Contents

Preface

PART I: A BASIC INTRODUCTION TO THE 2005 HAGUE CHOICE OF COURT CONVENTION

1 The Context and History of the Hague Negotiations ................. 3
   I. Introduction 3
   II. The Context of the Hague Negotiations 3
   III. The History of the Hague Negotiations 5
      A. The Pre-existing International Legal Framework for a New Convention 5
      B. The Negotiations 6

2 The Convention Structure and Content .......................... 11
   I. Introduction 11
   II. The Three Basic Rules 11
      A. Article 5: The Chosen Court Shall Have Jurisdiction 11
      B. Article 6: Courts Not Chosen Shall Suspend or Dismiss the Case 12
      C. Article 8: A Judgment Given on Jurisdiction Based on an Exclusive Choice of Court Agreement Shall Be Recognized and Enforced 13
      D. The Optional Fourth Rule: Recognition and Enforcement of Judgments Based on Non-exclusive Choice of Court Agreements 15
   III. Convention Scope 15
      A. The Three Basic Limitations 15
         1. The International Case Limitation 15
         2. The Exclusive Choice of Court Agreement Limitation 16
         3. The Civil or Commercial Matters Limitation 17
      B. Article 2 Exclusions from Scope 18
      C. Adjustments to the Article 2 Exclusions 18
   IV. Specific Additional Issues 19
      A. Consent and Validity 19
      B. Damages 21
      C. Special Mention for Insurance Contracts 22
   V. Creating a Sense of Balance: The Process of Negotiation and the Final Result 22
      A. Advantages and Disadvantages of a Consensus Process 22
# CONTENTS

## 3 Interpretation and Use of the Convention

### I. Interpretation of the Convention

A. Introduction

B. Sources Establishing Consensus

1. The Text
2. The Preamble
3. Extra-textual Sources of Consensus
   a. The Interpretive Report
   b. Statements in the Plenary of the Diplomatic Conference
   c. Consensus from sources other than the plenary session of the Conference

### II. Use of the Convention

A. Transactional Lawyers
B. Litigators
C. Judges
D. Avoiding the Homeward Trend

## Part II: Article-by-Article Commentary on the Convention

### 4 Scope and Definitions (Articles 1–4)

#### I. General Matters

#### II. Article 1: The Three Basic Elements of Scope

A. An Exclusive Choice of Court Agreement

1. Article 3(a) and (b): Defining Exclusive Choice of Court Agreements
   a. An agreement
   b. Designating a court or courts
   c. To the exclusion of any other courts
      1) Agreements deemed to be exclusive
      2) Examples
   d. For the purpose of deciding particular classes of disputes

2. Article 3(c): Other Aspects of “Exclusive Choice of Court Agreements”
   a. Requirements of form
   b. Parties to the agreement
   c. The severability rule

B. Concluded in Civil or Commercial Matters

C. In International Cases

1. “Case”
2. “International”
   a. “International” for purposes of jurisdiction (Article 1(2))
      1) The “not international” test
      2) The importance of national law
      3) The time at which international status is determined
      4) Application in non-unified legal systems
      5) Consequences of a case that is not international
CONTENTS

b. “International” for purposes of recognition and enforcement (Article 1(3)) 53
   1) General issues 53
   2) Defining “judgment” (Article 4(1)) 54
D. A General Observation 54

III. Article 2: Exclusions from Scope 54
   A. Article 2(1): Exclusions for Protective Purposes Based on the Type of Agreement 55
   B. Article 2(2): Exclusions Based on Subject Matter 56
      1. General Issues 56
      2. Family and Domestic Law Matters 58
         a. Status and legal capacity of natural persons 58
         b. Maintenance obligations 58
         c. “Other family law matters” 59
         d. Wills and succession 59
      3. Bankruptcy Matters 60
      4. Transportation Exclusions 61
      5. Antitrust Matters 62
      6. Liability for Nuclear Damage 63
      7. Certain Tort Claims 63
      8. Rights in Rem and Tenancies of Immovable Property 65
      9. Certain Internal Matters of Legal Persons 67
     10. Intellectual Property Matters 67
         a. Generally 67
         b. Validity of intellectual property rights 68
         c. Infringement of intellectual property rights 69
     11. Entries in Public Registers 70

IV. Clarifications to, Amplifications of, and Exceptions to Exclusions from Scope in Chapter I 71
   A. Preliminary Matters (Article 2(3)) 71
   B. Arbitration and Related Proceedings (Article 2(4)) 73
   C. States as Parties 74
      1. States as Parties to Civil or Commercial Matters (Article 2(5)) 74
      2. States as Defendants (Article 2(6)) 75
   D. Other Matters 76
      1. Provisions in Other Chapters Which May Affect Scope 76
      2. Other Limitations on the Effect and Operation of the Convention 76
      3. The Mandatory Nature of the Convention 76

5 Jurisdiction (Articles 5–7) ........................................ 78
   I. Introduction 78
   II. Exclusive Jurisdiction of the Chosen Court 78
      A. Article 5(1): The Court Chosen Shall Have Jurisdiction 78
         1. The Basic Rule 78
         2. The Validity Exception 79
            a. Existence of an agreement 79
            b. Determining whether the agreement is “null and void” 79
            c. The autonomous Convention choice of law rule 80
3. The Rule Against Declining Jurisdiction 82
4. Internal Rules of Subject Matter Jurisdiction and Transfer 84
B. Article 6: A Court Not Chosen Shall Not Exercise Jurisdiction 87
   1. The Basic Rule 87
   2. The Exceptions 89
      a. The validity exception 90
      b. Lack of capacity 90
      c. Public policy 91
      d. The agreement cannot reasonably be performed 94
      e. The chosen court has decided not to hear the case 95
III. Article 7: Avoiding Interference with Interim Measures of Protection 95
IV. Final Comments on the Jurisdictional Rules and Interim Measures 96

6 Recognition and Enforcement (Articles 8–15) 98
   I. Introduction 98
   II. Article 8(1): A Judgment Shall Be Recognized and Enforced 98
      A. Defining “Recognition” and “Enforcement” 98
      B. The Three Conditions of Article 8(1) 99
      C. The Consequences of Meeting the Three Conditions 101
      D. Bases for Refusal of Recognition or Enforcement 101
   III. Article 8(2): Prohibitions on Review of Decisions of the Court of Origin 102
      A. No Review on the Merits 102
      B. Bound by the Findings of Fact 103
         1. The General Rule 103
            a. Findings of fact and jurisdictional determinations 103
            b. Findings of fact and scope of the Convention 104
            c. Summarizing the effect of the general rule 104
         2. The Qualification to the General Rule 105
      3. The Convention and the Traditional Approach to Review by the Court Addressed 105
   IV. Article 8(3): Effect and Enforceability in the Originating Court 106
   V. Article 8(4): Postponement or Refusal of Recognition or Enforcement 107
   VI. Article 8(5): The Effect of Internal Transfer Rules on Recognition and Enforcement 109
   VII. Article 9: Grounds for Denial of Recognition or Enforcement 110
      A. Revisiting the Question of Validity 111
      B. Party Capacity 111
      C. Lack of Notice to the Defendant 112
         1. Documents Covered 113
         2. Notice Sufficient to Enable the Defendant to Arrange for His Defense 113
         3. Effect if Defendant Fails to Challenge Notice in the Court of Origin 114
      4. Protection of State Interests 115
      5. Impact on Article 2(6) 116
      D. Extrinsic Fraud 116
      E. Public Policy and Fundamental Principles of Procedural Fairness 117
CONTENTS

1. “Manifestly Incompatible with the Public Policy of the Requested State” 117
2. “Incompatible with Fundamental Principles of Procedural Fairness” 118
3. Substantive Public Policy 118
4. Relationship to Other Provisions of Article 9 119
5. Application in Non-unified Legal Systems 119
F. Inconsistent Judgments From Courts in the Requested State 119
1. Timing Issues 120
2. Inconsistent Judgments Between the Same Parties 120
3. The Relationship Between Article 9(f) and Article 6 120
4. The Discretionary Nature of Article 9(f) 121
G. Inconsistent Judgments From Other Courts 121
VIII. Article 10: Preliminary Questions 122
A. Article 10(1): Non-recognition of Rulings on Preliminary Questions 123
B. Article 10(2): Non-recognition of Judgments Based on Rulings on Preliminary Questions 123
C. Article 10(3): Special Rule for Intellectual Property Rights Rulings 124
D. Article 10(4): Preliminary Questions Implicating Article 21 Declarations 126
IX. Article 11: Discretionary Non-Recognition of Non-Compensatory Damages 126
X. Article 12: Judicial Settlements in Civil Law Systems 130
XI. Article 13: Documents to be Produced 132
A. General Requirements 133
B. Article 13(1): Documents to be Produced 133
C. Article 13(2): Additional Documents That Might be Required 135
D. Article 13(3): Standard Form to Accompany Documents 135
E. Article 13(4): Translation Requirements 135
XII. Article 14: Procedure for Recognition 136
XIII. Article 15: Severability 137
7 General Clauses (Articles 16–26) .......................... 139
I. Introduction 139
II. Article 16: Transitional Provisions 139
A. Article 16(1): The Date of Conclusion of an Exclusive Choice of Court Agreement and the Application of Chapter II Rules on Jurisdiction 140
1. General Application of the Rule 140
2. Application of the Rule to Cases Involving Convention Declarations 140
B. Article 16(2): The Date Proceedings Are Brought 141
C. Timing and the Scope of Review 142
III. Article 17: Insurance and Reinsurance Contracts 142
IV. Article 18: No Legalization Requirements 144
V. The Declaration System 145
A. Declarations in General 145
B. Article 19: Declarations Limiting Jurisdiction 146
1. The Substance of Article 19 146
2. The Potential Article 19 Interpretation Problem 148
C. Article 20: Declarations Limiting Recognition and Enforcement 149
D. Article 21: Declarations to Exclude Specific Matters from Scope on a State-by-State Basis 150
1. Article 21(1): Making the Declaration 151
2. Article 21(2): Reciprocal Treatment 152
E. Article 22: Reciprocal Declarations to Recognize and Enforce Judgments Based Upon Non-Exclusive Choice of Court Agreements 153
1. The General Contours of Article 22 Declarations 154
2. Conditions Required by Article 22(2) 155
3. Special Issues 158
4. Planning for Article 22 Prior to Entry into Force 158
VI. Article 23: Uniform Interpretation 159
VII. Article 24: Review of Operation of the Convention 161
VIII. Article 25: Non-Unified Legal Systems 161
A. References to the Law or Procedure of a State 162
B. References to Residence in a State 163
C. References to the Court or Courts of a State 164
D. References to a Connection with a State 164
E. The Insulation of Internal Legal Orders from Convention Rules 164
IX. Article 26: Relationship of the Convention to Other Sets of Rules 165
A. General Concerns 167
B. The Convention and Other Treaties 167
1. Article 26(1): The Rule of Compatible Interpretation 167
a. Article 26(2): Priority when all parties are resident in States that are party to the other treaty 168
b. Article 26(3): Priority to an earlier treaty with a non-Contracting State 169
c. Article 26(4): Priority to recognition and enforcement provisions in other treaties 170
d. Article 26(5): Priority to treaties dealing with specific subject matters when a declaration has been made 170
8 Final Clauses (Articles 27–34) ................................................. 174
I. Introduction 174
II. Article 27: Signature, Ratification, Acceptance, Approval or Accession 174
III. Article 28: Declarations with Respect to Non-Unified Legal Systems 175
IV. Article 29: Regional Economic Integration Organizations 176
V. Article 30: REIO Accession Without Its Member States 177
VI. Article 31: Entry Into Force 178
CONTENTS

VII. Article 32: Declarations 179
VIII. Reservations Under the Convention 180
IX. Article 33: Denunciation 180
X. Article 34: Notifications by the Depositary 181

PART III: CHOICE OF COURT IN THE ABSENCE OF A MULTILATERAL CONVENTION

9 Treatment of Choice of Court Clauses in U.S. Courts ....................... 185
    I. From Outcast to Accepted Practice 185
    II. The Bremen Standard 185
    III. The New York Statute on Choice of Court 189
    IV. Comparison with the Brussels Regulation 189
    V. From Current Practice to the Hague Convention 191

10 Recognition and Enforcement of Judgments in the United States: With and Without Choice of Court Agreements ...................... 192
    I. Introduction 192
    II. Federalism and the Foundations of U.S. Judgment Recognition Practice 193
        A. The General Problem of Federal Courts Applying State Law 193
        B. Constitutional Foundations for Sister State Judgments Recognition 193
        C. Foreign Nation Judgments in a Federal System 195
            2. The Uniform Foreign Money-Judgments Recognition Act and the Restatement of Common Law 196
                a. Basic rules of recognition and enforcement 196
                b. Grounds for denial of recognition 197
                    1) Finality and conclusiveness of the judgment 197
                    2) Due process 198
                    3) In personam and in rem jurisdiction 198
                    4) Subject matter jurisdiction 199
                    5) Notice and opportunity to be heard 200
                    6) Fraud 200
                    7) Public policy 201
                    8) Inconsistent judgments 202
                    9) Judgments contrary to party agreement 202
                    10) Inconvenient forum 202
            D. Sorting Out the Issues in a Federal System 203
    III. Enforcement of Judgments: The Procedural Sibling to Recognition 204
    IV. Recent Developments 207
        A. The 2005 Uniform Foreign-Country Money Judgments Recognition Act 207
    V. Specific Issues Regarding the Recognition and Enforcement of Judgments Based on Choice of Court Agreements 210
PART IV: LITIGATION AND ARBITRATION CHOICES AFTER THE HAGUE CONVENTION

11 Planning the Choice of Forum: Choice of Court under the Hague Convention and Arbitration under the New York Convention . . . . 215

I. Introduction 215
II. Comparing Arbitration and Litigation 216
III. The Contribution of the Convention on Choice of Court Agreements to Balanced Decision-Making in International Transactions 218
   A. General Similarities Between the Two Conventions 218
   B. Distinctions that May Affect the Choice of Forum 218
      1. Matters of Scope 218
      2. Obligations of a Court that Is Not the Chosen Forum 219
      3. Grounds for Non-Recognition of the Resulting Award or Judgment 219
      4. The Effect of Available Declarations 220
IV. Final Comments 221


Appendix B: Cited Excerpts from the Nygh-Pocar Report 306

Index 313