RECENT INTERNATIONAL AGREEMENT


Trade is greatly facilitated when international parties can make contracts safe in the knowledge that their disputes will be recognized and resolved in the forum of their choice. Yet legal systems may fail to protect these reasonable expectations. Recently, the member states of the Hague Conference on Private International Law approved the Convention on Choice of Court Agreements, which lays out uniform rules for the enforcement of international choice of court clauses. The Convention not only requires that courts in member states assume jurisdiction pursuant to certain forum selection agreements between businesses around the world, but also lays out rules for the recognition of judgments thereby entered. These provisions will — if signed and ratified by the United States — render immaterial difficult questions regarding which law federal courts should apply to such agreements. Moreover, the Convention may also serve as a catalyst for standardized treatment of domestic forum selection clauses among the states and may later promote a much-needed legislative standardization of domestic jurisdictional law.

In 1992, the United States spearheaded a project with the Hague Conference on Private International Law to draft a worldwide convention on the recognition and enforcement of judgments in international civil law. Increasing reliance on cross-border trade had ex-

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2 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (declaring that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [federal] case is the law of the State”).


5 See Peter H. Pfund, The Project of the Hague Conference on Private International Law To Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters, 24 BROOK. J. INT’L L. 7, 8 (1998); see also id. at 11–13 (outlining the reasons the United States chose to pursue this objective through the Hague Conference).
posed limitations in the legal framework for dealing with international civil litigation; as one State Department official put it, a worldwide judgments convention would help "lay the legal structure necessary to support the growth of global markets, promote sensible international legal cooperation, and provide for the general well-being of all our societies." Although a United Nations convention has successfully regulated enforcement of arbitral contracts and agreements since 1958, the United States, unlike many European countries, is not yet a party to any treaty regarding the enforcement of judgments.

The first draft of the Hague Convention was more comprehensive, but it ultimately proved too controversial; after years of delays, the United States appeared ready to abandon the project. In order to salvage the negotiations, the Permanent Bureau of the Hague Conference, together with an informal working group, proposed that

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9 See Pfund, supra note 5, at 8. The lack of an international judgment treaty has left the United States at a disadvantage: the general perception is that although American courts regularly — and perhaps wantonly — enforce foreign judgments, U.S. judgments are not accorded the same respect abroad. See Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 CORNELL L. REV. 89, 89 (1999) (“As a well-behaved member of the international community of nations, the United States eagerly gives appropriate respect to foreign judgments, despite sometimes getting no respect in return.”). But see Friedrich K. Juenger, A Hague Judgments Convention?, 24 BROOK. J. INT’L L. 111, 114 (1998) (“There may be some American judgment creditors with horror stories to tell about their inability to collect abroad on a domestic judgment; but there does not seem to be an army of them clamoring for greater comity.”); Russell J. Weintraub, How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away To Get It?, 26 BROOK. J. INT’L L. 167, 170–71 (1998) (describing the need for empirical research to determine how frequently foreign courts enforce U.S. judgments).


11 The negotiations stalled in part because of the different conceptions of jurisdiction in the different countries. Id. at 6.

12 In February 2000, Jeffrey Kovar, then the Assistant Legal Adviser for Private International Law at the Department of State, wrote, “[i]n our view, there has not been adequate progress toward the creation of a draft convention that would represent a worldwide compromise among extremely different legal systems. It is difficult for us to be optimistic that there is adequate support for reaching such a goal.” Kovar Letter, supra note 6, at 3.
the Convention be scaled down to address only choice of court agreements between businesses, leaving many of the broader jurisdictional and enforcement provisions on the cutting room floor. On this advice, the Hague Conference resurrected a leaner version of the original draft, and in June 2005, all of the member states approved it as the Hague Convention on Choice of Court Agreements.

With the stated objective of “promot[ing] international trade and investment through enhanced judicial co-operation,” the Convention applies solely to “international cases [of] exclusive choice of court agreements concluded in civil or commercial matters.” Significantly, it pertains only to business-to-business transactions; consumer contracts and contracts of employment are specifically excluded.

Three basic rules — fettered with many restrictions — form the foundation of the Convention. First, a court designated in an exclusive choice of court agreement “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.” Second, the inverse also applies: any court not designated in the exclusive forum selection agreement must refuse jurisdiction. Third, state parties must enforce judgments resulting from an exclusive choice of court agreement. A fourth, optional provision allows states to declare that they will recognize and enforce judgments rendered by courts of other contracting states designated in nonexclusive choice of court agreements.

Member states also adopted other provisions to limit the scope of the Convention. For example, the delegates agreed that a domestic court may refuse recognition of another court’s judgment if the damage award exceeds “actual loss or harm suffered.” This provision

13 See DOGAUCHI & HARTLEY, supra note 10, at 6.
14 Hague Convention, supra note 1, pmbl.
15 Id.
16 Id. art. 1(1). “An exclusive (or mandatory) forum selection clause requires that any litigation take place only in the specified forum, and nowhere else. In contrast, a nonexclusive forum selection agreement permits litigation of disputes in a particular forum but does not preclude the parties from going forward in other courts if they also have jurisdiction.” GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 371–72 (3d ed. 1996) (footnote omitted).
17 See Hague Convention, supra note 1, art. 2(1).
18 Id. art. 5(2).
19 Id. art. 6.
20 Id. art. 8.
21 Id. art. 22; see also Ronald A. Brand, The New Hague Convention on Choice of Court Agreements, http://www.asil.org/insights/2005/07/insights050726.html (last visited Dec. 10, 2005) (“[This provision] is a response to discussions during the negotiations indicating that a significant number of industries rely on non-exclusive choice of court clauses. If Contracting States exercise this declaration option, it will substantially expand the recognition and enforcement benefits of the Convention.”).
22 Hague Convention, supra note 1, art. 11(1).
arose mostly out of fear of large damage awards given by U.S. courts. In addition, following a contentious debate, intellectual property claims (other than copyright) were excluded from the Convention, unless they arise only as a preliminary question in the proceedings.

The Convention does not expressly exclude nonnegotiated contracts, despite fears that such contracts may result in abuses of differences in bargaining power. Nevertheless, several other provisions directly safeguard the interests of the contracting parties. For example, a court is not required to enforce the choice of court agreement if the agreement was procured by fraud or if the recognition or enforcement would be “manifestly contrary to the public policy” of the requested state. Nor is a court required to enforce an award if the service of process was incompatible with the fundamental principles of the state in which the requested court sits. Even with these various exceptions, the Convention sets clear and decisive rules regarding enforceability of choice of court agreements in international civil litigation and, if successfully implemented, may pave the way for a more comprehensive convention.

In addition to its positive implications for U.S. litigants abroad, the adoption of the Convention on Choice of Court Agreements should be

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23 The United States had previously attempted to negotiate a bilateral judgments recognition treaty with the United Kingdom, but efforts failed due to the fear that damage awards in the United States were often considerably higher than those awarded in the United Kingdom. See Juenger, supra note 9, at 112–13.

24 See Brand, supra note 21.

25 Hague Convention, supra note 1, art. 2(2)(n)–(o). A “preliminary question” is one that is “not the object of the proceedings but is a question that the court has to decide in order to give judgment.” Dogrucci & Hartley, supra note 10, at 12. The Convention similarly excludes suits relating to employment contracts, personal injury suits, wills, and insolvency. See Hague Convention, supra note 1, art. 2(2). It also gives significant leeway for countries to carve out individual exceptions to the Convention. Article 21 provides that “where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply to this matter.” Hague Convention, supra note 1, art. 21.

26 A court designated in an agreement lacks jurisdiction if “the agreement is null and void under the law of that State.” Hague Convention, supra note 1, art. 5(1). This refers “primarily to generally recognized grounds of invalidity like fraud, mistake, misrepresentation, duress and lack of capacity.” Dogrucci & Hartley, supra note 10, at 19.

27 Hague Convention, supra note 1, art. 6(c). Still, negotiators strongly emphasized that this exception should have a limited scope. See Peter D. Trooboff, Foreign Judgments, NAT’L L.J., Oct. 17, 2005, at 13.

28 Hague Convention, supra note 1, art. 9(c)(ii).

29 This convention was narrow primarily due to the desire to reach some form of agreement early in negotiations. Cf. Ronald A. Brand, Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS, supra note 3, at 75, 77 (“The world will be much better off with a convention of limited ambition, providing a foundation for future developments, than with a convention that will leave out important states and never result in true global adherence.”).
welcomed domestically for two main reasons. First, the ratification of this Convention would significantly clarify U.S. law by resolving difficult questions that federal courts now face in deciding whether to apply state or federal law to international forum selection agreements. Second, it would provide a key opportunity for American courts and legislatures to reflect on the state of domestic forum selection clauses. Yet one lesson learned from The Hague is to start small; with this in mind, Congress could use a redevelopment of domestic forum selection clauses to embark carefully on a more comprehensive standardization of domestic personal jurisdiction laws.

The current U.S. law on international forum selection clauses is muddled. Historically, forum selection clauses were per se unenforceable in American courts. Slowly, federal courts began to chip away at this rule. In The Bremen v. Zapata Off-Shore Co., the Supreme Court ruled that international forum selection clauses are “prima facie valid” in admiralty cases, unless “enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” In justifying its decision, the Court remarked that “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.” Such passionate rhetoric seemingly blesses the enforcement of all international forum selection clauses. The Court indicated, however, that it intended its decision to apply to the federal courts only when they are exercising federal common law admiralty jurisdiction, although it later noted that the ruling might well be “instructive” in other circumstances.

The Court’s lack of clarity has caused confusion over whether the Bremen rule applies in nonadmiralty cases. Federal courts have been left without any guidance over whether to apply federal common law to international choice of court agreements or whether to apply state law, which may diverge from the federal standard. These discrepancies, in turn, raise distinct Erie questions: may federal courts in diversity cases apply Bremen, or must they apply state law under current

30 BORN, supra note 16, at 373–74.
32 Id. at 10.
33 Id. at 9.
34 Id. at 10. The Court later established the legality of forum selection clauses even in admiralty cases in which the resisting party is a consumer who has accepted a nonnegotiated form contract. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590–97 (1991).
choice of law jurisprudence? Although most courts and commentators have applied the federal standard — and many states have adopted standards similar enough to Bremen to make this analysis often moot — there is still disagreement over this predicament in cases where the state standards are more restrictive. The ratification of this Convention would finally lay to rest this uncertainty by requiring the recognition of international forum selection clauses in both state and federal cases.

Perhaps more importantly, the treaty provides a new point of reference for state courts and legislatures wishing to revisit their laws regarding domestic forum selection clauses. Although the Convention would be nothing more than persuasive authority, it presents a clear approach to the issue that translates well to interstate litigation. Indeed, it is ironic that U.S. companies will have greater certainty of enforceability in international contract disputes than in interstate contract disputes. While some observers still worry that nonnegotiated contracts are not specifically excluded from the Convention, the mere


38 See Walter W. Heiser, Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise, 45 FLA. L. REV. 361, 371 (1993) (“Today, the vast majority of state courts have held that contractual forum selection clauses are valid and enforceable.”). But see Yackee, supra note 36, at 1187 (providing a comprehensive overview of the states that apply a more restrictive standard than Bremen).

39 Compare Lipcon v. Underwriters at Lloyd’s, London, 148 F.3d 1285, 1294 (11th Cir. 1998) (“Supreme Court precedent . . . suggests that the enforceability of choice clauses in international agreements should be determined by a framework designed specifically for the international commercial context.”), and Harold G. Maier, The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law, 6 VAND. J. TRANSNAT’L L. 387, 396 (1973) (arguing that “it is clear from the opinion in Zapata that the validity of forum-selection clauses in international contracts is . . . a matter affecting important national interests”), with Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 919 (11th Cir. 1989) (“Because the application of federal judge-made law [to international forum-selection agreements] would encourage forum shopping and promote the inequitable administration of the laws, we must apply state law to decide the issue presented.”), Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357 (3d Cir. 1986) (“The interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law.”), and Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1634–35 & n.80 (1997) (arguing that the current “federal common law of foreign relations . . . lacks justification”).

40 Treaties are the “supreme Law” of the United States and thus bind both the federal and state courts. U.S. CONST. art. VI, cl. 2.

fact that the Convention applies to businesses and not consumers should alleviate many concerns over unfairness. Moreover, the limitations in the Convention designed to protect the parties—such as the right of a court to refuse to enforce an award if it is “manifestly incompatible” with the State’s public policy—could be instructive in crafting domestic provisions that will provide courts with some flexibility while leaving a general rule of enforceability intact.

When a broader convention was envisioned, some commentators, citing the current confused state of domestic jurisdictional standards in the United States, suggested that Congress should use the Hague Convention as a springboard to reexamine American jurisdictional law through federal legislation. Indeed, the same policy goals that motivate an international convention—including the need for procedural uniformity and clarity—also apply in our own balkanized federal system. As Professors Kevin Clermont and Kuo-Chang Huang advocate, “Congress could legislate that state or federal courts, not only in all international cases but also in interstate cases, possess jurisdiction only if the case’s circumstances satisfy the treaty’s or the proposal’s analogous jurisdictional provision.”

Proposing a model law “under which constitutional limits fade into the background and legislative rules move to the fore,” they argue that Congress should provide clear and uniform guidelines to correct current fragmented standards of jurisdiction in both international and domestic cases.

In theory, a sweeping legislative approach may be the best way of proceeding, but in reality, Congress should learn a lesson from The Hague and start with a narrow statute that could pave the way for more comprehensive legislation. This cautionary history appears particularly relevant given Congress’s past legislative mistakes in dealing with jurisdictional issues. The Federal Arbitration Act (FAA), a statute analogous to the one that Professors Clermont and Huang advocate, requires that arbitration agreements be enforced no differently

Chairman and CEO, Motion Picture Ass’n, to Jeffrey Kovar, Assistant Legal Adviser for Private Int’l Law, U.S. Dep’t of State 2 (June 26, 2003), available at http://www.cptech.org/ecom/jurisdiction/JV%20Kovar%20letter.pdf (“Any attempt to exempt whole classes . . . of transactions from a convention designed to honor the choice of court agreements . . . could only promote chaos, not certainty.”).

Hague Convention, supra note 1, art. 9(e).


See, e.g., Clermont, supra note 9, at 97–123.

Clermont & Huang, supra note 3, at 193.

See id.

than other contracts. Although the FAA was designed to clarify the law and add certainty to arbitral agreements, it has been perceived as poorly drafted and may have had the effect of increasing litigation and confusing the courts. Issues that some argue may hamper FAA reform — namely, concerns that interest groups will interfere in the process and fears that reform will only increase uncertainty in the law — may apply equally to the enactment of broad litigation legislation. If Congress starts with a narrow, successful statute regarding forum selection, it may build up the expertise and political will to enact broader and more comprehensive legislation.

Even if Congress does not seize the opportunity to reform domestic law, the ratification of the Hague Convention alone would be a major advance. The reasons provided in the *Bremen* decision for per se enforceability of such clauses apply even more strongly today than they did then: “We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” A uniform approach to international forum selection clauses would not only begin to standardize the world’s terms for civil litigation, but it may also bring us one step closer to clarifying our own.

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50 See Park, supra note 48, at 1244–45.