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ARBITRATION OR LITIGATION? CHOICE OF FORUM AFTER THE 2005 HAGUE CONVENTIONON CHOICE OF COURT AGREEMENTS

The possibility of wide ratification of and accession to the 2005 Hague Convention on Choice of Court Agreements presents important issues for those drafting international commercial contracts. Transactions lawyers have rather easily justified the inclusion of arbitration agreements in international commercial contracts because the New York Arbitration Convention insures both compliance with the agreement to arbitrate and the recognition and enforcement of any resulting arbitral award. When the Hague Convention becomes effective in a significant number of states, choice of court clauses will be more easily enforced, and court judgments will more easily recognized in other states. Thus, the choice between arbitration and litigation will hinge on the real differences between these two dispute settlement options, and not merely on the fact that one is more easily enforced than the other. This chapter compares the choices for both private parties and states under the Hague Convention with those existing under the New York Arbitration Convention.

Key words: *Choice of forum. – Arbitration. – Hague Convention. – New York Convention. – Recognition and enforcement of judgments.*

1. INTRODUCTION

The Convention on Choice of Court Agreements was completed on June 30, 2005, as part of the Final Act of the Twentieth Session of the Hague Conference on Private International Law.[1] Like the New York Ar-

[1] The text of the Final Act of the Twentieth Session, and a documentary history of the Choice of Court Convention project, are available on the Hague Conference website at: *http://hcch.e-vision.nl/index_en.php.*

bitration Convention,[2] the Hague Convention establishes rules for enforcing private party choice of forum agreements, as well as rules for recognizing and enforcing the decisions issued by the chosen forum.

It has been rather easy for transactions lawyers to justify the inclusion of arbitration agreements in international commercial contracts, largely because the New York Convention insures both compliance with the agreement to arbitrate and the recognition and enforcement of any resulting arbitral award. If and when the Hague Convention becomes effective in a significant number of states, those who draft such contracts will find it necessary to make a more balanced choice between arbitration and litigation of potential disputes. If choice of court clauses will be as easy to enforce as arbitration agreements, and court judgments as easy to have enforced as arbitral awards, then the choice between the two types of forum will necessarily hinge on the real differences between these two dispute settlement options, and not merely on the fact that one is more easily enforced than the other.

With both the United States and the European Community having signed the Hague Convention, thereby indicating their intent to become parties to it, it is time for international commercial lawyers to consider the relative differences between arbitration and litigation more carefully.[3] It is not the purpose of this article to go into those comparisons, or to offer a conclusion regarding a preference for arbitration or for litigation. In most events, that comparison will depend on specific circumstances of the transaction involved. What I want to do here is to set the stage for that comparison by reviewing the provisions of the new Hague Convention and comparing it with the New York Convention so that lawyers will be better able to use that comparison to make informed choices between arbitration and litigation as the preferred means of dispute settlement with respect to a particular transaction.

2. THE 2005 HAGUE CONVENTION

The Hague Convention will apply to non-consumer agreements that designate a single court (or the courts of a single state) for resolution

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ["New York Convention"], available at: *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html*.

[3] The United States signed the Convention on January 19, 2009, and the European Community signed on April 1, 2009. *See* Status Table available at *http://www.hcch.net/index_en.php?act=conventions.status&cid=98*.

of disputes.[4] It is designed to apply only to international agreements, excluding from its scope agreements to which "the parties are resident in the same Contracting State and . . . all other elements relevant to the dispute . . . are connected only with that State."[5]

2.1. The Three Basic Rules

The Convention sets out three basic rules:

1) Article 5 provides that the court chosen by the parties in an exclusive choice of court agreement has jurisdiction;[6]
2) Article 6 requires that, if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case;[7] and
3) Article 8 provides that a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States.[8]

Like the New York Convention, the Hague Convention is intended to enhance predictability by insuring that party agreements will be honored, and that the results of dispute resolution in the chosen forum will be enforced. While there are many bilateral and regional agreements on the recognition and enforcement of judgments, until the Hague Convention, there existed no true global convention. Some countries, like the United States, are not a party to any treaties on the recognition and enforcement of judgments. Thus, there has been no global judgments convention to be compared with the widely adopted New York Arbitration Convention.

2.2. The Optional Fourth Rule

The Hague Convention offers an optional fourth rule by party declaration. Contracting States may declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.[9] Thus, while a non-exclusive agreement would not receive the benefits of Articles 5 and 6 at the jurisdictional stage of agreement enforcement, any resulting judgment could receive the benefits of Article 8 at the judgment recognition and enforcement stage. This option recognizes that, once a judgment is ob-

4 Hague Convention, art. 2(1)(a).

5 *Ibid*. art. 1(2).

6 *Ibid*. art. 5.

7 *Ibid*. art. 6.

8 *Ibid*. art. 8.

9 *Ibid*. art. 22.

tained based on jurisdiction founded on the consent of the parties, there is value in the free movement of such a judgment. If enough Contracting States exercise this declaration option, it will substantially expand the recognition and enforcement benefits of the Convention.

2.3. Limitations on Scope

Article 1 provides the general limitations on Convention scope by stating that the "Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters."[10] Thus, there are three basic scope issues. In order for the Convention to apply (absent an Article 19 declaration), (1) there must be an "international case," (2) there must be an exclusive choice of court agreement, and (3) both of these must involve a "civil or commercial matter."

Paragraphs (2) and (3) of Article 1 define what is an international case for purposes of the Convention. For purposes of jurisdiction (*i.e.*, in determining whether to enforce the choice of court agreement), "a case is international unless the parties are resident in the same Contracting State and 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."[11] Thus, a case is international unless it is wholly domestic. For purposes of recognition and enforcement of a resulting judgment, the rule is very simple: "a case is international where recognition or enforcement of a foreign judgment is sought."[12]

Contracting States have two methods of modifying the international case definition. Under Article 19, a Contracting State may limit the jurisdictional rules by declaring

> that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[13]

This allows states to avoid cases unrelated to their own judicial system in any way. On the other hand, those states wanting to develop magnet forums (just like arbitral institutions want to develop business), need not exercise this declaration and can otherwise develop their laws and courts to encourage broader use of their courts.

A Contracting State may limit the recognition and enforcement rules under Article 20, by declaring

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[10] *Ibid*. art. 1(1).

[11] *Ibid*. art. 1(2).

[12] *Ibid*. art. 1(3).

[13] *Ibid*. art. 19.

> that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, 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 requested State.[14]

This option gives a state a second look at incoming judgments, but allows non-recognition only when the case is entirely domestic to the recognizing state.

> Under Article 3(a), a choice of court agreement is exclusive if it is an agreement that is concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, 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.[15]

Thus, such an agreement may not designate optional courts in differing states, even if all other courts are excluded. To the extent a choice of court agreement is not clear, however, paragraph (b) of Article 3 provides that

> 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.[16]

The remainder of Article 3 provides certain formality requirements for the choice of court agreement,[17] and sets forth the rule, common in arbitration, that the choice of forum clause "shall be treated as an agreement independent of the other terms of the contract," and that the "validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."[18]

Article 2 provides further limitations on the scope of the Convention. In paragraph (1), there are exclusions based on the type of agreement, providing that neither contracts with consumers nor employment agreements shall be within the scope of the Convention.[19] Paragraph (2) then follows with a list of matters that are outside the scope of the convention. This list begins with matters for which national laws often claim exclusive jurisdiction for local courts (disputes dealing with issues of personal status and legal capacity of natural persons,[20] maintenance obliga-

14 *Ibid*. art. 20.

15 *Ibid*. art. 3(a).

16 *Ibid*. art. 3(b).

17 *Ibid*. art. 3(c).

18 *Ibid*. art. 3(d).

19 *Ibid*. art. 2(1).

20 *Ibid*. art. 2(2)(a).

tions and other family law matters,[21] wills and succession,[22] insolvency proceedings,[23] rights in rem in immovable property,[24] internal corporate matters,[25] validity of intellectual property rights (other than copyright and related rights),[26] and infringement of intellectual property rights[27]), and continues with matters often subject to existing international legal regimes or ancillary to the main thrust of the Convention (carriage of passengers and goods,[28] certain maritime matters,[29] antitrust cases,[30] liability for nuclear damage,[31] claims for personal injury to natural persons,[32] and non-contractual tort claims for damage to tangible property[33]). States may add to this list for their courts by making a declaration pursuant to Article 21. Such a declaration, however, will have reciprocal effect, and shall thus apply as well in the courts of other Contracting States, preventing enforcement of agreements choosing the courts of the declaring state in disputes involving such matters.[34]

Avoidance of misuse of the Article 2(2) exclusions to frustrate valid consent to jurisdiction in a chosen court is addressed in Article 2(3) and Article 10 through the existence of special rules for cases in which excluded subject matter is raised only in preliminary questions not the main object of the proceedings, otherwise allowing the Convention to operate effectively in such circumstances.[35]

3. COMPARISONS WITH THE NEW YORK CONVENTION

3.1. General Respect for Party Autonomy in Choice of Forum

Both of the New York and Hague Conventions bring with them a focus on party autonomy. While most twenty-first century lawyers regard

21 *Ibid*. art. 2(2)(b)-(c).

22 *Ibid*. art. 2(2)(d).

23 *Ibid* art. 2(2)(e).

24 *Ibid*. art. 2(2)(l).

25 *Ibid*. art. 2(2)(m).

26 *Ibid*. art. 2(2)(n).

27 *Ibid*. art. 2(2)(o).

28 *Ibid*. art. 2(2)(f).

29 *Ibid*. art. 2(2)(g).

30 *Ibid*. art. 2(2)(h).

31 *Ibid*. art. 2(2)(i).

32 *Ibid*. art. 2(2)(j).

33 *Ibid*. art. 2(2)(k).

34 *Ibid*. art. 21(2)(b).

35 Further discussion of these provisions, *see* R. A. Brand, P. M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements*, 2008, 71–77.

party autonomy as a fundamental starting point for all transnational commercial relationships, the ability of private parties to select their forum for dispute resolution is historically a relatively recent development. In arbitration, the focus on party choice for dispute resolution was locked in for disputes in the United States by the Federal Arbitration Act in 1925.[36] This was followed internationally with the 1958 New York Convention, with ratifications and accessions growing throughout the twentieth century as the wall of resistence to arbitration fell.

Party autonomy in choice of court is a more recent development, with courts traditionally being jealous of private party decisions to go to the courts of other states. In the United States, for example, until the latter half of the twentieth century, it was common for courts to hold that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."[37] This approach ended in the United States with the 1972 Supreme Court decision in *Bremen v. Zapata*,[38] in which the court upheld a clause between a German firm and a U.S. company, in a contract for towing an oil rig from the United States to Italy, which provided for litigation in the United Kingdom. Noting 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,"[39] the Court added that forum

[36] 9 U.S.Code §§ 1–14, first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by Congress in October of 1988 and renumbered on December 1, 1990 (PLS 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101–369); and Section 10 was amended on November 15, 1990.

[37] Carbon Black Export, Inc. v. The Monrose, 254 F.2d 297, 300–301 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959). It has been said that this position rested on the rationale that "(1) the parties cannot by agreement in the contract alter the jurisdiction of the courts, and (2) such contractual stipulations are violative of public policy." V. Nanda, *The Law of Transnational Business Transactions*, 1986, § 8.02[1][a]. Some commentators considered significant the distinction between conferring and ousting jurisdiction ("prorogation" versus "derogation" in civil law terms). However, it was also suggested that "[t]he real issue . . . is not whether the parties can by agreement 'confer' or 'oust' jurisdiction, but whether the selected or ousted court will exercise its own jurisdiction in such a way as to give effect to the intention of the parties." G. Delaume, *Transnational Contracts*, 1986, § 6.01. *Compare* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) ("No one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction over [the plaintiff's] action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.").

[38] M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[39] 407 U.S. at 9.

selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."[40] While the *Bremen* case resulted from admiralty jurisdiction, subsequent cases extended this deference to party choice of forum broadly, even to consumer contracts.[41]

In Europe, respect for party autonomy in commercial relations is found in Article 23 of the Brussels I Regulation, which provides for the enforcement of agreements selecting the courts of EU Member States when at least one party is domiciled in a Member State.[42] While this respect for party autonomy is not provided for in insurance, consumer, and employment contracts,[43] in other civil and commercial matters it is now a basic principle of European law.

3.2. Party Autonomy in the New York and Hague Conventions

Whether the Hague Convention will provide a level playing field for choice of court and arbitration agreements will depend on both the balance of rules that will be applicable to private party transactions and the ways in which Contracting States may choose to affect the application of those rules.

3.2.1. The Perspective of the Parties

For the private party, there are some important differences between the New York and Hague Conventions. These differences include nuances in the limitations on party autonomy contained in each instrument.

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[40] 407 U.S. at 10.

[41] *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

[42] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. E.U. L 12/1, 16 January 2001:

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[43] *Ibid.* arts. 8–14, 15–17, and 18–21, respectively.

Article II(3) of the New York Convention requires that parties to an arbitration agreement be refereed to arbitration, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed."[44] This rule of substantive validity follows the requirement in Article II(1) that there be consent ("an agreement"), and the formal validity requirement ("in writing," "signed by the parties or contained in an exchange of letters or telegrams") in Article II(2). The Convention does not, however, provide guidance in determining the law applicable to the Article II(3) question of substantive validity. This is left to the rules of private international law of the forum seised with the matter.[45]

The Hague Convention differs from the New York Convention by inserting the substantive validity issue in three separate articles, and in providing an autonomous Convention choice of law rule for purposes of this determination. Article 5(1) requires that a court chosen in an exclusive choice of court agreement take jurisdiction "unless the agreement is null and void under the law of that State."[46] Article 6(a) requires that any other court in a Contracting State "suspend or dismiss proceedings . . . unless . . . the agreement is null and void under the law of the State of the chosen court."[47] Once a judgment is issued by the chosen court, Article 9(a) provides that a court in another Contracting State may refuse recognition and enforcement if "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."[48] Together, these three provisions incorporate a single source of applicable law for making the determination of substantive validity of the choice of court agreement. This has two effects for purposes of party autonomy. First, it limits party autonomy by acknowledging that there are laws that prevent the validity of certain types of agreements or agreements by certain types of parties. Second, it tempers those limits by allowing the parties to the choice of court agreement to select the law of a state whose rules liberally uphold choice of court agreements. Whether this will create the effect of offshore jurisdictions that support what other states would consider to be misuse of choice of court agreements remains to be seen, but it does allow for that possibility. The same possibility does not exist under Article II of the New York Convention because, with no autonomous choice of law rule, each court may use its own rules of private international law to determine the law applicable to the issue of substantive validity.

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[44] New York Convention, art. II(3).

[45] The New York Convention does provide autonomous choice of law rules for specific determinations required in Article 5(1)(a) and 5(2)(a) at the award recognition and enforcement stage.

[46] Hague Convention, art. 5(1).

[47] *Ibid.* art. 6(a).

[48] *Ibid.* art. 9(a).

The substantive validity rule (allowing nonrecognition of an arbitration agreement if it is "null and void, inoperative or incapable of being performed") is the only limitation on the requirement of recognition and enforcement of an otherwise formally valid agreement to arbitrate under Article II of the New York Convention. The Hague Convention provides additional limits on party autonomy at this jurisdictional stage, however, in the form of Article 6 grounds on which a court not chosen may refuse to suspend or dismiss proceedings in favor of the chosen court. These grounds include lack of party capacity,[49] "manifest injustice" or violations of public policy resulting from giving effect to the agreement,[50] situations where "the agreement cannot reasonably be performed,"[51] and situations where "the chosen court has decided not to hear the case."[52] Thus, at least at an academic level, the Hague Convention provides more limitations on party autonomy at the jurisdictional stage when the question is the recognition and enforcement of the *agreement* on choice of forum. Whether this will develop as a meaningful difference in the choice between an agreement to arbitrate and a choice of court agreement remains to be seen.

A third set of limitations on party autonomy, found in both the New York and Hague Conventions, comes into play at the stage of recognition and enforcement of an award or judgment resulting from jurisdiction under the applicable choice of forum clause. In the New York Convention, Article III provides for the obligation to recognize and enforce an arbitral award, and Article V provides bases for exceptions to this obligation. In the Hague Convention, the obligation to recognize and enforce a judgment is found in Article 8, and the exceptions are found in Article 9. The comparison between the two sets of bases for nonrecognition can be summarized as follows:

New York Convention	**Hague Convention**
Rule (Article III):	**Rule (Article 8):**
Arbitral awards will be recognized and enforced	Judgments will be recognized and enforced
Exceptions (Article V):	**Exceptions (Article 9):**
– lack of party capacity	– agreement was "null and void"
– ack of proper notice	– lack of party capacity
– outside the scope of the agreement to arbitrate	– lack of proper notice

[49] *Ibid*. art. 6(b).

[50] *Ibid*. art. 6(c).

[51] *Ibid*. art. 6(d).

[52] *Ibid*. art. 6(e).

- proper arbitration procedure
- award is not yet binding, or has been set aside
- subject matter "is not capable of settlement by arbitration"
- "contrary to . . . public policy"
- judgment "obtained by fraud"
- manifestly incompatible with public policy
- inconsistent with local judgment
- inconsistent with earlier judgment

Once again, whether the differences in these lists will result in substantive differences in the choice between arbitration agreements and choice of court agreements remains to be determined through the further application of both conventions.

3.2.2. The Perspectives of the Contracting States

The questions raised by a comparison of the New York Convention and the Hague Convention require decisions not only by private parties, but by states as well. For the potential Contracting State, there are more opportunities to vary the terms of the Hague Convention. The New York Convention, in Article X, allows only one declaration: that a state will "apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."[53] The Hague Convention, on the other hand, contains three possible declarations that may limit the application of the Convention, and one that may extend its application.

> Article 19 of the Hague Convention allows a Contracting State to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[54]

This provision indicates the possibility for sovereign entrepreneurship. While it specifically allows a state to reduce the availability of its courts for international disputes, states not exercising the Article 19 declaration may in fact encourage recourse to their courts, thus creating business for their legal communities, even when the transaction involved has no other connection to the chosen forum.

While Article 19 allows limitations on the jurisdictional rules of the Hague Convention (those rules dealing with recognition and enforcement of a choice of court agreement), Article 20 provides a second possible declaration that can limit the application of the Convention rules regarding recognition and enforcement of judgments resulting from the

[53] New York Convention, art. X(1).

[54] Hague Convention, art. 19.

exercise of jurisdiction under the Convention. Pursuant to Article 20, a state may declare

> that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, 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 requested State.[55]

This allows a Contracting State a second shot at a case taken originally to another state, but is a very limited exception, being available only when *all* elements relevant to the dispute other than the chosen court are "connected only with" the Contracting State that has made the declaration.

The third provision allowing limitation of the operation of the Convention is Article 21. As mentioned above,[56] this provision allows a Contracting State to declare that it will not apply the Convention to a matter to which it "has a strong interest in not applying this Convention."[57] Any state making such a declaration must "ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined," and is subject to reciprocal application such that other Contracting States will refuse to respect exclusive choice of court agreements selecting the courts of the declaring state in disputes involving such matters.[58] This element of reciprocity is designed to discourage states from making Article 21 declarations.

The final provision allowing for a declaration is Article 22, already discussed above.[59] It allows Contracting States to expand the scope of the Convention such that the provisions on recognition and enforcement of a judgment will apply as well to judgments based on non-exclusive choice of court agreements. This will not make the jurisdictional rules of Articles 5 and 6 applicable to non-exclusive choice of court agreements. To do so would have created other issues that were intentionally left out of the Convention.[60] It will, however substantially expand the value of the Convention if the declaration is widely exercised.

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55 *Ibid*. art. 20.

56 *See supra* note 34 and accompanying text.

57 Hague Convention, art. 21(1).

58 *Ibid*. art. 21(2).

59 *See supra* note 9 and accompanying text.

60 For example, choice of court agreements allowing litigation in either of two states (but excluding litigation in all others) would have required rules for parallel litigation in the jurisdictional chapter of the Convention (Chapter II). This would have raised difference between the traditional civil law *lis pendens* approach respecting the jurisdiction of the first court seised (a race to the courthouse) and the traditional common law approach allowing parallel litigation, but also permitting courts the discretion to decline jurisdiction through the doctrine of *forum non conveniens* (a race to judgment). For further discussion of Article 22, *see* Brand, Herrup, 153–59.

4. CONCLUSIONS: LEVELING THE PLAYING FIELD FOR CHOICE OF FORUM AGREEMENTS

A comparison of the New York and Hague Conventions reveals distinctions that will be important in planning decisions of both states and private parties. For states, those decisions come at the ratification or accession stage, in determining specific issues of Hague Convention scope in the application of declarations under Articles 19, 20, 21, and 22. Here the principal question is how states themselves want to place limits on party autonomy. The first three declarations all allow a state to enter the Convention with additional limits on party autonomy either by limiting the cases the particular Contracting State's courts may accept under an exclusive choice of court agreement (Article 19), by limiting the foreign judgments a Contracting State will allow its courts to recognize and enforce (Article 20), or by excluding additional subject matter disputes from Convention Scope on a reciprocal basis (Article 21). The fourth declaration allows a state to expand the scope of the Convention, providing for enhanced free movement of judgments based on non-exclusive choice of court agreements.

For private parties, a comparison of the New York and Hague Conventions demonstrates decisions about the exercise of party autonomy to select a forum for dispute resolution in transnational commercial relationships. There are clear language distinctions between the jurisdictional rules found in Article II of the New York Convention and those found in Articles 5 and 6 of the Hague Convention, as well as nuanced distinctions between the recognition and enforcement rules found in Articles III and V of the New York Convention and Articles 8 and 9 of the Hague Convention. The extent to which these distinctions will be significant for practical purposes in choosing between agreements to arbitrate and choice of court agreements remains to be seen. What is clear is that the similarities are greater than the differences, and that widespread ratification and accession to the Hague Convention will change the climate from the simple existence of an enforcement mechanism for arbitration and none for litigation, to a balanced enforcement mechanism for both. This will require that transactions lawyers draft choice of forum clauses with greater attention to the real differences between arbitration and litigation.