**Comment: In keeping with comment 2 above under section 104, subsection (e) might be omitted, but it would seem odd to remove that subsection and retain the rest of section 404.**

Section 405. Relationship to state law [RECOGNIZING THAT THE FUNDAMENTAL POLICY QUESTIONS HERE REMAIN OPEN, WOULD WELCOME COMMENTS ON THE TEXT.]

- (a) [Except as otherwise provided in subsection (b) of this section, insofar as a state has enacted into law the Uniform Choice of Court Agreement Act as approved on [date] and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws [or the Uniform Law Commission?], such Uniform Act shall apply in that state in lieu of sections [ ] of this Act.]
- (b) [In the event of any inconsistency between such Uniform Act as enacted by any state and this Act, such Uniform Act shall be preempted by this Act.]

**Comment:**

- 1. Something like this section would be needed if the “cooperative federalism” approach is adopted.**
- 2. In that case, we would need to consider which sections of this Act, as it is finally drafted, should continue to apply in conjunction with the Uniform Act.**
- 3. What if the Uniform Act is subsequently amended (in a fashion that maintains consistency with the Convention)?**

Section 406. Effective date

This Act shall take effect on the date that the Convention enters into force for the United States.