REPORT ON THREE PRIVATE INTERNATIONAL LAW TREATIES: (1) HAGUE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS; (2) HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS; AND (3) UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

WORKING GROUP ON THREE PRIVATE INTERNATIONAL LAW TREATIES
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE
COUNCIL ON INTERNATIONAL AFFAIRS
COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE

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I. Executive Summary

The United States State Department (the "U.S. State Department") Office of the Legal Adviser of Private International Law ("L/PIL") requested the views of the New York City Bar Association ("NYCBA") with respect to three private international law treaties:

1. The Hague Convention of 30 June 2005 on Choice of Court Agreements (the "COCA Convention");

2. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Judgments Convention"); and

3. The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").

Specifically, L/PIL has solicited the views of the NYCBA on two questions: (1) whether the United States should pursue adoption and ratification of the three private international law treaties at issue (the "Three Treaties"), and if so, (2) how they should be implemented in the United States. To date, the United States has signed, but not ratified, each of the Three Treaties.

L/PIL's outreach to the New York City Bar Association for guidance on issues affecting practicing lawyers and their clients and the preparation of this Report continue a tradition of consultation by the Executive Branch with the organized bar on comparable issues that dates back over two decades. In 2000, the U.S. State Department, as part of its ongoing negotiations of the then-proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, requested that the Committee on Foreign and Comparative Law of the NYCBA conduct a survey of foreign jurisdictions "for the purpose of determining what practical obstacles exist to obtaining recognition of money judgments obtained in United States courts in the domestic courts of selected trading partners of the United States."[1]

This report reflects the collective assessment and recommendation of NYCBA members from various NYCBA committees and councils listed on the signature page of this report (the "Working Group") who analyzed the benefits and consequences of the COCA Convention, the Judgments Convention, and the Singapore Convention, as well as potential paths for implementation in the United States.[2]

Because the Three Treaties involve the recognition and/or enforcement of a court judgment or mediated settlement agreement concluded in another country, it is important to define both terms

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[1] The Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. ASS'N BAR CITY N.Y. 378, 380 (2001).

[2] One member of the Working Group believes the problems described in this Report in respect of the COCA and the Judgments Conventions are both more likely and more serious than other members, and therefore dissents from the Working Group's recommendations with respect to them.

at the outset. "By recognizing a judgment, 'the forum court accepts the determination of the legal rights and obligations made by the rendering court in the foreign country.'"[3]

Enforcement, with respect to a (recognized) judgment, refers to the means by which "the legal procedures of the state . . . ensure that the judgment debtor obeys the foreign-country judgment,"[4] which effectively means that a U.S. court will treat a foreign judgment as a U.S. court judgment. "Recognition 'is a prerequisite to enforcement of the foreign-country judgment.'"[5] Enforcement, with respect to a mediated settlement agreement, refers to the means by which a party to the agreement can bring an action (usually) in a court in the enforcing jurisdiction to compel a recalcitrant party to comply with the agreement.

A. Summary of Three Treaties

The COCA Convention addresses contracts in international cases[6] containing a choice of court agreement in two respects: (1) it provides that the parties' agreement to resolve their disputes before a chosen court must be enforced, subject to certain limited exceptions, by the chosen forum and honored by all other COCA Convention states, and (2) further provides that a judgment rendered by the chosen court must be recognized and enforced in other Contracting States, subject to certain limited grounds for non-recognition.

The Judgments Convention is similar to the COCA Convention's second part in identifying those commercial and international court judgments that must be recognized in the courts of other Contracting States, subject to an exhaustive list of grounds that a requested court may rely upon to refuse recognition of the foreign judgment.

The Singapore Convention facilitates the enforcement of international mediated settlement agreements by requiring Contracting States to enforce such agreements except on limited, enumerated grounds and allows a party to invoke such an agreement to prove a matter has already been resolved.

B. Current State of U.S. Law

Under current practice in the United States, federal and state courts readily enforce choice of court agreements that choose a U.S. forum, as well as those that choose a foreign one. As to foreign court judgments, for decades, courts in the United States have relied on state law to recognize and enforce foreign country money judgments that are conclusive, final, and enforceable in the country of origin subject to a limited set of defenses with respect to the underlying judgment.

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[3] *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 481 cmt. b (2019) (quotation and citation omitted).

[4] *Id.* (citation omitted).

[5] *Id.* (citation omitted).

[6] *See* Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, June 30, 2015 ("COCA Convention"), Arts. 1(2) & 1(3) (providing that for purposes of Chapter II, "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;" and for purposes of Chapter III, "a case is international where recognition or enforcement of a foreign judgment is sought").

Importantly, the vast majority of jurisdictions in the United States have for many years been willing to recognize foreign court judgments without any requirement of "reciprocity," *i.e.*, that the issuing country would enforce a similar U.S. court judgment. Because there has never been a "bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments"[7] to date, many foreign countries, particularly civil law jurisdictions, historically have been reluctant to recognize U.S. court money judgments despite U.S. courts' willingness to recognize foreign judgments. Thus, from the perspective of the United States, the widespread adoption of the COCA Convention and the Judgments Convention would alter the status quo primarily by having foreign courts enforce agreements choosing a U.S. court as the exclusive forum for resolution of disputes and by making U.S. federal and state court judgments much more readily and predictably enforced in those other States joining these two conventions.

As Prof. Linda Silberman has written, "the U.S. interest in this [Judgments] Convention is not about harmonizing U.S. law on recognition/enforcement but rather about ensuring that U.S. judgments are enforced in other countries that have had significantly more restrictive regimes on recognition generally and/or are hostile to U.S. judgments in particular."[8] The COCA Convention and Judgments Convention are intended to provide increased certainty for litigants, thereby reducing certain obstacles to international trade. Due to the reciprocity requirement embedded in both the COCA Convention and the Judgments Convention, as multilateral instruments binding only on Contracting States, the efficacy of both treaties in facilitating the enforcement of U.S. judgments abroad hinges on how widespread adoption of these two conventions turns out to be.

With respect to the Singapore Convention, the majority of jurisdictions in the United States and abroad currently treat a mediated settlement agreement as a contract to be enforced like other contracts by proceedings in a court. Those proceedings and procedures vary substantially from jurisdiction to jurisdiction, creating obstacles for parties seeking to enforce mediated settlement agreements in jurisdictions outside of where such agreements were concluded. Adoption of the Singapore Convention would provide clarity and uniformity to the process of enforcing international mediated settlement agreements where there are now significant variations. By making international mediated settlement agreements easier to enforce, the Singapore Convention will elevate the stature of mediated settlements in the international business and legal communities and is expected to lead to an increase of mediation as a tool to resolve cross border disputes.

C. Ratification Recommendations

In formulating its recommendations, the Working Group adopted two guiding principles in its assessment of the Three Treaties: *First*, because all Three Treaties have been finalized after many years of deliberation and are open for adoption and implementation, the Working Group saw

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[7] U.S. Department of State – Bureau of Consular Affairs, *Enforcement of Judgments*, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

[8] Linda Silberman, *The 2019 Judgments Convention: The Need for Comprehensive Federal Implementing Legislation and a Look Back at the ALI Proposed Federal Statute* (May 14, 2021) at 8, NYU School of Law, Public Law Research Paper No. 21-219.

its mandate as providing an assessment and recommendation with respect to each of the Three Treaties as they are, rather than as offering suggestions on how they could be modified or improved.

Second, because the United States already has well-developed jurisprudence on enforcing choice of court agreements, as well as recognizing and enforcing foreign country money judgments, the test applied by the Working Group in formulating its recommendation is whether the adoption and implementation of the Three Treaties would result in a net benefit to U.S. national interests in having choice of court agreements and the judgments of U.S. courts more readily enforceable abroad relative to the burdens such adoption would impose on U.S. practice and principles.

As to mediated settlement agreements, the United States has well-developed jurisprudence on enforcing settlement agreements as contracts. The test applied by the Working Group in formulating its recommendation as to the Singapore Convention primarily is whether the adoption and implementation of that treaty would result in a net benefit to U.S. national interests in having mediated settlement agreements of U.S. nationals more readily enforceable abroad and whether it would promote greater use of mediation internationally. The Working Group has also noted, where appropriate, the impact that the Singapore Convention would have on U.S. practice and principles.

1. COCA Convention

In September 2006, following the COCA Convention's approval by the Hague Conference on Private International Law, the International Commercial Disputes Committee of the NYCBA submitted a report to the Legal Adviser to the Secretary of State (the "ICDC Report") supportive of the COCA Convention on the grounds that U.S. ratification "would serve the interests of litigants in U.S. courts and U.S. businesses engaged in international trade." The ICDC Report concluded that adoption of COCA:

> would significantly enhance the enforceability abroad of choice-of-U.S. court agreements and, even more significantly, U.S. judgments based on such choice-of-U.S. court clauses, which currently is unpredictable at best. The Convention would thus 'level the playing field' as between U.S. enforcement of foreign judgments, which currently are relatively liberally enforced, and foreign enforcement of U.S. judgments, whose enforcement currently is unpredictable. In the Committee's view, this alone justifies U.S. ratification of the Convention, as it would significantly enhance the enforcement of U.S. judgments obtained by U.S. litigants and, in particular, by U.S. businesses engaged in international trade that have obtained U.S. judgments against their foreign counterparties.[9]

The ICDC Report mirrored the view adopted in 2006 by the American Bar Association.[10]

Since 2006, the Judgments Convention has been negotiated, finalized, and signed by the United States, developments that were not anticipated when the COCA Convention was adopted in

[9] Report of the Committee on International Commercial Disputes of the New York City Bar on the Hague Convention on Choice of Court Agreements, September 2006, at 2, 9, https://www.nycbar.org/pdf/report/DOC182.pdf.

[10] ABA Resolution No. 123A, 1 (Aug. 7, 2006) (available by request from the ABA).

2005.[11] The COCA Convention and the Judgments Convention have largely been viewed as a "package,"[12] designed to serve complementary functions, although their language with respect to the grounds on which a court can refuse enforcement are not identical.[13] Recently, however, criticisms and concerns have been raised as to the COCA Convention, which are addressed below in Section IV(A)(i)(3). In short, those concerns derive from the common concern that the COCA Convention is not sufficiently protective of procedural rights, and therefore could result in requiring U.S. courts to recognize and enforce judgments of a corrupt judicial system or that otherwise do not provide a "full and fair trial" in a legal system that "secure[s] an impartial administration of justice" for foreign parties.[14]

Despite these criticisms, a majority of the Working Group has adopted the view that the benefits of ratification of both the COCA Convention and Judgments Convention (as further discussed below), warrant pursuit, and the concerns raised with respect to the COCA Convention can be largely mitigated by the inclusion of guiding language in federal implementing legislation (as further discussed below) that articulates the proper judicial interpretation of the COCA Convention consistent with the Judgments Convention. Therefore, a majority of the Working Group recommends—consistent with the view first adopted in the 2006 ICDC Report—that the United States should pursue ratification of the COCA Convention, provided that the language recommended in Section V(b) and Appendix 8 is included in federal implementing legislation. Such language seeks to provide judicial guidance as to certain treaty terms, including the "public policy" exceptions in Articles 6(c) and 9(e) of the COCA Convention, by specifying that U.S. courts are not bound to either decline jurisdiction as a nonchosen court or recognize or enforce a foreign judgment if (i) there was no proper consent to the putatively chosen court's exercise of jurisdiction; (ii) the chosen court sits within a judicial system that is systemically unfair, biased or corrupt; or (iii) the specific proceedings before the chosen court were not compatible with due process of law.

2. Judgments Convention

A majority of the Working Group recommends that the United States pursue ratification of the Judgments Convention, as doing so would improve efficiency and predictability with respect to the recognition and enforcement of court judgments in other fora and increase the likelihood that

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[11] The ABA also supports U.S. ratification of the Judgments Convention, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/102b-annual-2020.pdf . The 2020 ABA Judgments Convention report does not alter its 2006 report on the COCA Convention, but appears to assume that the COCA Convention is no longer on the table, the United States having failed to ratify it because of disagreements over the method of implementation. According to the ABA Judgments Convention report, "[e]very effort should be made to avoid such a stalemate with respect to the 2019 Judgments Convention" as occurred with respect to efforts to ratify and implement the COCA Convention in this country.

[12] As explained in the Revised Draft Explanatory Report, the Judgments Convention "seeks to extend the benefits of" the COCA Convention. *See* Revised Draft Explanatory Report (Dec. 2018), https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf. "[B]ecause the Hague Conference negotiators viewed the 2005 Choice of Court Convention and the 2019 Judgments Convention as a 'package,' the Judgments Convention did not include consent to jurisdiction via an exclusive choice of court agreement within the list of jurisdictional filters eligible for recognition and enforcement." Linda Silberman, *The 2019 Judgments Convention: The Need for Comprehensive Federal Implementing Legislation and a Look Back at the ALI Proposed Federal Statute* (May 14, 2021) at 8, NYU School of Law, Public Law Research Paper No. 21-19, Available at SSRN: https://ssrn.com/abstract=3846307.

[13] *See, e.g., id.*

[14] *Hilton*, 159 U.S. at 202-03.

U.S. judgments are predictably and efficiently recognized and enforced abroad, without materially affecting existing U.S. practice. Further, the Judgments Convention includes procedural safeguards not found in the COCA Convention, thereby avoiding perceived shortcomings of the COCA Convention.

For example, Article 5(a) of the Judgments Convention permits the requested court to assess whether the "jurisdictional filter" claimed by the party seeking recognition was met in the issuing court, and, therefore, the determination by the issuing court of its jurisdiction is not dispositive on the requested court. Moreover, Article 29 of the Judgments Convention allows a Contracting State to suspend the effect of the treaty with respect to other Contracting States within 12 months of ratification if it finds any concerns about the fairness or corruption of that country's legal and judicial system. Finally, Article 7(1)(b) ameliorates concerns with the COCA Convention's limitation on non-recognition solely with respect to judgments procured by deliberately fraudulent conduct, as the Judgments Convention contains no such limitation to the type of fraud that would mandate non-recognition.

The Working Group also recommends that when adopting and implementing the Judgments Convention, the United States should make the Article 19 reservation, under which the United States would not apply the Judgments Convention to any foreign court judgment against the United States, any agency of the United States, or any person acting for the United States or its agencies.[15]

3. Singapore Convention

The Working Group unanimously recommends that the United States ratify the Singapore Convention. The Singapore Convention will make mediation a more attractive option for resolving cross-border disputes. It will also make enforcement of international mediated settlement agreements easier abroad and in the United States, and the trade-off will benefit U.S. interests because, unlike many foreign jurisdictions, the process for enforcing such agreements in most U.S. states is not substantially different from the regime that would be created under the Singapore Convention. The Singapore Convention would also elevate the stature of mediation settlements in the international business and legal communities and lead to the increased use of mediation as a dispute resolution tool in international disputes. Therefore, the Working Group recommends that the United States adopt and implement the Singapore Convention, but it is not recommended that the United States adopt either of the two reservations authorized by the Singapore Convention, which permit states to exclude settlements involving them or their government agencies, or to agree to apply the Singapore Convention only to the extent that disputing parties have agreed to its application. Both reservations would undermine the central purpose of the Singapore Convention, *i.e.*, encouraging wider use of mediation.

D. Implementation Recommendations

The Working Group is of the view, after considering various alternatives, that the Three Treaties should be implemented under a stand-alone federal law akin to Chapter II of the Federal Arbitration Act which implements the Convention on the 1958 Convention on Recognition and

[15] The Working Group recommends that the guiding language proposed in the implementing legislation of the COCA Convention similarly be adopted with respect to any implementing legislation of the Judgments Convention.

Enforcement of Foreign Arbitral Awards (the "New York Convention"). This implementation model would create the most *ex ante* predictability for litigants by ensuring the creation of transparent and accessible legal regimes that apply the relevant treaty obligations uniformly and transparently throughout the United States, including with respect to matters left to be addressed by a Contracting State's domestic law. For this reason, to the extent that any of the Three Treaties are self-executing, the Working Group nevertheless considers it advisable to enact implementing federal legislation. Federal legislation is also less likely to be inadvertently overlooked by courts than a self-executing treaty, which will further encourage uniform application.

With respect to the COCA Convention and the Judgments Convention, we have concluded that they should be implemented via coordinated and complementary federal statutes that ensure consistent interpretation of both treaties. The federal law approach could allow for the express requirement that U.S. courts recognize choice of court agreements and foreign judgments that have already been recognized and enforced by another U.S. court. This will help to guard against forum-shopping by reducing the risk of different and inconsistent outcomes across U.S. states and reduce transactional costs for litigants. This federal legislation should also provide for federal subject matter jurisdiction, which would mitigate the risk of discordant state-court interpretations of the same rules, and at the same time allow for the development of federal court expertise and a robust body of precedent that would contribute to the uniform interpretation of the COCA Convention and Judgments Convention. The implementing legislation for the COCA Convention and the Judgments Convention should include the protective language that the Working Group has proposed in order to increase the likelihood that the COCA Convention and the Judgments Convention are applied consistently by U.S. courts to ensure that if a party did not receive due process in the foreign court, the U.S. court has the discretion to deny recognition and enforcement of such judgments.

As it relates to the Singapore Convention, the American Bar Association ("ABA") and some commentators have argued that the Singapore Convention is a self-executing treaty, and therefore that the Singapore Convention may be considered U.S. law. However, without federal law clarifying certain areas that the Singapore Convention leaves to be filled by domestic law, adopting this approach could lead to the significant risk that the Singapore Convention would be applied in an inconsistent manner by states, and therefore, the stand-alone short form model—which ameliorates this concern by ensuring uniform application throughout the United States, including what matters are left to state law—is likely the best approach for the implementation of the Singapore Convention.

II. Overview of the Conventions

The Hague Conference on Private International Law ("Hague Conference") is an intergovernmental organization whose members currently include 90 states as well as the European Union that develops conventions, protocols, and principles related to the conflict of laws.[16] The Hague Conference has been responsible for the drafting of a number of key multilateral treaties,

[16] *Conventions, Protocols, and Principles: Conventions and other Instruments*, The Hague Conference on Private International Law (HCCH), https://www.hcch.net/en/instruments/conventions; https://www.hcch.net/en/states/hcch-members. According to the Hague Conference website, it is possible for a state that is not a member of the Hague Conference to become a party to one of its Conventions. *FAQ*, The Hague Conference on Private International Law (HCCH), https://www.hcch.net/en/faq.

such as the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention"), Convention of 18 March 1970 on the taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), and the Convention of 22 December 1986 on the Law Applicable to Contracts for the International on Sale of Goods (the "CISG").[17]

Throughout its long history of developing private international law instruments, the Hague Conference[18] proposed in 1954 a convention on international civil procedure,[19] in 1965, a draft convention on choice of court agreements,[20] and, in 1971, a convention (and addendum) on the recognition and enforcement of foreign judgments ("1971 Hague Convention").[21] Following the failure of the 1971 Hague Convention to gain meaningful traction,[22] the United States initiated the "Judgments Project" and in 1990 submitted a proposal[23] to the Hague Conference to develop a broad instrument governing both the exercise of jurisdiction and the enforcement of judgments in civil and commercial matters,[24] in order to support the growth of global markets and promote

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[17] *Id.*

[18] The Hague Conference is largely dominated by continental European academics and government representatives. It was for decades an "exclusively European event" and held its first conference in 1893. Juergen Basedow, *The Hague Conference and the Future of Private International Law: A Jubilee Speech*, 82 The Rabel J. of Comp. and Int'l Law 924 (2018). Recently, non-European states have participated in the Hague Conference, but European states have retained their "programmatic influence" and both the Hague Conference and its Permanent Secretariat remain predominantly European in focus. *Id*. at 924. For the original Statute of the Hague Conference on Private International Law, *see* 15 U.S.T. 2228, T.I.A.S. No. 5710. Amendments to the Statute were adopted on June 30, 2005 and approved on September 30, 2006. *See generally* Ronald A. Brand, *Community Competence for Matters of Judicial Cooperation at the Hague Conference on Private International Law: A View from the United States*, 21 J. L. & Comm. 191, 208 (2002).

[19] Hague Conference on Private Law, Convention of 1 March 1954 on Civil Procedure, Mar. 1, 1954, 286 UNTS 265.

[20] Hague Conference on Private International Law, Convention of 25 November 1965 on the Choice of Court Agreements, Nov. 25, 1965, RCH p. 65.

[21] *See* Hague Conference on Private International Law, Convention of 1 February 1971 on the Recognition and on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971,1144 UNTS 249; The Hague Conference on Private International Law, Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 UNTS 271.

[22] Diana A. A. Reisman, *Breaking Bad: Fail-Safes to the Hague Judgments Convention*, 109 Geo. L.J. 879, 883 (2021).

[23] *See* Trevor Hartley & Masato Dogauchi, *Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report* (citing proposals by Arthur T. von Mehren as "intellectual origins" of Convention); Ronald A. Brand & Paul M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* 6 (3d ed. 2008) (citing Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, Hague Conference (May 5, 1992)).

[24] The United States was active in the negotiation of the Judgments Convention to ensure that the perceived benefits of the treaty would apply to, and benefit, U.S. litigants seeking enforcement of their judgments abroad. Reisman, *supra*, at 883.

international cooperation.[25] The actual drafting of the instrument began at the Hague Conference in 1992.[26]

The Hague Conference elected to revisit the topic of a multilateral recognition of judgments and jurisdiction convention in 1996 (after four years of informal discussions and study).[27] In 2001, the participants realized that the project was too ambitious and that it would be more productive to divide the goals.[28] These goals were pursued accordingly in two separate instruments: the COCA Convention and the Judgments Convention.[29]

A. The COCA Convention

The stated purpose of the COCA Convention is to ensure among Contracting States the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international commercial transactions.[30] The COCA Convention refers to the court named in the choice of court agreement as the "chosen court" and the court outside the jurisdiction of the chosen court where recognition and enforcement of a judgement is sought as the "requested court." As summarized in the Outline of the COCA Convention, the treaty adopts "three basic rules that give effect to choice of court agreements:

1. The chosen court must in principle hear the case, unless the agreement is null and void under the laws of the State;

2. Any court not chosen must in principle decline to hear the case unless the agreement is null and void under the laws of the State; and

3. Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies."[31]

For its proponents, "[t]he hope is that the [COCA] Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the 'New York Convention') has done for arbitration agreements."[32] Like the New York Convention on which it is modeled, the COCA Convention is

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[25] Ved P. Nanda, *The Landmark 2005 Hague Convention on Choice of Court Agreements*, 42 Tex. Int'l L.J. 773, 775 (2007).

[26] Nanda, *supra,* at 775.

[27] Hartley & Dogauchi, *supra,* at 785. *See also* Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. Priv. Int'l L. 243, 244 (2006).

[28] David Goddard, *The Judgments Convention-the Current State of Play*, 29 Duke J. Comp. & Int'l L. 473, 473-74 (2019).

[29] Reisman, *supra,* at 883.

[30] *See* COCA Convention, *supra,* at 1 (explaining that COCA is based on a belief that "international trade and investment" can be promoted through judicial cooperation and "enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters").

[31] Asian-Pacific Economic Cooperation, Outline of the Convention on Choice of Court Agreements, August 12, 2013, 2014/SOM3/EC/WKSP1/013.

[32] Hartley & Doguachi, *supra,* at 791.

divided between provisions relating to the enforcement of the choice of court agreement and those relating to the recognition and enforcement elsewhere of the judgment resulting from such a choice of court agreement.

Below is a summary of the COCA Convention's substantive provisions:

TOPIC	COCA CONVENTION SUMMARY
SCOPE OF THE CONVENTION	**Arts. 1 & 2 –** For the COCA Convention to be applicable, three requirements must be satisfied: 1) the case must be an **international** case; 2) there has to be an **exclusive choice of court agreement** concluded between the parties; and 3) it has to be a **civil or commercial** matter. A case is "**international**" for purposes of enforcing an exclusive choice of court agreement unless the parties are resident in the same Contracting State and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that Contracting State. A case is "**international**" for purposes of enforcing a resulting judgment when recognition or enforcement is sought of a requested court that is different from the chosen court.
EXCLUDED CIVIL OR COMMERCIAL MATTERS	**Art. 2 –** Not all international civil or commercial cases having exclusive choice of court agreements fall under the COCA Convention. There are several exclusions, with the most important exclusion being: • **arbitration & arbitration related proceedings**. The other exclusions include:[33] • **a natural person acting primarily for personal, family or household purposes**; • contracts relating to **employment** and **issues of personal status, legal capacity of natural persons, maintenance obligations and other family law matters**, wills and succession; • **insolvency, composition and analogous matters**;

[33] Article 17(1) states that insurance or reinsurance proceedings are not excluded from the COCA Convention, which is confirmed by its lack of inclusion in Article 2 on "Exclusions from Scope." For a comparison of the matters that are excluded from the COCA Convention and from the Judgments Convention, *see* Appendix 4.

TOPIC	COCA CONVENTION SUMMARY
	• ***in rem*** rights in immovable property,[34] **internal corporate matters**; • validity & infringement **of intellectual property rights other than copyright and related rights**; • **various maritime matters**; • **antitrust (competition) matters**; • claims for **personal injury** brought by or on behalf of natural persons;[35] and • various tort claims.[36]
APLICABILITY TO STATE PARTIES?	**Arts. 2(5)-(6) –** The COCA Convention is not inapplicable by the mere fact that a State, government, governmental agency or any person acting for a State is a party, but the COCA Convention does not affect the privileges and immunities of States or of international organizations, in respect of themselves or their property.
WHAT EXACTLY IS AN EXCLUSIVE CHOICE OF COURT AGREEMENT?	**Art. 3 –** An agreement constitutes an exclusive choice of court agreement when it is **concluded or documented** by two or more parties in **writing** or by any other means of communication which renders information subsequently accessible and designates the courts of one Contracting State or one or more specific courts of a Contracting State to decide the dispute. A choice of court agreement that designates the courts of one Contracting State or one or more specific courts of a Contracting State is **deemed to be exclusive unless** the parties have **expressly provided** that the choice of court is not exclusive. Similar to how an arbitration agreement is considered to be separable from the rest of the contract, an **exclusive choice of court agreement shall be treated as an agreement independent of the other terms of the contract** and may not be contested solely on the grounds that the contract is not valid**.**
WHAT IS A "JUDGMENT" FOR	**Art. 4(1) –** A "**judgment**" means any decision that is made on the merits by a court, including a decree or order, as well as any

[34] This exclusion applies only to COCA Convention and is not found in the Judgments Convention. Article 6 of the Judgments Convention provides that *in rem* rights in immovable property will be recognized and enforced only if the property is situated in the State of Origin.

[35] This exclusion applies only to the COCA Convention and is not found in the Judgments Convention.

[36] This exclusion applies only to the COCA Convention and is not found in the Judgments Convention.

TOPIC	COCA CONVENTION SUMMARY
PURPOSES OF THE COCA CONVENTION?	determination of costs or expenses by the court or an officer of the court (as long as the determination relates to a decision on merits). **Arts. 4(1), 7 – An interim measure order is not considered to be a judgment**. The COCA Convention does not purport to govern interim measures, and neither requires nor precludes a court's decision to grant, refuse, or terminate an interim order of protection by the court of a Contracting State. **Art. 12** – "**Judicial settlements**" that have been approved by an exclusive choice of court agreement or concluded before that court and are enforceable in the same manner as a judgment in the State of origin will be enforceable in the same manner as a judgment.
DETERMINING THE RESIDENCE OF AN ENTITY?	**Art. 4(2) –** An entity or non-natural person is considered to be a "**resident**" in the State: • where it has its statutory seat; • under whose laws it was incorporated or formed; • where its central administration is located; or • where it has its principal place of business.
JURISDICTION OF CHOSEN COURT	**Art. 5 – Only** if the agreement is **null and void under the laws of the State** of the chosen court[37] **can the chosen court decline to decide the dispute**. The chosen court cannot decline to decide the dispute on the ground that the dispute must be decided in a court of another State. Therefore, the courts of a Contracting State have no discretion on whether to hear the case or not.
OBLIGATIONS OF COURT THAT IS NOT CHOSEN	**Art. 6 –** A court that is not chosen must suspend or dismiss proceedings unless: • "the agreement is null and void under the law of the State of the chosen court;" • "a party lacked the capacity to conclude the agreement under the law of the State of the court seised;" • "giving effect to the agreement would lead to a manifest injustice or would be contrary to the public policy of the State of the court seised;" • "the agreement cannot reasonably be performed;" or

[37] Treating the choice of court agreement clause as separable from the rest of the contract pursuant to Art. 3(d) means that even if the contract is otherwise governed by another jurisdiction's laws, Art. 5(1) requires that the law of the State of the chosen court determine the validity of the clause, even if all other issues are to be resolved under the laws of another jurisdiction.

TOPIC	COCA CONVENTION SUMMARY
	• "the chosen court has decided not to hear the case."
RECOGNITION AND ENFORCEMENT	**Art. 8 –** If a judgment is given by a chosen court of a Contracting State, it shall be recognized and enforced in other Contracting States. There shall be no review of the merits of the judgment given by the chosen court; except where the judgment was given by default, the findings of fact on which the court of origin based its jurisdiction are binding on the requested court. Recognition or enforcement may be refused only on the grounds specified in Art. 9 (below). A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. Recognition or enforcement may be postponed or refused if the judgment is subject to review or the time limit for seeking review of the judgment in the State of origin has not expired, but such a postponement/refusal does not prevent a subsequent application to recognize or enforce the judgment.
GROUNDS FOR REFUSAL OF RECOGNITON AND ENFORCEMENT	**Art. 9 –** A Contracting State may refuse to enforce or recognize the judgment 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**; • a party **lacked capacity to conclude** the agreement **under the law of the requested** State; • the document instituting the proceedings (i) was not **notified to the defendant** in a way that provided sufficient time to respond; or (ii) was notified in such a manner that **is incompatible with the requested State's fundamental principles regarding service of process**; • the judgment was obtained by **fraud in connection with a matter of procedure**; • the judgment is **against public policy** of the requested State, **including where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness** of that State; • the judgment is **inconsistent with a judgment given in the requested State** in a dispute between the same parties; or • the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action.

TOPIC	COCA CONVENTION SUMMARY
TREATMENT OF NON-COMPENSATORY DAMAGES	**Art. 11 –** Recognition or enforcement of a judgment may be refused if the judgment awards damages, including exemplary or punitive damages, that do not compensate the party for actual loss or harm suffered.
NECESSARY DOCUMENTS TO BE SUBMITED TO THE REQUESTED COURT	**Art. 13 –** The party seeking recognition must produce: • a complete and certified copy of the judgment (including a certified translation into the State's official language if necessary or unless the requested State's law provides otherwise); • the exclusive choice of court agreement, a certified copy of the choice of court agreement, or any evidence of its existence; • if the judgment was by default, the original or certified copy of a document that shows proceedings were initiated or an equivalent document was notified to the defaulting party; • any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; • As it relates to Article 12 on judicial settlements, a certificate of the court of the State of origin that the judicial settlement is enforceable in the same manner as a judgment in the State of origin. **Art. 18 –** All documents are exempt from any legalization or analogous formality, such as Apostille.
JUDICIAL PROCEDURE	**Art. 14 –** Except as specified in the COCA Convention, the procedure for recognizing and enforcing of a judgment are governed by the law of the requested State. The court of the requested State "**shall act expeditiously**."
EFFECTIVE DATE	**Art. 16** – The COCA Convention shall apply to exclusive choice of court agreements concluded after the COCA Convention's entry into force for the State of the chosen court.
DECLARATIONS/ RESERVATIONS	**Art. 19 –** A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if there is no connection (other than the location of the chosen court) to the State and the parties or the dispute. **Art. 20 –** A State may declare that its courts may refuse to recognize or enforce a judgment by another State if (1) the parties were resident in the requested State; and (2) the relationship of the

TOPIC	COCA CONVENTION SUMMARY
	parties and other relevant aspects of the dispute were only connected with the requested State. **Art. 21 –** A State may declare that it will not apply the COCA Convention to a "specific matter" that is "clearly and precisely defined" where it has a strong interest in not applying the COCA Convention.
OPTIONAL TREATMENT OF NON-EXCLUSIVE CHOICE OF COURT AGREEMENTS	**Art. 22 –** A State may opt in to extend the scope of the COCA Convention to non-exclusive choice of court agreements with respect to recognizing and enforcing judgments.

The first State to ratify the COCA Convention was Mexico (in 2007), followed by the European Union (in 2015),[38] Singapore (in 2016),[39] and Montenegro (in 2018).[40] The COCA Convention entered into force on October 1, 2015, and is now in force for the European Union and its 28 Member States.[41] The COCA Convention has also been signed, but not ratified, by several states, including the United States (in 2009) and China (in 2017).[42] In August 2023, the COCA Convention entered into force for Ukraine.[43]

B. The Judgments Convention

Following the conclusion of the COCA Convention, in 2011 the Hague Conference established a working group to prepare a draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters and convened a Special Commission for that purpose with the participation of approximately 70 States. The Hague Conference adopted the Judgments Convention on July 2, 2019 as its 41st concluded convention. It is the first attempt at a global framework to fill an important gap in the landscape of private international law where judgments can circulate from one State to another, as long as they fall within the scope of the

[38] The EU's instrument of accession was deposited in June 2015. The Convention entered into force for members of the EU on 1 October 2015 (except for Denmark, as to which it entered into force on 1 September 2018). The United Kingdom and Ireland are also bound by the Convention. The United Kingdom left the EU on January 31, 2020, but acceded to the Convention in its own right on 28 September 2020. Michael James, *Hague Convention on Court Agreements*, Thomas Reuters Prac. Law (2015).

[39] *See* Singapore ratifies the 2005 Choice of Court Convention, Hague Conference on International Law Website (June 2, 2016), https://www.hcch.net/en/news-archive/details/?varevent=491.

[40] Hans van Loon, *The 2005 Hague Convention on Choice of Court Agreements – An Introduction*, 18 Annals Fac. L.U. Zenica 11, 14 (2016).

[41] James, *supra*, at 1.

[42] *Id*. at 1.

[43] *See* Choice of Court Convention enters into force for Ukraine, Hague Conference on International Law Website (Aug. 1, 2023), https://www.hcch.net/en/news-archive/details/?varevent=931.

Judgments Convention and there exist no grounds for non-recognition. The Judgments Convention was designed to help so-called medium-sized litigants, not just large multinational corporations which already have the resources to resolve transnational disputes by arbitration.[44]

China was an active negotiator in the Judgments Project.[45] The Chinese delegation, for instance, proposed the use of the phrase "rule-based multilateral trade and investment" instead of "international trade and investment," which became part of the preamble.[46] This was the first time the Hague Convention expressly supported multilateralism by promoting a multi-State cooperation framework, as unilateralism and protectionism, in the Chinese delegation's view, are challenges to the members of international society, and are unsustainable.[47] The multilateralism approach proposed by China was adopted and underscored in a joint statement made by China and the EU at their 21st summit in April 2019.[48]

As stated in its preamble, the Judgments Convention is intended to facilitate the cross-border recognition and enforcement of judgments, and, while still acting as a standalone treaty, also provide a "complementary" recognition and enforcement regime to the pre-existing COCA Convention.[49] The Judgments Convention is intended to advance its goal in five ways: (1) by providing "a framework for the recognition and enforcement of foreign judgments in all Contracting States;" (2) by "reduc[ing] the need for duplicative proceedings" and minimizing the need to re-litigate issues or disputes previously decided in the courts of other jurisdictions; (3) by "reduc[ing] the cost and timeframe of obtaining recognition and enforcement of judgments," thereby providing access to justice at a faster rate and lower cost; (4) by "improv[ing] the predictability of the law;" and (5) by "enabl[ing] claimants to make informed choices about where to bring proceedings, taking into account the ability to enforce the resulting judgment in other States and the need to ensure

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[44] Teitz, Louise Ellen, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 1 Roger Williams Uni. L. Rev. 60 (2004).

[45] The Chinese delegation was one of the vice chairs of the Special Commissions and the Diplomatic Session. *See* Sun Jin & Wu Qiong, *The Hague Judgments Convention and How We Negotiated It*, 19 Chinese J. Int'l L. 481, 485 (2020).

[46] *Id.* at 486.

[47] *Id.* The United States is viewed by some as unilateral in its economic policies. *See* Katheryn Russ, *What Unilateralism Means for the Future of the U.S. Economy*, Harvard Business Rev. (Dec 16, 2019), https://hbr.org/2019/12/what-unilateralism-means-for-the-future-of-the-u-s-economy.

[48] As the joint statement clearly articulates: "China and the EU reaffirm [. . .] their commitment to multilateralism, and respect for international law and for fundamental norms governing international relations, with the United Nations (UN) at its core. . . . China and the EU firmly support the rules-based multilateral trading system with the WTO at its core, fight[ing] against unilateralism and protectionism." Jin & Qiong, *supra*, at 486.

[49] Hague Conference on Private International Law, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019 ("Judgments Convention") at 1 ("The Contracting Parties to the present Convention, Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation, Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments, Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is *complementary to the Convention of 30 June 2005 on Choice of Court Agreements*") (emphasis added).

fairness to defendants."[50] Although the Judgments Convention does indeed provide a framework for the recognition and enforcement of foreign judgments in Contracting States, to be clear, the "foreign country judgments" subject to the Convention are only those of other Contracting States. In this respect, the Judgments Convention incorporates the principle of reciprocity,[51] which is a requirement that the vast majority of U.S. states do not currently impose on the recognition of foreign judgments.

While the Judgments Convention is considered a "sister instrument" to the COCA Convention, it is considerably broader in scope. Like the COCA Convention, the Judgments Convention requires Contracting States to enforce and recognize other Contracting States' judgments; however, it has no requirement for the member parties to have a "choice of court agreement" between them. Indeed, in deference to the COCA Convention, the Judgments Convention excludes from the 13 categories where the "connections with the State of origin that are considered sufficient ('jurisdictional filters') for the judgment to be recognised and enforced under the Convention"[52] any judgments resulting from an "exclusive" choice of court agreement.[53]

Below is a summary of substantive articles of the Judgments Convention:

TOPIC	JUDGMENTS CONVENTION SUMMARY
SCOPE OF THE JUDGMENTS CONVENTION	**Art. 1 –** In order for the Judgments Convention to apply, two (2) requirements must be fulfilled: 1) the judgment for which **recognition** and **enforcement is sought must be** in **civil** or **commercial** matters, and 2) the judgment must be given by a court in **one Contracting State** and sought to be recognized and enforced in the courts of **another Contracting State**.
EXCLUDED CIVIL OR COMMERCIAL MATTERS	**Arts. 1, 2 –** There are several excluded matters, the most significant being: • **arbitration & arbitration related proceedings**; and • **revenue, customs or administrative matters**. Other exclusions include: • **status and legal capacity for natural persons**; • **family law matters**, including **trusts and estates and marital property issues**;

[50] Hartley & Doguachi, *supra*, at 48.

[51] *See* Silberman, *supra*, at 7 ("Reciprocity is, of course, established in the Treaty instrument itself since it applies only between Contracting States.").

[52] Hartley & Doguachi, *supra*, at 88.

[53] Judgments Convention, *supra*, Art. 5(m).

TOPIC	JUDGMENTS CONVENTION SUMMARY
	• contracts relating to **employment** and **issues of personal status, legal capacity of natural persons, maintenance obligations and other family law matters**, wills and succession; • **insolvency, composition, resolution of financial institutions and analogous matters**;[54] • *in rem* rights in immovable property, internal corporate matters; • **carriage of passengers and goods**; • **intellectual property**;[55] • **various maritime matters**; • **antitrust (competition) matters**;[56] • **activities of armed forces and law enforcement personnel in their exercise of official duties**;[57] • **defamation**;[58] • **privacy**;[59] and • **sovereign debt restructuring through unilateral state measures**.[60]
APPLICABILITY TO STATE PARTIES	**Arts. 2(4)-(5) –** The Judgments Convention is applicable even where a State, government, or governmental agency, or any person acting for the State, is a party. The Judgments Convention does not "affect the privileges and immunities of States or of international organi[z]ations, in respect of themselves or their property."
A "JUDGMENT" FOR PURPOSES OF	**Art. 3(1)(b) –** A "**judgment**" means any decision on the merits by a court, including a decree or order, as well as any determination of costs or expenses by the court or an officer of the court (as long

[54] "Resolution of financial institutions" matters are not excluded from the COCA Convention but are excluded from the Judgments Convention.

[55] The Judgments Convention excludes all kinds of intellectual property matters, unlike the COCA Convention under which copyright and related rights matters are not excluded.

[56] The Judgments Convention excludes antitrust (competition) matters, "except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin." Judgments Convention, *supra*, Art. 2(1)(p). This exception to the exclusion of antitrust matters is not provided in the COCA Convention.

[57] This is an exclusion only to the Judgments Convention and is not found in the COCA Convention.

[58] This is an exclusion only to the Judgments Convention and is not found in the COCA Convention.

[59] This is an exclusion only to the Judgments Convention and is not found in the COCA Convention.

[60] This is an exclusion only to the Judgments Convention and is not found in the COCA Convention.

TOPIC	JUDGMENTS CONVENTION SUMMARY
JUDGMENTS CONVENTION	as the determination relates to a decision on the merits). A "judgment" includes a decision awarding **non-monetary relief.** An **interim measure is not considered a judgment**. **Art. 11** – "**Judicial settlements**" approved by a Contracting State court or which have been concluded in proceedings before a Contract State court are enforceable in the same manner as a judgment.
DETERMINING THE RESIDENCE OF AN ENTITY	**Art. 3(2) –** An entity or non-natural person is considered to be a "**resident**" in the State: • where it has its statutory seat; • under whose laws it was incorporated or formed; • where its central administration is located; or • where it has its principal place of business.
OBLIGATION TO RECOGNIZE AND ENFORCE ELIGIBLE JUDGMENTS	**Art. 4 –** If a judgment is given by a chosen court of a Contracting State, it shall be recognized and enforced in other Contracting States. Recognition and enforcement may be refused only on the grounds specified in the Judgments Convention. There shall be no review of the merits of the judgment in the requested State. A judgment shall be recognized only if it has effect in the State of origin, and can only be enforced if the judgment would be enforceable in the State of origin. 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.
"JURISDCITIONAL FILTERS" TO IDENTIFY	**Art. 5** – A judgment is eligible for recognition and enforcement if any one of 13 enumerated requirements for recognition and enforcement is met.[61]

[61] "A judgment is eligible for recognition and enforcement if one of the following requirements is met -

(a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;

(b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

TOPIC	JUDGMENTS CONVENTION SUMMARY
JUDGMENTS ELIGIBLE FOR RECOGNITION AND ENFORCEMENT	

(d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

(f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

(i) the agreement of the parties, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;

(i) the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem;

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and

(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

(ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated . . .

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or

(ii) to the extent that it was against the counterclaimant, unless the law of the State of original required the counterclaim to be filed in order to avoid preclusion;

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement."

Judgments Convention, *supra*, Art. 5(1)(a)-(m). As the Explanatory Note confirms: "There is no hierarchy among the filters in paragraph 1; none are more legitimate than any other for the purpose of recognition and enforcement under the Convention. Moreover, satisfaction of a single filter is sufficient, as expressly stated in paragraph 1." Francisco Garcimartin & Genevieve Saumier, Explanatory Report 88 (Hague Conference on Private International Law, 2020).

TOPIC	JUDGMENTS CONVENTION SUMMARY
UNDER THE JUDGMENTS CONVENTION	
GROUNDS FOR REFUSAL OF RECOGNITON AND ENFORCEMENT	**Art. 7 –** A Contracting State may refuse to enforce or recognize an otherwise qualifying judgment if: • the document instituting the proceedings (i) was not **notified to the defendant** in a way that provided sufficient time to respond; or (ii) was notified in such a manner that **is incompatible with the requested State's fundamental principles regarding service of process**; • the judgment was obtained by **fraud**; • the judgment is against the **public policy** of the requested State; • the proceedings were in violation of an agreement or a designation in a trust; • the judgment is **inconsistent with a judgment given in the requested State** in a dispute between same parties; or • the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action.
SEVERABILITY OF JUDGMENTS	**Art. 9 –** Recognition and enforcement of a severable part of the judgment can be granted.
TREATMENT OF NON-COMPENSATORY DAMAGES	**Art. 10 –** Recognition or enforcement of a judgment may be refused if the judgment awards damages that fail to compensate the party for actual loss or harm suffered.
NECESSARY DOCUMENTS TO BE SUBMITTED TO THE REQUESTED COURT	**Art. 12** – The party seeking recognition must produce: • a complete and certified copy of the judgment (including a certified translation into the State's official language if necessary or unless the requested State's law provides otherwise); • if the judgment was by default, the original or certified copy of a document that shows proceedings were initiated or an equivalent document was notified to the defaulting party; • any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; • As it relates to Article 11 on judicial settlements, a certificate of the court (including an officer of the court) of the State of

TOPIC	JUDGMENTS CONVENTION SUMMARY
	origin that the judicial settlement is enforceable in the same manner as a judgment in the State of origin.
APPLICATION OF NATIONAL LAW	**Art. 15** – Subject to Article 6, the Judgments Convention does not prevent the recognition or enforcement of judgments under national law.
JUDICIAL PROCEDURE	**Art. 13 –** The procedure for recognizing and enforcing a judgment are governed by the law of the requested State, unless the Judgments Convention states otherwise. The court of the requested State "**shall act expeditiously**." The court of the requested State may not refuse recognition or enforcement on the grounds that recognition or enforcement should have been sought in a different state.
DECLARATIONS/ RESERVATIONS	**Art. 30 –** Contracting States are authorized to make declarations/reservations upon signature, ratification, acceptance, approval, or accession of the Judgments Convention or at any time thereafter, with respect to the following issues: **Art. 14 –** A State may declare that it will not require a security, bond, or deposit from a party in one Contracting State who applies for enforcement of a judgment by a court in another Contracting State on the basis that the party is a foreign national/not domiciled in the place where enforcement is sought. **Art. 17 –** A State may declare and refuse to recognize or enforce a judgment given by a court of another Contracting State if certain conditions as provided are met. **Art. 18 –** A State may declare and refuse to apply the Convention to specific matters if certain conditions as provided are met. **Art. 19 –** A State may declare that it will not apply this Convention to judgments arising from proceedings to which any of the following is a party (a) that State, or a natural person acting for that State; or (b) a government agency of that State, or a natural person acting for such a government agency.

TOPIC	JUDGMENTS CONVENTION SUMMARY
OPT-OUT OPTION OF SPECIFIED CONTRACTING STATES	**Art. 29 –** Allows one Contracting State a limited opt-out option to avoid establishing treaty relations with another specified Contracting State that would otherwise be established unless the country-specific opt-out option were exercised.[62]

The first State to sign the Judgments Convention was Uruguay, which signed on the date of the Judgments Convention's conclusion in 2019, followed by Ukraine (in 2020), as well as Israel, Russia, and Costa Rica (each in 2021). The United States signed the Judgments Convention on March 2, 2022. The Judgments Convention entered into force with respect to the European Union (except for Denmark) and Ukraine on September 1, 2023.[63]

C. Singapore Convention

Following three years of work in the United Nations ("UN") Commission on International Trade Law ("UNCITRAL") Working Group II (Dispute Settlement) with participation by 85 Member States and 35 international governmental and non-governmental organizations, on June 25, 2018, the final draft of the Singapore Convention was recommended for submission to the UN General Assembly for its consideration.

The Preamble of the Singapore Convention sets forth the reasons for this first UN convention on mediation, including that parties to the Singapore Convention recognized: (1) the value of mediation as a method for settling commercial disputes in international trade, whereby the parties are assisted by a mediator in their attempt to settle a dispute amicably; (2) that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation; (3) the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States; and (4) that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social, and economic systems would contribute to the development of harmonious international economic relations.

The COCA Convention and the Judgments Convention address the recognition and enforcement of court judgments entered presumably against the will of the losing party. It is

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[62] "Article 29 fulfils two functions: it defines when the Convention becomes effective between two Contracting States and it *allows for a limited opt-out option to avoid the establishment of treaty relations with other Contracting States*. Such an option was considered fundamental for some States and consensus to include it was reached with a view to facilitating adherence by individual States and to maximize the reach of the Convention. *Opt-out mechanisms are included in other HCCH instruments but not in the HCCH 2005 Choice of Court Convention.* Because the latter instrument applies only to exclusive choice of court agreements, such a mechanism would have been inconsistent with the goal of securing the effect of party autonomy. The present Convention is much broader in scope and therefore a departure from the HCCH 2005 Choice of Court Convention can be justified." Garcimartin & Saumier, *supra*, at 176 (emphases added).

[63] *See* Status Table, Hague Conference on International Law Website (Sept. 1, 2023), https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

understandable, therefore, why a prevailing party may need to seek enforcement of a judgment in other fora when the losing party is unwilling to satisfy the judgment voluntarily and the debtor has insufficient or inaccessible assets in the country where the judgment was issued (despite its agreement to litigate there pursuant to a choice of court agreement or its amenability otherwise to the jurisdiction of such court). On the other hand, a mediated settlement agreement represents a consensual resolution of a dispute as opposed to a judgment imposed by a court against the losing party. Nevertheless, parties sometimes fail to live up to their agreed obligations, and numerous authorities recommend the inclusion of a dispute resolution provision in settlement agreements as best practices, suggesting that post-settlement disputes do exist or are on the rise.[64] The main impetus for the Singapore Convention was a desire to promote and enhance mediation as a method for resolving international commercial disputes. UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which disincentivizes the use of mediation in cross-border disputes.[65]

In any event, a party owed performance under a mediated settlement agreement may face the same absence of sufficient and/or accessible assets of its counterparty in the forum in which the dispute was resolved via mediation, creating the need to seek enforcement of the settlement agreement in another jurisdiction where the non-performing counterparty has property amenable to execution. In this respect, the potential need to pursue enforcement in other jurisdictions presents a commonality among all Three Treaties.

Below is a summary of substantive articles from the Singapore Convention:[66]

TOPIC	SINGAPORE CONVENTION[67]
SCOPE OF APPLICATION	**Art. 1 –** The settlement agreement must result from mediation and be international in nature. By "international," the Singapore Convention specifies that mediation must satisfy at least one of two criteria: • "(a) At least two parties to the settlement agreement have their places of business in different States; or • (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected."

64 S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 Wash. U. J.L. & Pol'y 011, 35 (2014).

65 Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 Pepp. Disp. Resol. L. J. 1, 3 (2019).

66 See generally United Nations Convention on International Settlement Agreements Resulting from Mediation, December 20, 2018 ("Singapore Convention").

67 *Id.*

TOPIC	SINGAPORE CONVENTION[67]
	"The Convention does not apply to settlement agreements: • concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; or • relating to family, inheritance or employment law. The Convention also does not apply to settlement agreements that: • have been approved by a court or concluded in the course of proceedings before a court; and • are enforceable as a judgment in the State of that court; or • have been recorded and are enforceable as an arbitral award."
DEFINITONS	**Art. 2 –** The Singapore Convention sets forth the following definitions: • Place of business: "(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement; (b) If a party does not have a place of business, reference is to be made to the party's habitual residence." • In Writing: "A settlement agreement is 'in writing' if its content is recorded in any form. This requirement . . . is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference." • Mediation: "'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute."
GENERAL PRINCIPLES	**Art. 3 –** Addresses the key obligations of the Parties to the Singapore Convention with respect to both enforcement of settlement agreements and the right of a disputing party to invoke a settlement agreement covered by the Singapore Convention. "Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Each Party to the

TOPIC	SINGAPORE CONVENTION[67]
	Convention may determine the procedural mechanisms that shall be followed where the Convention does not prescribe any requirement. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under conditions laid down in the Convention, in order to prove that the matter has already been resolved."
REQUIREMENTS FOR RELIANCE ON SETTLEMENT AGREEMENTS	**Art. 4 –** Article 4 covers the formalities for relying on a settlement agreement, namely, the disputing party shall supply to the competent authority of the Party to the Singapore Convention where relief is sought the settlement agreement signed by the parties and evidence that the settlement agreement resulted from mediation. • Such evidence may include: "(i) the mediator's signature on the settlement agreement; (ii) a document signed by the mediator indicating that the mediation was carried out; (iii) an attestation by the institution that administered the mediation; or (iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority. The competent authority may require any necessary document in order to verify that the requirements of the Convention are complied with." Article 4.2 addresses how the requirement that a settlement agreement be signed by the parties, or where applicable, the mediator, is met. Article 4.5 provides that the competent authority shall act expeditiously when considering the request for relief.
GROUNDS FOR REFUSING TO GRANT RELIEF	**Art. 5 –**The grounds for the competent authority of a Party to refuse to enforce a settlement agreement may be grouped into four main categories: • contract-like defenses (Article 5(1)(a)-(d)): "(a) A party to the settlement agreement was under some incapacity; (b) The settlement agreement sought to be relied upon: (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where

TOPIC	SINGAPORE CONVENTION[67]
	relief is sought under article 4; (ii) Is not binding, or is not final, according to its terms; or (iii) Has been subsequently modified; (c) The obligations in the settlement agreement: (i) Have been performed; or (ii) Are not clear or comprehensible; (d) Granting relief would be contrary to the terms of the settlement agreement" • mediator-misconduct defenses (Article 5(1) (e)-(f)): "(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement." • "subject matter of the dispute is not capable of settlement by mediation under the law of the Party to the Convention" (Article 5(2)(b)) • "granting relief would be contrary to the public policy of the Party to the Convention" (Article 5(2)(a)). Most of the grounds have been drawn from Article V of the New York Convention with "appropriate modifications to suit the context of mediation."[68] The burden is on the party against whom relief is sought to establish one or more of these grounds.
PARALLEL APPLICATIONS OR CLAIMS	**Art. 6 –** The competent authority of the State where relief is being sought has discretion to adjourn its decision under the Singapore Convention where an application or claim relating to a settlement agreement was made in a court, an arbitral tribunal, or other competent authority which may affect the relief being sought under Art. 4. The competent authority may also, on the request of a party, order the other party to give suitable security.
OTHER LAWS OR TREATIES	**Art. 7 –** Parties to the Singapore Convention have flexibility to enact national legislation in their countries or enter into treaties to expand the scope of enforceable settlement agreements. This would include settlement agreements excluded by Article 1,

[68] Ming Liao, Singapore Convention Series: Refusal Grounds In The UN Convention on International Settlement Agreements Resulting from Mediation, Kluwer Mediation Blog (April 12, 2020), http://mediationblog.kluwerarbitration.com/2020/04/12/singapore-convention-series-refusal-grounds-in-the-un-convention-on-international-settlement-agreements-resulting-from-mediation/.

TOPIC	SINGAPORE CONVENTION[67]
	Paragraphs 2 (type of dispute) and 3 (enforceable as a judgment or as an arbitral award) of the Singapore Convention.[69]
RESERVATIONS	**Art. 8 –** The Convention permits only two reservations by Parties: • A Party to the Convention may declare that "[i]t shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;" or • A Party to the Convention may declare that "[i]t shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention." Reservations may be made, and withdrawn, by a Party to the Singapore Convention at any time. "Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval." Withdrawals of reservations are deposited with the depositary, and take effect six months after deposit.
EFFECT ON SETTLEMENT AGREEMENTS	**Art. 9 –** The Singapore Convention and any reservation or withdrawal thereof apply only prospectively to settlement agreements which have been concluded after the date when the Convention, reservation or withdrawal enters into force for the Party concerned.

States that are parties to the Singapore Convention are required to enforce a mediated settlement agreement under conditions laid down in the Singapore Convention and in accordance with its rules and procedures.[70] Each party to the Singapore Convention may determine the procedural mechanisms that shall be followed where the Singapore Convention does not prescribe any requirement. Depending on their legal systems, some States may view enforcement as a process through which a document is taken to an administrative official (such as a notary or bailiff) who is expected to follow set instructions rather than undertake analytical tasks. In other systems, a court performs a more complex analysis.[71]

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[69] Deborah Masucci & M. Salman Rayala, *The Singapore Convention: A First Look*, 11 NYSBA, N. Y. Disp. Resol. L. 60, 61 (2018), https://www.imimediation.org/wp-content/uploads/2018/10/Singapore-Convention-Article-MSR-Pages.pdf.

[70] Singapore Convention, *supra*, Art. 3.

[71] *See* Schnabel, *supra*, at 39.

As outlined in Section III(A)(v) below, the enforcement mechanism in most states of the United States is likely to involve commencing a proceeding to enforce the mediated settlement agreement ("MSA") as a contract, subject to some narrowing of the defenses to enforcement that may be asserted (as discussed in Section III(A)(v)(2)). A few states, however, provide for converting the MSA to a judgment or the equivalent of an arbitral award under state law and procedures. Either way, once converted to a judgment or an arbitral award, the MSA would be enforceable in other "sister" states under the "full faith and credit" clause of the U.S. Constitution and in foreign states under the Judgments Convention or the New York Convention. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, parties to the Singapore Convention are required to allow that party to invoke the settlement agreement under conditions laid down in the Singapore Convention and in accordance with its rules of procedure in order to prove that the matter has already been resolved.[72] The Singapore Convention only addresses the phase before execution: namely, the determination that the settlement is enforceable and that the party is entitled to legal relief. Therefore, the Singapore Convention does not impose any particular rules on execution, and the requested State's rules of procedure apply. In this respect, the Singapore Convention follows the approach of the New York Convention.[73] However, the State's rules of procedure cannot conflict with or result in the denial of the substantive protections of the Convention.

There are two aspects of mediation that the Singapore Convention does not address. *First*, it does not provide for the enforcement of agreements to mediate. *Second*, it does not address the confidentiality of mediations, leaving that aspect of mediation to domestic law.

In addition to drafting the Singapore Convention, UNCITRAL Working Group II drafted a Model Law to implement the substantive provisions of the Convention. UNCITRAL's Model Law on International Commercial Conciliation (2002) addressed mediation procedures but did not include substantive provisions on enforcement procedures. UNCITRAL amended the Model Law, renamed the Model Law on International Commercial Mediation and International Settlement Agreements (2018) (the "Model Law"), to add a new Section 3 addressing the enforcement of international commercial mediated settlement agreements. Section 3 implements the substantive provisions of the Singapore Convention but, like the Convention itself, leaves to the State to apply its rules of procedure to enforce mediated settlement agreements as long as they are not inconsistent with the conditions laid down in the Model Law.[74] Neither the Singapore Convention nor the Model Law prevents a party from expanding the scope of enforceability of settlement agreements through its national laws or other treaties. Indeed, the notes to the Model Law indicate that States wishing to make the law applicable to domestic as well as international mediations, or to agreements

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[72] *Id.*

[73] *Id.*

[74] UNICITRAL Model Law on International Commercial Mediation and International Settlement Agreements Art. 17, 2002 ("Model Law"). The Model Law (2002 Version) has been adopted by 31 States. In addition, 13 States of the United States have enacted uniform legislation influenced by the Model Law and the principles on which it is based. *See* Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws. One state, Georgia, enacted legislation based on the text of the 2018 version of the Model Law.

settling a dispute irrespective of whether they resulted from mediation, may make appropriate adjustments to the text of the Model Law.[75]

The UN General Assembly adopted the Singapore Convention on December 20, 2018. The Singapore Convention opened for signatures on August 7, 2019, and the Singapore Convention came into effect on September 12, 2020, after three States ratified it. To date, 57 States, including the United States, have signed on to the Singapore Convention and 14 have ratified it.[76]

III. Analysis

A. Current Practice with Respect to Enforcement of Choice of Court Agreements, Foreign Judgments, and Mediated Settlement Agreements

i. Enforcement of Choice of Court Agreements in the United States

Choice of court agreements pose two issues to the courts presented with them: (1) will the chosen court exercise jurisdiction and resolve the dispute as the parties putatively have agreed? and (2) will other courts presented with the dispute that otherwise have jurisdiction to hear the matter agree to stand down in favor of the court chosen by the parties?

Choice of court agreements, commonly called choice of forum clauses, are generally enforced today in the federal courts and the great majority of states, both with respect to allowing cases to proceed in the parties' chosen jurisdiction and in dismissing cases brought in violation of a choice of forum clause. The treatment of choice of court agreements, however, is not uniform across all U.S. jurisdictions.

Historically, U.S. law disfavored choice of court agreements. Some courts reasoned that private parties did not have the power to "oust" a court of otherwise proper jurisdiction. Others found that choice of forum clauses could cause inconvenience or inconsistency, or that they somehow violated public policy.[77] Resistance to choice of forum clauses softened in the 1960s, and the American Law Institute's 1971 revision of the Restatement of Conflict of Laws called for such agreements to be enforced unless they were "unfair or unreasonable."[78]

The United States Supreme Court embraced this change in its 1972 decision in *M/S Bremen v. Zapata Off-Shore Co.*, an admiralty case which held that choice of court agreements are presumptively valid and enforceable unless the party opposing enforcement can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[79] Under a current formulation of this rule, enforcement will be denied only when the opposing party makes a strong showing that "(1) the clause is the product of fraud or

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[75] *See* Model Law, notes 3 and 5.

[76] *Jurisdictions*, Singapore Convention on Mediation, (last visited March 15, 2024) https://www.singaporeconvention.org/jurisdictions.

[77] *See generally* Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CNLILJ 51, 54 (1992).

[78] Restatement (Second) of Conflict of Laws § 80 (1971).

[79] *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 16 (1972).

overreaching; (2) enforcement is unreasonable and unjust; (3) its enforcement would render the proceedings gravely difficult and inconvenient to the point of practical impossibility; or (4) enforcement contravenes 'a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.'"[80] "[A] valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."[81]

Almost all States have adopted the *Bremen* rule of presumptive validity and enforceability of choice of forum clauses.[82] A few States, however, still prohibit or limit enforcement of choice of court agreements. At least two States, Idaho and Montana, purport to outlaw them.[83] A North Carolina statute prohibits enforcement of certain choice of court agreements as "against public policy."[84] And a number of States impose other limitations on their enforcement. Thus, even where the parties' contract specifies New York as the exclusive jurisdiction for resolution of disputes, New York courts do not have subject matter jurisdiction over disputes between foreign, non-resident corporations where the dispute has no other connection to New York unless the parties' choice of forum agreement also provides for choice of New York law and consents to jurisdiction in New York, and the "contract . . . [is] in consideration of, or relat[es] to any obligation arising out of a transaction covering in the aggregate," not less than US $1 million.[85] Washington State law prohibits enforcement of out-of-state choice of forum agreements in insurance policies sold in Washington.[86] California will not enforce choice of forum clauses in some employment contract

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[80] *Autoridad de Energía Eléctrica de Puerto Rico v. Vitol S.A.*, 859 F.3d 140, 145-46 (1st Cir. 2017) (quoting *Carter's of New Bedford, Inc. v. Nike, Inc*., 790 F.3d 289, 292 (1st Cir. 2015) (quoting *Huffington v. T.C. Group, LLC*, 637 F.3d 18, 23) (1st Cir. 2011)).

[81] *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988). Such exceptional circumstances may be found where, for example, a forum selection clause is expressly invalidated by statute and thus clearly violates public policy. *See, e.g., Matter of Hapag-Lloyd Aktiengesellschaft*, 1:19-cv-5731-GHW-RWL (S.D.N.Y. Nov. 29, 2021) (forum selection clause rendered null and void by Carriage of Goods by Sea, 46 App. U.S.C. § 1300 *et seq*.).

[82] *See, e.g., Marsh USA, Inc. v. Hamby*, 28 Misc. 3d 1214(A), at *3 (N.Y. Sup. Ct. 2010), *citing British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 A.D.2d 234, 567 N.Y.S.2d 731 (1st Dept. 1991); *and see* Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. Pa. J. Int'l L. 1013, 1014 (2010) ("Heiser").

[83] An Idaho statute declares any contract that deprives a party of access to the Idaho courts to be "void as it is against the public policy of Idaho." I.C. § 29-110(1). Montana law voids any agreement "by which any party to the contract is restricted from enforcing the party's rights under the contract by the usual proceedings in the ordinary tribunals." MONT. CODE MCANN § 28-2-708.

[84] N.C.G.S.A. § 22B-3.

[85] N.Y. BUS. CORP. LAW § 1314(b); N.Y. GEN.OBLIG. LAW § 5-1402(1), (2). Otherwise, and notwithstanding a New York choice of forum clause, New York courts do not have subject matter jurisdiction over a claim by one non-resident foreign corporation against another non-resident foreign corporation unless the case has some additional jurisdictional nexus with New York. *See* N.Y. BUS. CORP. LAW § 1314(b).

[86] WASH. REV. CODE § 48.18.200 [1] and [2]; *North Am. Elite Ins. Co. v. Space Needle, LLC*, Index No. 651519/21, 2021 NY Slip Op. 06769 (1st Dep't Dec. 2, 2021) (affirming denial of anti-suit injunction to enforce New York choice of forum clause in Washington insurance policy).

cases[87] or where enforcement would deprive a litigant of the right to a jury trial.[88] Ohio law will not enforce a choice of forum clause that purports to create personal jurisdiction in an Ohio court.[89] Similarly, Florida law will not enforce a choice of forum clause that purports to create personal and subject matter jurisdiction in a Florida court unless, among other things, the contract involves not less than US $250,000 consideration and the parties consent to application of Florida law and jurisdiction of the Florida courts.[90]

In addition, it is fundamental that a court must have an independent basis of subject matter jurisdiction before it can entertain a case to enforce a choice of forum clause. While parties can subject themselves to the personal jurisdiction of a chosen court by agreement, their mere agreement on a choice of forum clause cannot create subject matter jurisdiction. Thus, even if designated in a choice of court agreement, a U.S. federal or state courts cannot hear a case unless it has an independent basis of subject matter jurisdiction, which in the case of state courts, may include consent.[91]

U.S. courts have differed on how to determine the important question of whether a choice of court agreement is exclusive and mandatory or non-exclusive and permissive. Some have refused to find that a choice of forum clause is exclusive unless it expressly excludes jurisdiction elsewhere.[92] Others employ a traditional "plain meaning" approach and have deemed choice of

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87 CAL. LAB. CODE § 925(a) (choice of forum clause voidable at election of employee where contract was signed as condition of employment).

88 *Handoush v. Lease Finance Grp., LLC*, 41 Cal. App. 5th 729 (Cal. Ct. App. 2019) (California will not enforce forum selection agreement that deprives party of right to jury trial guaranteed under California Constitution and statute).

89 *Preferred Cap., Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (Ohio law will not enforce agreement to create personal jurisdiction in Ohio courts).

90 *Jetbroadband WV, LLC v. MasTec N. Am., Inc*., 13 So. 3d 159, 161-62 (Fla. Dist. Ct. App. 2009); FLA. STAT. §§ 685.101, 102. Article 19 of the COCA Convention itself permits signatory States to decline jurisdiction over cases subject to exclusive choice of court agreements where "except for the location of the chosen court, there is no connection between the State and the parties or the dispute." COCA Convention, *supra*, Art. 19. If the COCA Convention is ratified, the United States may make an Article 19 reservation to preserve the current law in those states that decline jurisdiction for disputes with "no connection" to the forum, save the agreement to litigate there.

91 *DeRoy v. Carnival Corp.*, 963 F.3d 1302, 1315 (11th Cir. 2020).

92 *See, e.g., Glob. Seafood, Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 226 (2d Cir. 2011) (phrase "is governed by Irish Law and the Irish Courts" did not impart a "clear and unambiguous intent by the parties to confer exclusive jurisdiction on Irish Courts or to select Ireland as the obligatory venue"); *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52 (2d Cir. 1994) (choice of forum clause was not mandatory because it did not contain language making it so); *Paper Express, Ltd. v. Pfankuch Maschinen*, 972 F.2d 753, 757 (7th Cir. 1992) ("[W]here venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced . . . ."); *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999) (contract that stated "Place of jurisdiction shall be Dresden" was not exclusive because it only specified jurisdiction).

forum clauses to be exclusive where they include mandatory language such as "shall," "only," or "must."[93] Clauses deemed ambiguous have been construed against the drafter.[94]

A few courts have determined that, notwithstanding a choice of forum clause, a case still may be dismissed on grounds of *forum non conveniens* even though dismissal deprives the parties of their contractually mandated forum.[95]

ii. Enforcement of Choice of Court Agreements Abroad

To determine whether there is a benefit to U.S. national interests in pursuing ratification and implementation of the COCA Convention, it is important to understand the status quo of international acceptance of exclusive choice of court agreements that designate the United States as the chosen jurisdiction. This report focuses on the top trading partners to the United States[96] and examines the status quo with respect to the enforcement of choice of court agreements by courts in those jurisdictions.[97]

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[93] *See, e.g.*, *Smart Communic'ns Collier Inc. v. Pope County Sheriff's Off.*, 5 F.4th 895, 897-98 (8th Cir. 2021) (plain meaning of agreement that any litigation "shall be brought and completed in Pope County, Arkansas and other pertinent Arkansas courts" made choice of court mandatory and exclusive); *Sterling Forest Assocs., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 251-52 (4th Cir. 1988) (contract that specified "jurisdiction and venue shall be in California" was mandatory); *Gen. Elec. Co. v. G. Siempelkamp & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (words "all" and "shall" rendered choice of forum clause mandatory).

[94] *See K & V Scientific Co. v. BMW*, 314 F.3d 494, 500-01 (10th Cir. 2002) (citing cases that have employed this interpretation); *Am. Boxing & Athletics Ass'n, Inc. v. Young*, 911 So. 2d 862, 866 (Fla. 2d DCA 2005) ("When a venue clause is susceptible to more than one interpretation, it should be construed against the drafter").

[95] *See, e.g.*, *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg., Inc.*, 873 S.W.2d 537, 540 (Ark. 1994); *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 555 N.E.2d 214, 218-19 (Mass. 1990); *Appalachian Ins. Co. v. Superior Court*, 208 Cal. Rptr. 627, 633 (Cal. Ct. App. 1984).

[96] Together, these chosen trading partners constitute 71% of all U.S. international trade. Underlying data for 2020 trade come from Foreign Trade: Top Trading Partners – December 2020, The United States Census Bureau (Dec. 10, 2021), https://www.census.gov/foreign-trade/statistics/highlights/top/top2012yr.html; U.S. International Trade in Goods and Services – Annual Revision (2020), The United State Census Bureau (June 8, 2021), https://www.census.gov/foreign-trade/Press-Release/2020pr/final_revisions/index.html.

[97] For the purposes of this analysis, the European Union (EU) is treated as one entity, which is consistent with the EU signing and ratifying the Treaty as one political entity, or in the parlance of the Hague Conventions, a "Regional Economic Integration Organisation."

The analyzed jurisdictions are detailed below:[98]

Rank	Country	Exports	Imports	Total Trade	Percent of Total Trade	COCA Convention Status
1	EU	231.2	415.5	646.7	17%	Ratified
2	China	124.6	435.4	560.1	15%	Signed
3	Mexico	212.7	325.4	538.1	14%	Ratified
4	Canada	255.4	270.4	525.8	14%	
5	Japan	64.1	119.5	183.6	5%	
6	South Korea	51.2	76.0	127.2	3%	
7	United Kingdom	59.0	50.2	109.2	3%	Ratified

The analyzed jurisdictions present a variety of approaches to choice of court agreements. While courts in most analyzed jurisdictions are generally favorable to such provisions, there are some differences in the judicial analysis regarding the approach to enforcement of such exclusive agreements that call for the choice of a foreign court, such as the default assumptions on exclusivity, any escape clauses available to the enforcing court, the applicability of public policy, and validity requirements, as will be further analyzed below.

1. European Union

The domestic law of each member state of the European Union governs choice of court provisions presented to the courts of a Member State. That domestic law varies widely.[99] Member States are subject to the Recast Brussels Regulation, which generally respects a choice of court clause between parties domiciled in EU Member States and non-Member States so long as certain prerequisites are met.[100] The domestic law of individual Member States may impose additional limitations on the enforceability of choice of court agreements. The European Union is a Contracting Party to the COCA Convention, having ratified the treaty in 2015.[101]

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[98] Underlying data for 2020 trade came from *Foreign Trade – U.S. Trade with Top Trading Partners*, census.gov; *Foreign Trade - U.S. Trade with European Union*, census.gov. For accession status see *HCCH | #37 - Status table*, https://www.census.gov/foreign-trade/statistics/highlights/top/top2012yr.html.

[99] *See, e.g.*, Ashlee Schaller, *Interpretation of Forum Selection Clauses: A Survey of Select English and German-Speaking Jurisdictions*, 44 N.C.J. Int'l L. 117 (2018).

[100] Recast Brussels Regulation (1215/2012). The Recast Brussels Regulation ("Brussels Recast") went into effect in January 2015. It is a recast form of the prior Brussels Regulation ("Brussels I"). The Brussels Recast introduced a simplified mechanism for the recognition and enforcement of judgments between EU member states and introduced several changes to the rules addressing choice of court agreements. *See generally The (recast) Brussels I Regulation applies!*, Clifford Chance, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2015/06/the-recast-brussels-i-regulation-applies.pdf.

[101] *See Status Table*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

Even in EU countries that are generally favorable to choice of forum clauses, there have been notable instances where local rules have invalidated U.S. choice of court agreements. For instance, the German Supreme Court invalidated a U.S choice of court agreement where the court was not satisfied that the U.S. court, here the courts of Virginia, would uphold the overriding mandatory rules as defined in Article 9(1) of the Rome I Regulation (the "Mandatory Rules").[102] That meant that the German party would likely lose his right to claim post-termination indemnity from the principal. This case is not the only one in which a court within an EU Member State found that deprivation of the Mandatory Rules should invalidate a U.S. choice of court agreement in favor of retaining exclusive jurisdiction for itself.[103]

2. China

In 2017, China signed the COCA Convention, but has yet to ratify or implement the treaty into existing law. Potentially in response to its signing of the COCA Convention, or perhaps in response to what is becoming more of an internationally standard approach to forum selection clauses, Chinese courts have been trending towards alignment with the COCA Convention even without formal ratification. Pending ratification, legal and legislative mechanisms remain that endanger forum selection clauses choosing U.S. courts.

First, in the event that a party brings suit in China where there is a contract that designates that U.S. courts have jurisdiction for actions arising out of the agreement, Chinese courts apply Chinese law to determine the validity of the forum selection clause rather than the law of the chosen forum.[104] The COCA Convention, on the other hand, holds that this initial analysis should apply the law of the chosen jurisdiction, including the forum's choice of law rules, which in this case would be that of the United States.[105] The COCA Convention's approach provides greater predictability to the parties and likely results in greater protection of the jurisdiction of U.S. courts.

Second, Chinese courts conduct their analysis of a choice of court agreement with the assumption that the agreement is non-exclusive, unless the parties expressly provide otherwise.[106] This default towards non-exclusivity is contrary to the core values of the COCA Convention. The choice of U.S. courts in an agreement should be respected unless there is manifest injustice or other substantial reasons to deviate from that choice made by the parties. A presumption against exclusivity is counterproductive to that result. It is true, however, that while Chinese law dictates this initial presumption, Chinese courts have started to apply the COCA Convention standard for

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[102] Themeli, E., *The Civil Justice System Competition in the European Union : Great Race of Courts*, Eleven International Publishing 85 (2018). However, the CJEU has been very clear in that *forum non conveniens* is not part of the aim of the Brussels I (recast) Regulation. *See Andrew Owusu v N. B. Jackson* 2005 I-013831 March 2005 (Court of Justice).

[103] *See* Decisions of German Supreme Court: Jan. 1, 1961 – VII ZR 180/60; Dec. 12, 1970 – II ZR 39/70; May 5, 1983 – II ZR 135/82; March 12, 1984 – II ZR 10/83; June 15, 1987 – II ZR 124/86.

[104] Huang Zhang, *International Jurisdiction under the 2005 Hague Convention on Choice of Court Agreements: Implications for China*, 47 Hong Kong L. J. 560 (2017).

[105] *Id.* at 559.

[106] *Id.* at 565.

exclusivity.[107] For example, in a recent case in front of the Shanghai High People's Court, a forum selection agreement was deemed exclusive because there was no contrary intention of the parties found. While this case is a favorable signal, the reality remains that the legal framework in China dictates a starting presumption against exclusivity, and reliance on court trends may not be a secure basis for assuring U.S. interests in the enforcement of forum selection clauses.

Finally, Chinese law states that if the court selected by the parties to a contract has no objective connection with the dispute, the court must deem the choice of court agreement invalid.[108] This principle is inconsistent with the COCA Convention. Indeed, as one of the world's leading commercial forums, the United States has an interest in ensuring that objective connections are not required to make forum selection clauses valid. Many commercial parties designate the courts of the United States as the chosen forum for resolution of their disputes. This may be true even though neither party is domiciled or transacts business regularly in the United States. The objective connection test calls into question such forum selection clauses and strips U.S. courts of their exclusive jurisdiction to hear the case.

3. Mexico[109]

Mexico was one of the original signatory states to the COCA Convention and was an early ratifier. Local courts generally respect the choice of jurisdiction in a contract unless the dispute concerns some of the areas of exclusive jurisdiction of the Mexican court. However, national legislation does vary from the COCA Convention in several respects. *First*, courts have, at times, imposed a reciprocity element in its analysis of enforcement of exclusive choice of court agreements. An agreement selecting a foreign court would thus be enforced if that foreign jurisdiction would likewise enforce an agreement selecting Mexico as having exclusive jurisdiction. At first blush, this would not impede the enforcement of U.S. choice of court agreements, as courts in the United States would likely enforce such a reciprocal agreement. *Second*, the Mexican Code of Civil Procedure, Article 567, holds that a choice of court agreement will not be valid if it does not operate for the benefit of all parties.

Mexico has been clear that adoption of the COCA Convention is meant to bring stability and predictability to investors and businesses that regularly intersect with Mexican courts.

4. Canada

Canadian federal law is generally favorable concerning choice of court provisions. In *ZI Pompey v. ECU Line*,[110] the Supreme Court of Canada held that Canada will uphold choice of court clauses, provided that they meet the "strong cause" test that was set out prior in an English case,

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[107] *See, e.g., Cathay United Bank Co., Ltd. v. a certain Gao* (国泰世华商业银行股份有限公司诉高某案) (Shanghai High People's Ct. 2016).

[108] *See* PRC Civil Procedure Law, Art. 34; 2015 Supreme People's Court's Interpretation of Civil Procedure Law, Art 531; PRC Special Maritime Procedure Law, Art. 8.

[109] *See* Nuria Gonzalez Martin *et al.*, *México y la Convencion de La Haya de 30 de junio de 3005 sobre acuerdos de eleccion de foro*, REEI (Dec. 22, 2011); Marco Tuulio Venegas Cruz, Litigation and enforcement in Mexico: overview, Thomson Reuters Practical Law (April 1, 2021) https://us.practicallaw.thomsonreuters.com/0-502-1511.

[110] *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 2003 SCC-27.

The Eleftheria.[111] The strong cause test had previously been used by the Canadian courts to assess forum selection clauses as a matter of common law, and the *Pompey* decision merely affirmed that this was the correct approach in the courts of Canada.

Under the strong cause test, the court begins with the presumption that the "parties should be held to their bargain," and the party opposing enforcement then has the burden of showing that this presumption is incorrect. The Supreme Court noted that there should be good reason that the parties not be bound by the clause and that deviation from the written express intention of the parties be granted. Canada has not yet signed or ratified the COCA Convention.[112]

5. Japan

Although Japanese law recognizes exclusive forum selection clauses, it is not a signatory to the COCA Convention and its approach contains unique restrictions. The standard for recognizing such clauses is laid out in the Japanese Code of Civil Procedure ("CCP") and by the *Chisadane* Principles, which were established in the Japanese Supreme Court Case *Chisadane*.[113]

The CCP was amended in April 2012 to include the rules of international jurisdiction for the first time. Article 3-7 of the CCP states:

> (1) The parties may decide by agreement the country in which they may file an action.
> (2) The agreement provided in the preceding paragraph shall have no effect unless it is in writing and is concerned with an action arising from specific legal relationships.
> (3) For the purpose of the preceding paragraph, an agreement is deemed to be in writing if it is recorded in an electromagnetic record (*viz.* a record made in an electronic form, a magnetic form, or any other form unrecognizable to human perception, which is used for information processing by computers).

The provision stating that an agreement will be invalid unless it arises from a specific legal relationship forms the basis for the standard of enforcement and is of particular interest to the status quo of enforcing U.S. choice of court agreements. The Tokyo District Court recently examined this provision in *Shimano Manufacturing Co., Ltd. v. Apple, Inc.*, which involved an exclusive choice of courts clause for the federal courts of Santa Clara County, California.[114] There, the court held that the jurisdiction clause was not made with respect to an action based on specific legal relationships because the agreement did not limit the object of an action to disputes between the plaintiff and the defendant. If the clause had limited the choice of court to specific disputes such

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[111] Owners of Cargo Lately Laden on Board Ship or Bessel Eleftheria v. Owners of Ship or Vessel Eleftheria ("The Eleftheria") [1969], 2 All ER 641.

[112] *Status Table*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[113] *Chisadane*, Judgment, 29 Minshu (10) 1554 (Supreme Ct. of Japan, November 28, 1975).

[114] *Shimano Manufacturing Co., Ltd. v. Apple Inc.*, Interlocutory Judgment, Case No. 2016WLJPCAO2156001 (Tokyo District Ct. Feb. 15, 2016).

as "the dispute arises out of or relates to this Agreement," the clause could have been enforced.[115] This presented an opportunity for the Japanese court to reject the U.S. court's exclusive jurisdiction.

Japanese law also has requirements on the applicable law for courts in Japan to apply to analyze choice of court agreements, embodied in the so-called *Chisadane* Principles:[116]

(1) for validity of an agreement, it is not necessary for both offer and acceptance to be delivered by means of a signed document but rather it is sufficient if the chosen courts are expressly specified in a document made by either or both of the parties and the existence and content of the agreement are clear;
(2) effect will in principle be given to a foreign choice of court agreement excluding the jurisdiction of the Japanese courts, if the case does not belong to the realm of exclusive jurisdiction of the Japanese courts, and if the chosen foreign courts would have jurisdiction in the case; and
(3) effect may, however, be denied to a choice of court agreement if it is "extremely unreasonable and contrary to the law of public policy" ("the public policy test").

This test is regularly applied in lower courts, and there have been some instances where the law of Japan was applied to the validity of the choice of court agreement rather than the law of the chosen forum.[117] This leaves a regime with potential vulnerabilities for U.S. choice of court agreements. Japan has not yet signed or ratified the COCA Convention.[118]

6. South Korea

Most Korean law in the area of enforcement and recognition of choice of court agreements has been determined in case law rather than in legislation. South Korean courts generally respect the choice of forum agreed upon by the parties. Further, the Korean Supreme Court has held that such an agreement for exclusive jurisdiction of a foreign court is effective provided that:[119]

(1) The case is not about a matter subject to the exclusive jurisdiction of the South Korean courts;
(2) The chosen foreign court has jurisdiction in the matter under the relevant law of the foreign country;
(3) The foreign court designated as the court with exclusive jurisdiction has a reasonable connection to the matter in dispute.

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[115] *Id.*

[116] *Chisadane*, Judgment, 29 Minshu (10) 1554 (Supreme Ct. of Japan, November 28, 1975), https://www1.doshisha.ac.jp/~tradelaw/PublishedWorks/ApplicableLawChoiceofCourtAgreement.pdf.

[117] Koji Takahashi, *Cases and Issues in Japanese Private International Law: Law Applicable to Choice-of-court Agreements*, 58 Japanese Yearbook of Int'l L. 384-396 (2015), https://www1.doshisha.ac.jp/~tradelaw/PublishedWorks/ApplicableLawChoiceofCourtAgreement.pdf.

[118] Status Table, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[119] Sung Hoon Lee, *Foreign Judgment Recognition and Enforcement System of Korea*, 6 1 J. of Korean L. 121 (2006).

The Korean Supreme Court has also stated that there is a public policy exception to enforcement.[120] South Korea has not yet signed or ratified the COCA Convention.[121]

7. United Kingdom

For now, post-Brexit, contracts with a United States choice of court agreement that are brought before an English court are governed by English common law. The leading decision is *Donohue v. Armco Inc.*,[122] which concluded that the parties' choice of forum should be respected absent "strong reasons." This continues the tradition of *The Eleftheria*, which is relied upon by the Canadian Supreme Court as well. Only when there are strong reasons that were unforeseeable at the time of contracting or some other reason in the interests of justice, does a court have discretion not to enforce the choice of forum.[123]

It is worth noting that the English Court of Appeal has previously decided that the Brussels Recast exempted employment arrangements from the usual analysis of choice of court rules not just within the EU but worldwide. This means that an employee can sue an employer where the employee was located, and enjoin suits in other fora, for any claim related to employment, even if against an affiliate of the employer, not the employer.[124] The United Kingdom is a Contracting Party to the COCA Convention, having ratified the treaty in 2020.[125]

iii. Recognition and Enforcement of Foreign Judgments in the United States

As matters have stood for over 50 years, "the United States . . . appears to be the most receptive of any major country to recognition and enforcement of foreign judgments."[126] Indeed, "recognition and enforcement of foreign country judgments has tended to be much more generous than the treatment given by foreign courts to U.S. judgments."[127]

Historically, until the Supreme Court's decision in *Hilton v. Guyot*, whether a U.S. court would recognize and enforce the judgment of a foreign court was, absent a controlling treaty or statute, a matter of common law that required detailed analysis of the rights at issue and the nature of the underlying foreign proceeding.[128] In *Hilton*, the Supreme Court announced a new federal common law rule that a U.S. court will recognize and enforce a judgment of a foreign country's

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120 *Id.* at 119.

121 *Status Table*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

122 *Donohue v. Armco Inc., and Others*, [2001] UKHL 64, [2002] Ll Rep 45 (UK).

123 *Antec International Ltd. v. Biosafety USA Inc*., [2006] EWHC 47 (Comm.).

124 *See, e.g., Petter v. EMC*, [2015] EWHC 1498 (QB).

125 *Status Table*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

126 Andreas F. Lowenfeld, International Litigation and Arbitration 368 (1993).

127 Statement of Professor Linda J. Silberman before the Subcommittee on Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, February 12, 2009 at 5.

128 *Hilton v. Guyot*, 159 U.S. 113, 180-88 (1895).

court as a matter of comity, subject to the condition that the foreign country provides reciprocity for U.S. judgments.

Thirty years after *Hilton*, a unanimous decision of the New York Court of Appeals signaled the rejection of reciprocity as a requirement for enforcement of foreign judgments. In *Johnston v. Compagnie Generale Transatlantique*, the New York court held that comity required a French judgment to be conclusive without regard to reciprocity because:

> Comity is not a rule of law, but it is a rule of 'practice, convenience and expediency. It is something more than mere courtesy . . . since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.' It therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment.[129]

The rejection of a requirement of reciprocity in the *Johnston* decision came to represent the "predominant American view of the matter,"[130] with "the comity analysis of *Hilton* remain[ing] at the core of the inquiry in judgment recognition cases."[131]

Upon the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*,[132] recognition and enforcement of foreign country court judgments largely became questions of state law following *Erie*'s holding that federal courts do not have the power to create general federal common law. Under current law, unless a federal statute or treaty is involved, state law governs whether and how a judgment from a foreign country court will be recognized and enforced in the United States.

For the last half century, this area of law has been dominated by state enactment of statutes based on one of two model laws promulgated by the Uniform Law Commission, the Uniform Foreign Money Judgments Recognition Act of 1962 (the "1962 Act") or its successor, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (the "2005 Act" and, together with the 1962 Act, the "Uniform Acts"). New York enacted the 1962 Act (with minor amendments) in 2007 as Article 53 of the New York Civil Practice Law and Rules ("CPLR") and, in 2021, updated CPLR Article 53 to conform it (with minor differences) to the 2005 Act. Today, as shown in the mas below, 38 U.S. States, the District of Columbia, and the Virgin Islands have laws based on one of the Uniform Acts, with 30 of those jurisdictions[133] adopting the 2005 Act and 10 retaining the

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129 *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926).

130 Richard W. Hulbert, *Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration*, 29 U. Pa. J. Int'l L. 641, 643 (2008).

131 Ronald A. Brand, *Federal Judicial Center Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. Pitt. L. R. 494, 497-98 (2013).

132 *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

133 The 30 States and Territories, in order of adoption of the 2005 Act, are: California, Nevada, Idaho, Michigan, Colorado, Oklahoma, Washington, Oregon, North Carolina, Montana, Hawaii, New Mexico, Iowa, Minnesota, Illinois, Indiana, Delaware, Alabama, District of Columbia, Virginia, Georgia, Arizona, Texas, North Dakota, Tennessee, Utah, New York, Nebraska, Rhode Island, and Maine. Nebraska introduced legislation in 2024 to adopt the 2005 Act.

1962 Act.[134] The remaining twelve States[135] follow substantially similar common law rules, largely as outlined in the 1987 Restatement (Third) of Foreign Relations Law of the United States ("Third Restatement").[136] In 2018, the American Law Institute issued the Restatement (Fourth) of Foreign Relations Law of the United States ("Fourth Restatement").

Because of the overall consistency of State law rules for recognition of foreign country judgments, "even though state law governs, the grounds for recognition and enforcement of foreign judgments are nearly the same in any court in the United States."[137]

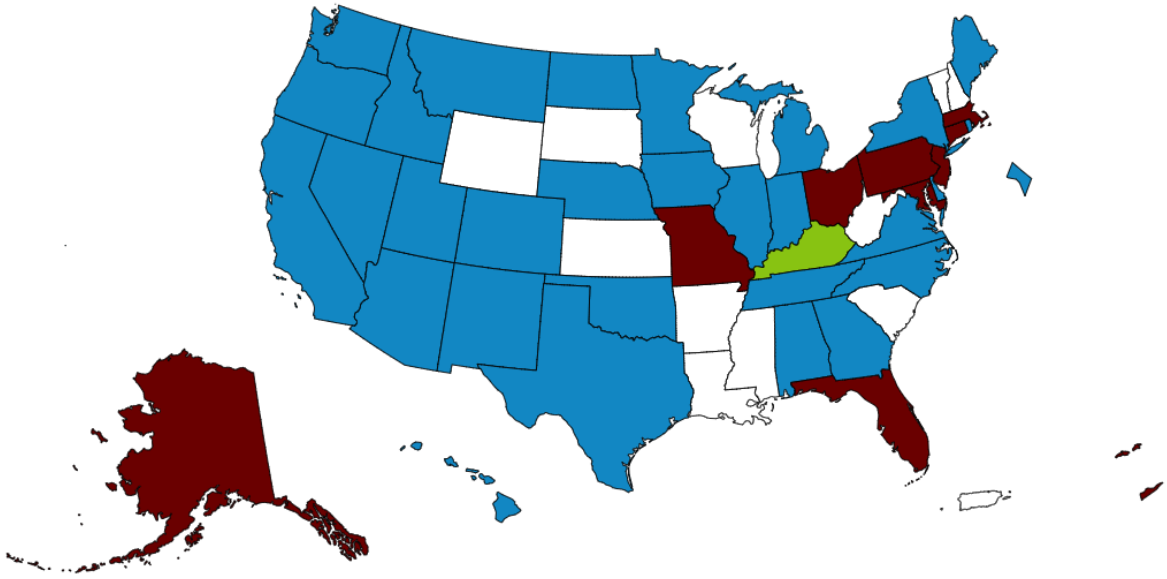
[134] The eight States and Territories that still retain the 1962 Act, in order of adoption, are: Maryland (Md. Code Ann., Evidence §§ 10-701–709 (West 2022)); Massachusetts (Mass. Gen. Laws Ann. Ch. 218 § 4A (West 2022)); Missouri (Mo. Ann. Stat. § 74.14 (West 2022)); Connecticut (Conn. Gen. Stat. Ann. §§ 50a-30–38 (West 2021)); Pennsylvania (42 Pa. Stat. and Cons. Stat. Ann. § 4306 (West 2022)); Florida (Fla. Stat Ann. § 55.601–55.607 (West 2022)); and New Jersey (N.J. Stat. Ann. §2A:49A-16.4 (West 2022)). Alaska (Alaska Stat. Ann. §§ 09.30.100–110 (West 2021)), Ohio (Ohio Rev. Code Ann. Tit. 23 § 23290 (West 2022)), and the U.S. Virgin Islands (V.I. Code Ann. Tit. 5 §§ 562–565 (West 2022)) have adopted statutes which treat foreign country money judgments in the same manner as U.S. sister state and federal court judgments subject to full faith and credit and recognize such foreign country judgments under a "registration" regime rather than requiring the commencement and service of an action. If the judgment debtor appears, it can then challenge enforceability of the foreign country judgment on the same grounds as available under the 1962 Act.

[135] These States are as follows: Arkansas, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming. As noted above, Kentucky recently introduced legislation to adopt the 2005 Act.

[136] *See* Carlton Fields, *Recognition of Foreign Country Judgments in the United States: A Primer*, CARLTON FIELDS, P.A. (Feb 28, 2014), https://www.carltonfields.com/insights/publications/2014/recognition-of-foreign-country-judgments-in-the-un.

[137] Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 Wayne L. Rev. 1161, 1165 (2005).

Figure 1: Map of Uniform Act Adoption (2024)[138]



Current Version Legislation

Jurisdiction	Year	Bill Number	Status	Sponsor
Kentucky	2024	HB 802	Introduced	Flannery
Maine	2022	LD 903	Enacted	Moriarty
Nebraska	2021	LB 501/LB 593	Enacted	Slama
New York	2021	SB 523	Enacted	Hoylman
Rhode Island	2021	HB 5874/ SB 801	Enacted	Craven/Archambault
Utah	2020	SB 132	Enacted	Hillyard
Tennessee	2019	SB 275	Enacted	Gardenhire
North Dakota	2017	SB 2169	Enacted	Hogue
Texas	2017	SB 944	Enacted	Clardy
Arizona	2015	SB 1447	Enacted	
Georgia	2015	SB 65	Enacted	Jacobs
Virginia	2014	SB 473	Enacted	Obenshain
Alabama	2012	SB 348	Enacted	Williams
District of Columbia	2012	19-216	Enacted	Mendelson
Delaware	2011	HB 104	Enacted	George
Illinois	2011	SB 1074	Enacted	Wilhelmi
Indiana	2011	HB 1548	Enacted	Foley
Iowa	2010	SF 358	Enacted	
Minnesota	2010	HF 776	Enacted	
Hawaii	2009	SB 119	Enacted	Taniguchi
Montana	2009	SB 209	Enacted	Laslovich
New Mexico	2009	HB 690	Enacted	Cervantes
North Carolina	2009	SB 285	Enacted	Hartsell
Oklahoma	2009	SB 887	Enacted	Anderson
Oregon	2009	SB 286	Enacted	
Washington	2009	SB 5153	Enacted	Kline
Colorado	2008	HB 1202	Enacted	McGihon
Michigan	2008	HB 4650	Enacted	Condino
California	2007	SB 639	Enacted	Harman
Idaho	2007	SB 1012	Enacted	
Nevada	2007	SB 177	Enacted	

[138] *Foreign-Country Money Judgments Recognition Act*, Uniform Law Commission (last visited March 145, 2024) https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e.

It is important to note that under the Uniform Acts and the Third and Fourth Restatements, recognition of a foreign country judgment requires the commencement and service of a legal action[139] and affords the defendant an opportunity to oppose the recognition of the foreign country judgment in the United States.[140] The need to commence a judicial proceeding with respect to foreign country judgments is distinguishable from the process within the United States with respect to a judgment issued by a sister State or a federal court. Under the U.S. Constitution and 28 U.S.C. § 1738, each State is required to afford full faith and credit to the final judgments of the courts of another State.[141] The Uniform Enforcement of Foreign Judgments Act of 1964 ("UEFJA")[142] with respect to the enforcement of sister State court judgments and 28 U.S.C § 1963 with respect to federal court judgments, provide for a streamlined registration process, where, upon the filing of a properly authenticated judgment of a sister State court or federal court from outside the State, the receiving Court Clerk must then treat the "foreign" judgment in the same manner as a judgment of a court of the enacting State[143] or federal district court, without the need to commence any judicial proceeding to enforce the judgment.[144]

Whether one seeks to recognize and enforce a foreign court judgment in a U.S. jurisdiction that has adopted one of the Uniform Acts or follows the common law set out in the Third Restatement (and now the Fourth Restatement), the process involves the filing and service of a lawsuit on the defendant and consideration by the U.S. court of several factors: (1) the type of judgment; (2) the finality of the foreign country judgment; (3) whether there are any mandatory or

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[139] *See* 2005 Act § 6; Restatement (Third) of Foreign Relations Law § 481 (comment g.) ("No procedures exist in the United States for registration of foreign country judgments. . . . Therefore, enforcement of a debt arising out of a foreign judgment must be initiated by civil action. . . ."); Restatement (Fourth) of Foreign Relations Law § 482 ("A person seeking recognition of a foreign judgment must either initiate a civil proceeding for that purpose in a court of competent jurisdiction or properly raise the issue in an existing proceeding.").

[140] There is one exception. As between certain U.S. States and all Canadian provinces and territories, the 2019 Uniform Registration of Canadian Money Judgments Act facilitates the enforcement of Canadian money judgments in the United States, by allowing such judgments to be registered as judgments in the courts of U.S. State signatories (currently, Colorado, Nevada, Nebraska, and Rhode Island) as if the Canadian money judgment had been issued by a court in that State. *See Registration of Canadian Money Judgments Act*, Uniform Laws Commission, https://www.uniformlaws.org/committees/community-home?communitykey=49ecb2a9-a8b7-4041-8eba-e9d6f7293ea5.

[141] U.S. Const., Art. IV, §1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.").

[142] Enacted in New York as CPLR Art. 54.

[143] In New York, the definition of a "foreign judgment" subject to New York's Article 54 of the CPLR excludes a judgment "obtained by default in appearance, or by confession of judgment." N.Y. CPLR § 5401.

[144] Uniform Enforcement of Foreign Judgments Act of 1964. For a useful explication of the provisions of the Uniform Enforcement of Foreign Judgments Act, *see* Judge Rowan Wilson's opinion in dissent in *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*], No. 73, 2021 WL 5926893, at *8-9 (N.Y. Dec. 16, 2021). The registration of judgments has also been adopted in different jurisdictions. For example, in the European Union, a party may register the judgment of one EU country in the court of another EU country, and need not commence a separate judicial proceeding in order to recognize and enforce such judgment. *See How to enforce a court decision*, European Justice (Oct. 26, 2020) https://e-justice.europa.eu/52/EN/how_to_enforce_a_court_decision.

discretionary grounds for declining recognition in the United States; and (4) whether the procedural requirements for a U.S. foreign country judgment recognition action have been satisfied.[145]

1. Types of Judgments

The Uniform Acts cover only judgments granting or denying recovery of a sum of money; excluded from coverage under the Uniform Acts are money judgments on taxes, fines, or criminal-like penalties and judgments relating to domestic relations.[146]

Neither the Uniform Acts, the Third Restatement, nor the Fourth Restatement imposes any requirement that the foreign judgment be "international," in that, for example, a judgment of a German court rendered in a dispute between two German residents and having no connection outside Germany may also be recognized in this country.[147]

2. Finality Criteria

For a judgment to be recognized under the Uniform Acts, the party seeking recognition must demonstrate that the foreign judgment is conclusive, final, and enforceable in the country of origin.[148]

3. Grounds for Declining Recognition

None of the regimes applicable in the United States allows a U.S. court to review the merits of the underlying foreign case. Rather, recognition of an eligible foreign judgment is required unless the U.S. court finds applicable one of the various mandatory or discretionary grounds for denying recognition set out below.

Although neither the 2005 Uniform Act nor the 1962 Uniform Act authorizes a U.S. court to deny recognition of an otherwise eligible foreign-country judgment on grounds that the foreign country would not recognize a comparable U.S. court judgment, six states—Arizona, Florida, Maine, Massachusetts, Ohio and Texas—have enacted a version of the Uniform Acts with a non-

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[145] The 2005 Act also allocates the burden of proof, provides other rules of procedure, and provides for a statute of limitations. *See Summary of the Uniform Foreign Country Money Judgments Recognition Act*, The National Conference of Commissioners on Uniform States Laws.

[146] *See* 2005 Act §§ 3(a)-(b); 1962 Act §§ 1(1)-(2).

[147] 2005 Act § 3(b); 1962 Act § 1(2); Restatement (Third) of Foreign Relations Law § 481; Restatement (Fourth) of Foreign Relations Law § 481.

[148] *See* The Council of State Governments Committee on Suggested State Legislation, *Suggested State Legislation 2011 Volume 70: Uniform Foreign-Country Money Judgments Recognition Act*, 267 (Jan. 28, 2011), https://knowledgecenter.csg.org/kc/content/uniform-foreign-country-money-judgments-recognition-act#:~:text=Thirteen%20states%20had%20enacted%20the%20revised%20Uniform%20Foreign-Country,Mexico%2C%20Nevada%2C%20North%20Carolina%2C%20Oklahoma%2C%20Oregon%2C%20and%20Washington.

uniform modification to require (or, in the case of Ohio, to give the court discretion to deny recognition on grounds of) reciprocity.[149]

Mandatory Grounds for Non-Recognition of Foreign Judgments

2005 Act	1962 Act	Third Restatement	Fourth Restatement
The **judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process**.	Same	Same	Same[150]
The foreign court **did not have personal jurisdiction over the defendant**.	Same	Same	Same
The foreign court **did not have subject matter jurisdiction**.	Same		Same
			The **judgment rested on a claim of defamation** and the SPEECH Act forbids its recognition or enforcement.[151]

[149] *See* Arizona (A.R.S. § 12-3252(B)(2)); Florida (§ 55.605(2)(g), Fla. Stat.); Maine (14 M.R.S.A. § 8505(2)(G)), Massachusetts (M.G.L. c.235, § 23A); Ohio (Ohio R.C. 2329.92(B)); and (TEX. CIV. PRAC. & REM. CODE ANNO. § 36A.004(C)(9)).

[150] The Fourth Restatement substitutes "principles of fairness" for "due process" to distinguish between "due process" as it is understood in the international context from the American concept of "due process" as provided for by the Fifth and Fourteenth Amendments to the U.S. Constitution. Jen Moringio, *N.J Legislation Follows Foreign Relations law Restatement on Judgments*, The ALI Advisor, (March 1, 2018) https://thealiadviser.org/us-foreign-relations-law/n-j-legislation-follows-foreign-relations-law-restatement-judgments/.

[151] The SPEECH Act, 28 U.S.C. § 4101, *et seq*., federalizes and preempts the recognition in the United States of any foreign court defamation judgment by conditioning recognition on the foreign defamation law provides "at least as much protection for freedom of speech and press . . . as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State" in which recognition is sought, or the defendant would have been found liable under such standards. 28 U.S.C. § 4102(a)(1)(A)-(B). New York law similarly prohibits recognition and enforcement of foreign defamation judgments unless the applicable foreign law provided at least as much protection of freedom of speech as provided under the U.S. and New York Constitutions, as means to prevent "Libel Tourism," or the attempted enforcement of large libel money judgments issued by foreign courts against American authors. CPLR § 5304(b)(9).

Discretionary Grounds for Non-Recognition of Foreign Judgments

2005 Act	1962 Act	Third Restatement	Fourth Restatement
		The foreign court did not have subject matter jurisdiction.	
The defendant in the proceeding in the foreign court **did not receive notice of the proceeding in sufficient time** to enable the defendant to defend.	Same	Same	Same
The **judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case**.	Same	The judgment was obtained by fraud.	Same
The **judgment or the cause of action** (claim for relief) on which the judgment is based **is repugnant to the public policy of this state or of the United States**.	Same	Same	Same
The **judgment conflicts with another final conclusive judgment**.	Same	Same	Same
The **proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court**.	Same	Same	Same
In the case of jurisdiction based only on personal service, **the foreign court was a seriously inconvenient forum for the trial of the action**.	Same	Same	Same
The **judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment**.			Same

2005 Act	1962 Act	Third Restatement	Fourth Restatement
The **specific proceeding** in the foreign court leading to the judgment **was not compatible with the requirements of due process of law**.			Same
			The **courts of the state of origin would not recognize a comparable U.S. judgment**.[152]

With respect to the foreign court's lack of personal jurisdiction as a mandatory ground for non-recognition, U.S. courts are not bound by compliance with the foreign country's own jurisdictional rules or the foreign court's finding of personal jurisdiction. Rather, the Uniform Acts list six non-exclusive bases for personal jurisdiction that meet U.S. constitutional requirements and are adequate as a matter of law in the United States to establish that the foreign court had jurisdiction to render the judgment sought to be recognized here.[153] The Uniform Acts authorize courts to find other bases of personal jurisdiction as sufficient to enforce a foreign court judgment in this country.[154] The Fourth Restatement similarly provides that "courts in the United States will not recognize a foreign judgment if the court rendering the judgment would have lacked personal jurisdiction under the minimum requirements of due process imposed by the Constitution."[155] Accordingly, in a recognition action in the United States, the determination whether a party was subject to personal jurisdiction before the issuing court is examined through the lens of U.S. due process norms.

4. Procedural Requirements in U.S. Courts Applicable to Actions to Recognize Foreign Court Judgments

Although a judgment creditor often seeks recognition and enforcement of a foreign country judgment in the United States because it believes the defendant has assets in this country, that is not always the case. A key issue that arises in actions in U.S. courts to recognize foreign judgments

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[152] "Neither international nor federal law requires reciprocity, but it also is true that neither forbids reciprocity." Restatement (Fourth) of Foreign Relations Law § 484 (2018).

[153] Those bases are: "(1) the defendant was served with process personally in the foreign country; (2) the defendant voluntarily appeared in the proceeding other than for the purpose of protecting property or of contesting jurisdiction; (3) the defendant had agreed to submit to the jurisdiction of the foreign court; (4) the defendant was domiciled in the foreign country or was a business organization that had its principal place of business in, or was organized under the laws of, the foreign country; (5) the claim arose out of business done through the defendant's office in the foreign country; (6) the claim arose out of the defendant's operation of a motor vehicle or airplane in the foreign country." 1962 Act § 5(a); 2005 Act § 5(a).

[154] 1962 Act § 5(b); 2005 Act § 5(b).

[155] Restatement (Fourth) of Foreign Relations Law § 483 cmt. (e).

is what contacts the defendant needs to have with the U.S. forum in order for the plaintiff to obtain a judgment recognizing and enforcing a foreign country's judgment. The drafters of the Uniform Acts did not take a position on whether an American enforcing court must have personal jurisdiction over the debtor or *quasi in rem* jurisdiction over the debtor's assets,[156] so the issue has been left up to each U.S. state to determine. Consistent with the position adopted in the Third Restatement[157] and Fourth Restatement,[158] most U.S. courts require a jurisdictional nexus with respect to the judgment debtor or its assets before they will hear an action against the defendant to recognize a foreign country money judgment. There are, however, some divergences among U.S. courts' treatment of this issue. Indeed, within New York State itself, the Appellate Division's First Department in New York requires *in personam* jurisdiction over the defendant or *in rem* jurisdiction over its assets in order to maintain an action for recognition and enforcement where the defendant asserts defenses to the recognition of the foreign county judgment, while the Appellate Division's Fourth Department does not require any such connection.[159] Courts in Texas and Iowa have held that an enforcing court does not need personal or *quasi in rem* jurisdiction.[160] Courts in Michigan and Connecticut, however, have held that there must be some basis for personal or *quasi in rem* jurisdiction over the defendant before a foreign country judgment can be recognized in that State.[161] Finally, almost all federal courts of appeals have held that either property or personal jurisdiction is necessary to support an action to confirm a foreign arbitral award, which rule would apply by extension to foreign country judgments.[162]

In addition, to the extent recognition and enforcement of a foreign country judgment is sought in a U.S. federal court, the plaintiff must establish an independent basis for subject matter

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156 2005 Act, *supra*, § 6 cmt. 4.

157 Restatement (Third) of Foreign Relations Law § 481 cmt. h.

158 Restatement (Fourth) of Foreign Relations Law § 482 cmt. b.; Restatement (Fourth) of Foreign Relations Law § 486 cmt. c.

159 *Compare Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 291 (4th Dep't. 2001) (no *in personam* jurisdiction is necessary and no property need be present), *with AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 73 N.Y.S.3d 1, 3 (1st Dept. 2018) (enforcing court must have a jurisdictional basis, *in personam* or *in rem*, if judgment creditor raises a substantive objection to recognition of the foreign court judgment); *see Harvardsky Prumyslovy Holding, A.S.-V Likvidaci v. Kozeny*, 166 A.D.3d 494 (1st Dep't 2018) (when a judgment debtor raises a non-frivolous ground for denying recognition, there must be an *in personam* or *in rem* jurisdictional basis for maintaining recognition and enforcement proceeding in New York); *Diaz v. Galopy Corp. Int'l, N.V.*, 79 N.Y.S.3d 494, 498 (Sup. Ct. N.Y. Cty. 2018) (no need for proof of jurisdiction where defendant fails to assert substantive statutory grounds for non-recognition).

160 *See Haaksman v. Diamond Offshore (Bermuda) Ltd.*, 260 S.W.3d 476, 481 (Tex. Ct. App. 2008) (no need for *in personam* or *in rem* jurisdiction, following *Lenchyshyn*); *Gesswein v. Gesswein*, 566 S.W.3d 34 (Tex. App. 2018) (judgment debtor may not assert that enforcing court does not have *in personam* jurisdiction over the judgment debtor); *accord Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300, 305 (Tex. App. 2009); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) (following *Lenchyshyn*, no need for personal jurisdiction in judgment recognition cases).

161 *See Electrolines, Inc. v. Prudential Assurance Co.*, 260 Mich. App. 144, 878, 880, 885-86 (Mich. Ct. App. 2003) (enforcing court must have *in personam* or *in rem* jurisdiction); *Intrigue Shipping, Inc. v. Shipping Assocs., Inc.*, No. FSTCV135014113S, 2013 WL 6978815, at *4 (Conn. Super. Ct. Dec. 13, 2013) (proof of personal jurisdiction unnecessary where judgment creditor alleged presence of assets in forum).

162 Linda J. Silberman and Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought*, 91 N.Y.U. L. Rev. 344, 352-354 (2016).

jurisdiction over the proceeding, most often, diversity of citizenship.[163] State courts remain, in any case, available to hear actions for the recognition of foreign country judgments where diversity is lacking.

U.S. courts are also split on whether, upon recognition (or "domestication") under State law, a foreign country judgment is entitled under the U.S. Constitution to the same "full faith and credit" as an original sister State judgment.[164] Some courts have found that a U.S. court judgment recognizing a foreign country judgment is entitled to full faith and credit as a sister State judgment, while others have determined that such foreign country judgments are not entitled to full faith and credit as mandated by the U.S. Constitution.[165]

iv. Recognition of U.S. Judgments Abroad

A U.S. judgment may not be enforced in any foreign country without first being recognized by a court in that country under the laws of that specific jurisdiction. There is no known comprehensive study of all foreign jurisdictions and whether and by what means they would recognize and enforce a U.S. judgment. As noted above, in response to a request from the State Department, the NYCBA published a report in 2001 surveying the treatment of U.S. judgments in 12 foreign jurisdictions.[166] Since then, legal industry publishing services Practical Law and Lexology have published practice notes by local counsel in dozens of jurisdictions describing the mechanics entailed in seeking to enforce a foreign court judgment in those jurisdictions.[167]

As the State Department explains: "The general principle of international law . . . is that a foreign state exercises the right to examine foreign judgments for four causes: (1) to determine if the court that issued the judgment had jurisdiction; (2) to determine whether the defendant was properly notified of the action; (3) to determine if the proceedings were vitiated by fraud; and (4) to establish that the judgment is not contrary to the public policy of the foreign country."[168]

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[163] *See* 28 U.S.C. §§ 1332–1333.

[164] Silberman & Simowitz, *supra*, at 356–57.

[165] Silberman & Simowitz, *supra*, at 356–35.

[166] The Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. ASS'N BAR CITY N.Y. 378, 381 (2001) (Belgium, Canada, China, England and Wales, France, Hong Kong Special Administrative Region (Hong Kong), Italy, Japan, Mexico, South Africa, Spain, and Switzerland).

[167] As of this writing, the jurisdictions covered by Practical Law include: Australia, Barbados, Belgium, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Channel Islands Guernsey, Channel Islands Jersey, China, Denmark, France, Germany, Gibraltar, Hong Kong, India, Indonesia, Ireland, Isle of Man, Italy, Luxembourg, Malta, Mauritius, Mexico, Netherlands, Poland, Russian Federation, Singapore, Spain, Switzerland, Turkey, UK — England and Wales, UK — Scotland, Ukraine and United Arab Emirates. *All Jurisdictions* https://1.next.westlaw.com/Browse/Home/PracticalLawGlobal/Countries?transitionType=Default&contextData=(sc.Default)&navId=9D397C8EDBC38E5BB0921773F5F7C272. Lexology publishes an annual survey of the enforcement of foreign judgments in some of the same jurisdictions as Practical Law as well as Austria, Bahamas, Bahrain, Cyprus, and more. *See* Oliver Browne, Tom Watret & Georgie Blears, *Enforcement of Foreign Judgments*, Lexology, https://www.lexology.com/gtdt/workareas/enforcement-of-foreign-judgments.

[168] *Enforcement of Judgments*, U.S. Department of State – Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

Historically, foreign countries have been reluctant to recognize U.S. court judgments based on the following features of the U.S. legal system that have been perceived to be objectionable: the reach of U.S. long-arm jurisdiction,[169] excessive jury awards and punitive damages, and alleged breaches of state sovereignty resulting from service of process or taking of evidence abroad.[170]

Whereas to date, the United States is not a party to any in-force treaty with respect to the recognition of its court's judgments, many countries have entered into bilateral, regional and/or other treaties with specifically selected counterparties to facilitate the recognition of each other's court judgments.[171]

"The principal problem" holders of U.S. judgments have had in enforcing those judgments abroad "stems from the fact that, because the United States is not a party to any judgments conventions, American judgment creditors never have access to the simpler, cheaper, quicker avenues for enforcement provided by treaty. Instead they must proceed by common law action (as in England, Canada, South Africa, and Hong Kong) or under residual statutory procedures in civil law countries. These alternative approaches are more complicated, slower, and in some cases present uncertainty in points of detail."[172] In some countries—ones in Scandinavia, for example—the absence of a treaty simply precludes recognition of a U.S. or any other non-treaty country's judgments.[173]

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[169] Specifically, foreign countries found objectionable the practice the U.S. Supreme Court upheld in *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990), as consistent with due process of "tag jurisdiction," where a defendant's only contact with the United States was having been served with process here. On the other hand, foreign resistance to U.S. notions of "doing business jurisdiction" have largely been mooted by the U.S. Supreme Court's recent restrictions on the exercise of general jurisdiction in *Daimler AG v. Bauman*, U.S. (2014) and *Goodyear Tires v. Brown*. *See* Andrea Bonomi, *Recognition and Enforcement of U.S. Civil Judgments in Europe: Old Problems and Recent Trends*, US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger? – Publications of the Swiss Institute of Comparative Law, Schulthess Editions Romandes 277, 283–84 (2018).

[170] *See* Andrea Bonomi, *Recognition and Enforcement of U.S. Civil Judgments in Europe: Old Problems and Recent Trends*, US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger? – Publications of the Swiss Institute of Comparative Law, Schulthess Editions Romandes 277, 282 (2018); Sarah E. Coco, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209, 1220 (2019) ("Several specific areas of U.S. domestic law are commonly cited as reasons for the non-recognition of U.S. judgments, including jurisdiction, public policy concerns about punitive damages, and reciprocity.").

[171] An example of a bilateral judgment recognition treaty is the one between Germany and Israel. *See* Markus Langen, Dr. Andreas Klein & Dominik Stier, *Litigation: Enforcement of foreign judgments in Germany*, Lexology (Jul. 2, 2018), https://www.lexology.com/library/detail.aspx?g=f476bc5a-60f4-4f1a-9aad-22a5e11fb708. In Singapore, the Reciprocal Enforcement of Commonwealth Judgments Act provides for mutual recognition of judgments rendered by courts in the United Kingdom, Australia, New Zealand, Sri Lanka, Malaysia, Pakistan, Windward Islands, Brunei Darussalam, Papua New Guinea and India (except the states of Jammu and Kashmir). *See* Lakshanthi Fernando & Wei Ming Tan, *Recognition and Enforcement of Foreign Judgments in Singapore*, CMS Law (Dec. 10, 2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-recognition-and-enforcement-of-judgements/singapore. *See also Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, E.U. -DK., Jan. 10, 2015, L 149/80 ("Recast Brussels Regulation I"); *see also* Commission Regulation 37/2014 of Jan. 21, 2014, *Procès-verbal* of Ratification to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 30 October 2007, 2014 O.J. (L 18) 70,71 ("Lugano Convention").

[172] Hulbert, *supra*, at 647-48.

[173] Andrea Bonomi reports that the Nordic countries of Denmark, Finland, Iceland and to a certain extent, Norway and Sweden, "simply refuse[] recognition and enforcement of foreign decisions unless it is based on a treaty with the

In England and Wales, due to the absence of any reciprocal agreement or statute that would otherwise automatically apply to recognize U.S. judgments, a U.S. judgment may be enforced in England only at common law, under which a party must bring a new action under which the judgment is considered a contractual debt. Importantly, the foreign judgment may be recognized only if it is (1) final and conclusive, (2) for a sum of money, but not for taxes, a fine, or a penalty, and (3) based on indirect jurisdiction (*i.e.*, jurisdiction cannot be based on tort or performance of a contract or any of the grounds it uses itself for direct jurisdiction), which makes recognition and enforcement of foreign country judgments outside of a treaty very restrictive.[174] While English courts generally will not review the substance of the foreign court judgment, they may consider the way that such judgment was obtained in the event of a challenge to recognition, and courts may deny recognition under limited circumstances, including, *inter alia*, (1) the foreign court did not have international jurisdiction under English private international law principles; (2) a party did not have due notice and opportunity to be heard; (3) the judgment is not compatible with public policy; or (4) the judgment conflicts with an existing domestic judgment or other foreign judgment.[175]

This procedure is generally the same among non-common law jurisdictions for which a treaty is not an absolute prerequisite for recognition. For example, courts in France and Germany—two countries with similar recognition regimes for foreign judgments—will recognize U.S. and other foreign judgments pursuant to provisions in their respective Codes of Civil Procedure.[176] Whether courts in other jurisdictions impose additional requirements to recognition—such as a particular form of service, limitations periods, or the ability to initiate foreign judgment enforcement proceedings *ex parte*—varies.

In China, foreign judgments may generally be recognized and enforced pursuant to two regimes: (1) where a party has a treaty or other agreement with China on the mutual recognition of judgments; or (2) under the principle of reciprocity, in accordance with the Civil Procedure Law of the People's Republic of China.[177] China has few treaties regarding the recognition of foreign judgments with its trading partners, and therefore, in practice, the majority of foreign judgments

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country of origin." Andrea Bonomi, *Recognition and Enforcement of U.S. Civil Judgments in Europe: Old Problems and Recent Trends*, in US LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESSES OR JUST A PAPER TIGER? 277, 280 (Andrea Bonomi & Krista Nadakavukaren eds., 2018).

[174] Andrew Bartlett & Ashley Morgan, *Enforcement of judgments and arbitral awards in the UK (England and Wales): overview* (Thomson Reuters Practical Law 2020); Patrick Doris, Rebecca Sambrook, and Helen Elmer, *Enforcement of Foreign Judgments 2019*: *United Kingdom*, Law Bus. Research, (2018).

[175] *Id.*

[176] *See* Erwan Polsson *et al*., *Enforcement of judgments and arbitral awards in France: Overview* (Thomson Reuters Practical Law 2019); Axel Benjamin Herzberg & Bodenheimer Herzberg, *Enforcement of judgments and arbitral awards in Germany: Overview* (Thomson Reuters Practical Law 2017).

[177] *See* Nuo Ji *et al.*, *Enforcement of Judgments and Arbitral Awards in China: Overview*, 5 (Thomson Reuters Practical Law 2020); Civil Procedure Law of the People's Republic of China, Art. 282 ("Having received an application or a request for recognition and enforcement of a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates state sovereignty, security and the public interest, it shall rule to recognize its effectiveness. If enforcement is necessary, it shall issue an order of enforcement, which shall be implemented in accordance with the relevant provisions of this Law.").

seeking recognition in China must be done on the basis of reciprocity.[178] While reciprocity may be difficult to establish in Chinese courts, pursuant to a Supreme People's Court decision in 2015, Chinese courts may consider providing judicial assistance in order "to promote the establishment of reciprocity, subject to the mutual intent and commitment between China and the relevant country."[179] Since 2016, some Chinese courts have found "de facto reciprocity" and agreed to recognize and enforce foreign judgments (including foreign judgments issued in the United States, Singapore, and South Korea) where litigants could demonstrate that courts in the country where the foreign judgment was rendered had similarly recently recognized and enforced Chinese judgments.[180]

In Russia, foreign judgments may be recognized and enforced under: (1) an international treaty; (2) federal law; or in the absence of either, (3) international comity and reciprocity.[181] While "the number of judgments enforced on the basis of reciprocity" in Russia "is very limited," in part because the party seeking recognition "must provide proof that the foreign courts of the relevant jurisdiction enforce Russian judgments,"[182] there has been recent success in the recognition of English court decisions before Russian courts.[183]

Although particular U.S. judgments have been recognized abroad, in both common law and civil law regimes, there remains a considerable degree of unpredictability and inconsistency regarding the treatment of a U.S. court judgment in jurisdictions around the world.

v. Treatment of Mediated Settlement Agreements in the U.S. under Existing Practice

In the common law jurisdictions of the United States, an MSA is governed by "the formalities and substantive elements of a contract . . . ."[184] This distinguishes an MSA from an arbitral award, which is entitled to confirmation and enforcement under the Federal Arbitration Act ("FAA") or applicable state law. For domestic MSAs, contract law is typically applied "with little regard to the special nature of the negotiations in the mediation context."[185] Unlike a court

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178 Ji *et al.*, *supra*, at 5.

179 *Id.* at 14.

180 *Id.* at 14-15.

181 Edward Bekeschenko *et al.*, *Enforcement of Judgments and Arbitral Awards in the Russian Federation: Overview*, 3 (Thomson Reuters Practical Law 2020). There is only one federal law in Russia that recognizes a right to recognize and enforce foreign judgments: the Federal Law on Insolvency (Bankruptcy). *See* Alexander Kostin, *Recognition and enforcement of foreign judgments in Russia*, Oct. 2014 Edition, Fin. Worldwide Mag.: Special Rep.: Int'l Disp. Resol., (2014), https://www.financierworldwide.com/recognition-and-enforcement-of-foreign-judgments-in-russia#.Yap2ktDML-g.

182 *Id.* at 3.

183 *See* Anna Kopylova, *Enforcement of English Judgments in Russia: Reciprocity*, KDB Legal Koch Boes (Mar. 8, 2021), https://kdb.legal/en/enforcement-of-english-judgments-in-russia-reciprocity/.

184 David Weiss & Brian Hodgkinson, *Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, 25 Am. Rev. Int'l Arb. 275, 276 (2014).

185 Edna Sussman, *A Brief Survey of US Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony*, IBA Legal Practice Division, Mediation Committee Newsletter 32 (April 2006).

upholding an arbitral award, a court considering contract law claims and defenses asserted with respect to MSAs "will consider evidence to determine whether a binding contract was entered into and review any defenses raised as they would in any other contract dispute."[186] Because contract law is state law, mediation law is highly localized.

1. Contract Formation

In most states, MSAs are treated as contracts. The first question to address, before considering defenses to enforcement, is whether a binding contract was formed, taking into account the traditional requirements of offer, acceptance, consideration, and sufficient evidence to establish a meeting of the minds.[187] In the context of a mediation proceeding, often late in the day and subject to time pressures, the contract may be in the form of an abbreviated agreement or even a memorandum of understanding, sometimes argued at a later point to be simply a non-binding "agreement to agree." The enforceability of the parties' MSA may depend on whether there is a writing that spells out in sufficient detail the material terms of the agreement. For example, if there is a shorthand document saying the parties will exchange mutual releases but the terms of the release are not specific and the parties later are unable to agree on the terms, the MSA may be missing a material term, and the contract may be deemed not fully formed and thus not enforceable. As a general rule, however, courts will enforce such abbreviated agreements "where all of the material terms ha[ve] been the subject of mutual consent . . . ,"[188] even if the agreement anticipated a more complete document that ultimately was not prepared.[189]

Another issue related to contract formation is whether an oral settlement agreement can be enforced. At the conclusion of a mediation, the parties may have shaken hands on an oral understanding, and state statutes of frauds commonly provide that contracts made to be performed within one year need not be in writing. A court could find an oral agreement enforceable "if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound."[190] But some state laws require more. California law, for example, provides that an oral agreement arising from mediation may be enforceable only if (1) it is recorded, (2) with terms recited on the record in the presence of the parties and the mediator, (3) the parties acknowledge on the record that the oral agreement is enforceable, and (4) the recording is reduced to writing and signed by the parties within 72 hours.[191] Under the Uniform Mediation Act ("UMA"), as

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[186] Sussman, *supra*, at 32.

[187] Weiss, *supra*, at 276.

[188] Sussman, *supra*, at 33 (*citing Harkader v. Farrar Oil Co.*, No. 2004-CA-000114-MR, 2005 WL 1252379 (Ky. App. May 27, 2005)).

[189] *Id.* at 33 (citing *Claridge House One Condo. Ass'n v. Beach Plum Prop's*, No. A-1275-11T4, 2006 WL 290439 (N.J. Super. A.D. Feb. 8, 2006), *Golding v. Floyd*, 539 S.E.2d 735 (Va. 2001), *M. Martin v. Senn Dunn LLC*, No. 1:05CV00061, 1:05CV004642, 2005 WL 2994424 (M.D. N.C. Nov. 7, 2005) and *Weddington Prod's v. Flic*, 71 Cal. Rptr.2d 265 (Cal. App. 2d Dist. 1998)).

[190] *Id.* at 33 (*citing White v. Fleet Bank of Maine*, 875 A.2d 680 (Me. 2005), *Std. Steel v. Buckeye Energy*, No. Civ. A. 04-538, 2005 WL 2403636 (WD Pa Sept. 29, 2005), and *Harkader v. Farrar Oil Co.*, No. 2004-CA-000114-MR, 2005 WL 1252379 (Ky. App. Oct. 12, 2005)).

[191] CAL. EVID. CODE § 1118. *See* Steven G. Mehta, *Enforceable Settlement Agreements: The Settlement agreement is often one of the most important documents drafted in the litigation context*, Cal. Bar J. (Nov. 2007), https://archive.calbar.ca.gov/archive/Archive.aspx?articleId=89226&categoryId=89101&month=11&year=2007.

promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 and adopted by twelve states and the District of Columbia,[192] strict confidentiality rules would preclude admission in enforcement proceedings of evidence of oral settlement agreements reached in the mediation. Accordingly, in these twelve states and the District of Columbia, MSAs will likely be enforceable only if in writing.

These variances in state law regarding contract formation obviously create many uncertainties. Although an MSA for international commercial mediation will likely be in writing, some issues related to contract formation may remain unresolved in the final agreement, including whether certain issues are characterized as ancillary or minor or not material, and whether a settlement agreement is sufficiently definite. Addressing these issues as a matter of state contract law is a challenge for a common law lawyer. It is even more challenging for a non-U.S. lawyer untrained in the U.S. common law approach to advise a client on whether a settlement agreement meets the requirements of contract formation under state common law.

2. Defenses to Enforcement of a Contract

Assuming the proper formation of an MSA, the next question is what defenses can be asserted to its enforceability. The defenses are typical contract defenses and include:

- Lack of consideration;
- Fraud or deception in the inducement;
- Duress or coercion;
- Mistake;
- Lack of competence or capacity; and
- Lack of authority.

Consideration is a basic element of the common law of contracts, although it is not required in civil law systems.[193] Duress or coercion can be found where there is unequal bargaining power, an unequal number of negotiating representatives, or lack of time to consult financial advisors or attorneys, a defense unlikely to succeed in the international mediation context, where parties are sophisticated entities represented by counsel.[194] The conduct of the mediator may be a factor in duress or coercion – for example, where the mediator imposed extreme time pressure, argued to a party that the value of the claim at issue did not warrant the costs of litigation, or assured a party that an MSA could be challenged even after being signed.[195] The burden of demonstrating a defense of incompetence or incapacity is heavy and lies on the person asserting it, but it may be successful if supported by expert testimony—for example, as to the effect of an accidental excess

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[192] While wide approval of the UMA was anticipated, only twelve states and the District of Columbia have adopted the UMA in the last twenty years. The twelve states are Georgia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington. New York, whose law is often adopted in choice of law provisions, has not adopted it. The principal focus of the UMA was to promote uniformity in the confidential treatment of mediation proceedings. Its lack of success to date means the laws of confidentiality in mediation varies state to state.

[193] Weiss, *supra*, at 277.

[194] Sussman, *supra*, at 34 (*citing Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1142 (N.D. Cal. 1999)).

[195] *Id.* (*citing Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Dist. Ct. App. Fla. 2001)).

of a medicine or a medicinal injection.[196] Lack of authority can be argued where state law requires the signature of a party, and only counsel signed the agreement. Fraud or deception in the inducement can be argued, such as when a party has made an affirmative misrepresentation on the limits of an insurance policy,[197] although an affirmative misrepresentation may not be admissible in an enforcement proceeding because of confidentiality of the mediation proceedings required by the mediated agreement or by law (unless the representation is documented in an MSA).[198]

3. Other Differences in States' Laws

Some states have adopted unique provisions separate from contract law relating to the enforcement of MSAs. Hawaii has a broad statutory definition of what constitutes an arbitral proceeding: "'Arbitration' shall also encompass, as appropriate, mediation, conciliation, and other forms of dispute resolution as an alternative to international litigation. . . ." Under this definition an MSA may be deemed an arbitration award, and "[a]rbitral or other awards or settlements" are to be enforced under the New York Convention.[199] Because of this broad definition, Hawaii law has been construed as according to an MSA "the same level of deference that arbitral awards receive under the FAA [Federal Arbitration Act]."[200] Another outlier is found in North Carolina law, under which an arbitrator may mediate or employ conciliation to settle a dispute and convert any resulting settlement agreement into an arbitral award.[201] And California permits the conversion of an MSA into an arbitral award on the consent of the parties and the mediator:

> If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.[202]

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[196] *Id.* (*citing McMahan v. McMahan*, No. E2004-03032-COA-R3-CV, 2005 WL 3287475 (Tenn. Ct. App. Dec. 5, 2005), and *Little v. Greyhound Lines, Inc.*, No. 04 Civ. 6735(RCC), 2005 WL 2429437 (S.D.N.Y. Sept. 30, 2005)).

[197] *Id.* at 35 (*citing Brinkerhoff v. Campbell*, 994 P.2d 911 (Wash. App. Div. 1, 2000)).

[198] *Id*. (citing *Princeton Ins. Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005)).

[199] Hawaii REV. STAT. § 658D-5; *see* Weiss, *supra*, at 284-85.

[200] Weiss, *supra*, at 285.

[201] N.C. GEN. STAT. ANN. § 1-567.60; *see* Weiss, *supra*, at 284.

[202] CAL. CIV. PROC. CODE § 1297.401. Ohio, Oregon, and Texas have comparable statutes. OH. REV CODE § 2712.87; OR. REV. STAT. ANN. § 36.546; TEX. CIV. PRAC. & REM. CODE § 172.211. Under Colorado and Minnesota law, MSAs are treated as a stipulated court order or a contract. COL. REV. STAT. § 13-22-308; MINN. REV. STAT. § 572.3.

While the focus of this section is on the enforcement of MSAs under U.S. law, as an aside we note that Argentina and Sweden have adopted the same approach as California, permitting the parties to empower the mediator to confirm an MSA as an arbitral award. Weiss, *supra*, at 283. Enforcement of MSAs in countries governed by Sharia law may be at the other end of the continuum, where they may be construed as contracts that could be determined to be unlawful under Sharia concepts of fairness and reciprocity, and the avoidance of unknown "risk and uncertainty even to a party willing to accept it . . . " Fatima Akaddaf, *Application of the United Nations Conventions on Contracts for the International Sale of Goods to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 Pace U. L. Rev. 1, 26 (2001); Weiss, *supra*, at 277.

vi. Enforcement of Mediated Settlement Agreements Outside the United States

In assessing whether there is a benefit to U.S. national interests in promulgating and effectuating the Singapore Convention, it is important to understand the extent of international enforcement of MSAs. In preparing this report, the Working Group assessed the current state of the law in a number of foreign jurisdictions with respect to the enforcement of cross-border MSAs. In the interests of economy, an exhaustive review of every jurisdiction outside the United States has not been undertaken. Rather, the Working Group reviewed the applicable laws of countries that have a similar legal tradition to the United States, an established history of using mediation as a tool for dispute resolution, or are otherwise major trading partners of the United States. These jurisdictions include three signatories to the Singapore Convention,[203] of which only Singapore has ratified the Convention, [204] several EU Member States, [205] and a number of other major economies.[206]

Aside from EU Member States and Singapore, which are required by international or regional law to enforce certain cross-border MSAs, no jurisdiction within the scope of our review had enacted national legislation explicitly addressing the automatic enforceability of cross-border MSA. While the EU has yet to sign the Singapore Convention, it enacted a parliamentary directive mandating the recognition and enforcement of commercial cross-border MSAs involving parties domiciled in Member States.[207] Member States were granted discretion to implement legislation meeting the minimum procedural standards in this directive and, in practice, they adopted a number of different approaches to enforcement. In contrast to the unilateral enforcement mechanism found in the Singapore Convention, enforcement of an MSA in a Member State pursuant to the EU directive requires the consent of all parties.[208]

A review of domestic legislation in non-EU jurisdictions indicates that, generally, other countries tend to give an MSA the legal status of a contract. Litigation or arbitration is therefore typically a prerequisite for enforcement in these jurisdictions. As in the United States, a party resisting enforcement of an MSA may raise contractual defenses.

Nonetheless, at least some of the jurisdictions within our review provided (in limited circumstances) for the expedited enforcement of MSAs. In Mexico, for example, mediated and non-mediated settlement agreements may be enforced by means of an expedited summary enforcement procedure known as "Via de Apremio."[209] Additionally, two Canadian provinces

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[203] Singapore, Brazil, China, and by extension Hong Kong.

[204] Singapore.

[205] European Union, Germany, Spain, France, and The Netherlands.

[206] Mexico, Canada, Switzerland, and the United Kingdom.

[207] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) ("EU Directive").

[208] EU Directive, *supra*, Art. 6.2.

[209] Mexican Code of Civil Procedure, Art. 2.157. Procedencia de la vía de apremio; *see also* Luis Alfonso Cervantes Castillo *et al.*, Mediation Q&A: Mexico, 13 (Westlaw June 30, 2020).

enacted legislation based on the UNCITRAL Model Law on Commercial Conciliation, which allows for expedited enforcement of MSAs in provincial courts.[210] We provide further detail on each jurisdiction we reviewed in Appendix 5.

B. Impact of the Adoption of the Conventions on U.S. and Foreign Practice

i. Impact of the COCA Convention on Enforcement of Choice of Court Agreements in the United States

While adoption and implementation of the COCA Convention would not significantly change the current practice of federal courts and the large majority of state courts that follow the *Bremen* rule, it would increase uniformity and predictability in the enforcement of choice of court agreements that does not currently exist in U.S. law. The COCA Convention would work greater changes in the minority of state jurisdictions that are unwelcoming to choice of court agreements or that have imposed limitations on their enforcement.

Article 5(1) of the COCA Convention provides that the court of a Contracting State designated in an exclusive agreement "shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State." The law of a chosen court refers to the "whole law," including the conflict of laws rule of the chosen court, both for prorogation and derogation.[211] The COCA Convention does not define the phrase "null and void," but an Explanatory Report on a preliminary draft of the COCA Convention states that the provision "is intended to refer primarily to generally recognized grounds of invalidity like fraud, mistake, misrepresentation, duress and lack of capacity."[212]

Article 5(2) then provides that the chosen court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State."[213] As a result, the COCA Convention would be particularly restrictive in cases where a U.S. court is the "chosen court" under a choice of court agreement because it therefore deprives the chosen court to stay or dismiss the case on grounds of *forum non conveniens,* unless the State adopts the Article 19 reservation (as the United States may do). The COCA Convention also would impose a presumption of exclusivity on the choice-of court-agreement clause and thereby limit courts' flexibility in determining whether a choice of forum clause is mandatory or permissive. It should be noted that this rule as to "exclusivity" is only a default rule that parties can work around by drafting their choice-of-court agreement to use language to have whichever type of choice-of court agreement they want.

The COCA Convention would have less impact in cases where a U.S. court is not the chosen court. COCA Convention Article 6(c) permits a non-chosen court to refuse enforcement on grounds

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210 *See* Com. Mediation Act 2010 (Ontario); Com. Mediation Act 2005 (Nova Scotia).

211 *Id.* at 765.

212 Hartley & Doguachi, *supra*, at 93.

213 Article 5(3) puts some limits on these obligations, however, by providing that paragraphs (1) and (2) of Article 5 do not affect rules "on jurisdiction related to subject matter" or "on the internal allocation of jurisdiction among the courts of a Contracting State." A chosen court in the United States therefore would retain authority under applicable U.S. law to refuse to hear a case for lack of subject matter jurisdiction or to transfer the suit to another court in the United States which would have subject matter jurisdiction.

that largely overlap those already recognized by federal and most state courts. That said, however, Article 6(c) is arguably less flexible and expansive than the "unreasonable and unjust" standard enunciated in *Bremen* and its federal and state progeny. As noted, some States are more restrictive in their enforcement of choice of court agreements than would be permitted by the COCA Convention.

ii. Impact of the COCA Convention on Enforcement of Choice of Court Agreements in Foreign Countries

If the United States were to ratify the COCA Convention, at least 34%[214] of U.S. international trade would immediately be subject to, and affected by, the treaty. Further, at least 15%[215] of such trade would have some reasonable prospect of being affected. The rest would be unlikely to change in the near future.

Despite only half of these jurisdictions having shown an interest in adopting the COCA Convention, we analyzed the status quo of each.

1. European Union

The European Union is discussed as a single entity, though it is more a bloc, because it ratified the COCA Convention as an aggregate political entity, thereby binding all its Member States. If the United States ratifies the COCA Convention, it will govern US-EU disputes arising within its scope, no matter which EU Member State is involved in the analysis of the choice of court agreement.

Given that EU Member States have found that the deprivation of the Mandatory Rules as defined in Article 9(1) of the Rome I Regulation should invalidate a U.S. choice of court agreement in favor of retaining exclusive jurisdiction for itself, the regime imposed by the COCA Convention appears to be a deviation from the status quo. Indeed, a uniform rule for recognition and enforcement which excludes application of the Mandatory Rules, would be a deviation from the status quo, as EU courts could no longer invalidate choice of court agreements on this basis.

2. China

In 2017, China signed the COCA Convention, but has yet to ratify or implement the treaty into existing law. Thus, China's ratification of the COCA Convention is expected, and its status quo would be affected by such a ratification. Potentially in response to its signing of the COCA Convention, or perhaps in response to what is becoming more of an internationally standard approach to forum selection clauses, Chinese courts have been trending towards alignment with the COCA Convention even without formal ratification.

The United States' ratification of the COCA Convention would have a material impact on the status quo of forum selection clauses in China as it would guarantee a standard approach to U.S.

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[214] This figure reflects trade with EU, Mexico and the UK as detailed in the table in Section III(A)(ii).

[215] This figure reflects trade with China that would have some reasonable prospect of being effected as detailed in detailed in the table in Section III(A)(ii).

choice of court agreements and avoid application of unfavorable frameworks, such as the existing presumption of non-exclusivity under Chinese law.

3. Mexico

Mexico is a signatory to the COCA Convention and has fully ratified the treaty. Because Mexican courts were already honoring choice of court agreements, the effect of its adoption of the COCA Convention appears minimal.

4. Canada, Japan, and South Korea

Neither Canada, Japan, nor South Korea has signed the COCA Convention or announced any intention to do so. Consequently, the status quo prevailing in those countries with respect to the treatment of choice of court agreements, as set out in Section 3 above, would not be affected by U.S. implementation of the COCA Convention.

5. United Kingdom

The United Kingdom was bound by the European Union's ratification of the COCA Convention while it was a member of the EU. Upon withdrawal, it accepted the COCA Convention in its own right. If the United States ratifies the COCA Convention, it will govern U.S.-UK disputes arising within its scope.

Because employment agreements are exempt from the COCA Convention, in any event, U.S. ratification of the COCA Convention would not affect this carve-out for choice of court clauses in the context of employment agreements. Thus, the status quo regime in the United Kingdom is reasonably favorable to the enforcement of exclusive choice of court agreements and the change resulting from U.S. ratification of the COCA Convention would continue to be positive, even if the effect is small.

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Ratification of the COCA Convention would thus have mixed results within the largest bloc of U.S. trading partners. As the EU has already ratified, there would be an increase in the enforcement of choice of court agreements. In at least three of the jurisdictions, Canada, Japan and South Korea, there would be no effect on the existing enforcement of U.S. choice of court agreements because those countries are not expected to adopt the COCA Convention. Mexico already honors U.S. choice of court agreements, so its ratification of the COCA Convention is also not likely to alter the status quo. Were China to ratify the COCA Convention, that would have a positive effect on U.S. commercial interests. In other jurisdictions beyond the countries surveyed here, the status quo would be improved by the widespread adoption of the COCA Convention with respect to the enforcement of exclusive choice of court agreements.

iii. Impact of the COCA and Judgments Conventions on U.S. Enforcement of Foreign Judgments

Apart from the establishment of reciprocity, adoption and implementation of the COCA Convention and the Judgments Convention would have minor practical impact on the overall U.S. system for recognition and enforcement of foreign-country judgments. These two Conventions, however, would make some changes in existing law that could affect the outcome in a relatively small number of cases.

1. *Impact on Recognition and Enforceability Generally*

The first thing to note in this regard is the significant limitations on the types of judgments covered by the COCA and Judgments Conventions. By their terms, both Conventions apply only to judgments in civil or commercial matters issued by the court of a Contracting State in "international" cases.[216] Both Conventions also exclude from their coverage a long list of judgments, including, among others, judgments relating to: arbitration and related procedures; family law matters; employment; insolvency and related matters; intellectual property;[217] various maritime matters; and antitrust (competition) matters.[218] The COCA Convention further excludes from its coverage consumer agreements, various tort claims, and claims for personal injury.[219] The Judgments Convention excludes from its coverage judgments relating to armed forces and enforcement activities, defamation, privacy, and sovereign debt restructuring through unilateral measures.[220] Of particular significance (and discussed below), the Judgments Convention also explicitly "carves out" and does not cover judgments arising from cases where the sole jurisdictional connection between the case and the court rendering the judgment is "an exclusive choice of court agreement" although nothing would stop a Contracting State from extending the benefit to judgments not covered by the Judgments Convention.[221]

The Judgments Convention's exclusion of defamation judgments would not change the status quo in the United States, as such foreign judgments are already regulated by the 2010 Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), which, without compelling recognition or enforcement in any case, makes foreign libel judgments unenforceable in U.S. courts unless either the foreign law applied offers at least as much protection as the First Amendment to the U.S. Constitution or the defendant would have been found liable if the case had been heard under U.S. law.[222]

As a result of these limitations and exclusions, neither the COCA Convention nor the Judgments Conventions would even apply to, and therefore cannot affect, recognition of many foreign-country judgments that come before courts in the United States, including judgments

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[216] COCA Convention, *supra*, Art. 1(1); Judgments Convention, *supra*, Art. 1(1).

[217] The COCA Convention does apply to judgments for copyright and related matters. COCA Convention, *supra*, Art. 2(2)(n).

[218] COCA Convention, *supra*, Art. 2(2)(g), (h); Judgments Convention, *supra*, Art. 2(1)(g), (p).

[219] COCA Convention, *supra*, Arts. 2(2)(j), (k).

[220] Judgments Convention, *supra*, Arts. 2(1)(n), (o), (k), (l),(q).

[221] *Id.* at Art. 5(1)(m).

[222] 28 U.S.C. § 4102. New York law similarly prohibits recognition and enforcement of foreign defamation judgments unless the applicable foreign law provided at least as much protection of freedom of speech as provided under the U.S. and New York Constitutions. CPLR § 5304(b)(9).

originating from non-Contracting States (currently the vast majority of countries), non-covered judgments from Contracting States, and all non-"international" foreign country judgments. Such foreign-country judgments outside the ambit of either Convention would continue to be subject to the same patchwork of statutory and common law enactments and procedures for recognition and enforcement in the United States as they are today.

Moreover, Judgments Convention Article 15 expressly provides that the Convention "does not prevent the recognition or enforcement of judgments under national law."[223] The Judgments Convention thus creates "a floor . . . and not a ceiling" for purposes of judgment recognition and would leave U.S. courts free to continue to recognize and enforce judgments from a Contracting State under existing law and without reliance on the Judgments Convention's rules.[224]

The rules for recognition and enforcement of foreign judgments under both the COCA Convention and Judgments Convention are similar to those of the Uniform Acts. Both Conventions provide that a judgment shall be recognized and enforced without review of the merits of the judgment and may only be refused on specified grounds.[225]

The Judgments Convention's thirteen "[b]ases for recognition and enforcement" create "filters" to identify foreign court judgments that were rendered by a court with a jurisdictional nexus between the issuing court and the judgment debtor or the property at issue that generally comports with traditional U.S. requirements for personal or *in rem* jurisdiction.[226]

One area in which the COCA Convention and Judgments Convention may expand the scope of recognizable and enforceable judgments is foreign judgments for non-monetary relief, such as specific performance or an injunction, which currently are outside the scope of the Uniform Acts and enforceable in the United States as a matter of international comity rather than by statute.[227] These Conventions do not exclude non-monetary judgments from their mandate that all judgments subject to the Conventions shall be recognized and enforced unless a specified exception applies. One commentator, writing about the COCA Convention, has suggested that U.S. courts could avoid conflict with domestic law as to the enforceability of non-monetary relief by determining that the "public policy" exception to enforcement[228] applies, or that the COCA Convention is not intended to require a Contracting State to grant non-monetary relief that is not available under its law.[229]

The adoption and implementation of the COCA Convention and Judgments Convention should not result in the use of U.S. judgments to extend the recognition and enforceability of judgments from non-Contracting States in Contracting States. Whereas some U.S. courts have

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223 Judgments Convention, *supra,* Art. 15. The COCA Convention does not contain a comparable provision.

224 Ronald A. Brand, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?,* 82(4) Univ. of Pittsburgh L. Rev. 847, 864 (Sept. 24, 2021).

225 COCA Convention, *supra,* Art. 8(1), (2); Judgments Convention, *supra,* Arts. 4(1), (2).

226 Judgments Convention, *supra,* Art. 5.

227 *See* Restatement (Third) of Foreign Relations Law § 484 (1987).

228 COCA Convention, *supra,* Art. 9(e); Judgments Convention, *supra,* Art. 7.1(c).

229 Heiser, *supra,* at 1047.

recognized a "judgment on a judgment" or a "judgment on an arbitral award,"[230] the COCA Convention and Judgments Convention define a "judgment" as a "decision on the merits,"[231] and therefore should preclude the possibility that another Contracting State is required to recognize and enforce a merits judgment of a non-Contracting State via an application to recognize a U.S. court judgment on such judgment.

Of course, the major change in U.S. practice effectuated by adoption and implementation of the COCA Convention and Judgments Convention—and the major reason for their adoption and implementation—would be to establish reciprocal recognition of foreign judgments that are subject to the Conventions. Currently, only seven U.S. States condition recognition and enforcement of foreign-country judgments on the originating country reciprocally being willing to enforce a U.S. court judgment.[232] Courts in these States will not recognize a foreign-country judgment unless the foreign country would recognize a similar judgment issued by the State's courts. By establishing reciprocal recognition of all judgments subject to the COCA and Judgments Conventions, these Conventions would impose reciprocity in all U.S. jurisdictions and render existing reciprocity statutes satisfied with respect to judgments of Contracting States covered by the Conventions.

2. *Impact on Grounds for Non-Recognition of Foreign Judgments*

A notable difference between current U.S. law and the COCA Convention and Judgments Convention is that the two Conventions do not provide for mandatory exceptions to recognition. The Uniform Acts mandate non-recognition of a foreign money judgment where "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or the foreign court lacked personal or subject matter jurisdiction.[233] In contrast, the COCA Convention and Judgments Convention (like the New York Convention) permit, but do not require, non-recognition on the grounds that recognition or enforcement would be "manifestly incompatible with the public policy of the requested State," including cases where "the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness."[234] And neither the COCA Convention nor the Judgments Convention makes the foreign court's lack of personal or subject matter jurisdiction a mandatory ground for non-recognition.

Although the COCA Convention and Judgments Convention would thus deprive U.S. courts of an express statutory power to deny recognition and enforcement of a foreign-country judgment, all the jurisdictional filters in the Judgments Conventions as well as the consent to a chosen court under the COCA Convention are consistent with the requirements of U.S. law with respect to personal jurisdiction. The COCA Convention applies only to judgments where the parties have

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[230] *See Commissions Import Export S.A. v. Republic of Congo*, 757 F.3d 321 (D.C. Cir. 2014); *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. NavimpexCentrala Navala*, 29 F.3d 79 (2d Cir. 1994).

[231] COCA Convention, *supra*, Art. 4(1); Judgments Convention, *supra*, Art. 1(b).

[232] These states are Arizona (A.R.S. § 12-3252(B)(2)), Florida (§ 55.605(2)(g), Fla. Stat.), Maine (14 M.R.S.A. § 8505(2)(G)), Massachusetts (M.G.L. c.235, § 23A), Ohio (Ohio R.C. 2329.92(B)), and Texas (TEX. CIV. PRAC. & REM. CODE ANNF. § 36A.004(C)(9)).

[233] Uniform Act § 4(b)(1)-(3).

[234] COCA Convention, *supra*, Art. 9(e); Judgments Convention, *supra*, Art. 7.1(c).

consented to the foreign court's jurisdiction by written agreement.[235] Similarly, the Judgments Convention applies only to judgments issued in cases where at least one of the enumerated jurisdictional connections with the State of origin is present.[236] Each of these "jurisdictional filters" listed in Article 5 of the Judgments Convention corresponds to a traditional basis for the exercise of general personal, long-arm, or *in rem* jurisdiction as recognized in almost every U.S. forum,[237] and requiring a showing that the issuing court possessed at least one such jurisdictional filter will ensure that the rendering court had *in personam* and subject matter jurisdiction under the law of the State of origin.[238] Further, the United States still adopts a policy of mandatory non-recognition if the jurisdictional basis relied upon by the foreign court does not meet U.S. due process standards for exercising jurisdiction.[239] Thus, the COCA Convention and Judgments Convention will not require enforcement of judgments that would otherwise be unenforceable in the United States today.

Under the Uniform Acts, the Third Restatement, and the Fourth Restatement, a party may oppose recognition of a foreign country judgment on grounds of lack of court integrity or due process.[240] U.S. courts have rarely denied recognition based solely on systemic deficiencies of a foreign country's courts, although such cases have occurred.[241] On the whole, however, "US courts have rightly understood that the case-specific grounds available under the Uniform Acts give them sufficient tools to police foreign judgments without having to condemn a foreign country's entire

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[235] COCA Convention, *supra*, Art. 3.

[236] Judgments Convention, *supra*, Art. 5.

[237] It should be noted that one traditional basis for the exercise of jurisdiction in U.S. courts—the place of injury combined with purposeful conduct that causes such injury—is not included among Article 5's "jurisdictional filters." A foreign judgment issued in a case that met that jurisdictional test could nevertheless still qualify for recognition in a U.S. court under the Judgment Convention's Article 15, which permits recognition of judgments under otherwise applicable national law.

[238] In addition, both the COCA Convention and Judgments Convention would permit the United States to further limit their application to some small degree by declaring that its courts will not recognize or enforce a judgment otherwise covered by the Conventions if all parties were residents of the U.S. and "all other elements relevant to the dispute," other than the location of the court of origin (or the chosen court in the case of a choice of court agreement), "were connected only" with the U.S. COCA Convention, *supra*, Art. 20; Judgments Convention, *supra*, Art. 17.

[239] It is a fundamental precept of U.S. law that a court cannot enforce a judgment where the rendering court lacked personal jurisdiction. Even a sister state judgment otherwise entitled to "full faith and credit" will not be enforced under circumstances where the defendant defaulted and contests enforcement in another state on the grounds the rendering court lacked personal jurisdiction over her.

[240] *See supra* at Section III(A)(iii)(3) (providing a mandatory ground for non-recognition that the "judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process").

[241] *See, e.g.*, *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (Liberian judgment would not be enforced because Liberia's judicial system collapsed during civil war); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (Iranian default judgments against sister of former Shah of Iran would not be enforced where defendant showed courts of Iran would not provide her with due process); *Shanghai Yongrun Inv. Mgt. Co. v. Kashi Galaxy Venture Cap. Co.*, No. 156328/2020, 2021 WL 1716424 (N.Y. Sup. Ct. April 30, 2021) (court denied enforcement of Chinese judgment based on evidence that corruption often influenced Chinese court decisions), *rev'd* 2022 NY Slip Op. 01523 (1st Dep't, March 10, 2022) (allegations that defendants "had an opportunity to be heard, were represented by counsel, and had a right to appeal . . . sufficiently pleaded that the basic requisites of due process were met"); *Mulugeta v. Ademachew*, 407 F. Supp. 3d 569, 583 (E.D. Va. 2019) (finding that there was sufficient evidence that the judgments contained inconsistencies and conclusory findings and that the defendant had substantial political sway in Ethiopia).

judicial system."[242] The COCA Convention and Judgments Conventions do not include systemic lack of court integrity and due process as a specified grounds for non-recognition, but both treaties include violation of domestic (U.S.) public policy exception as grounds for a U.S. court to deny recognition.[243] Moreover, the Judgments Convention (but not the COCA Convention) also permits the United States to avoid having to recognize and enforce judgments of a corrupt judicial system of another signatory State by means of a declaration issued within 12 months of the other signatory State's ratification that U.S. ratification of the Judgments Convention does not establish relations with such other State with respect to the Judgments Convention.[244]

The Uniform Acts' discretionary grounds for non-recognition are, with three exceptions, consistent with those of the COCA Convention and Judgments Convention.

First, while neither convention recognizes inconvenience of the forum as a grounds for non-recognition,[245] both Uniform Acts provide that a foreign judgment need not be recognized where "jurisdiction [is] based only on personal service [and] the foreign court was a seriously inconvenient forum for the trial of the action."[246] On the other hand, this issue is irrelevant under the COCA Convention as jurisdiction would be predicated on the defendant's choice of the foreign court and not "only on personal service." Similarly, "personal service" alone cannot be the sole contact with the foreign jurisdiction under the jurisdictional filters recognized by the Judgments Convention.[247]

Second, the language of the 1962 Act's public policy exception (but not that of the 2005 Act) is somewhat narrower than that of the COCA Convention and Judgments Convention.[248]

Third, both the COCA Convention and Judgments Convention, unlike the Uniform Acts, expressly give a court discretion to refuse recognition or enforcement to the extent that a judgment

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[242] William S. Dodge, *Decision Denying Enforcement of Chinese Judgment Threatens Reciprocity*, N.Y. L. J. (June 17, 2021).

[243] COCA Convention, *supra*, Art. 9; Judgments Convention, *supra*, Art. 7.

[244] Judgments Convention, *supra*, Arts. 29 (2)-(3).

[245] As noted, Article 19 of the COCA Convention does not require a finding of inconvenience, but it does restrict the applicability of the COCA Convention where parties have no relationship to the forum other than the choice of court. However, the reservation under Article 19 is not a complete proxy for convenience or inconvenience.

[246] *See* 2005 Act, *supra*, § 4(c)(6); 1962 Act, *supra*, § 4(b)(6).

[247] *See* Judgments Convention, *supra*, Art. 5.

[248] *Compare* 1962 Act, *supra*, § 4(b)(6) ("the [cause of action] [claim of relief] on which the judgment is based is repugnant to the public policy of this state") *with* COCA Convention, *supra*, Art. 9(e) ("recognition or enforcement would be manifestly incompatible with public policy of the requested State, including situations with the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.") *and* Judgments Convention, *supra*, Art. 7(1)(c) ("recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State."). Consistent with the COCA Convention and Judgments Convention, the 2005 Act permits non-recognition where "the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or the United States" or where "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." 2005 Act, *supra*, §§ 4 (c) (3), (8).

"awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered."[249]

3. Impact on Recognition and Enforcement of Arbitral Awards

Adoption and implementation of the Judgments Convention should not result in any change to current procedures for the recognition and enforcement of foreign-country arbitral awards. As noted, the Judgments Convention does not apply to arbitration and related proceedings.[250] Foreign-country arbitral awards and foreign-country judgments confirming arbitral awards are outside the scope of the two Conventions, and therefore implementation of the Judgments Convention should not impact the law and procedures by which such awards and judgments are recognized and enforced in the U.S.[251] In particular, the Judgments Convention should not change the doctrine of "parallel entitlements" by which a party holding an arbitral award issued in a foreign country can choose to seek U.S. recognition and enforcement directly under the FAA (if the award is subject to the New York or Panama Conventions for the recognition and enforcement of foreign arbitral awards)[252] or 22 U.S.C. § 1650a (if the award is an International Centre for Settlement of Investment Disputes Convention award),[253] or first confirm the award via a foreign-country court judgment (either at the seat or in a secondary jurisdiction) and then bring that judgment to a court in the United States for recognition and enforcement under applicable state law.[254]

iv. Impact of Adoption of the COCA Convention and the Judgments Convention Abroad

The COCA Convention and Judgments Convention avoid historically objectionable aspects of U.S. jurisprudence by omitting tag jurisdiction from the exhaustive list of "jurisdictional filters" and by authorizing courts to decline to enforce awards of non-compensatory compensation such as exemplary and punitive damages.

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249 COCA Convention, *supra*, Art. 11(1); Judgments Convention, *supra*, Art. 10.

250 COCA Convention, *supra*, Art. 2(4); Judgments Convention, *supra*, Art. 2(3).

251 Similarly, adoption and implementation of the COCA and Judgments Conventions should not change current practice with respect to enforcement of U.S. arbitration awards in the courts of foreign Contracting States. Thus, the holder of a U.S. arbitration award should not be able to enhance or extend the enforceability of the award by converting it to a U.S. judgment and then seeking enforcement of the U.S. judgment in the courts of a Contracting State under the auspices of the Conventions because these Conventions do not apply to proceedings related to arbitration.

252 *See* 9 U.S.C. §§ 202, 302.

253 *See* 22 U.S.C. § 1650a.

254 *See, e.g.*, *Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014) (foreign court judgment confirming arbitral award is distinct from arbitration award itself and will be subject to state law for foreign-country judgment recognition); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79, 81-83 (2d Cir.1994) (permitting the enforcement under the New York Uniform Foreign Money–Judgments Recognition Act of a judgment of the Paris Court of Appeals granting exequatur to arbitral award where the period for seeking confirmation of the award under the FAA Chapter 2 had passed).

Creation of treaty relations between a Contracting State and the United States would mean eligible U.S. court judgments would be predictably and efficiently recognized to a far greater degree and on par with the judgments of other treaty countries.

v. Impact of the Singapore Convention on the Enforcement of Mediated Settlement Agreements

1. Impact on the Enforcement of Mediated Settlement Agreements Generally

As detailed in Section IV of this report, at the present time, there are varying approaches to enforcing MSAs in the United States and abroad. As pointed out by a number of commentators, unless or until the Singapore Convention is adopted, enforcing an MSA requires a separate court proceeding or arbitration when one party reneges.[255] Consequently, a new dispute has to be initiated after having presumably resolved the underlying matter resulting in increased costs and time before there is closure. Such procedures are very time consuming and could have negative consequences when time is of the essence (*e.g.*, contracts involving the distribution of perishable products or technology components).

Parties to the Singapore Convention in accordance with Article 3[256] agreed to:

- "Enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention" (Art. 3.1); and

- "Allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved" (Art. 3.2).

Consequently, were the United States to ratify the Singapore Convention, a party to an international MSA falling within the criteria set forth in the Convention could enforce this agreement in a court or other competent authority without further proceedings. As a treaty obligation that would preempt state common law, enforcement of MSAs would presumably be expedited as required by Article 4.5 of the Singapore Convention. MSAs entered into by parties that are not residents of an adopting country or executed in a country that has not adopted the Singapore Convention would still be eligible to be enforced in an adopting county. Therefore, once the Singapore Convention has been ratified in the United States, MSAs executed outside the United States and/or by parties that are residents in non-adopting countries could be enforced in the United States under the Singapore Convention. Similarly, adoption of the Singapore Convention by other States would allow U.S. nationals to enforce MSAs in those States under the Singapore Convention. Additionally, an MSA falling within the scope of the Singapore Convention could be invoked as a

[255] *See, e.g.*, Robert Butlien, *The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation*, 46 Brook. J. Int'l Law 183, 185-187 (2019); *see generally* Schnabel, *supra*.

[256] *See* Singapore Convention, *supra*, Art. 3.

defense to further litigation or arbitration of the underlying matter. As a result, the Singapore Convention is expected to reduce such unnecessary cases.[257]

In assessing the impact of the Singapore Convention, it must be noted that there are significant limitations on the type of settlement agreements covered by the Singapore Convention. Under Article 1, the Singapore Convention only applies to settlement agreements that (1) result from mediation, (2) resolve commercial disputes, and (3) are international. It does not apply to settlement agreements that were not mediated, are not commercial or are domestic rather than international. The settlement agreement must be in writing and observe certain other (though minimal) formalities. Certain categories of disputes are excluded: personal or consumer transactions for personal, family or household purposes; family law matters; inheritance law matters; and employment law matters. The Singapore Convention also explicitly excludes settlement agreements (1) approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment in the state of that court; and (2) recorded and enforceable as an arbitral award.[258] Thus, a considerable percentage of settlement agreements overall will not be affected by the Singapore Convention.

There are additional limitations of the Singapore Convention. It only addresses the enforcement of MSAs and does not provide for enforcement of agreements to mediate.[259] Nor does the Singapore Convention address the confidentiality of mediation. Both enforcement of agreements to mediate and the confidentiality of mediation proceedings are left to domestic law.

The Singapore Convention will provide clarity and uniformity to the process of enforcing MSAs covered by the Singapore Convention where now there are significant variations from State to State. The requirements for a party seeking to enforce an MSA are set forth in Article 4. The grounds for refusing enforcement are limited to those set forth in Article 5. Adoption of the Convention is likely to yield benefits in streamlined procedures and certainty.

The Singapore Convention, if widely adopted, is likely to achieve its broader purpose of giving greater stature to mediation in the international business and legal communities. It will put MSAs on a more equal footing with arbitral awards, and do for mediation what the New York Convention did for arbitration. However, it must be noted that the Singapore Convention does not provide for the enforcement of agreements to mediate, and in this respect differs from the New

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[257] *See* Gibson Dunn, *The Singapore Convention on Mediation: New Kid on the Dispute Resolution Block Now in Force*, Gibson Dunn (Oct. 16, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/10/singapore-convention-on-mediation-new-kid-on-dispute-resolution-block-now-in-force.pdf; Gibson Dunn, *The Singapore Convention on Mediation and the Path Ahead*, Gibson Dunn (Aug. 22, 2019), https://www.gibsondunn.com/singapore-convention-on-mediation-and-the-path-ahead/.

[258] In this respect, the scope of the Singapore Convention does not overlap with the COCA Convention, Judgments Convention, or New York Convention.

[259] The Working Group that drafted the Singapore Convention considered and abandoned at an early stage provisions for the enforcement of mediation agreements (as opposed to mediated settlement agreements). A principal reason appeared to be that the concept of enforcing agreements to mediate was that "the scope of issues dealt with in a mediation process is not limited by the terms of a mediation clause that triggers it . . . [and] requiring parties to engage in a collaborative process (mediation) . . . remains controversial in certain jurisdictions." Nadja Alexander & Shou Yu Chong, *An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore*, Nederlands-Vlaams tijdschrift voor Mediation en conflict management, 4 Research Collection Sch. of L., 37, 38, 52 (2018).

York Convention which provides for the enforcement of agreements to arbitrate. This may prevent mediation from fully achieving the stature of arbitration in resolving international disputes.

2. *Impact on Enforcement of MSAs in the United States*

As noted above, adoption of the Singapore Convention will mean that a party may enforce an MSA falling within the criteria set forth in the Singapore Convention in a court or other competent authority in more streamlined proceedings. The Singapore Convention limits the formalities that may be required for an MSA to be recognized. Domestic law may not place any further requirements beyond what Article 4 requires. A party resisting enforcement will have limited grounds on which to oppose enforcement, and domestic law may not expand or narrow the grounds enumerated in Article 5. This regime is not a radical departure from what exists in the U.S. today. Most States permit a party desiring to enforce a settlement agreement to bring an action in court to enforce the settlement agreement as a contract without having to prove the merits of its claim in the dispute purportedly resolved by the settlement agreement. Most states also permit a party resisting enforcement a limited range of defenses based on contract law (lack of consideration, fraud or deception, duress or coercion, mistake, lack of competence or capacity, lack of authority). While the Singapore Convention does not list specifically such contract-based defenses as grounds for refusing enforcement, it does allow a court to refuse enforcement (i) if a party is under some incapacity, (ii) if the MSA is "null and avoid, inoperative or incapable of being performed" under the law chosen by the parties to govern the MSA or, failing such a choice of governing law, under the law deemed applicable by the court where relief is sought, which should cover the most serious contract-based defenses such as fraud, deception, duress, and coercion, or (iii) if enforcing the MSA would be contrary to the public policy of the State where enforcement is sought. The main benefits of the Singapore Convention are clarity and uniformity, streamlined procedures, and more certainty. Because the Singapore Convention applies only to settlement agreements that are mediated, international and commercial, most domestic mediations and most domestic law on mediation will not be affected.

It is important to note, however, that the specific procedures governing the process of enforcement, including what is required procedurally in specific jurisdictions (federal or state courts) would still be governed by the rules of the competent authority within the state as they are today. This is the case under both the Singapore Convention and the Model Law, as long as the local procedures of the competent authority do not contradict or undermine the substantive provisions of the Singapore Convention.

A potentially controversial aspect of the Singapore Convention is that it could make international MSAs easier to enforce than domestic MSAs, and mediated settlement agreements easier to enforce than unmediated settlement agreements. However, the Singapore Convention does not prevent a Contracting Party from enacting laws or entering into other treaties that give domestic or unmediated settlements the same treatment granted to MSAs by the Singapore Convention. This could be addressed though the implementing instrument or other legislation by extending the same benefits to domestic MSAs or unmediated settlement agreements.

3. Impact on the Enforcement of MSAs Abroad

The Singapore Convention is expected to provide more clarity and uniformity in enforcing international commercial MSAs abroad by U.S. nationals. For the Singapore Convention to be successful and to benefit the interests of U.S. nationals, there will need to be widespread ratification, acceptance, approval, or accession.

The Singapore Convention currently has 56 signatories.[260] Twelve States have ratified the Convention: Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey, and Uruguay. And of these States, Belarus, Japan, Kazakhstan, and Saudi Arabia have opted for the Article 8(a) reservation which permits states to declare that the Singapore Convention "shall not apply . . . to settlement agreements to which [the State] is a party, or to which any [of its] governmental agencies or any persons acting on behalf of a governmental agency is a party, to the extent specified in the declaration."[261]

However, many of the world's major players—including the European Union and the United Kingdom—have not signed, let alone ratified, the Singapore Convention.

a. The European Union

The European Union is not a signatory to the Singapore Convention and made clear during the UNCITRAL Working Group sessions that it had serious doubts about the project. From the start, the European Union took the position that there was no need for a convention on mediation and thought that it was "unrealistic" to create a harmonized approach to enforcing mediated agreements.[262]

Once the UNCITRAL Working Group began discussing the Singapore Convention's terms, the EU argued that the Singapore Convention should be limited to MSAs involving monetary compensation; however, the UNCITRAL Working Group rejected the EU's proposal.[263] While the drafters acknowledged that "non-monetary relief might present complicated issues to a court applying the Convention," they considered that these risks are also present under awards enforced under the New York Convention.[264] The drafters also considered that this limitation would "dramatically undermine the benefits of mediation."[265]

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[260] The signatories include: Afghanistan, Armenia, Austria, Belarus, Benin, Brazil, Brunei Darussalam, Chad, Chile, China, Colombia, Congo, Democratic Republic of the Congo, Ecuador, Eswatini, Fiji, Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Lao People's Democratic Republic, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, Republic of Korea, Rwanda, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor-Leste, Turkey, Uganda, Ukraine, United States of America, Uruguay, and Venezuela. *See* United Nations Convention on International Settlement Agreements Resulting from Mediation, Sept. 12, 2012, No. 56376 ("Settlement Convention").

[261] Singapore Convention, *supra*, Art. 8(a). *See generally* Settlement Convention (one State that has signed but not ratified the Convention, Iran, opted for both permissible reservations upon signing).

[262] Schnabel, *supra*, at 5-6.

[263] *Id.* at 11-12.

[264] *Id.* at 1, 12.

[265] *Id.*

The EU also proposed that the Singapore Convention only apply if the mediation followed a "structured" process[266] and wanted a mediated agreement to only be enforceable if reduced to a single document.[267] Again, the UNCITRAL Working Group rejected both of the EU's proposals. The UNCITRAL Working Group considered that it was not possible to determine precisely what a "structured" process would be, and so it did not include any such requirement in the Singapore Convention.[268] Similarly, the UNCITRAL Working Group rejected the proposal that the mediated settlement had to be contained in one document, instead adopting the approach that a mediated settlement must simply be in writing.[269]

The Singapore Convention did not, however, reject all EU proposals. Critically, Article 12(4) of the Singapore Convention permits international rules applied by regional economic integration organizations ("REIO"), such as the EU, to supersede the Singapore Convention in limited situations. Specifically, the REIO rules would prevail if the relief is sought in a Member State of the REIO and no non-REIO State is involved in the mediated agreement. Even where a non-REIO State is involved, the Convention provides for additional protections for an REIO's internal rules about recognition and enforcement of judgments between Member States in the event that they conflict with the Singapore Convention. As a result, Article 12(4) provides the European Union and its member states with an added assurance that the Singapore Convention could not be applied in the EU to enforce a mediated settlement between EU Member States that would conflict with EU law.

At present, the European Union appears to still be considering whether to sign the Singapore Convention. The European Parliament, the European Council, and EU Member States have also yet to voice their opinion on the matter.

b. The United Kingdom

The United Kingdom is also not currently a signatory to the Singapore Convention. However, the UK has not been as vocal in opposing the Singapore Convention.

The UK did conduct a "closed consultation" exercise to analyze the Singapore Convention, but the results of that exercise are not public. Following the closed consultation, in May 2020 a draft statutory instrument to implement the Singapore Convention in England and Wales was prepared.[270]

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266 *Id.* at 15-16.

267 *Id.* at 28-29.

268 *Id.* at 16.

269 Singapore Convention, *supra*, Art. 1(1); *see also* Schnabel, *supra*, at 28.

270 The United Nations Convention on International Settlement Agreements Resulting from Mediation (England and Wales) Regulations 2020, Draft Statutory Instruments, 2020.

The UK also issued a Policy Statement regarding the Private International Law consequences of various instruments, including the Singapore Convention.[271] The Policy Statement reiterates that "[t]he government has not taken a formal decision yet on whether the UK should join this convention" and simply provides that "further consideration is required including necessary engagement with the sector."[272]

The House of Commons then debated the Policy Statement in September 2020. During this debate, certain members of Parliament's statements suggest that they may be in favor of the Singapore Convention. For example, Mr. John Howell raised the issue of the Singapore Convention and explained that "[a]ll it does is bring mediation settlements under UK law in the same way that arbitration settlements are included within the New York convention."[273] Mr. John Howell then went on to explain that the Singapore Convention "is a treaty that [the UK has] been waiting to sign since it was first talked about in 2018" and that "[i]t is *absolutely unconscionable* that it has not been signed, ratified and brought into UK law in a much shorter period."[274] He explained that without ratifying the Singapore Convention, the UK was being "left out" of the mediation community, and argued that ratifying the Convention is necessary for the UK to maintain its position "as the centre of mediation in the world."[275]

Evidence suggests that the UK does not inherently oppose the Singapore Convention. Instead, it seems plausible that the UK's delay in ratifying the Singapore Convention is in part because, until its withdrawal from the European Union concluded, many mediated settlements in the UK could be recognized and enforced across the European Union under the EU Mediation Directive. Alternatively, the UK may simply not wish to be a "first mover" among western nations to ratify the Singapore Convention.

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The country-to-country differences in enforcement procedures are substantially greater than state-to-state differences in the United States. Thus, achieving uniformity in the international enforcement of MSAs provides potentially greater benefits to U.S. nationals seeking enforcement abroad than to foreign interests seeking enforcement in the United States. In addition, easier and more efficient enforcement will bring savings in time and costs. Greater clarity and certainty of enforcement will enhance the confidence parties will have in choosing mediation to resolve their disputes. Nevertheless, local procedures and formalities required by competent authorities within States are likely to remain because they are permitted by the Singapore Convention as long as they do not conflict with the substantive provisions of the Singapore Convention.

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[271] Policy Statement, Private International Law (Implementation of Agreements) Bill.

[272] *Id.*

[273] Robert Buckland, Priv. Int'l L. (Implementation of Agreements) Bill [Lords]. Vol.679: debated on Wednesday 2 September 2020, https://hansard.parliament.uk/commons/2020-09-02/debates/FB161092-BD00-4BF6-8362-F71A764CA6BF/PrivateInternationalLaw(ImplementationOfAgreements)Bill(Lords)#main-content.

[274] *Id.* (emphasis added).

[275] *Id.*

IV. Recommendations

As noted in the Executive Summary, the Working Group adopted certain criteria for formulating its recommendation as to whether the United States should pursue adoption and ratification of the Three Treaties. As to the COCA Convention and the Judgments Convention, the Working Group considered whether, on balance, adoption and ratification would benefit U.S. parties in terms of facilitation of agreements to litigate in a particular court, and of the recognition and enforcement of judgments, without resulting in the undesirable consequence of facilitating the recognition of either categories of or particular foreign judgments that would not, and should not otherwise, be enforceable in the United States. As to the Singapore Convention, we applied similar criteria, namely, whether U.S. adoption and ratification would provide benefits in resolving cross-border disputes by providing a uniform framework or result in adverse consequences.

Our recommendations are not based on the current list of Contracting States as many treaties start with a small number of signatories, only to increase over the years. Rather, we address changes to the status quo based on which countries have already indicated an intent to join.

As stated in the Executive Summary, the Working Group's recommendation with respect to each of the Three Treaties is as follows:

- COCA Convention: A majority of the Working Group recommends the adoption and ratification of the COCA Convention.

- Judgments Convention: A majority of the Working Group recommends the adoption and ratification of the Judgments Convention.

- Singapore Convention: The Working Group unanimously recommends the adoption and ratification of the Singapore Convention.

As further discussed below, the Working Group recommends that any of the Three Treaties that the United States elects to adopt and ratify be implemented through stand-alone federal law, and in the case of the COCA Convention and Judgments Convention, federal statutes that are coordinated and complementary.

A. The COCA Convention and the Judgments Convention

i. Benefits

1. Benefits of Enforcing Choice of Court Agreements

As noted above, the COCA Convention is unique among the Three Treaties in also promulgating rules as to the exercise of jurisdiction to hear and resolve a particular category of disputes—those arising from or related to contracts containing exclusive choice of court agreements. Accordingly, we first consider the benefits to the United States of Chapter II of the COCA Convention dealing with the exercise of jurisdiction by the chosen court and the restrictions placed on all other courts.

Under Articles 5-7, subject to limited enumerated exceptions, a court that has been designated as the sole court pursuant to a choice of court agreement has jurisdiction to decide a dispute, and any court of a Contracting State other than the chosen court is required to suspend or dismiss the proceeding to which an exclusive choice of court agreement applies.[276] By affording such jurisdictional certainty to Contracting States with respect to choice of court agreements, parties can expect to save considerable time and expense on jurisdictional disputes, which advances judicial economy and decreases the risk of unnecessary parallel proceedings. Moreover, parties benefit from the certainty associated with knowing that their agreed-upon exclusive choice of court selection will be honored and enforced by courts in Contracting States, thus enhancing party autonomy.

In 2005, the United States expressed the need for an international convention on choice of forum clauses in order to rely upon properly drafted choice of court clauses and enable enforcing them and the resulting judgments.[277] Generally, the commentary specifically addressing Chapter II of the COCA Convention has been supportive of adoption. Although the implementation of the COCA Convention would arguably conflict with the law in the small number of U.S. states that do not enforce choice of court agreements, the Working Group is not persuaded by the position of one commentator that the COCA Convention "is an unprecedented intrusion on states' rights in the United States."[278] One source raised the concern that Article 5(2), which states that a court that is designated pursuant to 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, subject to the reservation in Article 19,"[279] may "create or perpetuate additional uncertainty as to certain domestic court choices in the United States" because "State" could be interpreted to mean either federal courts or state courts for purposes of venue determinations.[280] The concern, however, is adequately mitigated, in the Working Group's view, by Article 5(3)(b), which provides that the COCA Convention does not affect rules "on the internal allocation among the courts of a Contracting State," *i.e.*, venue determinations, and by Article 5(3)(a) which provides that it does not affect rules concerning subject matter jurisdiction and thus does not create subject matter jurisdiction in a U.S. court where none otherwise exists.

As the 2006 ICDC Report concluded, the United States's adoption of the COCA Convention would:

> significantly enhance the enforceability abroad of choice-of-U.S. court agreements and, even more significantly, U.S. judgments based on such choice-of-U.S. court clauses, which currently is unpredictable at best. The Convention would thus "level the playing field" as between U.S. enforcement of foreign

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[276] *See* COCA Convention, *supra*, Arts. 5-6.

[277] Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Comp. L. 543, 548-49 (2005).

[278] Alexander Kamel, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 Geo. L.J. 1821, 1826 (2014).

[279] COCA Convention, *supra*, Art. 5(2).

[280] Daniel H.R. Laguardia, *et al*., *The Hague Convention on Choice of Court Agreements: A Discussion of Foreign and Domestic Judgments*, 80 U.S.L.W. 1803, 5-6 (2012).

> judgments, which currently are relatively liberally enforced, and foreign enforcement of U.S. judgments, whose enforcement currently is unpredictable.[281]

According to the ICDC Report, "this alone justifies U.S. ratification of the convention, as it would significantly enhance the enforcement of U.S. judgments obtained by U.S. litigants and, in particular, by U.S. businesses engaged in international trade that have obtained U.S. judgments against their foreign counterparties."[282]

The COCA Convention's promotion of greater uniformity in the enforcement of exclusive choice of court agreements is a generally desirable outcome; however, the Working Group has not detected a significant reluctance by other countries to respect choice of court agreements.

2. Benefits of Recognizing and Enforcing Foreign Judgments

In general, it has long been and remains the view of the American bar that the United States would benefit from an international agreement facilitating the recognition and enforcement of U.S. judgments abroad. Writing two decades ago, a committee of the New York City Bar Association concluded its study of the challenges faced by holders of U.S. court money judgments with the determination that "the recognition of [U.S. money judgments] abroad is subject to inconsistent legal regimes and a myriad of substantive, procedural, and practical hurdles," and the recommendation that "a multinational instrument harmonizing the recognition of foreign judgments would mitigate many obstacles to international trade and thus promote its development."[283] As noted above, an international agreement such as the COCA Convention could (1) increase uniformity and predictability in the enforcement of choice of court agreements that does not currently exist in U.S. law; and (2) potentially benefit U.S. litigants of foreign choice of court agreements in increasing the likelihood of said agreements being enforced overseas. However, any foreign court judgment otherwise enforceable under existing U.S. law would still be enforceable whether or not the COCA Convention is adopted here.

As a nonparty to any treaty on recognition and enforcement of foreign judgments, as recounted above, the United States remains at a major disadvantage because it is more hospitable to enforcing foreign judgments than foreign courts enforcing U.S. judgments.

Accordingly, we address the COCA Convention's judgment recognition provisions (Chapter 3) separate from the assessment of the Judgments Convention.

3. COCA Convention Judgment Recognition Provisions

Upon its conclusion, the COCA Convention gained wide support from the intellectual property community, the insurance industry, and the legal profession which has enthusiastically

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[281] Report of the Committee on International Commercial Disputes of the New York City Bar on the Hague Convention on Choice of Court Agreements, September 2006, at 2, 9, https://www.nycbar.org/pdf/report/DOC182.pdf.

[282] *Id.*

[283] Comm. on Foreign & Compar. Law, *supra*, at 410. *See also* Nanda, *supra*, at 775; American Bar Association, *Report 102B*, 1 (American Bar Association August 3-4, 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/102b-annual-2020.pdf (American Bar Association recommending that the United States and all other states adopt the Judgments Convention).

endorsed it, including professional associations such as the American Bar Association, the International Bar Association, the International Law Association, and the American Society of International Law.[284] The ABA's Section of International Law in its August 2006 report observed that the COCA Convention addresses a specific perceived need for facilitating global transactions and providing certainty for U.S. parties and litigants and urged the U.S. government "promptly to sign, ratify and implement the [COCA Convention]."[285] As noted above, the ICDC Report also advocated for the adoption of the COCA Convention when published in 2006.

Although certain organizations and individuals—including the ABA's Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements—remained as of 2016 in favor of the United States' ratification of the COCA Convention,[286] of late, the COCA Convention has been subject to scrutiny from others with respect to various provisions contained in Chapter III on the enforcement of resulting judgments. Certain commentators and practitioners have faulted the COCA Convention for a variety of reasons, which essentially derive from the common concern that the COCA Convention is not sufficiently protective of procedural rights, and therefore could result in requiring U.S. courts to recognize and enforce judgments of a corrupt judicial system or that otherwise do not provide a "full and fair trial" in a legal system that "secure[s] an impartial administration of justice" for foreign parties.[287]

As noted above,[288] the motivating goal of the COCA Convention drafters was to create a treaty to facilitate the adoption and enforcement of exclusive choice of court agreements the way that the New York Convention has indubitably achieved those goals with respect to international arbitration. The reason the COCA Convention drafters looked to international arbitration as an appropriate analogy and, indeed, structured the COCA Convention to parallel, in many key respects, the New York Convention, is the belief that both exclusive choice of court and arbitration agreements reflect the exercise of party autonomy at the time of contracting as to how any future disputes should be resolved, which Contracting States should honor by enforcing the parties' preferred dispute resolution mechanisms. Although both dispute resolution clauses reflect to some degree a joint (*i.e.*, agreed) exercise of party autonomy, the analogy is not perfect.

Under the COCA Convention, the primary "choices" being made under an exclusive choice of court agreement are that disputes be litigated and the selection of the judicial system before which such litigation will take place, with all other issues (the judge, the rules of procedure, the relief available, confidentiality, appellate/review rights, etc.) determined by local law and procedure and usually not subject to party variation. In contrast, all these issues may—and often are—addressed by the parties in the context of their agreement to arbitrate or the institutional Rules of

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284 Nanda, *supra*, at 787-88.

285 *Id*.

286 Glenn P. Hendrix, *et al*., *Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements*, 49(3) The Int'l Lawyer 255, 255 (Feb. 16, 2016) (noting that "[t]he Convention enjoys universal support in the United States, but its transmittal to the Senate for advice and consent to ratification has been held up by disagreements over whether it should be implemented by federal law or by a combination of federal and state law").

287 *Hilton*, 159 U.S. at 202-03.

288 *See* Section II.

Arbitration to which they agree, which are typically of a default rather than mandatory character. Moreover, arbitration facilitates the parties' choice of a third jurisdiction (different from the nationalities of the parties) to serve as the seat of the arbitration whose arbitration law will govern issues of compelling arbitration and any application to vacate, annul or set aside the resulting award. Arbitration, typically, also affords the parties the opportunity to have a say in who will resolve the particular dispute that has arisen. Under the COCA Convention, one would expect that in a significant percentage of cases, the chosen court will be the home court of one of the parties, rather than of a "neutral" third country. Although the courts of New York and England have been and continue to be amenable to hearing any commercial dispute (in the case of New York, provided the value of the agreement exceeds US $1 million), cases where parties select a court in a jurisdiction with no relation to the parties or their contract are likely to be the minority. Indeed, Article 19 of the COCA Convention expressly authorizes a Contracting State to decline to have its courts serve as a "neutral" forum notwithstanding the parties' agreement where "except for the location of the chosen court, there is no connection between the State and the parties or the dispute."[289] As such, the extent of the exercise of party autonomy for purposes of the COCA Convention may devolve to one party acquiescing to litigate in the courts of its counterparty, perhaps or perhaps not in exchange for concessions on other deal points.[290]

Some have criticized the COCA Convention and challenged the premise that choice of court agreements and arbitration agreements are analogous and should be supported and enforced based on the same considerations of respect for party autonomy.[291] The Working Group determined that this Report should not engage in the comparative debate that the COCA Convention has generated as to which regime is "better" for international commercial transactions or whether the COCA Convention is as protective of the procedural rights of the parties as the New York Convention.[292]

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[289] COCA Convention, *supra*, Art. 19.

[290] The Working Group members are primarily practitioners who are involved on advising on dispute resolution agreements in advance of contracting and after execution when disagreements arise. It is the collective experience of the Working Group that attention to dispute resolution mechanisms in international agreements tends to be focused on by the parties at the end of the drafting process, often after the commercial terms are already set. Accordingly, it is not clear how often an agreement by one party to subject its disputes to resolution in the home court of its counterparty is made in exchange for meaningful concessions on commercial terms versus made because the local counterparty insists and the foreign party acquiesces in that position.

[291] Gary Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention, Part II - Kluwer Arbitration Blog*, Kluwer Arbitration Blog, (June 17, 2021), http://arbitrationblog.kluwerarbitration.com/2021/06/16/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-ii/ ("Born, Part II") (describing why it is "unwise to attempt to transpose the New York Convention" to national court litigation by listing the differences between international arbitration and cross-border litigation).

[292] Therefore, this report also does not discuss, or respond to, criticisms of the COCA Convention that are solely comparative in nature, with the New York Convention as the comparison point. *See generally, e.g.*, Gary Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention, Part III - Kluwer Arbitration Blog*, Kluwer Arbitration Blog, (June 18, 2021), http://arbitrationblog.kluwerarbitration.com/2021/06/18/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-iii/ ("Born, Part III") (critiquing the COCA Convention by analyzing which provisions are "parallel" to the New York Convention provisions). Instead, the Working Group's analysis and recommendations are based on the COCA Convention as a standalone convention, against the status quo of how choice of court agreements are viewed in transnational litigation. João Ribeiro-Bidaoui, *Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born* (July 21, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/21/hailing-the-hcch-hague-2005-choice-of-court-convention-a-response-to-gary-born/ ("[T]he proper standard for a realistic and fair appreciation of the Convention is the

The Working Group has approached its task by accepting the premise that international parties of various levels of sophistication[293] have agreed to a chosen court to resolve future disputes.

Below we address the specific and applicable criticisms that have been leveled recently to the COCA Convention's judgment recognition provisions and the responses offered by the COCA Convention's proponents, as well as the Working Group's expectation that such criticisms will be rare in practice, do not outweigh the potential benefits of encouraging implementation of the COCA Convention together with the Judgments Convention as the "package" deal they were intended, and can be adequately mitigated by the inclusion of language in the federal implementing legislation.

Criticism 1: Concerns Regarding Procedural Fairness

In a 2021 article by Gary Born, Chair of WilmerHale's International Arbitrational Practice Group and a highly regarded scholar and practitioner in the field of international arbitration and litigation, Mr. Born strongly advocated against adoption of the COCA Convention. His primary concern is the susceptibility of judgments rendered without basic due process to being enforced in the United States under the COCA Convention's terms.[294] The COCA Convention directs non-recognition of a judgment only in cases of deliberately fraudulent conduct, *not* other denials of procedural fairness—including through incompetent, negligent, inadvertent or biased decision making by national courts.[295] The COCA Convention instead limits non-recognition to cases where "the specific proceedings leading to the judgment" were procedurally unfair, which forbids any inquiry into the fairness and independence of the legal system whose courts issued the judgment.[296] Mr. Born posits that the COCA Convention consequently does not include as a defense to recognition that the entire judicial system is unfair, biased or corrupt where no showing can be made relating to the specific case. Mr. Born also criticized the COCA Convention for treating procedural unfairness solely as a sub-set of public policy.[297]

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kaleidoscopic treatment of choice of court agreements, and the uncertainty and unpredictability that judgments based upon such agreements face in the absence of a global legal regime.").

[293] Although both the COCA Convention excludes consumer and employment contracts, there is no specific exclusions for standard form or preprinted contracts whose terms are not subject to negotiation or in fact not negotiated between the parties. Accordingly, although some commentators have ventured predictions as to the degree of sophistication that the parties to agreements covered by the COCA Convention will have with respect to dispute resolution alternatives, there is nothing in the COCA Convention itself that directly or indirectly restricts its ambit to sophisticated individuals or entity parties. For that reason, the Working Group's recommendations do not assume any particular "sophistication" level of parties to COCA Convention exclusive choice of court clauses.

[294] *See* Born, Part II, *supra*.

[295] Gary Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention, Part III - Kluwer Arbitration Blog*, Kluwer Arbitration Blog, (June 18, 2021), http://arbitrationblog.kluwerarbitration.com/2021/06/18/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-iii/. Some commentators have criticized COCA's express recognition of fraud, as a basis that should be subsumed within the public policy exception in order to simplify recognition and enforcement procedures; however, some States do not recognize anti-fraud as a public policy. *See* Kasem, *supra*, at 93. Similar criticisms have been made against the Judgments Convention, which has an analogous fraud exception in Article 7(1)(b). *See* Reisman, *supra*, at 894.

[296] Born, *supra*.

[297] *Id.*

Commentators disagreeing with Mr. Born have pointed to other provisions in the COCA Convention that address these concerns. For example, Walter Heiser has compared the COCA Convention's grounds for nonrecognition with provisions of the 2005 Act, which mandates nonrecognition if the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with due process.[298] Prof. Heiser acknowledged that the COCA Convention "permits" nonrecognition on similar grounds without *mandating* it, but stressed that the "impact" of the difference will likely be "quite limited" as "[a] court in the United States is unlikely to exercise its discretion in favor of recognition or enforcement of a judgment rendered by a foreign legal system whose courts are not impartial or whose procedures violate fundamental notions of due process."[299]

João Ribeiro-Bidaoui, who led the Transnational Litigation Team at the Permanent Bureau of the Hague Conference on Private International Law and oversaw the operation of the COCA Convention, responded to Mr. Born that instances of "denial of procedural fairness in the proceedings, such as a failure to provide due notice, denial of an opportunity to be heard, corruption or lack of a fair trial, [. . .] should fall squarely within the Convention's Art. 9(e) ground to refuse recognition or enforcement."[300] Footnote 35 of the Explanatory Report, states that "fraud as to the substance of the claim may be covered by other provisions, such as—in extreme circumstances—that concerning public policy."[301]

In reply, Mr. Born raised alarm at the "novel and surprising argument that the exception *should* swallow the rule." Mr. Born contends that the COCA Convention places too much weight on the public policy exception, which is "designed, in virtually all private international law contexts, as an *exceptional* escape device that permits a state to invoke its own law and policy in rare and unusual cases."[302]

Response to Criticism 1: Concerns Regarding Procedural Fairness

In the Working Group's view, disputes that may be affected by this perceived weakness are likely to be rare. It would apply only in cases where (1) a party has agreed to a particular court despite such systemic issues or (2) such systemic issues have arisen after a choice-of-court agreement was concluded. Especially in the latter case, the Working Group believes that U.S. courts could apply Article 6(c) to refuse to suspend proceedings due to a choice-of-court agreement,

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298 Heiser, *supra*, at 1045.

299 *Id.*

300 João Ribeiro-Bidaoui, *Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born* (July 21, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/21/hailing-the-hcch-hague-2005-choice-of-court-convention-a-response-to-gary-born/.

301 Hartley & Dogauchi, *supra*, at 791. . Proponents of the COCA Convention also point to the right of requested States to determine their own public policy as providing sufficient safeguards. According to the Judgments Convention Explanatory Report, the reference found in both the COCA Convention and Judgments Convention "to the public policy *of the requested State*," "indicat[es] that there is no expectation of uniformity as to the content of public policy in each State. Garcimartin & Saumier, *supra*, at Therefore, it "up to each State to define the public policy defence." *Id.*

302 Gary Born, *Why It Is Especially Important That States Not Ratify the Hague Choice of Court Agreements Convention, Part II*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2021/07/23/why-it-is-especially-important-that-states-not-ratify-the-hague-choice-of-court-agreements-convention-part-ii/ ("Born Rebuttal") (July 23, 2021).

or apply Article 9(e) to refuse enforcement of a resulting judgment in cases where the chosen court system is notoriously biased or corrupt.

Moreover, the Judgments Convention also does not have an exception relating specifically to enforcement of judgments that are systemically flawed. Article 29 of that Convention does allow a State to decide that the Judgments Convention will not apply between it and another Member State. This could be used to guard against enforcement of judgments from notoriously biased or corrupt legal systems who join the Judgments Convention. However, all such decisions must be notified within 12 months of the ratification, acceptance, approval or accession of the other State.[303] Therefore, if a member state's legal system becomes systemically biased in the future; or if the U.S. government simply does not make such a notification, the Judgments Convention would, like the COCA Convention, not expressly protect against the enforcement in the United States of foreign court judgments due to systemic due process issues in the court of origin.

Federal implementing language should clarify that recognizing judgments rendered by a legal system that systematically fails to provide impartial tribunals or fair procedures violates U.S. public policy. In particular, we recommend that federal implementing legislation and legislative history should guide courts in the interpretation of both the COCA Convention and also the Judgments Convention (discussed further below), by stating that U.S. public policy requires a court to refuse to recognize or enforce a judgment if, as stated by the Restatement of Foreign Relations Law, "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness."[304]

Criticism 2: Concerns Regarding Integrity and Competence of National Courts

Mr. Born has highlighted surveys and studies showing that a substantial number of national courts are unsuitable for resolving international commercial disputes due to their lack of basic standards of integrity, independence, and competence.[305] The COCA Convention, Mr. Born argued, fails to take into account the endemic corruption in different jurisdictions. As a result, Mr. Born opined that the adoption of the COCA Convention may expose litigants to substantial risks of procedural unfairness and arbitrary or corrupt adjudicative processes.[306] The COCA Convention drafters considered but rejected a provision that would permit one Contracting State to opt out of recognizing the judgments of another State that has adopted the COCA Convention on the theory that parties to a written exclusive choice of court agreement should have the right to pick the forum to hear their disputes and that it would benefit international commerce for Contracting States to respect that choice. Accordingly, to have such an opt-out feature would undermine the principle of party autonomy to choose a particular court system to resolve their cross-border disputes notwithstanding the possibility of about endemic judicial corruption.[307] This, therefore, creates a concern that by acceding to the COCA Convention regime, the United States may be required to

303 *See* Judgments Convention, *supra*, Art. 29.

304 *See* Restatement (Fourth) of Foreign Relations Law § 483(a), Mandatory Grounds for Non-Recognition (2018).

305 *See* Born, *supra*.

306 *Id*.

307 *See* Explanatory Report, *supra*, at 884.

recognize and enforce the judgment of a country's judicial system that later assents to the treaty with no opportunity to derogate from certain obligations with respect to a specific signatory.

Trevor Hartley, professor emeritus at the London School of Economics and Political Science and co-author of the Explanatory Report on the COCA Convention, rejected the notion that parties need to be protected from their own litigation choices: "If the parties insist on choosing the courts of a country where judicial corruption is a problem, they have only themselves to blame."[308] Moreover, Hartley noted, the COCA Convention has a backstop: Article 6(c) allows a Requested Court to not suspend or dismiss proceedings covered by an exclusive choice-of-court agreement if giving effect to the agreement "would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised."[309] In reply, Mr. Born countered that the blame for a judicially corrupt judgment will not be solely on the parties; it will also fall on the Hague Conference and the national legislatures that ratified the COCA Convention and thus enabled the situation.[310]

Supporters of the COCA Convention also point to mechanisms embedded in the Convention, such as regularly convened Special Commission meetings to consider the "practical operation" of specific provisions.[311] These Commission meetings can issue "authoritative recommendations" and advice to aid "uniform interpretation" of the Convention. Mr. Ribeiro-Bidaoui also retorted that being part of the Hague Convention system will incrementally develop judiciaries worldwide and enhance judicial cooperation with embedded international accountability. Mr. Born remained unconvinced, and noted that commentators disagreeing with him, cite to "no conceivable empirical justification" for their predictions.[312]

According to Mr. Born, "recognizing corrupt judgments will [not] induce courts not to be corrupt [but] would likely encourage them to continue their corrupt, but profitable, ways, by giving global effect to their illegally-procured judgments."[313] Mr. Born took particular issue with Mr. Ribeiro-Bidaoui's belief in the power of the COCA Convention to "incrementally" develop judiciaries, questioning whether that warrants the prejudice to the litigants along the way who will be denied justice.

Response to Criticism 2: Concerns Regarding Integrity and Competence of National Courts

As addressed above, Article 9(e) of the COCA Convention should prevent recognition and enforcement of any judgment rendered as a result of a fundamental denial of due process. whether obtained by outright fraud or simple bias. Moreover, the Judgments Convention includes identical

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308 Trevor Hartley, *Is the 2005 Hague Choice-of-Court Convention Really a Threat to Justice and Fair Play? A Reply to Gary Born*, EAPIL Blog, https://eapil.org/2021/06/30/is-the-2005-hague-choice-of-court-convention-really-a-threat-to-justice-and-fair-play-a-reply-to-gary-born/ (June 30, 2021).

309 Hartley, *supra*.

310 Born Rebuttal, *supra*.

311 Ribeiro-Bidaoui, *supra*,

312 Born Rebuttal, *supra*.

313 *Id.*

language in its Article 7(c). And like the COCA Convention, the Judgments Convention contains no other provisions that would allow a court where recognition is sought to examine the procedural fairness of the underlying decision. Indeed, this concern should be more pronounced in regard to the Judgments Convention, which specifically covers situations in which a judgment debtor has not agreed to litigate in the court in which a judgment was rendered. Again, federal implementing legislation can assure proper application of the same language in both conventions.

Criticism 3: Concerns Regarding the Resolution of Disputes Beyond the Scope of the Choice of Court Agreement

Related to the procedures of various national courts, Mr. Born additionally raised a concern over the absence of a mechanism in the COCA Convention to authorize requested courts to deny recognition where the chosen court decided a dispute outside the scope of the parties' choice-of-court agreement,[314] with the possible result that a party was forced to litigate in, and is bound to a judgment by, a court whose authority it never consented to with respect to the particular dispute resolved.[315]

Prof. Hartley responded that Mr. Born's concerns about the chosen court exceeding the scope of its jurisdiction are addressed by the text of the COCA Convention itself. Under Article 8(1), the duty to recognize and enforce a judgment applies only to a judgment given by a court of a Contracting State "designated in an exclusive choice of court agreement."[316] Article 3(a) defines the term "exclusive choice of court agreement" as an agreement that designates a court (or several courts) "for the purpose of deciding disputes which have arisen or may arise *in connection with a particular legal relationship*."[317] Prof. Hartley concluded that if the designated court decided a matter that did not concern the legal relationship specified in the choice-of-court agreement, the court that issued the judgment could be considered to no longer have been "designated" under Article 8(1). Therefore, such a judgment would not be subject to recognition and enforcement under the COCA Convention.

Response to Criticism 3: Concerns Regarding the Resolution of Disputes Beyond the Scope of the Choice of Court Agreement

In such extreme cases that implicate fundamental notions of consent to the choice of court agreement, U.S. courts could invoke Article 9(e) of the COCA Convention to refuse enforcement of any judgment for which the basis of jurisdiction is incompatible with fundamental U.S. public policy notions of the scope of voluntary consent to jurisdiction.[318]

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314 *Id.*

315 *Id.*

316 COCA Convention, Art. 8(1).

317 COCA Convention, Art. 3(a) (emphasis added).

318 Paul Beaumont & Mary Keyes, Hague Choice of Court Agreements in A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW, 393, 397 (Beamont and Keyes eds., 2022) ("The Convention does permit the non-chosen court to apply, in very extreme cases, its own standards to avert a manifest injustice or a manifest breach of its public policy. The manifest injustice/public policy tool is the correct tool to protect the fundamental interests of the State of the non-chosen court and the fundamental justice requirements of the dispute.").

Criticism 4: Concerns Regarding Finality

Mr. Born raises some additional concerns regarding the combined effect of COCA Convention Articles 9(a) and 8(2) relating to the finality and inability of a requested court to consider the validity of the choice of court agreement if the chosen court has already done so. Mr. Born argued that the COCA Convention permits a challenge to be made before the putatively chosen court as to the existence and validity of a choice of court agreement, but if that challenge is considered and rejected by the chosen court, no requested court may examine that issue in the context of determining whether to recognize the chosen court's judgment.[319] Therefore, Mr. Born posited, the chosen court will be the *sole* authority to decide the existence and validity of the choice of court agreement, without the possibility of review in recognition proceedings, which is a striking contrast to the New York Convention's treatment of arbitral awards, under which each state where recognition is sought is entitled to examine the validity of the agreement to arbitrate.[320] This is true even though the validity of both the choice of court agreement and agreement to arbitrate will be determined under the laws of a single jurisdiction.

In response, Mr. Ribeiro-Bidaoui noted that Mr. Born is on the one hand worried about how the COCA Convention gives legitimacy to potentially incompetent and corrupt judicial review, but on the other hand also complains that the COCA Convention does not provide enough judicial review.[321] Mr. Ribeiro-Bidaoui views the COCA Convention's provisions as merely following the quasi-universal rule that the "law of the forum governs matters of procedure, including jurisdiction," *forum regit processum*. Mr. Born strongly disagreed in reply, asserting that Mr. Ribeiro-Bidaoui is misconstruing *lex fori*, which Mr. Born contends governs only procedural conduct within adjudicative proceedings (e.g. rules of evidence) and not jurisdiction or recognition of judgments. Instead, Mr. Born insisted that the universal rule is that "recognition court[s] may review the jurisdictional basis" for a judgment or award.[322]

In response to Mr. Born's rebuttal, Prof. Hartley viewed as overstated Mr. Born's concerns about requested courts being bound by factual determinations of chosen courts under Article 8(2).[323] Prof. Hartley quoted the Explanatory Report to the COCA Convention, which he contends makes clear that the requested court does not have to accept the *legal evaluation* of the facts adopted by the chosen court—just the factual record. Paragraph 166 of the Explanatory Report provides the following example: "If the court of origin found that the choice of court agreement was concluded by electronic means that satisfy the requirements of Article 3(c)(ii), the court addressed is bound by the finding that the agreement was concluded by electronic means. However, it may,

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319 *Id.*

320 Where recognition courts are granted the authority by Article V(1)(a) to deny recognition based upon the absence of a valid arbitration agreement, notwithstanding an arbitral tribunal's ruling that such an agreement existed and notwithstanding an annulment court's decision to the same effect. *Id.*

321 Ribeiro-Bidaoui, *supra*.

322 Born Rebuttal, *supra*.

323 Trevor Hartley, *The 2005 Hague Convention on Choice-of-Court Agreements: A Further Reply to Gary Born*, EAPIL Blog, https://eapil.org/2021/08/03/the-2005-hague-convention-on-choice-of-court-agreements-a-further-reply-to-gary-born/ (August 3, 2021).

nevertheless, decide that Article 3(c)(ii) was not satisfied because the degree of accessibility was not sufficient to meet the requirements of Article 3(c)(ii)."

Therefore, a requested court could determine whether the relevant facts in the record satisfied the requirements of the COCA Convention, which is a legal test and subject to *de novo* review. Moreover, Prof. Hartley clarifies that the requested court is only bound by factual determinations related to non-recognition (Articles 9(a)-(b)) and not Articles 9(c)-(e), which do not concern jurisdiction but instead procedural fairness and public policy. Therefore, in a case of alleged procedural unfairness, a requested court would not have to defer to the chosen court on either the findings of fact or law when applying the public policy exception.[324]

Response to Criticism 4: Concerns Regarding Finality

As with respect to the above responses, the Working Group believes that Articles 6(c) and 9(e) of the COCA Convention could apply in extreme circumstances. If a party is brought into a "putatively chosen" court based on an allegedly manifestly non-existent or invalid choice of court agreement, Article 6 allows the aggrieved party to begin litigation in the alternative court it deems appropriate. If that court finds that one of the exceptions in Article 6 applies (or in fact there simply is no choice-of-court agreement), it need not suspend or dismiss the proceedings before it. In addition, if the determination of a "putatively chosen" court as to its jurisdiction runs afoul of fundamental U.S. public policy notions of voluntary consent to jurisdiction, a resulting judgment should not be enforceable in the United States based on Article 9(e). The COCA Convention therefore does not engender significant risk of a rogue court erroneously declaring itself the chosen court under a manifestly illegitimate or non-existent choice of court agreement.

Moreover, as addressed in the 2006 ICDC Report, under Article 9(b) of the COCA Convention, recognition and enforcement may be refused if a party did not have capacity, under the law of the enforcing court (including its choice of law rules), to enter into the alleged choice of court agreement. These provisions provide adequate protection for parties that may be faced with a judgment based on a manifestly non-existent or invalid choice of court agreement.

* * *

The Working Group has considered whether any of the foregoing concerns could be alleviated through the invocation of reservations or declarations authorized under the COCA Convention. Those permitted reservations authorize a Contracting State to refuse to: (1) have its courts determine disputes to which an exclusive choice of court agreement applies if there is no connection (other than the location of the chosen court) to the State and the parties or the dispute (Article 19); (2) recognize or enforce a judgment by another State if (a) the parties were resident in the requested State; and (b) the relationship of the parties and other relevant aspects of the dispute were only connected with the requested State (Article 20); and (3) apply the Convention to a specific matter where it has a strong interest in not applying the Convention (Article 21).

While none of these reservations addresses the foregoing concerns, as the permitted reservations pertain to a court's connection to the dispute or to specific subject matters of

[324] *Id.*

contractual relations that may be carved out from a Contracting State's obligations under the COCA Convention, the Working Group believes that federal implementing legislation can (and should) include language in the form set out below and legislative history that would ameliorate the concerns expressed about the COCA Convention. Recommendations with respect to this language is included in Section V(b) and Appendix 8 below.

ii. Recommendation

The Working Group recommends by majority vote that the United States ratify the COCA Convention and the Judgments Convention, subject to certain declarations and reservations as well as the inclusion of certain language in federal implementing legislation, as set out below.

As to the Judgments Convention specifically, the Working Group recommends its implementation subject to certain declarations and reservations pursuant to Judgments Convention Articles 19 and 29 to protect against any concerns relating to procedural safeguards and the ability of a Contracting State to categorically decline to recognize judgments from selected countries that have been found to have corrupt judicial systems.

In formulating its recommendations, the Working Group is also mindful of the possibility inherent in all international treaties open to all countries to join that after the United States were to ratify the Judgments Convention, a foreign state may choose for tactical reasons to join the Judgments Convention so as to place the United States in the potentially difficult situation of having to decide whether to agree to bilateral treaty relations with such country despite misgivings as to its judicial system or to make the often politically fraught decision to exercise its Article 29 prerogative to opt-out of treaty relations with such country.

In addition to the Article 29 opt-out right as to a particular Contracting State, the Judgments Convention affords signatories the right to invoke certain other reservations. Below we set out our recommendations as to those reservations:

Reservation	Recommendation
Art. 14 – A State may declare that it will not require a security, bond, or deposit from a party in one Contracting State who applies for enforcement of a judgment by a court in another Contracting State on the bases that the party is a foreign national/not domiciled in the place where enforcement is sought.	The Working Group does not recommend that a reservation should be made, as the issue of security for costs should be left to existing practice in U.S. federal and state courts.
Art. 17 – A State may declare and refuse to recognize or enforce a judgment given by a court of another Contracting State if certain conditions as provided are met.	The Working Group has not identified any particular conditions necessary to be invoked as prerequisites in addition to those already provided by the Judgments Convention.

Art. 18 – A State may declare and refuse to apply the Convention to specific matters if certain conditions as provided are met	The Working Group has not identified any matters that should be excluded in addition to those already excluded by the Judgments Convention.
Art. 19 – A State may declare that it will not apply this Convention to judgments arising from proceedings to which any of the following is a party (a) that State, or a natural person acting for that State; or (b) a government agency of that State, or a natural person acting for such a government agency.	The Working Group recommends that it would be appropriate for the United States to make this declaration so as not to apply the Judgments Convention to any foreign judgment against the United States, any agency of the United States or any person acting for the United States or its agencies.

B. Singapore Convention

i. Benefits

Adoption of the Singapore Convention would make mediation a more attractive option for resolving cross-border disputes. Mediation is generally perceived to be a more efficient and cost-effective mechanism to resolve cross-border disputes than litigation and arbitration. Mediation provides speed, flexibility and confidentiality to the parties. Wide adoption of the Singapore Convention could facilitate enforcement of mediated settlement agreements in multiple jurisdictions, leading to greater rates of voluntary compliance. As a result, evasion of payment becomes an ultimately unsuccessful strategy.

The Singapore Convention would benefit U.S. residents and enterprises in three ways:

1. Enforcing MSAs abroad in the other States that are Parties to the Singapore Convention would be easier. The Singapore Convention would bring uniformity to a system that is diverse and confusing, and it would bring savings in time and costs in enforcing MSAs.

2. Enforcing MSAs in the U.S. would also be easier, but the trade-off benefits U.S. interests because the process for enforcing MSAs negotiated in the international commercial context in most U.S. states is not substantially different from the regime that would be created under the Singapore Convention.

3. The Singapore Convention will elevate the stature of mediated settlements in the international business and legal communities and will lead to increased use of mediation as a tool to resolve cross-border disputes.

More generally, adopting the Singapore Convention could promote international cooperation and business given the uniform framework it provides for enforcing mediated

settlement agreements.[325] It is expected to increase business opportunities for U.S. nationals.[326] Ratification by the United States would likely encourage other countries to follow suit and may encourage the further use of mediation worldwide. Furthermore, it would signal to the international community the importance the US places on mediation as a dispute resolution mechanism. It should also be noted that increased use of mediation could improve the international business climate and promote more cross-border agreements.

The Singapore Convention does not apply retroactively.[327] Specifically, Article 9 states that "the Convention . . . shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned." Therefore, timely ratification would be advantageous. As already noted, there are currently 53 signatories to the Singapore Convention and the Convention has been ratified by eight countries. All of the countries that ratified the convention are to some extent trading partners of the U.S. It would be to the U.S.'s benefit if this same mechanism is available to U.S. nationals.

ii. Disadvantages

There are no significant disadvantages to the U.S. in adopting the Singapore Convention. The limitations of the Singapore Convention have been noted (*e.g.*, it does not provide for the enforcement of agreements to mediate and does not address the confidentiality of mediation), but they constitute missed opportunities rather than reasons for not adopting it. While the Singapore Convention could make international MSAs easier to enforce than domestic MSAs, and mediated settlement agreements easier to enforce than unmediated settlement agreements, the Singapore Convention does not prevent a contracting Party from enacting laws that give domestic and unmediated settlement agreements the same treatment granted to MSAs by the Singapore Convention.

As discussed above, the United States already recognizes most MSAs that the Singapore Convention would require it to recognize. Similarly, regarding refusal of recognition, the principal grounds used in the United States would be preserved by the Singapore Convention. However, many states, such as Colorado and Minnesota, currently provide grounds for refusal of recognition that go beyond those allowed by the Singapore Convention – typically, these address formalities and technical defenses and account for a substantial percentage of MSA issues litigated in the United States.[328] Unless the United States were to implement the Singapore Convention on a state-by-state basis, ratification would effectively nullify these state laws.

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[325] *See* Mica Nguyen Worthy, *Internal Mediation: The New Mode of the Future?*, Cranfill Sumner LLP, (June 4, 2021), https://www.cshlaw.com/resources/international-mediation-the-new-mode-of-the-future/.

[326] *See* Maddy White, *New UN Singapore Convention – why is it important?*, Global Trade Review, (July 18, 2019), https://www.gtreview.com/news/asia/new-un-singapore-convention-why-is-it-important/.

[327] *See* Singapore Convention, *supra*, Art. 9.

[328] For a discussion of the impact of the United States's potential ratification of the Singapore Convention on such states that require further formalities, *see* Section V(D)(i) *infra*.

iii. Recommendation

The United States was the principal proponent of the Singapore Convention. Work on a mediation convention was proposed by the U.S. at the 2014 UNCITRAL session. The U.S. was deeply involved in the work of UNCTRAL Working Group II in drafting the Convention and gaining support among States to support it.

The Singapore Convention would substantially benefit the U.S. business and legal communities by promoting the international use of mediation to resolve disputes and by providing a more efficient and reliable framework for enforcing international mediated settlement agreements. The benefits outweigh any perceived or real disadvantages.

The Singapore Convention, if adopted would complement the New York Convention, the COCA Convention and the Judgements Conventions but not overlap with them.

It is recommended that the United States adopt the Singapore Convention.

With respect to the two reservations authorized by the Singapore Convention, it is not recommended that the United States adopt either one.

The first permits a declaration not to apply the Singapore Convention to settlement agreements to which the United States is a party, or to which any government agencies or any person acting on behalf of a government agency is a party (the "government exemption declaration"). The second permits a declaration that the Singapore Convention shall apply only to the extent parties to the MSA agreed to the application of the Singapore Convention (the "opt-in declaration"). Both declarations would tend to undermine a central purpose of the Singapore Convention, to encourage wider use of mediation, especially the opt-in declaration which would require parties to be aware of the Singapore Convention and affirmatively provide that the Singapore Convention applies either in the MSA or otherwise. The government exemption declaration would be inconsistent with the U.S.'s historic waiver of immunity to allow it to be sued for breach of contract. There does not appear to be a good policy reason to make U.S. nationals subject to the Singapore Convention but not the government.

V. Implementation

This section surveys the various models by which a treaty may be implemented in the United States (**Part A**) and concludes that federal-only legislation is the most appropriate model for implementing the COCA Convention (**Part B**), the Judgments Convention (**Part C**), and the Singapore Convention (**Part D**).

While the prior section concerned the substance of the proposed treaties and addressed how they would change the applicable law in the United States and other jurisdictions if implemented, and whether those changes reflected an improvement on the status quo, this section focuses on the practical implementation of the Three Treaties were they to be adopted and ratified.

The primary considerations for this analysis are the efficiency and predictability of alternative modes of implementation. Irrespective of the applicable substantive rule, an efficient

and predictable mode of implementation will enable to practitioners to provide more definite and reliable advice to clients regarding the likelihood of enforcing judgments or settlement agreements in cross-border commercial transactions.

While the Three Treaties differ slightly from each other in terms of subject matter and the extent to which they overlap and diverge from existing U.S. law, our analysis concludes that as treaties designed to facilitate cross-border transactions and disputes, federal implementation would best serve this purpose by creating a predictable, uniform, and accessible regime.

A. The Potential Models

There are several methods by which the United States could implement a treaty. *First*, if the treaty is determined to be self-executing, it will come into effect without any action beyond ratification.[329] *Second*, the U.S. Congress may enact federal legislation that implements the substance of the treaty. *Third*, Congress may follow the "cooperative federalism" model to incentivize states to enact implementing legislation, either through conditional spending or conditional preemption. Lastly, when so provided by the terms of a treaty, the United States could opt to submit a declaration that the treaty shall extend to only one or more states. This would allow only a subset of states to implement the treaty through state-only legislation.

i. Self-Executing Treaty

Treaties that are deemed self-executing require no implementing legislation to take effect. Under the Supremacy Clause of the U.S. Constitution, treaties that are signed by the President with the advice and consent of the Senate are considered to have the force of federal law and thus preempt conflicting state laws.[330] Whether or not a treaty is self-executing, however, is not always clear;[331] ultimately, it is a question of the "intention of the United States," as evidenced by the treaty's own language as well as statements made by the President and Senate.[332] Thus, the executive branch and the Senate ought to make clear their intentions during the signing and ratification processes if they desire a treaty to be self-executing.[333]

There are clear benefits to self-executing treaties. First, they provide a uniform national law for all parties dealing with the United States, both through the text of the treaty and – theoretically, at least – a unified federal court system that will interpret it. This creates clear and stable expectations for commerce. Second, implementation through self-execution can save significant time and legislative resources. Implementing legislation often takes years[334] and involves extensive

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329 *See* Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 Am. Rev. Int'l Arb. 265, 279-80 (2019) (describing self-executing treaties and providing examples).

330 U.S. Const., Art. VI.

331 For a discussion on defining "self-executing," *see* Charlotte Ku, *et al.*, *Even Some International Law Is Local: Implementation of Treaties Through Subnational Mechanisms*, 60 Va. J. Int'l L. 105, 115 (2019).

332 *See* Kamel, *supra*, at 1833-34 (citing *Foster v. Neilson*, 27 U.S. 253 (1829)).

333 *See* Schnabel, *supra*, at 280.

334 The time between signing of the Hague Adoption Convention and the passage of implementing act, for example, was six years, with the Senate not ratifying the convention for another eight years. Irene Steffas, *The Hague Adoption Convention and Its Impact on All Adoptions*, Nov./Dev. Fed. Law, 34 (2010).

coordination with relevant stakeholders. This means not only delaying the benefits of the treaty, but also displacing other legislative priorities. Lastly, faster implementation can contribute to a treaty's momentum in gaining signatories, particularly given the weight accorded to the United States' endorsement of an agreement.[335]

There are, however, important limitations to self-executing agreements, although implementation would do no harm provided it is designed correctly. First, self-execution is not an appropriate form of implementation for treaties that do not provide sufficient detail to be immediately implemented – for example, if the subject matter interacts with existing federal or state law in a way that needs clarification[336] or if the treaty itself requires establishing regulatory mechanisms.[337] Thus, self-executing treaties are often simpler and narrower agreements such as the Hague Service Convention[338] and Hague Evidence Convention.[339]

Further, self-executing agreements bear the risk that the treaty will be either interpreted differently across local jurisdictions or not applied at all. This "homeward trend" in interpretation has arisen with the CISG.[340] In the face of unfamiliar terminology and relatively thin legal precedent, state and local judges have often interpreted the CISG in light of local precedent; other times, practitioners overlook the applicability of the CISG altogether, as self-executing treaties do not appear in legal research in the same way that legislation and court precedent do.[341] Such agreements thus face the threat of non-uniform application despite uniform text.[342]

On balance, self-execution provides limited benefits over federal or state-level implementation for treaties that require substantial coordination with federal or state law. For those that do not, however, self-execution may be an attractive method of implementation, particularly if the substance is detailed and simple enough as to not require implementing legislation to iron out its details, as it provides immediate and uniform national standards for executing the terms of a treaty.

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335 *See* Schnabel, *supra*, at 282.

336 *See, e.g.*, *infra* notes 314-315 and accompanying text.

337 *See, e.g.*, *infra* notes 309-310 and accompanying text.

338 Conven. of 15 Nov. 1965 on the Serv. Abroad of Jud. and Extrajudicial Documents in Civ. or Com. Matters, Hague Conf. on Priv. Int'l., Nov. 15, 1965, 658 U.N.T.S. 163.

339 Convention of 18 Mar. 1970 on the Taking of Evid. Abroad in Civ. or Com. Matters, Oct. 7, 1972, 847 U.N.T.S. 231.

340 *See generally* Franco Ferrari, *Autonomous Interpretation Versus Homeward Trend Versus Outward Trend in CISG Case Law*, 22 Unif. L. Rev. 244 (2017).

341 Ku *et al*., *supra*, at 151.

342 Joshua D.H. Karton & Lorraine de Germiny, *Can the CISG Advisory Council Affect the Homeward Trend?*, 13 Vindobona J. Int'l Com. L. & Arb. 71, 72 (2009). *Cf.* COCA Convention, *supra*, Art. 23; Judgments Convention, *supra*, Art. 20 (each providing that "[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.").

ii. Federal-Only Implementing Legislation

A treaty may be implemented by federal legislation alone. This model may be used only where there is a constitutional basis for Congress to legislate, and where doing does not offend other constitutional provisions such as the Tenth Amendment, as discussed below. Examples of such constitutional bases include Congress' spending power, its authority over immigration, or its foreign or interstate commerce powers. For agreements involving only foreign commercial matters, such as the Three Treaties addressed in this memo, this requirement is easily met.

Similar to self-executing treaties, this model provides the benefit of a uniform national law, thus creating predictable and stable expectations for litigants in the United States and abroad. Federal implementation can provide the added detail and clarity for a treaty whose text is not sufficient for self-execution. The Hague Convention on Adoption, for instance, was implemented through the Intercountry Adoption Act ("IAA"),[343] which among other things designated a Central Authority along with its responsibilities,[344] established mechanisms for accrediting adoption agencies,[345] and dictated methods of oversight and enforcement.[346] Similarly, implementation through federal legislation can clarify a treaty's relation with existing federal law. One prominent example is the implementation of the New York Convention as Chapter Two of the FAA, which required harmonization with the then-existing provisions of that act.[347] Federal legislation has also been used to coordinate a treaty's administrative requirements with an existing administrative agency[348] and to divide jurisdiction when a treaty's provisions overlap with state law.[349]

Securing passage of federal legislation is no easy task. While federal implementation requires additional work compared to a self-executing treaty, compared to implementation at the state level, discussed in the next section, the federal-only approach can be an efficient method of implementation.

There are limitations inherent in a federal-only approach, including the need to avoid relying on state agencies and officers to enforce federal law. Federal implementing legislation that mandates state action risks violating the anti-commandeering doctrine.[350] That doctrine holds that, under state-sovereignty principles of the Tenth Amendment, Congress may not order states to enact or administer a federal program, such as requiring local law enforcement to perform background checks on firearm sales[351] or mandating that states maintain radioactive-waste disposal centers.[352]

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343 42 U.S.C. § 14901.

344 42 U.S.C. § 14911-14912.

345 42 U.S.C. § 14921-14925.

346 42 U.S.C. § 14924.

347 *See* Schnabel, *supra*, at 283.

348 *Id.* at 284 (discussing the example of the Cape Town Convention).

349 *Id.* at 284 (discussing the example of the Letters of Credit Convention).

350 *See generally* Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 Annals Am. Acad. 158 (2001) (surveying the history and seminal cases of the anti-commandeering principle).

351 *Printz v. United States*, 521 U.S. 898, 935 (1997).

352 *New York v. United States*, 505 U.S. 144, 174-75 (1992).

The Tenth Amendment "almost certainly" applies to federal legislation passed to implement a treaty,[353] and so a treaty obligation that requires administration by state- and local-level officials should not be implemented solely by federal statute.[354]

On one view, another disadvantage of federal legislation is that it must contend with the traditions of federalism. Where an agreement would displace state law in an area such as contract or family law, a treaty triggers federalism concerns and risks political backlash. The United States' constitutional structure between the state and federal governments has produced strong norms of federal restraint in these areas. While it has been argued that there is, in fact, no federalism-based legal ground that would prohibit federal implementing legislation of the Judgments Convention,[355] these norms are not entirely toothless. For example, the legislative history of the FAA, which implements the New York Convention, expresses Congress' respect for "long-standing concerns relating to interference with domestic state laws" and has been the basis for interpreting the FAA to avoid preempting state laws that provide for more favorable enforcement mechanisms.[356] Further, resistance from the states and hesitance from national figures have prevented ratification of multiple international agreements; the United States is the only country not to have ratified the U.N. Convention on the Rights of the Child,[357] for instance, largely due to purported federalism concerns.[358]

iii. Federal-and-State Implementing Legislation

Treaties also may be implemented under parallel federal and state legislation – an approach which has been termed "cooperative federalism." This approach involves parallel legislative processes at the state and federal levels, where states promulgate uniform legislation and Congress

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[353] Julian G. Ku, *Gubernatorial Foreign Policy*, 115 Yale L.J 2380, 2405 (2006). *But see* Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L. Rev. 598 (2001) (arguing that state sovereignty interests are weaker in the context of foreign relations and thus should yield to federal legislation that implements international agreements).

[354] The obligations of the Hague Child Support Convention, for example, are largely performed by state agencies, governed by each state's Uniform Interstate Family Support Act. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267, 330 (2009).

[355] *See* Connor J. Cardoso, *Implementing the Hague Judgments Convention* 31-41 (March 21, 2022) (unpublished manuscript) (on file with the New York Law Review).

[356] *Comm'ns Imp. Exp. S.A. v. Congo*, 757 F.3d 321, 329 (D.C. Cir. 2014); *see also id.* at 328 (citing *Certain Underwriters at Llod's London v. Argonaut Ins. Co.*, 500 F. 3d 577 n.6 (quoting S. REP. NO. 91-702, at 6 (1970) (Kearney testimony))).

[357] *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en (last visited March 15, 2024).

[358] Ku *et al*., *supra*, at 116 (citing David P. Stewart, *Ratification of Convention on the Rights of the Child*, 5 Geo. J. Fighting Poverty 161, 176 (1998)); *see also* Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 Geo. J. Fighting Poverty 327 (1998) (discussing the political concerns of federalism and suggesting a consistent approach for ratifying the convention).

promulgates legislation to provide guidance or incentives for states.[359] The cooperative federalism approach has been applied in two ways.

First, the Hague Convention on Child Support Convention was applied primarily through state adoption of the Uniform International Family Support Act ("UIFSA"), along with federal legislation conditioning the receipt of federal funds for the collection of child support on state enactment of the UIFSA.[360] Conditioning receipt of federal funds on enactment of specific legislation does not run afoul of the anti-commandeering principle or the values of federalism so long as it satisfies the test set forth in *South Dakota v. Dole*.[361] However, as the nine-year-long process of implementing the Child Support Convention shows, this approach can still require significant time and legislative resources.[362] Further, there must be a meaningful existing federal spending provision substantially related to the provisions to be enacted,[363] a circumstance that does not apply in the context of enforcing commercial judgments and mediated settlement agreements.

Second, cooperative federalism has been applied through conditional preemption. Under the Supremacy Clause of the Constitution, federal legislation preempts conflicting state law;[364] thus, Congress may pass legislation that expressly preempts conflicting state law unless the state has adopted legislation substantially similar to the law that Congress desires. This was the approach taken in passing the Electronic Signatures in Global and National Commerce Act ("E-Sign"),[365] which expressly preempted inconsistent laws in those states that had not enacted the Uniform Electronic Transactions Act ("UETA").[366] The result of this effort has been the enactment of some version of UETA in practically every state.[367] While this method has not yet been used in implementing any international agreements,[368] some commentators have proposed it for implementing the COCA Convention.[369] Other commentators have criticized the cooperative federalism approach, arguing that it should not be used for the implementation of the Judgments Convention, as the cooperative federalism approach has stalled the implementation of the COCA

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359 *See* Ku *et al*., *supra*, at 126-27 (describing the role of the ULC and L/PIL in cooperative federalism); *see also id.* at 128-33 (providing an in-depth account of the ULC's role in treaty negotiation and implementation).

360 *Id.* at 142-43; *see also* William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 Elon L. Rev. 39, 47-48 (detailing, through 2010, the process of passing UIFSA).

361 *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

362 Ku *et al*., *supra*, at 143.

363 *Dole*, 483 U.S. at 207.

364 U.S. Const., Art. VI.

365 Henning, *supra*, at 49-50.

366 15 U.S.C. § 7002.

367 *Electronic Transactions Act*, UNIFORM L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 (last visited March 15, 2024).

368 Henning, *supra*, at 50-51.

369 *See, e.g.*, Schnabel, *supra*, at 285-88; Glenn P. Hendrix *et al*., *Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements*, 49 Int'l L. 255 (2016).

Convention.[370] Essentially, the aim of conditional preemption is to circumvent federalism concerns by affording states a small amount of wiggle room in exchange for adopting the desired uniform bill. One drawback to this approach is clear: the duplicative cost of passing nearly identical legislation fifty-plus times, rather than just once through Congress, as well as the administrative cost for monitoring states' progress, drafting both uniform and preemptive laws, and having to amend laws in fifty-plus jurisdictions in the event the legislation requires updating.[371] Further, if states are permitted little substantive variance from the uniform bill, the approach risks being nothing more than an expensive fig leaf on federal encroachment; if states are permitted great variance, then the resulting laws become less uniform, undermining the purpose of the legislation.[372] Indeed, in the context of a private international law treaty, where uniformity is the primary motivation, it is unclear if any substantive divergence may be allowed without forfeiting altogether the benefit of the venture. This determination will require case-by-case assessment in light of the non-uniformity called for or tolerated by a given treaty.[373]

Nonetheless, the lesson of the E-Sign experience should be taken seriously: by enacting a preemptive federal statute, Congress persuaded forty-nine states to adopt uniform legislation.

iv. Implementation for States with Non-Unified Legal Systems

Lastly, treaties themselves often offer alternative methods for implementation for signatories with non-unified legal systems. For example, the COCA Convention,[374] the Judgments Convention,[375] and the Singapore Convention[376] all permit countries that have provinces with different systems of law to declare that the conventions will extend only to certain of their provinces. This provision is intended for countries like Canada, for example, which only allow for treaty implementation on certain subjects at the federal level.[377] Unlike the United States where federal legislation of foreign and inter-state commerce is well established, Canada sharply limits federal regulation of foreign and inter-provincial commerce that implicates only intra-provincial activity.[378]

While such provisions have never been explicitly invoked by the United States, this is the *de facto* result of its abandoned attempt to implement the Convention Providing a Uniform Law on the Form of an International Will (the "Washington Convention"). The intention was to pass

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370 *See generally* Cardoso, *supra*.

371 Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. Priv. Int'l L. 287, 300 (2006).

372 *See id.* at 300 (warning that such efforts may amount to "a mere token gesture" or be perceived as an attempt by the United States to "undermine treaties" by favoring domestic uniformity) (citation omitted).

373 For a cost/benefit analysis of the Hague Convention on Choice of Court Agreements, *see id.* at 301-06.

374 COCA Convention, *supra*, Art. 28.

375 Judgments Convention, *supra*, Art. 25.

376 Singapore Convention, *supra*, Art. 13.

377 Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 106, 1066 (2008).

378 Gregory W. Bowman, *U.S. and Canadian Federalism: Implications for International Trade Regulation*, 114 W. Va. L. Rev. 1007, 1038-39 (2012).

implementing legislation at both the federal and state levels; however, while many states passed such legislation, Congress never did.[379] The result is functionally the same as the Canadian provincial approach – the substance of the treaty is in effect only in those states that elected to implement it. Professor Curtis Reitz has argued for the viability of this method and explicitly argues that, if the remainder of the states were to implement the Washington Convention, the United States could claim that it is in compliance with the treaty's requirements and proceed to ratify the Washington Convention.[380]

The COCA Convention and Judgments Convention also allow further flexibility for States with non-unified legal systems. Specifically, they clarify (1) a country is not bound to apply the treaty to situations which involve solely two territorial units within that country, if different systems of law apply in those territorial units;[381] and (2) that one territorial unit is not bound to recognize or enforce a foreign judgment solely because that judgment has been recognized or enforced in another territorial unit within the same country.[382] There is nothing preventing a State with a non-unified legal system to apply the COCA Convention's obligations in these situations, but these provisions clarify that States have the option of declining to do so, without finding themselves in breach of their treaty obligations.

B. The COCA Convention

For the reasons set out in this section, we are of the view that were the United States to pursue ratification, a stand-alone federal law would be the best method for implementing the COCA Convention in the United States. The NYCBA made the same recommendation in its ICDC Report on the COCA Convention.[383]

Part B begins with a review of the key features of the COCA Convention and current U.S. law on the enforcement of choice of court agreements (B.i), then recounts the history of the debate concerning the implementation of the COCA Convention that took place between the State Department and relevant stakeholders in the years immediately following the signature of the Convention (B.ii). With this background, we then set forth our analysis and recommendations for the implementation of the COCA Convention (B.iii).[384]

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379 Ku *et al.*, *supra*, at 1067.

380 Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 Loy. L. Rev. 301, 323 (2005). We are, however, unaware of any instance in which the United States has implemented a treaty using this approach.

381 COCA Convention, *supra*, Art. 25(2); Judgments Convention, *supra*, Art. 22(2).

382 COCA Convention, *supra*, Art. 25(3); Judgments Convention, *supra*, Art. 22(3).

383 Report of the Committee on International Commercial Disputes of the New York City Bar on the Hague Convention on Choice of Court Agreements, September 2006, at 9-10, https://www.nycbar.org/pdf/report/DOC182.pdf.

384 While we recommend federal implementation of the COCA Convention, our goal is to provide the State Department with a thorough analysis and advice of the three Conventions, including the best form of implementation for each Convention.

i. The COCA Convention and Current U.S. Law on the Enforcement of Choice of Court Agreements

As a starting point, it is useful to make certain observations concerning the COCA Convention and current U.S. law on the enforcement of choice of court agreements, as they inform the issue of implementation in this country.

First, the COCA Convention contains obligations that already largely align with the existing law and practice of U.S. courts.[385] Especially after taking into account the categories of contracts that are excluded from the COCA Convention, the majority of covered choice of court agreements and foreign judgments would be recognized and enforced in the United States, absent certain preclusive circumstances.[386]

At the same time, there is no uniform law in the United States on the enforceability of choice of court agreements, including with respect to choice of law rules.[387] For this reason, states in the United States continue to differ on narrow but substantial issues such as the enforceability of choice of court agreements in franchise and mass-market contracts.[388] While both types of contracts are ostensibly covered under the COCA Convention, a state's reasons for refusing to enforce choice of court agreements within those types of contracts may arguably fall within the "manifestly contrary to the public policy" ground for non-enforcement under the COCA Convention.[389] Accordingly, without further implementing legislation, it is likely that the COCA Convention would be implemented in a non-uniform manner in the United States.

The COCA Convention itself also appears to expressly permit such divergences in enforcement. While the COCA Convention imposes clear rules in some respects, there are also other aspects left to be filled by the domestic law of the relevant Contracting State.[390] These matters, such as the substantive law of contracts, are those that in the United States have traditionally been governed by state, rather than federal, law.[391] Further, the COCA Convention

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385 *See* Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal and Recognition of Judgments in United States Courts*, 31 U. Pa. J. Int'l L. 1013 (2014).

386 *Id.* at 1041-42 (noting that because the Convention excludes from its scope several types of actions in which the *forum non conveniens* doctrine is typically successfully invoked by defendants, such as personal injury actions and anti-trust claims, the actual number of cases in which U.S. courts would be precluded under the COCA from dismissing or staying an action based on *forum non conveniens* is likely to be small).

387 William J. Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U. Pa. J. Int'l L. 657, 676 (2014).

388 *Id.* at 676-90 (noting that at least thirteen states hold that choice of forum provisions are unenforceable in franchise agreements and that some states have refused to enforce choice of court agreements in mass-market contracts because the effect of the enforcement would deny the customer a class-action remedy in the designated court).

389 *Id.* at 676-90.

390 *See, e.g.*, COCA Convention, *supra*, Art. 5(1) (determination of whether the choice of court agreement is "null and void under the law of that State"); *id.* at Art. 6(c) (determination of whether "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised"); *id.* at Art. 9(e) (determination of whether the "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State").

391 Woodward, *supra*, at 668.

recognizes that some Contracting States, such as the United States, have non-unified legal systems, and it thus clarifies in its Article 25 that the reference to the law or procedure of a State can also, where appropriate, refer to the law or procedure in force in the relevant territorial unit.[392] The COCA Convention also provides that its obligations do not have to apply to situations involving only two states within a Contracting State.[393] The architecture of the COCA Convention, therefore, expressly permits divergences *within* a Contracting State with a non-unified legal system on matters that are left to domestic law.

Finally, the COCA Convention contains various "escape valves" by which a Contracting State can declare that it is derogating from the Convention's obligations in specific situations. For example, the COCA Convention allows a Contracting State to declare that its courts may refuse to determine disputes that have no connection to the State; to declare that its courts may refuse to recognize or enforce a judgment rendered by a court of another Contracting State, when the dispute and the parties are connected only with the requested State; and to declare that it will not apply the Convention to a matter where it "has a strong interest" in doing so.[394]

ii. History of Implementation of the COCA Convention

Unlike the other two treaties addressed in this memorandum, the implementation method for the COCA Convention has been the subject of extensive debate and analysis.[395] Since signing the COCA Convention in 2009, the United States, led by the State Department's Office of the Legal Adviser for Private International Law ("L/PIL"), has been engaged in efforts to draft an implementation mechanism.

Initially, the State Department recommended the cooperative federalism model, believing it to be the best compromise between the relevant stakeholders. Under this approach, the State Department developed uniform state legislation and a conditionally preemptive federal statute that were as "identical as possible. . . ."[396] However, the Uniform Law Commission ("ULC"), among other stakeholders, rejected the proposal over its provision requiring federal courts to apply federal law, as opposed to state law, even when they sit in a state that has already adopted the uniform state legislation.[397] The ULC then, on July 18, 2012, approved its own uniform legislation, designating state law as the law to be applied by federal courts in such situations. The State Department did not endorse this proposal. Faced with this deadlock, L/PIL presented an alternative proposal involving federal-only legislation, modeled after Chapter Two of the FAA.[398]

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392 *See* COCA Convention, *supra*, Art. 25(1).

393 *See id.* at Arts. 25(2), 25(3).

394 *See id.* at Arts. 19-21.

395 OFFICE OF THE LEGAL ADVISER, STATE DEPARTMENT WHITE PAPER (Apr. 16, 2012), https://2009-2017.state.gov/s/l/releases/2013/211157.htm.

396 *Id.*

397 *Id.*; Harold Hongju Koh, Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Courts Agreements (Jan. 19, 2013), https://2009-2017.state.gov/s/l/releases/2013/206657.htm ("January 2013 White Paper").

398 January 2013 White Paper, *supra*.

With no consensus forthcoming, the ABA-ILA released its own proposal in February of 2016.[399] Another attempt at compromise, the proposal would implement Chapter Two—the choice of court section of the COCA Convention—through cooperative federalism, and Chapter Three—the enforcement of judgments section—through federal law. This includes the concession to the ULC that state choice-of-court law will govern in federal courts seated in states that have enacted the uniform law.[400] To date, however, there has been no agreement or substantial further progress made on the implementation of the COCA Convention.

iii. Analysis and Recommendation

As evidenced by the extensive history of the implementation of the COCA Convention, many different models of implementation, as well as arguments both for and against each model, have been canvassed. The objective of this report is not to restate all these arguments, but to explain from the practitioners' perspective what we consider to be the most important considerations with respect to the COCA Convention and, on that basis, recommend an appropriate model.

The practitioners' overriding consideration is for the COCA Convention to be implemented in a manner that creates *ex ante* predictability with respect to the enforceability of choice of court agreements and resulting judgments. This would allow counsel and commercial parties alike to make sound and coherent decisions at the contract drafting stage, or at the stage of deciding in which forum to pursue litigation, which would reduce costs overall.

For the foregoing reasons, we consider that a ***federal law***, as proposed by the U.S. Statement Department and set out in Appendix 6,[401] subject to the addition of certain guiding language, would best meet these considerations. As noted above, this method of implementation would establish a simple, streamlined, and transparent regime which both local and overseas parties can easily understand and use to resolve transnational commercial disputes without having to spend additional effort or cost in seeking out specialized expertise.[402]

Importantly, and as the NYCBA ICDC similarly concluded,[403] the federal law could ensure that the COCA Convention's obligations are uniformly applied throughout the United States, and in harmony with the Judgments Convention, including with respect to matters left to be addressed by a Contracting State's domestic law, in several ways.[404]

First, the federal law should clarify the scope of certain treaty terms where necessary and appropriate, including, for example, the "public policy" exceptions in Articles 6(c) and 9(e) of the

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399 Hendrix *et al*., *supra*.

400 *Id*.

401 *See* January 2013 White Paper, *supra*.

402 *See* Burbank, *supra*, at 300.

403 Report of the Committee on International Commercial Disputes of the New York City Bar on the Hague Convention on Choice of Court Agreements, September 2006, at 9, https://www.nycbar.org/pdf/report/DOC182.pdf (noting that implementation by means of federal legislation would "enhance uniform construction and application of the Convention within the United States").

404 *Id.* at 303.

COCA Convention. As noted in Section IV.A.i.3 above, there are concerns that U.S. courts may be compelled under the COCA Convention to either decline jurisdiction as a non-chosen court or recognize or enforce a foreign judgment in situations where (1) there was no proper consent to the "putatively chosen" court's exercise of jurisdiction; (2) the chosen court sits within a judicial system that is systemically unfair, biased, or corrupt; or (3) the specific proceedings before the chosen court were not compatible with due process of law. The federal implementing law of the COCA Convention should expressly state that the public policy exceptions in Articles 6(c) and 9(e) of the COCA Convention would constitute defenses to the U.S. courts' obligations in these specific scenarios. Such a provision would harmonize the COCA Convention and Judgments Convention as applied in the United States. A draft proposed provision to this effect, which could be inserted in any implementing legislation, is set out in Appendix 8 below with an accompanying commentary.[405]

Second, the federal law should clarify any declarations that the U.S. government wishes to make under Articles 19–22 of the COCA Convention. In the State Department's draft implementing legislation, for example, it is proposed that the U.S. make declarations under Articles 19 and 22, which provide that (1) even if chosen by the parties, a Contracting State's courts may refuse to determine disputes if there is no connection between the state and the parties or the dispute; and (2) a Contracting State's courts will recognize and enforce foreign judgments rendered by the courts of another Contracting State in disputes with a non-exclusive choice of court agreement.[406]

Third, this federal law should also provide for federal subject matter jurisdiction and thereby allow federal courts to develop expertise and a body of precedent that would contribute to the uniform interpretation of the COCA Convention.[407] To the extent that a single federal law is enacted, this would encourage courts to adopt self-contained interpretations of issues that the COCA Convention leaves to domestic law, such as what constitutes "manifest public policy."[408] In areas where state law would continue to apply (*e.g.*, substantive law of contract), by contrast, the federal law would establish a single choice-of-law rule which would determine the substantive state law to be applied. As the experience of the FAA has shown, developing precedent through the fifty states runs the risk of misapplication of general legal doctrines in context-specific situations that

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[405] Although the suggested language to be included in the implementing legislation included in Appendix 8 is proposed to be included as part of the legislative history of such legislation, it is also possible – and in some ways preferable – to include such language in the body of the implementing legislation itself to provide greater emphasis and promote uniformity of judicial consideration and application of the COCA Convention (as well as the Judgments Convention) in the United States. Moreover, this language may not be exhaustive and may be subject to change based on additional considerations made by the U.S. State Department or other commentators.

[406] Office of the Legal Adviser, Draft Federal Implementing Legislation, December 11, 2012, § 201(a) cmt. 1, § 304 cmt. 1 (Jan. 19, 2013), https://2009-2017.state.gov/s/l/releases/2013/211154.htm;.Office of the Legal Adviser, Draft Federal Implementing Legislation, April 24, 2012, § 202 cmt. 1, § 312 cmt. 1 (Jan. 19, 2013), https://2009-2017.state.gov/s/l/releases/2013/211156.htm.

[407] Peter D. Trooboff, Implementing Legislation for the Hague Choice of Court Convention in Foreign Court Judgments and the United States Legal System, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 131, 136 (Paul B. Stephan ed., 2014); David P. Stewart, Implementing the Hague Choice of Court Convention: The Argument in Favor of "Cooperative Federalism," in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 147, 158-59 (Paul B. Stephan ed., 2014).

[408] *See* Stewart, *supra*; Burbank, *supra*, at 303.

require a more tailored approach.[409] Moreover, this approach avoids the risk of divergence in the application of state contract law to cases brought under the COCA Convention. The experience and success of the U.S. implementation of the New York Convention under Chapter II of the FAA is also a helpful point of reference.[410]

We consider this approach—which would give federal courts subject matter and removal jurisdiction—to be superior to the approach under Chapter I of the FAA,[411] which does not give rise to federal subject matter jurisdiction but helps to ensure uniformity through the preemption of conflicting state law (although some state law, which is not considered contrary to the federal policy enshrined in the FAA, is not preempted). In our view, the Chapter I approach suffers from the same flaws as the cooperative federalism approach addressed below. The existence of parallel non-uniform state laws subject to federal preemption would provide a less rigorous regime for ensuring true uniformity in the application and interpretation of the treaty obligations. This regime could also create confusion and increased uncertainty for litigants who have to determine whether federal or state law would apply, and who might be confronted with differing standards and rules that have persisted because the state law does not in fact run afoul of the federal law. There is also an added risk that the state laws fall into disuse, are not updated or interpreted by courts, and end up being nothing more than a pitfall for unsuspecting and uninformed litigants.

The ***cooperative federalism*** approach,[412] which would involve parallel federal and state laws,[413] purports to address federalism concerns and thereby allows for greater stakeholder buy-in and a greater chance of obtaining the consent necessary for ratification.[414] The other arguments that have been made in favor of this approach, however, do not stand up to scrutiny. For one, it has been argued that this approach facilitates integration of treaty provisions with existing state law, which is critical for a treaty such as the COCA Convention that implicates many matters typically within the province of state law and procedure.[415] Yet, as already explained, (1) harmonization with state law can be done at the federal level through, for example, a single choice of law rule; (2) leaving too many issues to be determined by state law will not only create divergence in the enforcement of the COCA Convention's obligations, but also increase the risk of state courts misapplying general legal doctrines to context-specific situations that require a more tailored approach.

It has also been argued that this approach would not promote dis-uniformity because (1) the federal and state laws are very similar; (2) interpretations of the uniform state law that are contrary to federal law would be preempted; and (3) the federal law would apply in any states that have not adopted the uniform law.[416] However, as the experience of unifying U.S. law on the enforcement

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409 *See* Burbank, *supra*, at 302-03.

410 Hendrix *et al*., *supra*, at 263-65.

411 *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16.

412 *See* April 2012 White Paper, *supra*.

413 *See, e.g.*, Appendix 7 (as an example of the uniform state law).

414 *See, e.g.*, Kamel, *supra*, at 1837, 1839.

415 Reitz, *supra*, at 323.

416 *See* April 2012 White Paper, *supra*.

of foreign money judgments shows,[417] the fact that the federal and state laws are nearly identical is no guarantee that they will be adopted, implemented or interpreted uniformly. Nor is it clear how inconsistent interpretations of the uniform state law might be corrected in practice, given the unlikelihood of the Supreme Court granting certiorari to consider such an issue. As mentioned, Article 25 of the COCA Convention could also perpetuate non-uniform interpretations of certain residual aspects of the Convention.

Moreover, having two almost identical laws being applied at the federal and state level would most certainly cause confusion for litigants, particularly foreign litigants who may be less adept at navigating the federal court system.[418] Not to mention the administrative and transactional costs of enacting the federal and state laws, ensuring their uniformity both in text and in interpretation, and amending or updating them where necessary, would be significantly costlier than adopting the single federal law approach. To the extent that some state laws are infrequently used and not regularly updated to maintain conformity with the parallel federal law, the lack of jurisprudential guidance on the question, coupled with the inconsistencies between the two texts, would, at best, reduce predictability and, at worst, upset litigants' reliance interests and disrupt stable commercial relations.

The COCA Convention is not a ***self-executing treaty***,[419] and we do not believe that having only some U.S. states implement the COCA Convention under an ***Article 28 declaration*** would be either feasible or beneficial.[420]

Notwithstanding our position that a federal-only approach would best serve the interests of practitioners in the United States, we understand that its intrusion on the ability of state courts to determine their own jurisdiction and apply their own law in matters that have typically fallen within their remit is politically fraught.

In this regard, we wish to note that, notwithstanding the political issue, there does not appear to be any *legal* or *practical* issue. The State Department previously has concluded that a short form federal law would be feasible,[421] and, as explained above, there would only be narrow differences between the prevailing state laws and a federal law implementing the COCA Convention. Thus, while state law might be displaced, the rules under the COCA Convention do not deviate sufficiently from those rules to significantly upset any reliance interests or expectations. One

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[417] *See infra* Section V (noting that while there have been many efforts to harmonize this are, U.S. law on the recognition and enforcement of foreign judgments is not uniform – twenty-eight states and the District of Columbia have adopted the 2005 Uniform Act, eleven states have adopted the predecessor to the Uniform Act, the 1962 Act, and the remaining states follow the common law as memorialized in either the Third and Fourth Restatements of Foreign Relations Law).

[418] Stephen B. Burbank, *Whose Regulatory Interests? Outsourcing the Treaty Function*, 45 N.Y.U. J. Int'l L. & Pol. 1037, 1057 (2013).

[419] Kamel, *supra*, at 1833.

[420] COCA Convention, *supra*, Art. 28(1) ("If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.").

[421] *See* January 2013 White Paper, *supra*.

objection that was raised against federal implementation of the COCA, and which could conceivably be raised against the other Conventions discussed below, is that such federal substantive rules are improper under *Erie v. Tompkins*.[422] However, as has recently been argued, this argument is not persuasive, particularly as *Erie* does not apply where substantive rules are applied via federal statute.[423] Moreover, there is an equally compelling argument that, under the concerns of federalism, the enforcement of international choice-of-court agreements and judgments is a matter of international and foreign commerce that is most appropriately governed by federal law which, in turn, federal courts have a paramount interest in applying.[424]

C. The Judgments Convention

For the reasons set out in this section, we are also of the view that a stand-alone federal law would be the best method for implementing the Judgments Convention in the United States. This section reviews the key relevant features of the Judgments Convention and the current status of the relevant law in the United States (Section V(C)(i)), then analyses various implementation models before setting out a recommendation (Section (V)(C)(ii)).

i. The Judgments Convention and Current U.S. Law on the Recognition and Enforcement of Foreign Judgments

The Judgments Convention is similar to the COCA Convention in that it establishes international rules and standards for the recognition and enforcement of foreign judgments in Contracting States' courts. However, it differs from the COCA Convention in a few respects that are salient for our implementation analysis.

First, unlike the COCA Convention, which deals in part with the enforcement of choice of court agreements, the Judgments Convention, for the most part,[425] does not establish rules concerning when a court may or may not have jurisdiction over a particular dispute. At least in this respect, therefore, the Judgment Convention should give rise to fewer concerns of possible encroachment into the independence of state courts. Second, the Judgments Convention leaves fewer issues to be dealt with by the domestic law of the requested State, and most of these issues relate to procedural rather than substantive law.[426] This significantly weakens any argument that the treaty obligations need to be harmonized with the surrounding state law.

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[422] *See* Letter from Michael Houghton, President, Unif. L. Comm'n, to Harold Koh, Legal Advisor, U.S. Dep't of State (May 22, 2012).

[423] For a thorough refutation of this argument, *see* Cardoso, *supra*, at 30-40.

[424] Hendrix *et al*., *supra*, at 262.

[425] Article 13(2) of the Judgments Convention provides that "[t]he court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State." Judgments Convention, *supra*, Art. 13(24). This, however, is a much narrower obligation as compared to Articles 5 and 6 of the COCA.

[426] *See, e.g.*, *id.*, Art. 12(4) (requiring documents that are not in an official language of the requested State to be accompanied by a certified translation into that language "unless the law of the requested State provides otherwise"); *id.* Art. 13 (providing that the "procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State, unless this Convention provides otherwise").

There are also several features of the current U.S. law on the recognition and enforcement of foreign judgments that are worth noting.

First, while there have been many efforts to harmonize this area and there is a general consensus among the states around the core rules, U.S. law on the recognition and enforcement of foreign judgments is not uniform.[427] Twenty-eight states and the District of Columbia have adopted the Uniform Act, eleven states have adopted the predecessor to the Uniform Act, the 1962 Act, and the remaining states follow the common law as memorialized in either the Third and Fourth Restatements of Foreign Relations Law. In addition to the differences among the Uniform Act, the 1962 Act, and the Third and Fourth Restatements, each state has also implemented and interpreted the provisions of each of these rules differently, giving rise to a patchwork of laws that vary from state to state. One notable issue on which states diverge is whether reciprocity is required for the recognition and enforcement of foreign judgments, *i.e.* that the foreign country must also respect a U.S. judgment in similar circumstances. This requirement is not included in the Uniform Act, the 1962 Act, or the Third Restatement, and is a non-discretionary requirement under the Fourth Restatement.[428] As such, to the extent there even is guidance on the question under a given state's law, that law may reject, mandate, or inconsistently apply the reciprocity requirement.[429]

This divergence has led to practical problems for litigants looking to enforce a foreign judgment in the United States and invites forum shopping.[430] Before even commencing litigation, for example, a potential judgment creditor might not know where assets will ultimately be found and have to assess different state laws to determine whether enforcement is possible. After a foreign judgment is rendered, if assets are located in different states, the judgment creditor would also have to initiate suit in multiple states with possibly conflicting outcomes. Conversely, a potential judgment debtor would also be uncertain as to which defenses in the foreign jurisdiction might affect recognition and enforcement proceedings in the United States, as U.S. courts have different standards as to the jurisdictional grounds in a foreign proceeding that are acceptable for recognition purposes.[431] This leads to increased uncertainty and costs for foreign judgment creditors and debtors alike in the United States.

Second, while the recognition and enforcement of foreign judgments in the United States is today mostly governed by state law, there is precedent for federal law playing a role as well. As noted above,[432] the only Supreme Court case to deal with these issues is the 1895 decision *Hilton v. Guyot*,[433] where the court considered this a matter of federal common law informed by principles of international law. As the Fourth Restatement of Foreign Relations Law notes, a minority of states in the United States in fact continue to follow the rule in *Hilton*, imposing a reciprocity

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427 *See* Silberman, *supra*, at 4-5.

428 *See* Restatement (Fourth) of Foreign Relations Law § 484(i) (2018).

429 Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments, in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 99, 106 (Paul B. Stephan ed., 2014).

430 *Id.* at 105, 108.

431 *Id.* at 106-07.

432 *See supra* Section III.

433 159 U.S. 113 (1895).

requirement as a matter of general common law.[434] Otherwise, there are only two situations in which federal law directly governs the recognition of foreign judgments. First, the 2010 SPEECH Act limits the recognition and enforcement of foreign defamation judgments under federal law.[435] Second, where a foreign judgment is presented as a defense to a federal claim, federal law is applied in determining recognition and enforcement.[436]

ii. Analysis and Recommendation

As with the COCA Convention, practitioners' overriding consideration is for the Judgments Convention to be implemented in a manner that creates *ex ante* predictability regarding the recognition and enforceability of foreign judgments. The largely overlapping but still divergent state laws in this area confound efforts to discern the enforceability of foreign judgments in the U.S. when the enforcement jurisdiction is unknown, and at the same time create the perfect opportunity for the Judgments Convention to introduce much-needed uniformity and certainty. For the reasons set out below, we consider a stand-alone federal implementing legislation to be the model best suited for this purpose.

It is not clear whether the Judgments Convention is a ***self-executing treaty*** under U.S. law, and the executive and legislative branches of the government have not had occasion to opine on the question. However, some form of implementing legislation is likely advisable, if not required, because (1) both federal and state law are implicated in these matters; and (2) there are procedures that the Judgments Convention leaves to be dealt with by the domestic law of the Contracting State, as well as gaps in the Judgments Convention's rules that require clarifying and also need to be interpreted consistently with the COCA Convention.

A ***federal law***[437] implementing the Judgments Convention would, as with the COCA Convention, provide a simple, transparent, and coherent system that promotes true uniformity in the application and interpretation of the treaty obligations.[438]

The federal law could also, to the extent necessary, fill any gaps that the treaty itself does not address. Article 5(1) of the Judgments Convention sets out an exhaustive list of "jurisdictional filters"–indirect bases of jurisdiction on which a foreign judgment may be determined to be eligible for recognition and enforcement. While this list is clearly meant to be exhaustive, it is likely that, with technological advancement in international trade, new bases of jurisdiction will need to be recognized.[439] To the extent that the United States wishes to expand the bases on which foreign judgments may be recognized in its courts, it may do so under Article 15 of the Judgments

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434 *See* Restatement (Fourth) of Foreign Relations Law § 484 cmt. k (2018).

435 28 U.S.C. §§ 4101-4105.

436 Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 321 Corp. Couns. Int'l Adviser 2 (2012).

437 *See, e.g.*, Appendix 6, Chapter 3.

438 *See supra* Section V.

439 Brand, *supra*, at 865.

Convention[440] by enacting relevant provisions in the federal implementing legislation.[441] We note, though, that this would not address the recognition and enforcement of judgments that fall outside the scope of the Convention, which is largely governed by different State laws.[442] To the extent that Congress wishes to establish greater uniformity in this respect as well, it could use the federal implementing legislation to impose a reciprocity requirement for all foreign judgments, regardless of whether they fall within the scope of the Judgments Convention. The Judgments Convention is also silent on which party has the burden of proof to establish an indirect jurisdictional basis or a ground for non-recognition.[443] While the 2005 Act places the burden on the party resisting enforcement,[444] this issue is not uniformly addressed under current U.S. law and could be clarified under the federal implementing legislation.[445]

Finally, the federal law could expressly require that U.S. courts recognize and enforce any foreign judgments that already have been recognized and enforced by another U.S. court. Article 22(3) of the Judgments Convention explicitly clarifies that this is not an obligation.[446] However, it would be an important safeguard against forum-shopping by reducing the risk of different and inconsistent outcomes across states, and also significantly reduce transactional costs for litigants In addition to these advantages, a federal-law-only approach to the Judgments Convention might receive less political pushback than the COCA Convention because the Judgments Convention (1) leaves fewer issues to be decided by the domestic law of the requested State and therefore requires less harmonization with the surrounding state law; and (2) deals with matters that have, at least in part, involved federal common law and legislation.

If a determination is made to pursue ratification and implementation of both the COCA Convention and the Judgments Convention and to do so via federal legislation, the goal of harmonization of the two treaties would be significantly furthered if both were implemented via a single federal statute so as to reinforce the point that the two treaties serve common and overlapping terms (*e.g.*, "public policy") and purposes and therefore must be interpreted consistently to achieve the intended result.

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[440] Judgments Convention, *supra*, Art. 15 (providing that "this Convention does not prevent the recognition or enforcement of judgments under national law," meaning that the jurisdictional filters in Article 5(1) provide a floor for judgments recognition purposes, not a ceiling, and that Contracting States are free to adopt more liberal measures).

[441] *See* Linda J. Silberman, *The 2019 Judgments Convention: The Need for Comprehensive Federal Implementing Legislation and a Look Back at the ALI Proposed Federal Statute* (May 14, 2021), NYU School of Law, Public Law Research Paper No. 21-19, p. 7.

[442] *See id*.

[443] Brand, *supra*, at 35.

[444] 2005 Act, *supra*, § 4(d).

[445] Silberman, *supra*, at 105 n.22 (noting that the 1962 Act was silent on this question and that courts applying the Act have taken different positions).

[446] Judgments Convention, *supra*, Art. 22(3) ("A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.").

An approach involving both ***state and federal law***[447] would be suboptimal for the primary reason that it would result in a complex, multi-tiered system that does not have the requisite mechanisms in place to ensure true uniformity of implementation and interpretation. As the experience of the Uniform Act and 1962 Act has shown, mere uniformity of text does not guarantee uniformity of adoption, implementation, and practice. The fact that the 1962 Act had to be updated in 2005 to the Uniform Act, which then created more divergence between the states that have adopted the different acts, further underscores the difficulties and transactional costs associated with ensuring uniformity through state law in an area that is constantly evolving. Although case law may develop robustly in certain jurisdictions, such as New York or Delaware, that will not be the case in states that are less integrated with foreign trade, which could result in an uneven development of jurisprudence and pose a threat to uniformity. Without Supreme Court guidance, it is also unclear how inconsistent state law interpretations might be resolved.

D. The Singapore Convention

For the reasons set out in this section, we are of the view that the Singapore Convention should be implemented under a stand-alone federal law. This section reviews the key relevant features of the Singapore Convention and the current status of the relevant law in the United States (Section IV(A)), then analyzes various implementation models before setting out a recommendation (Section IV(B)).

i. The Singapore Convention and Current U.S. Law on the Enforcement and Recognition of Agreements Resulting from Mediation

Both mediation procedures and the process of enforcing MSAs are governed primarily by state law in the United States. There is wide diversity in these laws, with over 250 state laws and regulations governing confidentiality alone.[448] Only thirteen states have adopted the Uniform Mediation Act ("UMA"), which does not address enforcement of MSAs, instead allowing states to specify enforcement mechanisms in their uniform laws if they so wish.[449]

In most states, MSAs are largely treated the same as contracts.[450] Thus, the defenses against MSA enforcement are the typical contract defenses, such as incapacity, fraud, duress, and mistake.[451] A unique aspect of MSAs, however, arises from the confidential nature of mediation proceedings; because the best, and often only, evidence for the existence of a defense comes from the mediation proceedings themselves, mediation law must determine when, if ever, confidential

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[447] *See*, *e.g.*, Appendix 6, Chapter 3.

[448] James Coben, *Evaluating the Singapore Convention Through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts*, 20 Cardozo J. Conflict Resol. 1063, 1100 n.138 (2019).

[449] *See* Unif. Mediation Act § 14 (Unif. L. Comm'n 2001).

[450] A few states, however, view MSAs involving international commercial issues differently, either by treating them as arbitral awards and thus eligible for accelerated enforcement under the New York Convention, or requiring special formalities. Schnabel *supra*, at 273 ; MINN. STAT. §572.35; COLO. REV. STAT. §13-22-308.

[451] For examples of the application of contract defenses in enforcing MSAs, *see* Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, IN CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS VOL. 2, 343-359 (A. W. Rovine ed., 2008).

conduct or communications may be presented at enforcement proceedings. State approaches vary widely, and the ULC's attempt to standardize these exceptions to confidentiality sparked vigorous disagreement.[452] The general law of state mediation law, then, remains highly localized.

For better or worse, most of the domestic law on mediation would be left unaffected by the Singapore Convention. The Singapore Convention would displace only a narrow portion of existing state law, largely by eliminating defenses to enforcement that are unlikely to arise in the international commercial context (see above), and there is no federal law concerning the subject matter of the Singapore Convention.[453] In addition, the scope of the Singapore Convention is narrower than that of domestic mediation laws; not only is the Convention limited to "international" and "commercial" MSAs,[454] but the Singapore Convention explicitly excludes MSAs related to consumer transactions, family law, employment law, and inheritance law.[455] Enforcement of MSAs on these topics, and those not addressing international commercial matters, would continue to be regulated solely by domestic law.

Further, as the Singapore Convention only addresses enforcement of MSAs, laws governing the mediation procedures themselves, including the enforceability of agreements to engage in mediation, will remain untouched.[456] This includes one of the most contentious aspects of MSA enforcement – confidentiality – which the Convention leaves to the determination of domestic law.[457] Regarding another contentious issue – mediator conflicts of interest – a signatory's domestic law regarding required disclosures would "remain relevant" to interpreting enforcement defenses.[458]

The principal areas of preemption, then, remain narrow. First, the Singapore Convention limits the formalities that may be required for an MSA to be recognized. Domestic law may not place any further requirements if an MSA is: (1) in writing, (2) signed by the parties, and (3) accompanied by evidence of mediation, such as the mediator's signature.[459] State contract law generally requires even fewer formalities[460] and so would largely be unaffected. However, states

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[452] *See* Coben, *supra*, at 1099-1100 & n.138 (2019) (describing the ULC's struggle to choose a uniform approach to confidentiality).

[453] Schnabel, *supra*, at 284.

[454] Singapore Convention, *supra*, Art. 1.

[455] *Id.* at Art. 1(2).

[456] Schnabel, *supra*, at 267; Singapore Convention, *supra*, Art. 3.

[457] Coben, *supra*, at 1099 ("The Singapore Convention does not address confidentiality . . . .").

[458] Schnabel, *supra*, at 284.

[459] Singapore Convention, *supra*, Art. 1; *see also id.* at Art. 2 (defining the terms "in writing" and "mediation").

[460] Traditionally, for example, states allow for enforcement of oral MSAs, though the UMA and numerous states no longer enforce such agreements. *See* Sussman, *supra*, at 33-34 (citing examples and discussing the modern trend of the UMA).

such as Minnesota[461] and Colorado[462] that do require further formalities would have those elements of their law effectively nullified. As such formalities are generally aimed at protecting unsophisticated parties, these states may object that the Singapore Convention makes their citizens more vulnerable; however, such paternalistic concerns are likely less relevant in the context of international commercial mediation.

Second, Article 5 of the Singapore Convention enumerates exhaustive grounds for refusal of recognition and enforcement that a state may enact.[463] These grounds include incapacity, invalidity, lack of finality, lack of impartiality, and public policy concerns, which are "certainly broad enough" to cover those traditional defenses of state contract law that would likely arise in an international commercial context.[464] Rather, Article 5 would exclude current state-law defenses based on formalities and procedural matters, such as the initial court's lack of jurisdiction, failure to exhaust administrative remedies, and failure to raise or preserve an issue for review.[465] As catalogued by Professor Coben's comprehensive analysis of mediation litigation, numerous such state laws are actively litigated in the United States.[466] Thus, while the Singapore Convention would leave untouched traditional contract law defenses, it would eliminate many more technical defenses. Indeed, this is just the sort of streamlining that the Singapore Convention seeks to achieve, and it is unclear how substantial the value of such procedural defenses would be in the context of international commercial mediation.

ii. Analysis and Recommendation

The Singapore Convention is an outlier among the three treaties considered in this paper because its obligations encroach relatively minimally into existing state and federal law. On the one hand, this means that incorporating the Singapore Convention's obligations into the existing legal regime in the United States would be less disruptive, while on the other hand, the lack of guidance and case law on this matter presents risks for confusion and non-uniformity. The best method of implementation, therefore, would be one that creates a regime that promotes and ensures the uniform interpretation and enforcement of these obligations. For the reasons set forth below, we consider stand-alone federal implementing legislation to best meet these requirements.

The ABA[467] and commentators[468] have argued in favor of treating the Singapore Convention as a ***self-executing treaty***, reasoning that it is consistent with prior practice in respect

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461 Minnesota requires that an MSA must explicitly state that the agreement is binding and that the parties were given certain cautionary notice. MINN. STAT. §572.35.

462 Colorado requires that an MSA be signed by the parties as well as their attorneys and approved by the court as a stipulated agreement. COLO. REV. STAT. §13-22-308.

463 Singapore Convention, *supra*, Art. 5.

464 Coben, *supra*, at 1097.

465 *Id.* at 1082-83 (providing numerous examples); *see also* Schnabel, *supra*, at 45 (discussing examples of domestic laws that would not fit under Article 5).

466 Coben, *supra*, at 1082-83.

467 ABA Resolution 104A, 17 February 2020, at 3, https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2020/2020-midyear-104a.pdf.

468 Schnabel, *supra*, at 283.

of most private international law treaties and would be the most efficient path forward for implementation. They argue that the Singapore Convention can be treated as self-executing under U.S. law because (1) the text provides sufficient detail for direct application by courts to specific transactions or disputes; (2) the negotiating history suggests that the drafters meant for the Convention to have direct application; (3) the UNCITRAL Model Law,[469] which was developed in parallel and is essentially identical in content to the Convention, was seen as providing an alternative for countries not yet ready to accede; and (4) the executive and legislative branches have not expressed intent to the contrary. The self-executing treaty model is also feasible in this case because the Singapore Convention is a narrow treaty that does not require substantial coordination with state or federal law.

However, we are of the view that a ***short form federal law*** implementing the Singapore Convention would be a better approach. *First*, without a federal law clarifying certain areas that the Singapore Convention leaves to be filled by domestic law, there is a substantial risk that it will be applied in a non-uniform way in different states. Article 5, for example, allows a court to refuse to grant relief if the MSA is null and void under the applicable contract law "or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention . . . ."[470] Different states would apply different conflicts-of-laws rules to resolve this question, leading to different outcomes and less predictability in the system. Article 5(2), which sets out further grounds for refusing relief, also provides avenues through which non-uniform interpretations might arise. This includes the determination of what relief "would be contrary to . . . public policy" and "not capable of settlement by mediation under the law of that Party."[471]

Second, without a federal law expressly establishing federal subject matter jurisdiction, there is no clear regime for ensuring uniformity of application across the United States. This issue is further compounded by the fact that, as with the other treaties, the Singapore Convention allows for non-uniform implementation of its obligations in Contracting States with non-unified legal systems.[472]

Third, because self-executing treaties do not appear in legal research in the same way as legislation and court precedent, there is a risk that practitioners overlook the applicability of the Singapore Convention altogether. This point is particularly salient in respect of mediation which, unlike arbitration, is still gaining traction in the business community.

We are of the view that an approach involving both ***state and federal law*** is not appropriate with respect to the Singapore Convention because (1) the treaty's obligations do not encroach

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[469] *See* UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018, 57 U.N. GAOR, Annex II, § 3, U.N. Doc. A/73/17 (2018).

[470] Singapore Convention, *supra*, Art. 5(1)(b)(i).

[471] *Id.* Art. 5(2).

[472] *Id.* Art. 13(3) ("If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention: (a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit; (b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit; (c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.").

sufficiently on matters of state law; and (2) this approach, in any event, is one that introduces unnecessary complexity and confusion into the system. For similar reasons, we do not believe that having only some U.S. states implement the Singapore Convention under an ***Article 13 declaration*** would be either feasible or beneficial.[473]

[473] Singapore Convention, *supra*, Art. 13(1) ("If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.").

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[475] The Working Group acknowledges receipt of feedback on an earlier draft of this report from individuals involved with the Three Treaties at the Department of State Department and Department of Justice with respect to one portion of this Report. The voting members of the Working Group took that feedback into account in reaching its position on its recommendations. All conclusions in this report, however, are the result of deliberation and debate among the voting members of the Working Group.

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VI. APPENDICES

1. The COCA Convention
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APPENDIX 1:

COCA Convention

37. CONVENTION ON CHOICE OF COURT AGREEMENTS[1]

(Concluded 30 June 2005)

The States Parties to the present Convention,
Desiring to promote international trade and investment through enhanced judicial co-operation,
Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,
Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,
Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
Scope

(1) This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
(2) For the purposes of Chapter II, 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.
(3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2
Exclusions from scope

(1) This Convention shall not apply to exclusive choice of court agreements –
  a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
  b) relating to contracts of employment, including collective agreements.
(2) This Convention shall not apply to the following matters –
  a) the status and legal capacity of natural persons;
  b) maintenance obligations;
  c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
  d) wills and succession;
  e) insolvency, composition and analogous matters;
  f) the carriage of passengers and goods;
  g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Choice of Court Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court* (ISBN 978-9-40000-053-7, Intersentia, Antwerp, 2010, 871 pp.).

h) anti-trust (competition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;
k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
l) rights *in rem* in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;
o) 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;
p) the validity of entries in public registers.

(3) Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

(4) This Convention shall not apply to arbitration and related proceedings.

(5) Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

(6) Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
Exclusive choice of court agreements

For the purposes of this Convention –

a) "exclusive choice of court agreement" means an agreement 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;

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

c) an exclusive choice of court agreement must be concluded or documented –
i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) 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.

Article 4
Other definitions

(1) In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

(2) For the purposes of this Convention, an entity or person other than a natural person shall be considered to be 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.

CHAPTER II – JURISDICTION

Article 5
Jurisdiction of the chosen court

(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

(3) The preceding paragraphs shall not affect rules –

a) on jurisdiction related to subject matter or to the value of the claim;

b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6
Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

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

e) the chosen court has decided not to hear the case.

Article 7
Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention 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 or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8
Recognition and enforcement

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

(2) Without prejudice to such review as is necessary for the application of the provisions 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.

(3) A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

(4) 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. A

refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

(5) This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, 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.

Article 9
Refusal of recognition or enforcement

Recognition or enforcement may be refused if –

a) 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;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

  i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

  ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10
Preliminary questions

(1) Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

(2) 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 Article 2, paragraph 2.

(3) However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

  a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or

  b) proceedings concerning the validity of the intellectual property right are pending in that State.

(4) 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 pursuant to a declaration made by the requested State under Article 21.

Article 11
Damages

(1) 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.

(2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12
Judicial settlements (*transactions judiciaires*)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which 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 Convention in the same manner as a judgment.

Article 13
Documents to be produced

(1) The party seeking recognition or applying for enforcement shall produce –
   a) a complete and certified copy of the judgment;
   b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
   c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
   d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
   e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
(2) 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.
(3) An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
(4) If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15
Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV – GENERAL CLAUSES

Article 16
Transitional provisions

(1) This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
(2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17
Contracts of insurance and reinsurance

(1) Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
(2) Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may 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 Convention does not apply; or
b) an award of damages to which Article 11 might apply.

Article 18
No legalisation

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

Article 19
Declarations limiting jurisdiction

A State may 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.

Article 20
Declarations limiting recognition and enforcement

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.

Article 21
Declarations with respect to specific matters

(1) 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 the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
(2) With regard to that matter, the Convention shall not apply –
a) in the Contracting State that made the declaration;
b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22
Reciprocal declarations on non-exclusive choice of court agreements

(1) A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph *c)*, and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

(2) Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –

a) the court of origin was designated in a non-exclusive choice of court agreement;

b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and

c) the court of origin was the court first seised.

Article 23
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Article 25
Non-unified legal systems

(1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

(2) Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

(3) A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
Relationship with other international instruments

(1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

(2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

(3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty

concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

(4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

(5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting 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.

(6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27
Signature, ratification, acceptance, approval or accession

(1) This Convention is open for signature by all States.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States.

(4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28
Declarations with respect to non-unified legal systems

(1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 29
Regional Economic Integration Organisations

(1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

(2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its

Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

(3) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

(4) Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30
Accession by a Regional Economic Integration Organisation without its Member States

(1) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

(2) In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31
Entry into force

(1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

(2) Thereafter this Convention shall enter into force –

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32
Declarations

(1) Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

(2) Declarations, modifications and withdrawals shall be notified to the depositary.

(3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

(4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

(5) A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33
Denunciation

(1) This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer

period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
b) the date on which this Convention enters into force in accordance with Article 31;
c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.

APPENDIX 2:

Judgments Convention

41. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

(concluded 2 July 2019)

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
Scope

1. This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
Exclusions from scope

1. This Convention shall not apply to the following matters –

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

(c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

(d) wills and succession;

(e) insolvency, composition, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

(l) privacy;

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;

(q) sovereign debt restructuring through unilateral State measures.

2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3. This Convention shall not apply to arbitration and related proceedings.

4. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
Definitions

1. In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. An entity or person other than a natural person shall be considered to be habitually resident in the State –

(a) where it has its statutory seat;

(b) under the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment referred to under paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5
Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;

(b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

(d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

(f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

(i) the agreement of the parties, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance,

unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;

(i) the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

(ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

(a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;

(b) paragraph 1(f), (g) and (m) do not apply.

3. Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

Article 6
Exclusive basis for recognition and enforcement

Notwithstanding Article 5, a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.

Article 7
Refusal of recognition and enforcement

1. Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
Preliminary questions

1. A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2. 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 to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 10
Damages

1. 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.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 11
Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 12
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –

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

(b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

(c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. 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.

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

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court of the requested State shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
Costs of proceedings

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2. An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
Recognition and enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 16
Transitional provision

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
Declarations limiting recognition and enforcement

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 court of origin, were connected only with the requested State.

Article 18
Declarations with respect to specific matters

1. 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 the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19
Declarations with respect to judgments pertaining to a State

1. A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State; or

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2. Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 21
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

(a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

(d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2. Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to Regional Economic Integration Organisations.

Article 23
Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24
Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention shall be open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25

Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

3. This Article shall not apply to Regional Economic Integration Organisations.

Article 26

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27

Regional Economic Integration Organisation as a Contracting Party without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.

2. Thereafter this Convention shall enter into force –

(a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
Establishment of relations pursuant to the Convention

1. This Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

2. A Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention.

3. A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention.

4. A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
Declarations

1. Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
Denunciation

1. A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;

(b) the date on which this Convention enters into force in accordance with Article 28;

(c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

APPENDIX 3:

Singapore Convention

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on International Settlement Agreements Resulting from Mediation

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Contents

Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

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[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

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[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[5] Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: *(a)* if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or *(b)* as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

APPENDIX 4:

Table of Excluded Matters from COCA Convention and Judgments Convention

COCA Convention Excluded Categories	Judgments Convention Excluded Categories
Consumer contracts entered into by natural persons acting primarily for personal, family or household purposes	
Contracts of employment including collective agreements	
Status and legal capacity of natural persons	Status and legal capacity of natural persons
Maintenance obligations	Maintenance obligations
Family law matters	Family law matters
Wills and succession	Wills and succession
Insolvency, composition and analogous matters	Insolvency, composition, resolution of financial institutions, and analogous matters
Carriage of passengers and goods	Carriage of passengers and goods
Marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage	Transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average
Antitrust (competition) matters	Antitrust (competition) matters, except where the judgment is based on conduct that constitutes anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin
Liability for nuclear damage	Liability for nuclear damage

Claims for personal injury brought by or on behalf of natural persons	
Tort of delict claims for damage to tangible property that do not arise from a contractual relationship	
Rights *in rem* in immovable property, and tenancies of immovable property	
The validity, nullity or dissolution of legal persons, and the validity of decisions of their organs	The validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs
The validity of intellectual property rights other than copyright and related rights	Intellectual property
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	*See above*
Validity of entries in public registers	Validity of entries in public registers
	Defamation
	Privacy
	Activities of armed forces, including the activities of their personnel in the exercise of their official duties
	Law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties
	A sovereign debt restructuring through unilateral State measures

APPENDIX 5:

Enforcement of Mediated Settlement Agreements Outside the United States

a. *Brazil*

Brazil is a signatory to the Singapore Convention. As of March 15, 2024, however, Brazil has not ratified the Convention.

In Brazil, the enforcement of MSAs is governed by the Brazilian Mediation Act.[476] Brazilian law does not appear to distinguish specifically between domestic and cross-border mediation. The enforcement mechanisms of the Mediation Act distinguish mediations conducted in court from those conducted out-of-court.[477] An MSA reached outside of court is an extrajudicial enforcement order that may be enforced by both parties like a contract.[478] However, the Brazilian Code of Civil Procedure provides that if such a settlement agreement involves a monetary award, a debtor resisting enforcement has latitude to challenge the mediation agreement or raise any defense on the merits.[479] Alternatively, parties to an out-of-court MSA or a court-sponsored MSA may file the agreement for ratification with a court.[480] This process is considered non-litigious,[481] and provided an "agreement is ratified by a court, it shall be a judicially enforceable instrument."[482]

b. *Mexico*

As of March 15, 2024, Mexico has neither signed nor ratified the Singapore Convention.

Mexican federal law currently draws no distinction between mediated and non-mediated settlement agreements. Both agreements, however, may be enforced by means of an expedited summary enforcement procedure known under Mexican law as "Via de Apremio."[483] In practice, this procedure permits a party to a settlement agreement to seek the aid of a Mexican federal court to enforce its rights under a settlement agreement against

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476 L. No. 13.140, of June 26, 2015 ("Brazilian Mediation Act").

477 *See generally* Brazilian Mediation Act, *supra,* Sec. III (16 Mar. 2015); *see also* Tiago Cortez, Danilo Orenga, Flavia Cristina Alterio and Taísa Oliveira, Mediation Q&A: Brazil, 14 (Westlaw Apr. 30, 2020).

478 Brazilian Mediation Act, *supra,* Art. 20; *see also* Cortez *et al.*, *supra*, at 14.

479 Brazilian Code of Civil Procedure, Art. 917.

480 Brazilian Mediation Act, *supra,* Arts. 20, 28.

481 Brazilian Code of Civil Procedure, Art. 719-725.

482 Brazilian Mediation Act, *supra,* Art. 20; *see also* Cortez *et al.*, *supra*, at 14.

483 Mexican Code of Civil Procedure, Art. 2.157. Procedencia de la vía de apremio; *see also* Luis Alfonso Cervantes Castillo *et al.*, Mediation Q&A: Mexico, 13 (Westlaw June 30, 2020).

a breaching counter-party, including by attaching assets if necessary, without the need to commence proceedings to sue that party for breach of contract.[484] For the purpose of a summary enforcement proceeding of a mediated settlement agreement, Mexican law does not draw a distinction between international settlement agreements and domestic settlement agreements.[485]

In order for a settlement agreement to be eligible for expedited enforcement, it must meet certain formal requirements; namely, it must be executed in writing with original signatures.[486] If a settlement agreement was reached via mediation, evidence must be presented to show proof that it was reached as a result of mediation.[487]

The subject matter of an MSA is also relevant to whether it can be enforced, as certain matters which concern the public interest, such as certain family law matters (relating to inheritance, alimony, and parentage, among others), criminal claims, human rights violations, and taxes, may not be mediated.[488] Additionally, a settlement agreement that relates to a dispute for which a dispositive ruling already exists also will not qualify.[489] There are limited grounds to challenge a settlement agreement in an expedited enforcement proceeding. Notably, a settlement agreement may be nullified if the documents relied on for the agreement are later deemed to be invalid,[490] or if a party intentionally refrains from disclosing a key document during settlement negotiations.[491]

c. *Canada*

As of March 15, 2024, Canada has neither signed nor ratified the Singapore Convention. This is perhaps unsurprising in light of Canada's comments to UNCITRAL Working Group II during the drafting of the Convention:

> A fundamental question raised by this project is what policy rationale justifies giving expedited recognition and enforcement to one type of contracts [sic] over all the others (i.e. expedited

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[484] Cipriano Gómez Lara, *Juicio Ejecutivo y Vía de Apremio. En Derecho procesal civil* 195, 198 (Mex.: Oxford U. Press, 7 ed., 2005); Mediación TSJCDMX, *Preguntas Frecuentes*, https://www.poderjudicialcdmx.gob.mx/cja/cja-preguntas-frecuentes/; *see also* Cervantes Castillo, *supra*, at 13.

[485] Mexican Code of Civil Procedure, *supra*, Art. 2.157. *See also* Cervantes Castillo, *supra*, at 13.

[486] Federal Civil Code of Mexico, Art. 2945; Alternative Dispute Resolution Law for Mexico City, Art. 35.

[487] Antonio Mario Prida & Irena Mariana Cuéllar, *La nueva oportunidad para la mediación comercial internacional en Mexico*, 10 (Abogado Corporativo 2020, Thomson Reuters).

[488] Cervantes Castillo, *supra*, at 6.

[489] *Id.* at 6.

[490] Federal Civil Code of Mexico, *supra*, Art. 2956.

[491] *Id.* at Art. 2957.

> recognition and enforcement of settlement agreements is available while a similar expedited treatment is not available for a sale agreement). If the scope of the project were restricted to settlement agreements providing liquidated damages, it would be more akin to a judgment or an award and expedited enforcement procedures could more easily be justified. To the extent the settlement agreement covers aspects other than pecuniary settlements, it will be subject to a larger number of exclusions under domestic law with respect to specific performance, making the enforcement less likely. It will also be subject to interpretation by the parties and potentially by a court of law. For these reasons, the project should contemplate a convention on the recognition and enforcement of pecuniary settlements.[492]

In Canada, the enforcement of MSAs (with the exception of agreements involving the federal Crown, or relating to matters implicating federal legislative power), is generally governed by contract law at the state/province level.[493] At the federal level, and in most states, there are no rules specific to commercial settlement agreements, including those reached through mediation. Enforcement thus proceeds as a matter of contract law, and may be denied on the basis of grounds such as duress, unconscionability, illegality, undue influence, misrepresentation, mistake, or fraud.[494]

Two Canadian provinces – Ontario and Nova Scotia – provide an exception. Both provinces have enacted legislation based on the UNCITRAL Model Law on Commercial Conciliation.[495] Under Ontario law, with limited exceptions,[496] a party to an MSA may register that agreement with a court registrar whereupon the settlement agreement would then have "the same force and effect as if it were a judgment obtained and entered in the Superior Court of Justice."[497] Ontario law draws no distinction between "international"

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[492] UNCITRAL Working Group II, Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation / mediation – Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings – Comments received from States*: Note by the Secretariat*, 5, UN Doc. A/CN.9/WG.11/WP.188 (23 Dec. 2014).

[493] UNCITRAL Settlement of commercial disputes: Enforcement of settlement agreements resulting from international commercial conciliation / mediation: Compilation of comments by Governments: Note by the Secretariat, 8, U.N. Doc. A/CN.9/846 (Mar. 27, 2015).

[494] *Id*. at 10.

[495] *See* Com. Mediation Act 2010 (Ontario); Com. Mediation Act 2005 (Nova Scotia).

[496] The exceptions are: (a) if a party to the mediation against whom the applicant is seeking to enforce the settlement agreement did not sign the agreement or otherwise consent to the terms of the agreement; (b) the settlement agreement was obtained by fraud; or (c) the settlement agreement does not accurately reflect the terms agreed to by the parties in settlement of the dispute to which the agreement relates. *See* Com. Mediation Act 2010 (Ontario), *supra*, at c. 16, Sched. 3, s. 13(6).

[497] *See id.* at c. 16, Sched. 3, s. 13.

and "domestic" settlement agreements for the purpose of this enforcement procedure.[498] Similarly, in Nova Scotia, a settlement agreement is binding on the parties and, once filed with the Supreme Court of Nova Scotia, enforceable as if it were a judgment of that court.[499] Nova Scotian law likewise does not distinguish between international and domestic mediations for this purpose.[500]

d. *Singapore*

Singapore ratified the Singapore Convention in February 2020, implementing its terms with the promulgation of the Singapore Convention on Mediation Act 2020. The legislation allows a party to an international settlement agreement that meets stipulated formal requirements (which track the Singapore Convention) to apply to the Singaporean High Court to recognize that agreement as an order or judgment of that court.[501]

e. *China and Hong Kong*

China is a signatory to the Singapore Convention. As of March 15, 2024, however, China has not ratified the Convention. Should it ratify the Singapore Convention, China would need to take steps under its domestic legal framework to apply the Convention to Hong Kong.[502]

China commented to the UNCITRAL Working Group II drafting the Convention in 2015 that it had "no legislative framework providing for cross-border enforcement of settlement agreements reached only by the parties abroad."[503] Under the Chinese Civil Procedure Law enacted in 2017, parties to an MSA have the option of seeking judicial

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[498] The definition of "commercial dispute" – the subject of an MSA under the legislation – is broad, meaning: "a dispute between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers." *See id.* at c. 16, Sched. 3, s. 3.

[499] Com. Mediation Act 2005 (Nova Scotia), c. 36, s. 15.

[500] *See generally id.* at c. 36, s 5 (defining "mediation" to "mean[] a collaborative process in which parties agree to request a third party, referred to as a mediator, to assist them in their attempt to try to reach a settlement of their commercial dispute, but a mediator does not have any authority to impose a solution to the dispute on the parties.")

[501] Singapore Convention on Mediation Act 2020, §§ 4-5.

[502] Donna Wacker & Jonathan Wong, *Mediation Q&A: Hong Kong*, 5 (Westlaw June 30, 2021).

[503] UNCITRAL Working Group II, Note by the Secretariat, Settlement of commercial disputes: Enforcement of settlement agreements resulting from international commercial conciliation/mediation – Compilation of comments by Governments – Addendum, UN Doc. A/CN.9/846/Add.2, 5 (Apr. 22, 2015).

confirmation of their settlement agreement.[504] Further, there appears to be a specific mechanism by which creditors of payment obligations arising under an MSA may file an application before a competent court for a payment order, which the court will enforce if the debtor fails to timely submit a written objection.[505] It is not clear whether this procedure is available to parties to international MSAs.[506] However, for non-payment obligations contained in an MSA, there does not appear to be a means for a creditor to seek expedited enforcement of that obligation before a Chinese court.

Hong Kong law does not offer any expedited procedure to enforce an MSA.[507] To enforce the terms of an MSA, a party would therefore need to commence new legal proceedings to enforce that agreement like any other contract.[508] Separately, Hong Kong has promulgated a Mediation Ordinance regulating certain aspects of mediation, including the confidentiality of mediation communications and admissibility of those communications as evidence in arbitration or court proceedings, and third party funding.[509] However, the Ordinance is limited in its scope to mediations either wholly or partly conducted in Hong Kong, or those for which the underlying agreement specifies that the Mediation Ordinance or Hong Kong law apply to the mediation.[510] The Ordinance also does not address the enforcement of settlement agreements resulting from mediation.

f. *European Union*

As of March 15, 2024, the European Union has yet to sign the Singapore Convention, but it is one of the few jurisdictions mandating the enforcement of cross-border mediated settlements. In 2008, the European Parliament enacted Directive 2008/52/EC (the "Directive") to encourage the use of mediation in cross-border civil and commercial matters.[511] The Directive establishes minimum procedural standards for

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504 Civ. Proced. L. of the People's Republic of China, Art. 194; *see also* Zhu Huafang (Mary) &David Gu, *Mediation Q&A: China*, 15 (Westlaw May 31, 2020).

505 Civ. Proced. L. of the People's Republic of China, Art. 214; *see also* Huafang & Gu, *supra*, at 15.

506 Article 214 of the Civil Procedure Law is silent on whether a party to an international MSA may avail themselves of this procedure. Commentary indicates that there are no legal provisions for the enforcement of such agreements, suggesting the expedited procedure is likely unavailable to parties to international mediated settlement agreements. *See, e.g.*, Eunice Chua, The Singapore Convention on Mediation – A Brighter Future for Asia Dispute Resolution, Asian J. of Int'l L. 1, 11 (Jan. 2019). (suggesting China could meet its obligations under the Singapore Convention by "extending the availability of the procedure already available to domestic mediated settlement agreements to international commercial ones under the Civil Procedure Law.").

507 Wacker & Wong, *supra*, at 18-19.

508 *Id.*

509 *See generally* Mediation Ordinance 2012 (Hong Kong).

510 *Id.* at § 5.

511 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Arts. 3-8, 2008 O.J. (L 136) ("EU Directive"). Art. 12 of the

mediation and for the enforceability of certain cross-border mediated settlements with which all member states had to comply as of 2011.[512] With the exception of Denmark,[513] all member states are in compliance with the Directive.[514] This section provides a brief overview of the Directive's terms, and summarizes domestic implementation in the following member states: (1) Germany; (2) France; (3) Spain; and (4) the Netherlands.

The Directive seeks to address five primary issues: (1) quality of mediation; (2) court intervention; (3) enforceability; (4) confidentiality; and (5) limitation.[515] It has a broad scope, applying to all cross-border disputes in civil and commercial matters with the exception of State action and disputes involving "revenue, customs or administrative matters."[516] The Directive requires member states to apply its terms to cross-border disputes, but a Member state may opt to implement the Directive so that its terms also apply to "internal mediation processes."[517] Article 2 defines a cross-border dispute as "one in which at least one of the parties is domiciled or habitually resident in a Member state other than that of any other party" on the date the parties agree to use mediation or a court orders mediation.[518] The minimum standards in the Directive apply only to MSAs involving parties residing in different member states, but a member state may implement legislation that, in practice, renders the Directive applicable to any cross-border dispute.[519]

Article 6 of the Directive addresses the enforceability of MSAs. It requires member states to "ensure it is possible" for the parties, or one of the parties with the explicit consent

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Singapore Convention provides that an economic integration organization that is constituted by sovereign states (like the EU) may sign and ratify the Convention. Within UNCITRAL Working Group II, the EU stated that it saw no evident need for harmonization on the topic of mediation and opined that finding agreement beyond the Model Law's decision to leave the issue of enforcement to domestic law was unrealistic. *See* Schnabel, *supra*, at 5-6.

[512] Westlaw, "The EU Mediation Directive (Maintained)," Thomson Reuters Practical Law Practice Note, https://us.practicallaw.thomsonreuters.com/0-500-1117 ("Westlaw") at 2.

[513] EU Directive, *supra*, Art. 1.3.

[514] European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)), EUR. PARL. DOC. (2013/C 51 E/03).

[515] Westlaw, *supra*, at 7.

[516] EU Directive, *supra*, Art. 1.2.

[517] *Id.* at Recital 8 ("The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.").

[518] *Id.* at Art. 2.1.

[519] For example, the Article 3 of the Spanish Mediation Act defines cross-border disputes without reference to Member State. Thus, a cross-border MSA between non-Member State parties could be rendered enforceable in Spain and then, per the Directive, be recognized throughout the E.U.

of the others, to enforce the terms of a written MSA.[520] As some commentators have noted, the EU Directive's requirement that enforcement be available only to the parties jointly, or to one party with the explicit consent of the others, poses concerns where the parties have not specifically agreed to make their agreement enforceable and one party later wishes to resist enforcement.[521]

Under the Directive, there are two grounds on which a member state may refuse to make a settlement enforceable: (1) the content of the agreement is "contrary to the law of the member state where the request is made"; or (2) no law of that member state provides for the enforceability of the agreement.[522] The first of these provisions, in particular, arguably creates a license for courts of member states to go beyond the requirements of the Singapore Convention, and look at the substance of an agreement irrespective of whether the form requirements for enforcement are met.[523] The Directive defers to member states on the specific procedural mechanism for the enforceability process, but nonetheless requires that each member state designate a court or a competent authority to make a settlement agreement enforceable "in a judgment or decision or in an authentic instrument."[524]

The European Parliament has recognized that there remains a need to improve the free circulation of mediation agreements across the EU, because the Directive only establishes minimum standards for recognition and enforcement.[525] For example, the Directive provides that an MSA made enforceable in one member state "should be recognized and declared enforceable in the other member states in accordance with applicable Community or national law."[526] However, the Directive provides no procedural guidelines for the recognition and enforcement in one member state of cross-border MSAs that were already made enforceable in another member state.[527] Such differences in applicable law arguably create uncertainty regarding recognition and cross-border enforcement in certain jurisdictions.[528] In spite of this concern, no participant in a recent

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520 *Id.* at Art. 6.1.

521 Chua, *supra.*

522 EU Directive, *supra,* Recital 19.

523 Library of Congress, United Nations: UN Convention on International Settlement Agreements Resulting from Mediation Enters into Force (Oct. 13, 2020).

524 EU Directive, *supra,* Art. 6.2.

525 Directorate-General for Parliamentary Research Services, *The Mediation Directive, European Implementation Assessment: In-Depth Analysis* at 18, EUR. PARL. (2016).

526 EU Directive, *supra,* Recital 20.

527 *Id.* at Art. 6.4 ("Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.").

528 *See generally* Directorate-General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in

study of why commercial disputants in the EU do not opt for mediation raised concerns about the "lack of a direct enforcement mechanism for settlement agreements arising from cross-border mediation."[529]

g. *Germany*

As of March 15, 2024, Germany has neither signed nor ratified the Singapore Convention.

The German Mediation Act is the primary source of law governing mediation,[530] but the German Code of Civil Procedure generally governs the enforcement of MSAs.[531] The German Mediation Act makes no distinction between domestic and cross-border MSAs and does not define the territorial scope of its application.[532] Section 2(6) of the Act refers generally to settlements, but provides little clarity on the legal form of an MSA.[533] Commentators interpreting this provision consider an MSA equivalent to a binding contractual agreement.[534]

The law and practice of cross-border mediation is still evolving in Germany and "cross-border disputes are frequently resolved with the aid of institutional mediation rules."[535] Parties seeking enforcement of a cross-border MSA have four options, all of which render an agreement enforceable with the same effect as a court decision:[536] (1) request a declaration of enforceability from a civil notary;[537] (2) register a settlement with

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the EU, EUR. PARL. (2014) ("'Rebooting' the Mediation Directive") (discussing enforcement procedures in each Member State).

529 Anna Howard, *Why Parties Do Not Use Mediation for their EU Cross-Border Commercial Disputes*, EU Cross-Border Commercial Mediation: Listening to Disputants - Changing the Frame; Framing the Changes at § 8.04, Kluwer Law International (2021).

530 Mediation Act of 21 July 2012 ("German Mediation Act"); *see also* 'Rebooting' the Mediation Directive, *supra,* at 31-32.

531 *See* German Code of Civil Procedure §§ 328, 796.

532 *See generally* German Mediation Act; *see also* Kristina Osswald & Gustav Flecke-Giammarco, *Ch. 13: Germany, in EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* at §13.01, Kluwer Law International (2017).

533 German Mediation Act § 2(6); *see also* Kristina Osswald and Gustav Flecke-Giammarco, *Ch. 13: Germany, in EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* at §13.07, Kluwer Law International (2017).

534 *Id.*; *see also* Directorate-General for Internal Policies, *supra,* at 33.

535 Osswald & Flecke-Giammarco, *supra,* § 13.01.

536 Directorate-General for Internal Policies, s*upra,* at 33.

537 German Code of Civil Procedure § 796c. As grounds for refusal, § 796c (2) provides: "[i]nsofar as the notary refuses to issue a declaration of enforceability, he shall provide the grounds on which his decision is

a local court and seek a court declaration of enforceability;[538] (3) file a claim based on breach of contract if a party fails to comply with the agreement's terms;[539] or (4) have the settlement agreement recorded via a consent award in a subsequent arbitration.[540] Commentators have raised concerns over whether the first two options are in compliance with the EU Directive, because both require at least one party to the settlement agreement to be domiciled in Germany.[541] Additionally, the German Code of Civil Procedure provides that an MSA already rendered enforceable as a foreign judgment may be recognized provided recognition is not incompatible with German law or fundamental rights.[542]

h. *Spain*

As of March 15, 2024, Spain has neither signed nor ratified the Singapore Convention.

In Spain, the enforcement of MSAs is governed by Law 5/2012 (the "Spanish Mediation Act"), which incorporates the EU Directive into Spanish law.[543] Article 3 of that Act expands on the definition of cross-border disputes in the EU Directive,[544] and does not consider if one of the parties to a settlement agreement is domiciled in an EU member state.[545] The Act, which defines mediation broadly,[546] applies to civil and commercial mediation, including cross-border disputes.[547]

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based. Such refusal by the notary may be contested by filing a petition for a court decision to be taken with the court that has jurisdiction pursuant to section 796b (1)."

[538] *Id.* at §§ 796a, 796b. As grounds for refusal, § 796a (3) provides: "[t]he declaration of enforceability shall be refused to be issued if the settlement is invalid or if its recognition would violate public order."

[539] Osswald & Flecke-Giammarco, *supra*, § 13.07[A].

[540] German Code of Civil Procedure §§ 794 (1) Nr. 4a, 1053 (1) (2).

[541] Osswald & Flecke-Giammarco, *supra*, § 13.07[A].).

[542] German Code of Civil Procedure § 328; *see also* Osswald & Flecke-Giammarco, *supra*, § 13.07[C].

[543] L. 5/2012 of July 6, on Mediation in Civil and Commercial Matters (BOE 2012) ("Spanish Mediation Act").

[544] *Id.* at Art. 3 ("[Disputes] where at least one of the parties is domiciled or has its habitual residence in a State other than that in which any of the other parties affected by the dispute is domiciled at the time when they agree to make use of mediation or when the use of mediation is compulsory according to any such statutory enactment that may be applicable.").

[545] Mercedes Tarrazón & Marian Gili Saldaña, *Ch. 30: Spain, in EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7*, §30.02[B], Kluwer Law International (2017).

[546] Spanish Mediation Act, *supra*, Art. 1 ("[M]ediation is a means of dispute resolution, however named or referred to, whereby two or more parties attempt by themselves, on a voluntary basis, to reach a consensual agreement on the settlement of their dispute with the assistance of a mediator.")

[547] *Id.* at Art. 2(1); *see also* Tarrazón &Gili Saldaña, *supra*, § 30.03[A].

Under Spanish law, MSAs may be rendered enforceable as court judgments through: (1) ordinary judicial procedure if a judicial process was pending prior to mediation;[548] or (2) notarization by a civil-law notary for out-of-court mediations.[549] Notarization of an MSA gives it executive force, making it directly enforceable in court.[550] This procedure requires a Spanish civil-law notary to ensure that an MSA complies with the Mediation Act and is not contrary to Spanish law.[551] Article 27 of the Spanish Mediation Act extends the applicability of the aforementioned domestic notarization process to cross-border MSAs.[552] Alternatively, subject to EU legislation and applicable international treaties, agreements declared enforceable in another state are directly enforceable in Spain provided their enforceability is a result of official recognition by a competent foreign authority.[553]

i. *France*

As of March 15, 2024, France has neither signed nor ratified the Singapore Convention.

In France, the French Code of Civil Procedure generally governs the enforcement of MSAs.[554] Court-ordered mediation is governed by Articles 131-1 to 131-15 of the French Code of Civil Procedure.[555] Contractual mediation is governed by Articles 1530-1535 of the French Code of Civil Procedure.[556] Article L. 111-3 1 of the Code of Civil Enforcement Procedure (*code des procédures civiles d'exécution*) provides that agreements

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548 Spanish Mediation Act, *supra,* Art. 25(4); *see also* Spanish Code of Civil Procedure, *supra*, Art. 19(2).

549 Spanish Mediation Act, *supra,* Art. 23(3); *see also* Spanish Code of Civil Procedure, *supra,* Art. 517(2.2).

550 Spanish Mediation Act, *supra,* Art. 25(2).

551 *Id.*; *see also* Natalia Andrés *et al.*, *Mediation Q&A: Spain*, 16 (Westlaw Nov. 30, 2020).

552 Spanish Mediation Act, *supra,* Art. 27.2; *see also* Tarrazón & Gili Saldaña, *supra*, § 30.09.

553 Spanish Mediation Act, *supra,* Art. 27.2.

554 *See* L. No. 95-125 of 8 February 1995, Art. 21; *see also* France Directive by Ordonnance 2011-1540 of 16 November 2011 (implementing the EU Directive in French law); Decree No. 2012-66 of 20 January 2012 (codifying the provisions of the 2011 Ordonnance in the Code of Civil Procedure). Special rules on mediation are also set out in the Labour Code, the Criminal Code, the Code of Criminal Procedure and the Monetary and Financial Code. Furthermore, Law No. 2016-1547 of 18 November 2016 has introduced mediation in administrative law matters.

555 Clément Dupoirier & Raphael Coeurquetin, *Mediation Q&A: France*, 3 (Westlaw Dec. 31, 2019).

556 *Id.*

arrived at by court mediation or out-of-court mediation that are made enforceable by the ordinary courts or the administrative courts are enforceable documents.[557]

In France, court approval is required for a mediation agreement to be enforceable.[558] The request for approval may be made by either: (i) all of the parties or (ii) one of the parties with the express consent of the others.[559] The Code of Civil Procedure is silent on whether an MSA may be rendered enforceable absent the consent of all parties. The court may not change the wording of the mediation agreement and usually does not conduct a hearing prior to approval.[560] If the court refuses to approve the mediation agreement, an appeal can be filed.[561] Additionally, Article 1535 of the Code of Civil Procedure provides that France will recognize and declare enforceable any mediation agreement that "has been declared enforceable by a court or authority of another EU Member State."[562]

j. *The Netherlands*

As of March 15, 2024, The Netherlands has neither signed nor ratified the Singapore Convention.

In the Netherlands, there is currently no statutory scheme in relation to domestic mediation, which is generally regulated by private contract.[563] Courts in the Netherlands encourage mediation, and any settlement agreement resulting from a mediation process is considered to be a legally binding agreement.[564] Dutch Civil Procedure Law allows parties to a civil contract, including an MSA, to jointly request confirmation of their agreement by a notary.[565] Notarized agreements of this nature are directly enforceable in the

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[557] 'Rebooting' the Mediation Directive, *supra,* at 29 ("Under [Ordonnance 2011-1540], an agreement reached during the course of mediation proceedings, whether conventional or judicial, can be submitted to a judge for validation (homologation), making the agreement enforceable.").

[558] French Code of Civil Procedure, Art. 1534; *see also* Dupoirier & Coeurquetin, *supra,* at 15.

[559] *Id.*; *see* French Code of Civil Procedure, *supra,* Art. 1534.

[560] Dupoirier & Coeurquetin, *supra*, at 15.

[561] *Id.*

[562] French Code of Civil Procedure, *supra*, Art. 1535; *see also* Delphine Wietek, *Ch. 12: France*, *EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* §12.05[2][B], Kluwer Law International (2017).

[563] Machteld Pel, *Ch. 22: The Netherlands, EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* §22.01, Kluwer Law International (2017).

[564] Nick Margetson & Nigel Margetson, *Litigation and enforcement in the Netherlands: Overview,* 21 (Westlaw Apr. 1, 2021).

[565] Dutch Code of Civil Procedure, Art. 430 para 1; *see also* Machteld Pel, *Ch. 22: The Netherlands EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* §22.09[A], Kluwer Law International (2017).

Netherlands.[566] A settlement agreement may alternatively be referred to a judge for enforcement.[567]

Additionally, the Netherlands enacted a law in November 2012 to implement the Directive by regulating aspects of cross-border mediation.[568] Article 4 of this Act provides that cross-border MSAs may be drafted to be directly enforceable,[569] but it applies only to mediations within the scope of the Directive.[570] It is unclear whether the provisions of the Civil Procedure Law allowing for the expedited enforcement of civil contracts apply to international MSAs outside the scope of the Directive.

k. *Switzerland*

As of March 15, 2024, Switzerland has neither signed nor ratified the Singapore Convention.

In Switzerland, the Swiss Rules of Mediation, which were revised in July 2019 and June 2021, are the primary source of law governing mediation. Practitioners have indicated that large commercial disputes, particularly in an international context, are usually brought before the ordinary courts or settled through arbitration. Mediation is sought occasionally, however still to a lesser extent.[571] Under Swiss law, there are no specific rules for the enforcement of cross-border MSAs, which are considered no different than other private commercial agreements.[572]

The 2019 Swiss Mediation Rules provide that settlement agreements reached in a mediation must be in writing and signed by the relevant parties. The 2019 Swiss Mediation Rules also provide that, upon request by the parties, the Secretariat of the SCAI can issue certified copies of the settlement agreement if provided by the mediator with a signed original hard copy of the settlement agreement.[573] Furthermore, the Secretariat may issue a certificate of authenticity if the mediator confirms in writing that he or she witnessed the

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[566] Dutch Code of Civil Procedure, Art. 430 para 1; *see also* Directorate-General for Internal Policies, s*upra,* at 47.

[567] Machteld Pel, *Ch. 22: The Netherlands, in EU Mediation Law Handbook, Global Trends in Dispute Resolution Vol. 7* §22.03[C], Kluwer Law International (2017).

[568] L. of 15 November 2012 (Law 33320 concerning Implementation of the European Directive Nr. 2008/52/EG) ("L. of 15 November 2012"); *see also* Machteld Pel, *supra,* § 22.01.

[569] L. of 15 November 2012, Art. 4; *see also* Machteld Pel, *supra*, § 22.09[A].

[570] L. of 15 November 2012, Art. 1; *see also* EU Directive, *supra,* Art. 2.

[571] Urs Feller *et al.*, *Litigation and enforcement in Switzerland: Overview*, 26 (Westlaw Mar. 1, 2021).

[572] UNCITRAL Working Group II, Settlement of commercial disputes: Enforcement of settlement agreements resulting from international commercial conciliation / mediation – Compilation of comments by Governments Note by the Secretariat, 16, UN Doc. A/CN.9846/Add.3 (June 4, 2015).

[573] 2019 Swiss Mediation Rules, Arts17(2)-17(3).

parties signing the settlement agreement or if the parties have signed the settlement agreement at the Secretariat (presumably in the presence of the Secretariat).

The Swiss Code on Civil Procedure provides that, on joint application of the parties, a court may confirm a settlement reached through mediation during proceedings.[574] Such confirmation makes the mediation settlement equivalent to a legally binding decision and allows it to be enforced throughout the European Union under the terms of the 2009 Lugano Convention.[575]

l. *United Kingdom*

The United Kingdom signed the Singapore Convention on May 3, 2023, but it has not yet been ratified. As of January 2021, following the UK's departure from the European Union and the expiration of transition arrangements, the Directive no longer applies in the UK.[576]

Following the UK's withdrawal from the European Union, Part 78 of the UK Civil Procedure Rules, which provided for cross-border MSAs in conformity with the Directive, was repealed.[577] As mediation is well-established in the UK, practitioners believe this will have only limited impact on cross-border mediation.

Currently, there is no specific legislation regulating the conduct of mediations in England and Wales.[578] The UK Civil Procedure Rules, which govern civil litigation in England and Wales, expressly require parties to domestic disputes follow pre-action protocols contained in those rules, which set out steps that parties should take before commencing court proceedings. These rules require that parties first try to settle their dispute without recourse to the courts and consider ADR, including mediation.[579]

In the UK, settlement agreements entered into as a result of mediation are enforceable in the same way as any other legally binding contract and can be challenged

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[574] Swiss Civil Procedure Code, Art. 217; *See also* 2019 Swiss Mediation Rules, Arts 17(2)-17(3); Feller, *supra*, at 30.

[575] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Arts.5-43, 2009 O.J. (L 147).

[576] The Law Soc'y, *Alternative Dispute Resolution After Brexit*, (Jan. 13, 2021) https://www.lawsociety.org.uk/en/topics/brexit/alternative-dispute-resolution-after-brexit.

[577] The EU Mediation Directive, *supra*, at 4.

[578] Practical L. Glob., *Mediation Q&A: United Kingdom (England and Wale*s), 2, (Westlaw Jan. 31, 2021).

[579] Donald Lambert *et al.*, *Getting The Deal Through, Mediation 2020, United Kingdom*, §§ 1. Definitions, 1. Domestic Mediation Law (Bloomberg, 2020), https://www.bloomberglaw.com/product/blaw/document/28287879720.

as any other contract.[580] The parties may however apply to convert the contractual obligation set out in the settlement agreement into an order or direction on consent which is enforceable by judicial process (i.e., obtain a "Tomlin Order").[581] Ultimately, though, enforcing a settlement agreement is an action for breach of contract.

[580] Practical L. Glob., *supra*, at 19.

[581] *Id.* at 26.

APPENDIX 6:

Hague Convention on Choice of Court Agreements

Proposed Short Form Federal Implementing Legislation

Chapter 1. FINDINGS AND DEFINITIONS

Section 101. Short Title

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

Section 102. Implementation of Convention

The Convention on Choice of Court Agreements, done at The Hague on June 30, 2005, shall be enforced in United States courts in accordance with this Act.

Section 103. Findings

Congress finds:

- that the Convention on Choice of Court Agreements represents the fruits of many years of negotiations in the Hague Conference on Private International Law to develop an instrument on the recognition and enforcement of foreign judgments;

- that the Convention will help ensure that exclusive choice of court agreements concluded in civil or commercial matters will be effective, and that resulting judgments will be recognized and enforced; and

- that the Convention will enhance certainty in commercial contracts and thus promote international trade and investment.

Section 104. Definitions

In this Act:

(a) "Choice of court agreement" means an agreement between two or more parties which:

(1) is concluded or documented:

(i) in a writing; or

(ii) in any other form of communication that renders the information accessible so that it may be used for subsequent reference; and

(2) designates the court or courts of one or more Contracting States to decide disputes that have arisen or may arise in connection with a particular legal relationship.

(b) "Chosen court" means the court or courts of a Contracting State designated in an exclusive choice of court agreement.

(c) "Contracting State" means a country or Regional Economic Integration Organization for which the Convention is in force.

(d) "Convention" means the Convention on Choice of Court Agreements, done at The Hague on June 30, 2005.

(e) "Country of origin" means the Contracting State in which the court of origin is located.

(f) "Court" means any body, however denominated, authorized by a Contracting State or a political subdivision thereof to exercise judicial functions and acting in that capacity.

(g) "Court addressed" means the court in which recognition or enforcement of the judgment is sought under the Convention.

(h) "Court of origin" means the court of a Contracting State which issued a judgment for which recognition or enforcement is sought under the Convention. The term includes both a chosen court and a court to which a chosen court transferred the case in accordance with the rules on internal allocation of jurisdiction among the courts of the country of origin.

(i) "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, unless the parties to the agreement expressly have provided that the designation is nonexclusive.

(j) "Judgment" means:

(1) a court decision on the merits, however denominated, including a decree or order; or

(2) a determination of costs or expenses relating to a court decision on the merits which may be recognized or enforced under this Act.

The term does not include an interim measure of protection.

(k) "Nonexclusive choice of court agreement" means a choice of court agreement that is not an exclusive choice of court agreement as defined in subsection (i).

(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) "U.S. state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or possession of the United States.

(n) "Whole law" means the law of a jurisdiction including its choice of law rules.

Section 105. References to law in this Act

Each reference in this Act to the law of a jurisdiction is a reference to the internal law of the relevant jurisdiction, and not to its whole law.

Chapter 2. JURISDICTION AND RELATED MATTERS

Section 201. Exclusion for unrelated cases in U.S. state courts

(a) So long as the declaration by the United States under Article 19 of the Convention remains in effect, a U.S. state court designated as the chosen court may decline to exercise jurisdiction under this Act if, except for the location of the chosen court, there is no connection between:

(1) that U.S. state; and

(2) the parties or the dispute.

(b) Subsection (a) is subject to U.S. state law providing that the courts of that U.S. state either shall or shall not exercise jurisdiction in such cases, either with or without conditions.

Section 202. Federal subject matter jurisdiction

(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 insofar as jurisdiction otherwise exists under applicable law) shall have original jurisdiction over such an action or proceeding in the federal courts, concurrently with the courts of the U.S. states, without regard to the citizenship or residence of the parties or the amount in controversy.

Section 203. Consent to personal jurisdiction

For purposes of an action brought pursuant to a choice of court agreement, a person that is a party to the choice of court agreement consents to personal jurisdiction in the chosen court.

Section 204. Removal of cases from U.S. state court

(a) Subject to subsection (b), a defendant in an action in a U.S. state court that is a chosen court, a nonchosen court, or a court addressed may remove the action to the district court of the United States if removal is permitted under 28 U.S.C. § 1441 or other applicable federal law.

(b) Consent to an exclusive choice of court agreement shall constitute a waiver of the defendant's right to remove an action filed in a U.S. state court that is a chosen court if the exclusive choice of court agreement does not also designate a federal court to which the action could be removed from the state court under 28 U.S.C. § 1441 or other applicable law.

Chapter 3. RECOGNITION AND ENFORCEMENT

Section 301. Procedures for recognition and enforcement

(a) Except as otherwise provided in this Act, the procedures for recognition and enforcement of a judgment shall be those provided by the law applicable in the court addressed.

(b) An application filed with the court addressed for recognition or enforcement of a judgment may be accompanied by a document, issued by a court or an officer of a court of the country of origin, which is in substantially the form of the document set forth in the Appendix to this Act.

Section 302. Jurisdiction over property for purposes of recognition and enforcement

(a) In an action for recognition and enforcement of a judgment of a court of origin, in addition to such personal jurisdiction over the defendant as may exist under applicable law, a district court of the United States (including a court enumerated in section 460 of title 28) shall have jurisdiction over property of a defendant if the property is located in the district where the action is brought and could be used to satisfy the judgment. Jurisdiction in such cases shall be limited to the value of the property.

(b) Jurisdiction over property under subsection (a) shall be asserted by using the procedures provided by applicable law.

(c) Notice to claimants of the property shall be sent as provided in the Federal Rules of Civil Procedure.

Section 303. Statute of limitations applicable to recognition or enforcement action

(a) An action to recognize or enforce a judgment of a court of origin shall be commenced within the earlier of the time during which the judgment is effective in the country of origin or 15 years from the date that the judgment became effective in the country of origin.

(b) Subsection (a) shall not apply in U.S. state court in a state that either –

(1) has adopted the uniform version of section 9 of the Uniform Foreign-Country Money Judgments Recognition Act of 2005; or

(2) enacts on or after the effective date of this Act a statute of limitations applicable to recognition and enforcement of judgments.

Section 304. Recognition and enforcement of judgment issued by court chosen in nonexclusive choice of court agreement

So long as the declaration by the United States under Article 22 of the Convention remains in effect, it shall apply to a nonexclusive choice of court agreement whether concluded before or after the effective date of such declaration.

Section 305. Exclusion of forum non conveniens

A court addressed shall not decline to exercise jurisdiction over an action for recognition or enforcement of a judgment on the ground of forum non conveniens.]

Chapter 4. GENERAL

Section 401. Effective date

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

APPENDIX 7:

Hague Convention on Choice of Court Agreements

Proposed Uniform State Law

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Choice of Court Agreements Convention Implementation Act.

SECTION 2. IMPLEMENTATION OF CONVENTION. This [act] implements in this state the Convention on Choice of Court Agreements done at The Hague on June 30, 2005.

SECTION 3. DEFINITIONS. In this [act]:

(1) "Choice of court agreement" means an agreement between two or more parties which:

(A) is concluded or documented:

(i) in a writing; or

(ii) in any other form of communication that renders the information accessible so that it may be used for subsequent reference; and

(B) designates the court or courts of one or more contracting parties to decide disputes that have arisen or may arise in connection with a particular legal relationship.

(2) "Chosen court" means the court or courts of a contracting party designated in an exclusive choice of court agreement.

(3) "Contracting party" means a country or Regional Economic Integration Organization for which the Convention is in force. Each reference in this [act] to a court of the contracting party shall, in the case of a contracting party that is a Regional Economic Integration Organization, be deemed to be a reference to a court of the member country of the Regional Economic Integration Organization in which the court is located.

(4) "Convention" means the Convention on Choice of Court Agreements, done at The Hague on June 30, 2005.

(5) "Country of origin" means the contracting party in whose territory the court of origin is located.

(6) "Court" means any body, however denominated, authorized by a contracting party or a political unit of a contracting party to exercise judicial functions and acting in a judicial capacity.

(7) "Court of origin" means the court of a contracting party which issued a judgment for which recognition or enforcement is sought under the Convention. The term includes both a chosen court and a court to which a chosen court transferred the case in accordance with the rules on internal allocation of jurisdiction among the courts of the country of origin.

(8) "Exclusive choice of court agreement" means a choice of court agreement that designates the courts of one contracting party or one or more specific courts of one contracting party, unless the parties to the agreement expressly have provided that the designation is nonexclusive.

(9) "International case" means:

(A) in applying the provisions of this [act] relating to enforcement of a choice of court agreement, any case unless:

(i) the parties reside in the territory of the same contracting party; and

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

(B) in applying the provisions of this [act] relating to recognition or enforcement of a judgment, any case in which the judgment was issued by a court of a contracting party other than the contracting party in whose territory recognition and enforcement of the judgment is sought.

(10) "Judgment" means:

(A) a court decision on the merits, however denominated, including a decree or order; or

(B) a determination of costs or expenses relating to a court decision on the merits which may be recognized or enforced under this [act].

The term includes a consent order. The term does not include an interim measure of protection.

(11) "Judicial settlement" ("transaction judiciaire") means a contract in a civil law system to end litigation concluded by the parties to the litigation before a judge and recorded by the judge in an official document. The term does not include a consent order or an out of court settlement.

(12) "Nonexclusive choice of court agreement" means a choice of court agreement that is not an exclusive choice of court agreement as defined in subsection 8.

(13) "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.

(14) "Preliminary question" means an issue, including an issue raised as a defense, which is not an object of the proceedings but which the court must decide in order to determine whether to grant all or part of the relief requested.

(15) "Regional Economic Integration Organization" means an organization constituted solely by sovereign countries which has competence over some or all of the matters governed by the Convention.

(16) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or possession of the United States.

(17) "Whole law" means the law of a jurisdiction including its choice of law rules.

SECTION 4. <u>SCOPE</u>.

(a) Except as otherwise provided in this section, this [act] shall apply in an international case to either:

(1) an exclusive choice of court agreement concluded in a civil or commercial matter or a judgment of a court of another contracting party resulting from an exclusive choice of court agreement; or

(2) a judgment of a court of another contracting party resulting from a nonexclusive choice of court agreement concluded in a civil or commercial matter to the extent provided in Section 24.

(b) This [act] shall 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; or

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

(c) Subject to subsection (d), this [act] shall not apply to:

(1) the status and legal capacity of a natural person;

(2) a maintenance obligation;

(3) other family law matters, including matrimonial property regimes and other rights and obligations arising out of marriage or a similar relationship, such as a matter relating to divorce or dissolution, support, property division, or child custody;

(4) wills and succession, including administration of estates, intestate succession and other probate matters;

(5) insolvency, composition, and analogous matters, including bankruptcy;

(6) the carriage of passengers or goods;

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

(8) an antitrust matter;

(9) liability for nuclear damage;

(10) a claim for personal injury brought by or on behalf of a natural person, including a survival claim, and a claim for wrongful death;

(11) a tort claim for damage to tangible property, real or personal, which does not arise from a contractual relationship;

(12) a right in rem in real property or a tenancy in real property;

(13) the validity, nullity, or dissolution of a legal person, and the validity of a decision of the internal authorities of a legal person;

(14) the validity of an intellectual property right other than copyright and related rights;

(15) infringement of an intellectual property right other than copyright and related rights, unless an infringement proceeding is brought for breach of a contract between the parties relating to such a right, or could have been brought for breach of the contract; or

(16) the validity of an entry in a public register.

(d) A proceeding involving a matter listed in subsection (c) is not excluded from the scope of this [act] if the matter arises as a preliminary question.

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

(f) A proceeding is not excluded from the scope of this [act] merely because a country, including a government or governmental agency, or a person acting for a country, is a party to the proceeding.

(g) This [act] shall not affect the privileges and immunities of a country or an international organization, in respect of itself or its property.

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

(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 relates to a matter to which this [act] does not apply.

(j) If the United States has a declaration in effect under Article 21 of the Convention that it will not apply the Convention to a specific matter, the specific matter identified in the declaration is excluded from the scope of this [act].

(k) If another contracting party has a declaration in effect under Article 21 of the Convention that it will not apply the Convention to a specific matter, this [act] shall not apply to the specific matter identified in the declaration with regard to that contracting party.

SECTION 5. WHEN CHOICE OF COURT AGREEMENT DEEMED EXCLUSIVE. A choice of court agreement that designates the courts of one contracting party or one or more specific courts of one contracting party shall be deemed to be exclusive unless the parties have expressly provided otherwise.

SECTION 6. EXCLUSIVE CHOICE OF COURT AGREEMENT AS INDEPENDENT AGREEMENT. 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 may not be contested solely on the ground that the contract is not valid.

SECTION 7. RESIDENCE OF LEGAL PERSONS. For purposes of this [act], a person other than a natural person is a resident of a country:

(1) where it has its statutory seat;

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

(3) where it has its central administration; or

(4) where it has its principal place of business.

SECTION 8. REFERENCES TO LAW IN THIS ACT. Except where expressly stated otherwise, each reference in this [act] to the law of a jurisdiction is a reference to the internal law of the jurisdiction, and not to its whole law.

SECTION 9. DUTY OF CHOSEN COURT TO ACCEPT JURISDICTION.

(a) Except as otherwise provided in this section, and section 10, a chosen court of this state shall exercise jurisdiction over a dispute to which an exclusive choice of court agreement applies, unless the agreement is null and void under the whole law of this state.

(b) A chosen court of this state shall not decline to exercise jurisdiction over a dispute on the ground that the dispute should be decided in a court of another country or state, including on the ground of forum non conveniens.

(c) Subsections (a) and (b) shall not affect application of:

(1) jurisdictional limits placed on the chosen court relating to subject matter or amount in controversy; or

(2) rules regarding internal allocation of jurisdiction among its courts, including venue requirements.

(d) [A chosen court of this state may transfer a case to another court pursuant to *[indicate law of the state authorizing transfer*].] [A chosen court of this state shall transfer a case to another court pursuant to [*indicate law of the state mandating transfer*].] [If a chosen court of this state has discretion as to whether to transfer a case, the court shall give due consideration to the choice of court of the parties].].

SECTION 10. EXCLUSION FOR UNRELATED CASES.

(a) Except as provided under other law of this state:

Alternative A

(*No subject matter jurisdiction over unrelated cases*)

[a chosen court of this state does not have subject matter jurisdiction if, except for the choice of that court, there is no connection between this state and the parties or the dispute.]

Alternative B

(*Courts will decline all unrelated cases*)

[a chosen court of this state shall decline to exercise jurisdiction to decide a dispute to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between this state and the parties or the dispute.]

Alternative C

(*Courts have discretion to decline unrelated cases*)

[a chosen court of this state may decline to exercise jurisdiction to decide a dispute to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between this state and the parties or the dispute.]

Alternative D

(*Courts will accept unrelated cases, either with or without conditions*)

[a chosen court of this state shall exercise jurisdiction to decide a dispute to which an exclusive choice of court agreement applies without regard to whether there is any connection between this state and the parties or the dispute [if ... state conditions, if any, under which non- related cases will be accepted.]

(b) The [*designate authorized official*] of this state shall provide to the Secretary of State of the United States the text of the rule adopted under subsection (a).

SECTION 11. DUTY OF NONCHOSEN COURT TO DECLINE JURISDICTION.

(a) Except as otherwise provided in subsection (b), a court of this state that is neither the chosen court nor a court to which the chosen court has transferred the action under Section 9 shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.

(b) A nonchosen court of this state may proceed with the case if it determines that:

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

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

(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 this state;

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

(5) the chosen court has decided not to hear the case.

(c) Nothing in this [act] precludes the nonchosen court from suspending or dismissing proceedings on other grounds.

SECTION 12. CONSENT TO PERSONAL JURISDICTION. A person that agrees to a choice of court agreement designating a court of this state as the chosen court consents to personal jurisdiction in this state for purposes of a proceeding brought pursuant to the choice of court agreement.

SECTION 13. RECOGNITION AND ENFORCEMENT OF JUDGMENT.

(a) Except as otherwise provided in this [act], a court of this state shall:

(1) recognize a judgment of a court of origin; and

(2) once recognized, enforce the judgment in the same manner and to the same extent as a similar judgment issued by a court of this state.

(b) Without prejudice to such review as is necessary for the application of the provisions of this [act], a court of this state shall not review the merits of a judgment issued by a court of origin. A court of this state shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was issued by default.

(c) A court of this state shall recognize a judgment under this [act] only if the judgment has effect in the country of origin and shall enforce the judgment only if it is enforceable in the country of origin.

(d) A court of this state may refuse to recognize, or postpone recognition of, a judgment if the judgment is the subject of review in the country of origin or if the time limit for seeking ordinary review has not expired. The refusal does not prevent a subsequent application for recognition of the judgment.

SECTION 14. APPLICATION OF PROVISIONS TO JUDGMENT OF COURT TO WHICH CASE WAS TRANSFERRED.

(a) The provisions of this [act] on recognition and enforcement of a judgment shall also apply to a judgment issued by a court in the country of origin to which the case was transferred by the chosen court in accordance with the rules on internal allocation of jurisdiction among the courts of that country.

(b) If a judgment is the judgment of a court of origin to which the chosen court transferred the case and the chosen court had discretion as to whether to transfer, a court of this state may refuse to recognize the judgment against a party that objected to the transfer in a timely manner in the country of origin.

SECTION 15. EXCEPTIONS TO RECOGNITION OF A JUDGMENT.

(a) A court of this state may refuse to recognize a judgment of a court of origin if:

(1) the court of this state determines that the exclusive choice of court agreement was null and void under the whole law of the country of origin, unless the court of origin has determined that the agreement is valid;

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

(3) the document that instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in a way that enabled the defendant to arrange for a defense, unless:

(A) the law of the country of origin permitted adequacy of notice to be contested; and

(B) the defendant entered an appearance and presented its case without contesting notification in the court of origin;

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

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

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

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

(8) the judgment is inconsistent with an earlier decision issued in another country between the same parties on the same cause of action, provided that the earlier decision fulfills the conditions necessary for its recognition under the applicable law in this state.

(b) A court of this state may refuse to recognize a judgment for purposes of its enforcement to the extent that the judgment awards damages, including exemplary or punitive damages, which do not compensate a party for actual loss or harm suffered. In determining whether damages are compensatory, the court shall take into account the extent to which the damages awarded by the court of origin serve to cover costs and expenses, including attorney's fees, relating to the proceedings.

(c) If the United States has a declaration in effect under Article 20 of the Convention, recognition or enforcement of a judgment may be refused if 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.

SECTION 16. PRELIMINARY QUESTIONS.

(a) If a matter excluded under Section 4(c) arose as a preliminary question, a court of this state shall not recognize the ruling on that matter under this [act].

(b) Except as otherwise provided in subsection (c), a court of this state may refuse to recognize a judgment to the extent that the judgment was based on a ruling on a matter excluded under Section 4(c).

(c) If a ruling on a preliminary question is a ruling on the validity of an intellectual property right other than copyright or a related right, a court of this state may refuse or postpone recognition of a judgment based on that ruling under this section only if:

(1) the ruling is inconsistent with a judgment or decision of a competent authority on that matter issued in the country under the law of which the intellectual property right arose; or

(2) proceedings concerning the validity of the intellectual property right are pending in that country.

(d) If a matter excluded under Section 4(j) or 4(k) arose as a preliminary question:

(1) a court of this state shall not recognize the ruling on that matter under this [act]; and

(2) a court of this state may refuse recognition of a judgment to the extent that the judgment was based on a ruling on the matter excluded under Section 4(j).

SECTION 17. JUDGMENT BASED ON CONTRACT OF INSURANCE. A court of this state shall not limit or refuse recognition or enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of:

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

(2) an award of damages to which Section 15(b) might apply.

SECTION 18. JUDICIAL SETTLEMENT (TRANSACTION JUDICIARE). A court of this state shall recognize for purposes of enforcement and enforce a judicial settlement in the same manner as a judgment if:

(1) the settlement has been approved by a court of origin or concluded before that court in the course of proceedings; and

(2) the settlement is enforceable in the same manner as a judgment in the country of origin.

SECTION 19. DOCUMENTS TO BE PRODUCED IN CONNECTION WITH REQUEST FOR RECOGNITION OR ENFORCEMENT.

(a) A party seeking recognition of a judgment under this [act] shall provide with its request:

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

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

(3) if the judgment was issued by default, the original or a certified copy of a document establishing that the document that instituted the proceeding in the court of origin or an equivalent document was notified to the defaulting party; and

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

(b) A party seeking recognition for purposes of enforcement of a judicial settlement under Section 18 shall provide:

(1) a complete and certified copy of the judicial settlement;

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

(3) a certificate of the court of the country of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the country of origin; and

(4) any documents necessary to establish that the judicial settlement is enforceable in the country of origin.

(c) If the terms of the judgment or judicial settlement are not sufficient to permit a court of this state to verify whether the conditions for recognition or enforcement in this [act] have been complied with, the court may require the production of any documents necessary to show compliance.

(d) If an application for recognition of a judgment or judicial settlement is accompanied by a document issued by a court or an officer of a court in the country of origin completed in the form contained in Section 31 to the satisfaction of the court of this state from which recognition is sought, the requirements of subsections (a) and (b) shall be deemed satisfied.

(e) If the documents provided under this section are not in English, they shall be accompanied by a certified translation into English.

SECTION 20. PROCEDURES FOR RECOGNITION AND ENFORCEMENT. Except as otherwise provided in this [act], the procedures for recognition and enforcement of a judgment shall be those provided by the law applicable in the court of this state before which recognition or enforcement is sought.

SECTION 21. CAUSE OF ACTION FOR RECOGNITION AND ENFORCEMENT.

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

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

(c) Enforcement of a judgment recognized under this [act] may be requested in a recognition proceeding under subsection (a) or (b) or in any other manner provided by the law of this state.

SECTION 22. SEVERABLE PART OF JUDGMENT. A court of this state shall recognize or enforce a severable part of a judgment if recognition or enforcement of that part is applied for or only part of the judgment is capable of being recognized or enforced under this [act].

SECTION 23. STATUTE OF LIMITATIONS APPLICABLE TO RECOGNITION PROCEEDING. An action to recognize a judgment under Section 21 for purposes of enforcement shall be commenced within the earlier of the time during which the judgment is effective between the parties in the country of origin or 15 years from the date that the judgment became effective in the country of origin.

SECTION 24. RECOGNITION AND ENFORCEMENT OF JUDGMENT ISSUED BY COURT CHOSEN IN NONEXCLUSIVE CHOICE OF COURT AGREEMENT.

(a) If the United States has a declaration in effect under Article 22 of the Convention, subject to subsection (b), a court of this state shall recognize and enforce a judgment of a court of a contracting party designated in a nonexclusive choice of court agreement, or a court of that contracting party to which the case was transferred by the designated court in accordance with the rules on internal allocation of jurisdiction among the courts of that country, in the same manner and to the same extent that it would recognize and enforce a judgment of a court of origin of a contracting party before which proceedings were brought under an exclusive choice of court agreement, if the country of origin has made a declaration under Article 22 of the Convention.

(b) The court shall recognize the judgment only if:

(1) no other judgment exists between the same parties on the same cause of action issued by any other court before which proceedings could be brought in accordance with the nonexclusive choice of court agreement;

(2) no other proceeding is pending between the same parties on the same cause of action in any other court before which proceedings could be brought in accordance with the nonexclusive choice of court agreement; and

(3) the court that issued the judgment was the court first seized among those courts before which proceedings could be brought in accordance with the nonexclusive choice of court agreement.

(c) This section shall apply to a nonexclusive choice of court agreement whether concluded before or after the effective date of the declaration by the United States under Article 22 of the Convention.

SECTION 25. LEGALIZATION. All documents forwarded or delivered under this [act] shall be exempt from legalization or any analogous formality, including an apostille.

SECTION 26. UNIFORMITY OF INTERPRETATION. In applying and construing this [act], consideration should be given to its character as a uniform law, and to the need to promote uniformity of interpretation with respect to its subject matter among the states, having regard for the Convention's international character.

SECTION 27. RELATIONSHIP TO CERTAIN INTERNATIONAL INSTRUMENTS.

(a) If the United States has a declaration in effect under Article 26(5) of the Convention, this [act] shall not affect the application by a court of this state of the treaty to which the declaration applies.

(b) If another contracting party has a declaration in effect under Article 26(5) of the Convention, a court of this state may decline to apply this [act] to an exclusive choice of court agreement designating a court of the other contracting party as a chosen court to the extent of any inconsistency between application of this [act] and application of the treaty with regard to a specific subject matter that is the subject of the declaration.

SECTION 28. RELATIONSHIP TO OTHER STATE LAW. In the event of a conflict between this [act] and other law of this state, this [act] shall prevail. This [act] shall prevail without regard to whether the other law was in existence at the time this [act] was enacted or arose after enactment of this [act].

SECTION 29. [ACT] NOT EXCLUSIVE. This [act] does not prevent the enforcement of a choice of court agreement or recognition and enforcement of a judgment under law other than this [act] if the choice of court agreement or judgment is not within the scope of this [act].

SECTION 30. TRANSITION PROVISIONS FOR EXCLUSIVE CHOICE OF COURT AGREEMENTS.

(a) This [act] shall apply to an exclusive choice of court agreement that:

(1) designates a court in this state as the chosen court if the agreement was concluded after entry into force of the Convention for the United States; or

(2) designates a court of another contracting party as the chosen court if the agreement was concluded after entry into force of the Convention for that contracting party.

(b) This [act] shall not apply to proceedings in this state, whether in a chosen court, a nonchosen court, or a court in which recognition or enforcement of the judgment of the court of origin is sought, if the proceedings in this state were instituted before entry into force of the Convention for the United States.

(c) This section shall not apply to a nonexclusive choice of court agreement under Section 24.

SECTION 31. RECOGNITION AND ENFORCEMENT FORM. An application filed with a court of this state for recognition of a judgment may be accompanied by a document, issued by a court or an officer of a court of the country of origin, which is in substantially the form of the document that follows.

RECOMMENDED FORM UNDER THE CONVENTION ON CHOICE OF COURT AGREEMENTS
("THE CONVENTION")

(Sample form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention)

1. COURT OF ORIGIN.....

ADDRESS.....

TEL.....

FAX.....

EMAIL.....

2. CASE/DOCKET NUMBER.....

3. ..... (PLAINTIFF)

versus

..... (DEFENDANT)

4. (THE COURT OF ORIGIN) gave a judgment in the above-captioned matter on (DATE) in (CITY, STATE/PROVINCE, COUNTRY).

5. This court was designated in an exclusive choice of court agreement within the meaning of Article 3 of the Convention: YES / NO / UNABLE TO CONFIRM

6. If yes, the exclusive choice of court agreement was concluded or documented in the following manner:

7. This court awarded the following payment of money (please indicate, where applicable, any relevant categories of damages included):

8. This court awarded interest as follows (please speck the rate(s) of interest, the portion(s) of the award to which interest applies, the date from which interest is computed, and any further information regarding interest that would assist the court addressed):

9. This court included within the judgment the following costs and expenses relating to the proceedings (please specify the amounts of any such awards, including, where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings):

10. This court awarded the following non-monetary relief (please describe the nature of such relief):

11. This judgment is enforceable in the country of origin: YES / NO / UNABLE TO CONFIRM

12. This judgment (or a part thereof) is currently the subject of review in the country of origin: YES / NO / UNABLE TO CONFIRM

If "yes," please specify the nature and status of such review:

13. Any other relevant information:

14. Attached to this form are the documents marked in the following list:

- a complete and certified copy of the judgment;
- the exclusive choice of court agreement, a certified copy of the exclusive choice of court agreement, or other evidence of its existence;
- if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
- any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the country of origin; (List if applicable):
- in the case referred to in Article 12 of the Convention (Section 18 of this [act]), a certificate of a court of the country of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the country of origin;
- other documents.

15 . Dated this ..... day of..... 20.... at.....

16. Signature and/or stamp by the court or officer of the court:

CONTACT PERSON

TEL

FAX

EMAIL

SECTION 32. EFFECTIVE DATE.

(a) This [act] shall take effect ....

Alternative A

[This [act] shall take effect on the later of [date of enactment] or the date the Convention enters into force for the United States.]

Alternative B

(For use in a state that has constitutional restrictions prohibiting use of Alternative A, if the act is passed before the Convention goes into force.)

(b) This [act] may not be implemented until the [Governor] issues a proclamation declaring that the [Governor] has received an official communication from the Secretary of State of the United States that the Convention has entered into force for the United States.]

APPENDIX 8:

Hague Convention on Choice of Court Agreements

Draft Implementing Legislation on the Public Policy Exceptions

DRAFT TEXT

Section [*]. Public Policy Exceptions to the Recognition and Enforcement of Choice-of-Court Agreements and Subsequent Judgments

(a). A nonchosen court may proceed with the case under Section [*][582] above if, among other reasons, it determines that giving effect to the exclusive choice of court agreement would:

(1). violate fundamental public policy principles, in the United States or the relevant state of the United States, of voluntary consent to jurisdiction;

(2). lead to a judgment that is rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; or

(3). in the specific circumstances of the case, lead to a judicial proceeding that is not compatible with the requirements of due process of law.

(b). A court addressed may refuse to recognize a judgment of a court of origin under Section [*][583] above if, among other reasons, it determines that:

(1). the foreign court's exercise of jurisdiction that led to the judgment violated fundamental public policy principles, in the United States or the relevant state of the United States, of voluntary consent to jurisdiction;

(2). the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; or

(3). the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

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[582] This would be a reference to the Article 6(c) exception to the nonchosen court's duty to decline jurisdiction, *i.e.*, if it determines that "giving effect to the agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the United States or the relevant state of the United States."

[583] This would be a reference to the Article 9(c) ground for refusing recognition or enforcement of the judgment, *i.e.*, if such "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State." If this is to be adapted to the Judgments Convention, this would be a reference to the Article 7(1)(c) ground for refusing recognition or enforcement of the judgment.

COMMENTARY

Background. This draft text may be inserted in federal or state implementing legislation for the COCA Convention to clarify the scope of the public policy exceptions in Articles 6(c) and 9(e) of the COCA Convention. Specifically, the draft text ensures that U.S. courts are not bound to either decline jurisdiction as a nonchosen court (COCA, Art. 6) or recognize or enforce a foreign judgment (COCA, Art. 8) if (*i*) there was no proper consent to the putatively chosen court's exercise of jurisdiction; (*ii*) the chosen court sits within a judicial system that is systemically unfair, biased or corrupt; or (*iii*) the specific proceedings before the chosen court were not compatible with due process of law.

Structure. This draft text is structured as a separate stand-alone section, as opposed to an additional sub-provision to the section setting out the primary obligation or as the definition of the term "public policy." This is to make clear that (*i*) the public policy exceptions apply equally in those enumerated scenarios regardless of the fact that the "public policy" exceptions in COCA Articles 6(c) and 9(e) use slightly different language (*e.g.*, "manifestly incompatible" vs. "manifest injustice" vs. "manifestly contrary"); and (*ii*) this is not an amendment to, but an interpretation of, the relevant obligations under the COCA Convention. The use of the phrase "among other reasons" in each sub-section also clarifies that these scenarios in which the public policy exceptions would apply are not exhaustive.

Sub-section (a) addresses the exceptions to U.S. courts' duty to decline jurisdiction as the nonchosen court, while sub-section (b) address the exceptions to U.S. courts' duty to recognize and enforce judgments rendered by a chosen court.

Violates Public Policy Principles of Voluntary Consent to Jurisdiction. Sub-sections (a)(1) and (b)(1) address the scenarios where the public policy exception may apply because no proper consent was given to the putatively chosen court's exercise of jurisdiction.

Sub-section (a)(1) applies to the pre-judgment stage and ensures that a U.S. court may exercise jurisdiction even as a nonchosen court in a case where none of the other grounds under COCA Article 6 applied, and giving effect to the choice-of-court agreement would violate fundamental public policy principles of voluntary consent to jurisdiction. In the United States, the due process clause under the Constitution's Fourteenth Amendment "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations."[584] Under this principle, forum-selection clauses such as choice-of-court agreements are typically enforced as long as they are freely negotiated, "unaffected by fraud, undue influence, or overweening bargaining power," and their application "would [not] render litigation so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court."[585] Accordingly, a U.S. court may exercise jurisdiction as a nonchosen court under subsection (a)(1), for example, in situations where the chosen court has decided to exercise jurisdiction over a dispute that is outside the scope of the parties' choice-of-court agreement, or where a party's consent is defective (*e.g.*, due to unequal

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[584] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting I*nternational Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

[585] M*/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 12, 18 (1972).

bargaining power, undue influence, etc.) but the choice-of-court agreement is nevertheless still valid under the law of the state of the chosen court.

Sub-section (b)(1) applies to the post-judgment stage and ensures that a U.S. court may refuse to recognize or enforce a judgment on the basis that the foreign court's exercise of jurisdiction that led to such judgment violated the same fundamental public policy principles of voluntary consent to jurisdiction addressed above. This includes situations where the putatively chosen court (*i*) decided a dispute outside the scope of the parties' choice-of-court agreement; and (*ii*) exercised jurisdiction based on a choice-of-court agreement for which there was no proper consent given by one or more of the parties.

No Impartial Tribunals or Procedures that Comply with Due Process of Law.

Sub-sections (a)(2) and (b)(2) address the scenarios where the public policy exception may apply because the chosen court sits within a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. This language is taken from Section 4(b)(1) of the Uniform Foreign Country Money Judgments Recognition Act,[586] which, in turn, reflects the rule established by the United States Supreme Court in *Hilton v. Guyot*:

> "Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized."[587]

In accordance with the standard articulated in *Hilton v. Guyot*, the focus of the inquiry is not whether the foreign court has complied with every procedural rule applicable in the U.S., but "rather on the basic fairness of the foreign-country procedure."[588] Applying this standard, U.S. courts have in practice imposed a high burden on the party challenging recognition and enforcement to establish the existence of such circumstances.[589]

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[586] This language is also similar to Restatement (Fourth) of Foreign Relations Law § 483(a) Mandatory Grounds for Non-Recognition (2018).

[587] 159 U.S. 113, 202 (1895).

[588] Uniform Foreign Country Money Judgments Recognition Act, Section 4, Cmt. 5 (citing *Kam-Tech Systems, Ltd. v. Yardeni*, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act)); *accord Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act).

[589] *Compare Mulugeta v. Ademachew*, 407 F. Supp. 3d 569, 584 (E.D. Va. 2019) (finding that "while there is evidence that certain types of Ethiopian judgments, such as those with political implications, may be suspect, there is not sufficient evidence before the Court to find that the Ethiopian judiciary suffers from systematic corruption depriving all of its judgments from eligibility for recognition"); *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 804 F.3d 373, 382 (5th Cir. 2015) ("[A] judgment debtor must meet the high burden of showing that the foreign judicial system as a whole is so lacking in impartial tribunals or procedures compatible with due process so as to justify routine non-recognition of the foreign judgments."), *with Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999),

Incompatible with Due Process of Law in the Specific Proceeding.

Sub-sections (a)(3) and (b)(3) address the scenarios where the public policy exception may apply because the chosen court would not or did not conduct the specific proceeding in accordance with due process of law. This language is taken from Section 4(c)(8) of the Uniform Foreign Country Money Judgments Recognition Act, and addresses the scenario where it is difficult to establish systemic issues within a particular foreign judicial system, but where there is nevertheless evidence of lack of due process with respect to a particular proceeding. U.S. courts have generally allowed foreign judgments to be attacked on such grounds, even if the governing statute seemed to only allow challenges based on systemic irregularities in the foreign judiciary.[590]

COCA Article 9(e) already clarifies that the public policy exception to the enforcement of judgments "includ[es] situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State". The draft text, however, still includes sub-section (b)(3) to clarify that (*i*) the same standard applies equally to the (non-)enforcement of both choice-of-court agreements and judgments; and (*ii*) it is the standard under the Section 4(c)(8) of the Uniform Foreign Country Money Judgments Recognition Act, that uses slightly different wording from COCA Article 9(e) itself, that applies.

Consistency of Interpretation with the Judgments Convention. Any implementing legislation for the Judgments Convention should ensure that both the Judgments and COCA Conventions are interpreted consistently, notwithstanding any minor differences in the text.

Such legislation could, for example, use sub-section (b) of the draft text to clarify the public policy exception in Article 7(1)(c). The structure of sub-section (b) is easily adapted to the Judgments Convention, and would ensure that these public policy exceptions are interpreted and applied consistently, notwithstanding any differences in the text of COCA Article 9(e) and Judgments Convention Article 7(1)(c).

Similarly, any implementing legislation should make clear that differences in language between COCA Article 9(d) and Judgments Convention 7(b) relating to fraud are not intended to lead to a different result.[591] In particular, such legislation should state that both articles refer to the same

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aff'd, 201 F.3d 134 (2d Cir. 2000) (finding that the "Liberian judicial system simply did not provide for impartial tribunals" because "justices and judges served at the will of the leaders of the warring factions, and judicial officers were subject to political and social influence").

[590] *See, e.g.*, *Mulugeta v. Ademachew*, 407 F. Supp. 3d 569, 583-86 (E.D. Va. 2019) (declining to find that the Ethiopian judiciary was systematically corrupt, but nevertheless refusing to enforce the Ethiopian judgments at issue because "the speed of the Ethiopian judgments and the concerning and contradictory analysis upon which they rest, when viewed in combination with the evidence about the Ethiopian judiciary and Ademachew's status and known influence in Ethiopia, convince the Court that the Ethiopian judgments were rendered in circumstances that raise substantial doubt about the integrity of the rendering court[s] with respect to the judgment[s]"); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-13 (9th Cir. 1995) (refusing to enforce Iranian default judgments against the sister of the former Shah because the "evidence in this case indicated that [the sister of the former Shah] could not expect fair treatment from the courts of Iran").

[591] COCA Convention, Article 9(d) allows a court to refuse to recognize and enforce a judgment if the "judgment was obtained by fraud in connection with a matter of procedure" whereas Judgments Convention, Article 7(b) allows a court to refuse to recognize and enforce a judgment if the "judgment obtained by fraud."

circumstances, namely where there exists fraud relating to the proceedings that led to the judgment, not in any underlying transaction.