

Enforceability of Choice of Court Clauses in Transnational Agreements: the 2005 Hague Convention, Its Implementation in Contracting States, and the U.S. Approach

M. Veronica Saladino*

Abstract

Parties involved in transnational business naturally expose themselves to peculiar international risks, including the possibility of having a foreign court resolve their future disputes. To reduce uncertainty, transnational contracts often contain a so-called “choice of court” (or “choice of forum”) clause to dictate where future disputes should be resolved.

Chosen courts, however, do not always enforce such clauses. Indeed, absent a convention or a treaty, the enforcement of a choice of court clause is purely a matter of national law and, in the case of federal systems like the United States, even of sub-national domestic law. To guarantee predictability, several countries have ratified the Hague Convention of 30 June 2005 on Choice of Court Agreements (the “Convention”), which aims at ensuring that the parties’ choice will be respected. The United States, however, was not among them, and U.S. courts continue to apply a variety of tests to determine whether they will follow the parties’ selection of forum.

*This Article analyzes recent judicial decisions involving the enforceability of choice of court clauses in transnational agreements under the Convention (i.e., *Ermgassen & Co Limited v. Sixcap Financials Pte Limited*, and *Motacus Constructions Ltd v. Paolo Castelli SpA*), and under the internal laws of selected jurisdictions (France, United Kingdom, Florida, New York, and California). Such analysis aims to ascertain whether the Convention was successful in guaranteeing the enforcement of choice of court clause in transnational contexts, and whether the United States should finally ratify it.*

* Visiting Assistant Professor, Gonzaga University School of Law. Thank you to Professor David Stewart, whose expertise and mentorship have been instrumental in shaping the quality and depth of this work. Professor Stewart’s dedication to advancing knowledge in the field of Private International Law has been an inspiration. Thank you also to the editors of the *Chicago Journal of International Law* for their excellent comments and edits.

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I. INTRODUCTION

Reducing uncertainty is crucial for business,¹ and parties involved in commercial transactions worry about predictability and efficiency. Although managing risk is pivotal in both national and transnational deals, the price of uncertainty is often higher in cross-border transactions, particularly when it comes to parties' forum options for resolving disagreements.

To illustrate this heightened risk, consider the example of a U.S. company entering two identical commercial contracts: the first with another U.S. company located in a different state, and the second one with a foreign company. While both scenarios may present uncertainty regarding possible fora of dispute resolution,² in the second example, the parties expose themselves to specific risks stemming from the international nature of the contract, including the possibility of having a foreign court resolve their disputes. In addition to the inherent stress of litigation, in the second example the parties may face challenges related to costs of travel, personal attendance, unavailability of witnesses, finding local counsel, unfamiliar procedures and laws, foreign language, and different public policies. To reduce risks and increase predictability,³ parties often incorporate in their transnational contracts a so-called "choice of court" or "choice of forum" clause, which dictates where any future disputes must be resolved.

Chosen courts, however, do not always enforce choice of court clauses. Indeed, absent a convention or a treaty binding the chosen courts, questions of jurisdiction and enforcement of choice of court clauses are purely matters of national law, and in the case of federal systems like the United States, even of sub-national domestic law. Although most legal systems have accepted the principle of party autonomy⁴ and generally defer to the parties' choice when enforcing contract clauses,⁵ enforcement of the parties' choice of court must also necessarily

¹ See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 913–15 (2002).

² Uncertainty may arise in domestic commercial deals absent an instrument specifically designed to address dispute resolution, for example, a written contract containing an arbitration provision, or a choice of law and forum selection clause. See Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947) (stating that, other than actions relating to real property, which usually must be brought where the land is, all other actions are generally transitory and may be sued upon wherever the party being sued can be subjected to the court's jurisdiction).

³ Assuming an arbitration agreement is excluded, given that a vast majority of international agreements actually lack arbitration clauses. See Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 6, 11 (2018).

⁴ I.e., freedom of contract.

⁵ See generally Stefan Grundmann, *Information, Party Autonomy and Economic Agents in European Contract Law*, 39 COMMON MKT. L. REV., 269, 271 (2002) (arguing that the 20th century trend in European internal law seems to entail an erosion of party autonomy). See also Symeon Symeonides, *The Scope*

involve a jurisdictional analysis based on internal law.⁶ In fact, private parties cannot give a court jurisdiction over a case where the relevant law applicable to the court does not do so.⁷ Therefore, in deciding whether it can accept to hear a particular dispute, the chosen court will look not only to the plain language of the clause, but also to whether it can properly exercise jurisdiction under its internal rules.

For this reason, the contracted language may reveal itself to be nothing more than a scribble. Parties may discover that, even when they agreed to submit disputes to a particular court, the chosen court will decline to hear the case. This discovery is of significant consequence given the difficulties involved in pursuing or defending an action in a different forum than the one initially expected.

Great efforts have been made to achieve certainty on international dispute resolution *ab initio*, without forcing parties to agree to arbitrate.⁸ The most prominent of these efforts, the Hague Convention of 30 June 2005 on Choice of Court Agreements (“Convention”),⁹ is currently in force in thirty-one countries.¹⁰ The Convention aims to enable parties to make an effective choice as to where disputes among them will be resolved, and guarantees that such a choice will be respected.¹¹ Notably, however, the United States did not ratify the Convention,¹² despite many U.S.-based companies conducting business internationally.

and Limits of Party Autonomy in International Contracts: A Comparative Analysis, in PRIVATE INTERNATIONAL LAW, 101 (Franco Ferrari & Diego P. Fernández eds., 2019).

⁶ In the case of a U.S. court, the court would not only look at jurisdiction (personal and subject matter), but would also have the discretion to decide whether to decline to hear the case through the doctrine of *forum non conveniens*.

⁷ Although relevant applicable law may defer to the parties’ consent.

⁸ See 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 (2005) (mentioning that the Choice of Court Convention seeks to provide an equal and viable alternative to arbitration).

⁹ Convention on Choice of Court Agreements, Jun. 30, 2005, 44 I.L.M. 1294, <https://perma.cc/DV4Y-77K3> [hereinafter Convention].

¹⁰ Member states include Denmark, Mexico, Montenegro, the U.K., and Singapore. See *Status Table Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Mar. 3, 2021), <https://perma.cc/WWL4-QEW2> [hereinafter *Status Table*].

¹¹ With a few exceptions, of course, see Convention, *supra* note 9, art. 2 (excluding the applicability of the Convention to, *inter alia*, agreements to which a consumer is a party, or relating to contracts of employment, or matters of family law, insolvency, personal injury, transportation, etc.).

¹² The reasoning behind the lack of ratification mostly has to do with internal U.S. debates about how to incorporate and implement the Convention into U.S. law. Some had proposed a federal implementing statute analogous to Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201. Others, like the Uniform Law Commission, had taken the view that the Convention should be implemented through a uniform law implemented by states and supplemented by a federal statute. See generally Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUSTON J. INT’L L. 2, 11 (2010).

Therefore, if a transnational agreement selects a U.S. jurisdiction in its choice of court clause, the selection may not be respected.

When negotiating choice of court clauses in international agreements, practitioners should be familiar with the main provisions of the Convention and with the different approaches taken by U.S. courts. The analysis that follows aims to provide a helpful tool to determine whether certainty is better achieved by selecting a court of a state that has ratified the Convention or a court in the United States.

This Article will analyze: (i) the framework established by the Convention; (ii) judicial decisions involving the Convention's implementation in its contracting states, and the enforceability of choice of court clauses in transnational contracts under the internal laws of selected jurisdictions; and (iii) the approaches taken by certain U.S. courts (specifically the ones located in Florida, New York, and California) regarding enforcement of choice of court clauses absent Convention ratification. Through this analysis, I ascertain whether the Convention was successful in guaranteeing the enforcement of choice of court clauses in transnational contexts, and whether it would be advisable for the United States to finally ratify it.

II. THE 2005 HAGUE CONVENTION'S FRAMEWORK

Efforts to harmonize private international law have been particularly numerous in the last two decades,¹³ and this is not surprising. International business transactions have risen by an astonishing 4300% in the last seventy years.¹⁴ Technology has empowered companies to purchase and sell products anywhere in the world and to provide services across borders with just a computer and an internet connection. In this environment, it has indeed become more and more essential for businesses to be able to transact with international counterparts quickly and confidently.

Within this general harmonization effort, the international community successfully negotiated, both at a regional and a global level, a few international instruments that harmonize the enforceability of choice of court agreements. At a regional level, the European Union adopted Regulation (EU) No. 1215/2012 ("Brussels I Recast"),¹⁵ in which Article 25 provides that the court of a member

¹³ See *Conventions and Other Instruments*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://perma.cc/7Q9G-87AX> (last visited Dec. 20, 2022).

¹⁴ *Evolution of Trade Under the WTO: Handy Statistics*, WORLD TRADE ORGANIZATION, <https://perma.cc/VF4C-7C8D> (last visited Dec. 4, 2022).

¹⁵ Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast]. Brussels I Recast came into

state chosen by parties to resolve their disputes shall have exclusive jurisdiction to resolve disputes among them in accordance with their will, regardless of their domicile.¹⁶ Also at a regional level, in 2007 the European Union and three members of the European Free Trade Association¹⁷ signed the Lugano II Convention,¹⁸ in which Article 23 substantially mirrors Article 25 of Brussels I Recast.¹⁹

At a global level, negotiations commenced in the Hague Conference on Private International Law at the end of 2003²⁰ and resulted in the adoption of the Hague Convention on Choice of Court Agreements (the “Convention”) on June 30, 2005.²¹ The Convention first came into force between the European Union²² and Mexico on October 1, 2015,²³ and it currently counts thirty-two contracting parties: the EU-member states, Denmark, Mexico, Montenegro, Singapore, and the U.K..²⁴ Significantly, the United States has not yet ratified it²⁵ despite being among the first signatories.²⁶

force on January 10, 2015, repealing Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I]. Brussels I Recast applies to court proceedings in all EU member states that commenced on or after January 10, 2015.

¹⁶ Together with jurisdiction, Brussels I and Brussels I Recast also regulate the enforcement of civil and commercial judgments within the European Union.

¹⁷ Specifically, Norway, Switzerland and Iceland, but excluding Liechtenstein.

¹⁸ Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339), 3 [hereinafter Lugano II]. Lugano II replaced the previous Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319), 9 (also known as “Lugano I”). Similar to Brussels I and Brussels I Recast, the Lugano II Convention also regulates, together with jurisdiction, the enforcement of civil and commercial judgments among signatory states.

¹⁹ With one main difference: art. 23 of Lugano II requires that one or more of the parties agreeing to submit disputes to such court be domiciled in a state bound by Lugano II.

²⁰ Trevor C. Hartley, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE, 8 (2017).

²¹ Convention, *supra* note 9.

²² With the exclusion of Denmark.

²³ *Status Table*, *supra* note 10.

²⁴ *Id.* (the U.K. accessed to the Convention in 2020, after Brexit).

²⁵ *Id.*

²⁶ *Id.* While the United States signed the Convention on January 19, 2009, the EU signed it on March 4, 2009. Although Mexico did not initially sign the Convention, it was the first state to ratify it on September 26, 2007.

A. Applicability and Key Mandates

The Convention primarily aims at “promoting international trade and investment through enhanced judicial cooperation.”²⁷ To that end, the Convention applies, absent an exception, in “international²⁸ cases to exclusive²⁹ choice of court agreements . . . in civil³⁰ or commercial³¹ matters,”³² when the designated court is in a contracting state.³³ It also extends to business-to-business and state-to-business transactions alike,³⁴ but excludes agreements where the parties typically have uneven bargaining power³⁵ such as agreements with consumers, or contracts for employment.³⁶

The Convention covers some of the same grounds as Brussels I Recast and Lugano II on jurisdiction and recognition and enforcement of judgments.³⁷ Given the risk of conflicts between the Convention and other international instruments,

²⁷ Convention, *supra* note 9, Preamble.

²⁸ *Id.*, art. 1(2). The mere existence of a choice of court agreement designating the courts of a state other than in which the parties are residents is not enough to make the case “international.” The Convention will not confer jurisdiction on a court designated by a choice of court agreement if there is no other reason to regard the case as international.

²⁹ Notably, choice of court agreements under the Convention are presumptively exclusive unless the parties have expressly provided otherwise. Convention, *supra* note 9, art. 3(b).

³⁰ From a comparative point of view, note that, generally, in common law jurisdictions everything that is not criminal is civil law, while for civil law jurisdictions the distinction lays more between public and private law, of which civil and commercial law are branches of the latter.

³¹ The reference to “commercial” matters together with “civil” matters was important, as in some legal systems “civil” and “commercial” are regarded as separate and mutually exclusive categories. See TREVOR C. HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS, ¶ 10 (Mar. 2004), <https://perma.cc/38N5-2RE3>.

³² Convention, *supra* note 9, art. 1(1).

³³ See *id.* art. 2 (listing agreements and matters specifically excluded from the applicability of the Convention), art. 21 (allowing contracting states to make a declaration that a particular matter will fall outside of the scope of the Convention).

³⁴ *Id.* art. 2(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”); but see *id.* art. 2(6) (“Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property”). It is worth noting that art. 2(5) concerns situations in which a state acts *iure gestionis*, in a commercial capacity, and not *iure imperii*, as the sovereign government.

³⁵ And, therefore, one of them is not able to freely reach an agreement and exercise its autonomy.

³⁶ Convention, *supra* note 9, art. 2(1) (“This Convention shall not apply to . . . agreements to which . . . a consumer [i]s a party [, or agreements] relating to contracts of employment.”).

³⁷ See generally Brussels I Recast, *supra* note 15 and Lugano II, *supra* note 18. Those instruments, however, also contain rules for allocating jurisdiction in the absence of a choice of court agreement, which the Convention does not address.

especially in the case of EU-member states, the Convention contains a series of “give-way” provisions that allow other international instruments to prevail in certain circumstances.³⁸ The most significant of these “give-way” provisions is perhaps Article 26(6), which allows Brussels I Recast to prevail over the Convention when both are applicable, unless one of the parties is a resident of a non-EU member contracting state (i.e., Mexico, Montenegro, Singapore, or the U.K.).³⁹ From a technical standpoint, absent this “give-way” provision, the Convention would apply to situations where a choice of court agreement is made by two signatories located within the EU. However, in such cases, Article 26(6) permits the European regional agreement, Brussel I Recast, to prevail in regulating the enforcement of the choice of court agreement. Similarly, Brussels I Recast prevails with respect to the enforcement of judgments among EU-member states.⁴⁰

The Convention imposes three key mandates through which parties should be able to effectively subject themselves to their chosen court. First, the chosen court must hear the case. Article 5 commands that “courts of a [c]ontracting [s]tate designated in an exclusive choice of court agreement *shall* have jurisdiction to decide a dispute to which the agreement applies,”⁴¹ even if it believes that “the dispute *should* be decided in a court of another [s]tate.”⁴² This ensures predictability by guaranteeing that the parties will resolve their disputes in the chosen forum. Second, courts other than the chosen court must “suspend or dismiss proceedings to which an exclusive choice of court agreement applies.”⁴³ This requirement can prevent parallel proceedings and thus protects the parties against becoming entangled in different *fora*. Third, the judgment rendered by the chosen court must be “recognized and enforced in other [c]ontracting [s]tates.”⁴⁴ This guarantees that the parties’ primary interest in engaging the chosen court—

³⁸ Convention, *supra* note 9, art. 26.

³⁹ *Id.* art. 26(6)(a). Although not within the primary scope of this Article, for more on the relationship between the Convention, and Brussels I Recast, see also HARTLEY, *supra* note 22. See also, generally, Matthias Weller, *Choice of Court Agreements under Brussels I Recast and under the Hague Convention: Coherences and Clashes*, 13 J. PRIV. INT’L. L. 91 (2017).

⁴⁰ Convention, *supra* note 9, art. 26(6)(b).

⁴¹ *Id.* art. 5(1) (emphasis added). It is also important to note that a contracting state may declare that its courts may refuse to determine disputes to which an exclusive choice of court clause applies if there is no connection between that state and the parties of the dispute, except for the location of the chosen court. *Id.* art. 19. Note, however, that so far, no contracting state has made any such declaration. See *Status Table*, *supra* note 10.

⁴² Convention, *supra* note 9, art. 5(2) (emphasis added).

⁴³ *Id.* art. 6.

⁴⁴ *Id.* art. 8(1). The Convention does not similarly protect the ruling of a non-chosen court, which is not entitled to recognition and enforcement under the Convention’s system.

i.e., to obtain an actual, tangible result⁴⁵ through governmental enforcement mechanisms—is protected.

B. Exceptions

On their face, the Convention’s three key mandates aim to remove obstacles that might otherwise undermine the parties’ choice of forum and to facilitate the recognition and enforcement of a resulting judgment. However, each of the Convention’s mandates is accompanied by numerous exceptions. Perhaps, such a high number of exceptions has the potential to undermine the Convention’s intended purpose.

First, the chosen court can reject to hear the case if the choice of court clause is null and void under the laws of the state where it sits.⁴⁶ Second, courts other than the chosen court may continue proceedings to which the exclusive choice of court clause applies when: (a) under the laws of the state of the chosen court, the clause is null and void;⁴⁷ (b) under the laws of the state of the court seized, a party lacked the capacity to enter into the clause; (c) giving effect to the clause would “lead to a manifest injustice[,] or would be manifestly contrary to the public policy of the [s]tate of the court seized;”⁴⁸ (d) the agreement cannot be reasonably performed for “exceptional reasons beyond the control of the parties;”⁴⁹ or (e) the chosen court has decided not to hear the case.

⁴⁵ Indeed, the parties’ primary interest is not to obtain a favorable judgment from the selected court which, by itself, is nothing more than a legal fiction.

⁴⁶ Convention, *supra* note 9, art. 5(1). The “null and void” provision is primarily intended to refer to generally recognized groups of invalidity, *i.e.*, fraud, mistake, misrepresentation, duress, and lack of capacity. *See* MASATO DOGAUCHI & TREVOR C. HARTLEY, PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS EXPLANATORY REPORT, ¶ 93 (Dec. 2004), <https://perma.cc/36ES-B2T2> [hereinafter *December 2004 Explanatory Report*]. Although not within the scope of this article, it is worth noting that Article 3(d) of the Convention reaffirms the principle that choice of court clauses are “separable” or “severable” from the parties’ underlying agreement (*i.e.*, that, on one hand, the termination, invalidity, or non-existence of the underlying contract does not affect the choice of court clause and, on the other hand, the termination, invalidity or non-existence of the choice of court clause does not affect the underlying contract). Convention, *supra* note 9, art. 3(d) (“[A]n 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.”).

⁴⁷ This is a counterpart of the first mandate’s provision.

⁴⁸ Convention, *supra* note 9, art. 6(c).

⁴⁹ *Id.* art. 6(d). This was intended to apply to cases where there are exceptional circumstances so that it would not be possible for the parties to bring proceedings before the chosen court, for example in cases of war in the state of the chosen court, or when the chosen court no longer exists or has changed to such a fundamental degree that it could no longer be regarded as the same court. *December 2004 Explanatory Report, supra* note 46, ¶ 149 (analyzing Article 7 of the draft Convention, moved to Article 6 in the adopted Convention text).

Third, a contracting state may refuse to recognize and enforce the chosen court's judgment, *inter alia*,⁵⁰ if:

(a) under the laws of the state of the chosen court, the clause is null and void, “*unless* the chosen court has determined that the agreement is valid;”⁵¹

(b) under the laws of the requested state, a party lacked the capacity to enter into the clause;⁵²

(c) the defendant was not properly notified of the action which resulted in the judgment sought to be enforced;⁵³

(d) the judgment was obtained with procedural fraud;⁵⁴

(e) the recognition or enforcement would be “manifestly incompatible” with the public policy of the requested state, including where the “*specific* proceedings leading to the judgment” are incompatible with that state’s fundamental principles of procedural fairness;⁵⁵

(f) the judgment sought to be enforced is inconsistent with a judgment given in the requested state in a dispute among the same parties;⁵⁶

(g) the judgment sought to be enforced is inconsistent with an *earlier* judgment given in another state between the same parties on the same cause of action that satisfies the conditions necessary for its recognition in the requested state;⁵⁷ or

⁵⁰ Convention, *supra* note 9, *passim*.

⁵¹ *Id.*, art. 9(a). If the chosen court has determined that the clause is valid, the court where enforcement of the resulting judgment is sought cannot substitute its judgment with that of the chosen court.

⁵² *Id.* art. 9(b).

⁵³ *Id.* art. 9(c).

⁵⁴ *Id.* art. 9(d). This exception may be invoked, for example, where the plaintiff serves the writ on the wrong address, deliberately gives the defendant wrong information as to the time and place of the hearing, or where either party seeks to corrupt a judge or juror or conceals evidence. For purposes of this exception, fraud may be committed by either party or by the court. *December 2004 Explanatory Report*, *supra* note 46, ¶ 142.

⁵⁵ Convention, *supra* note 9, art. 9(e) (emphasis added). While the first part of the exception states the general public policy exception found in convention of this kind, the second part focuses on procedural failings in that particular case.

⁵⁶ *Id.* art. 9(f). Markedly, there is no reference as to which judgment was given first, therefore the court of the requested state may give preference to a judgment of its own state even if that judgment was given *after* the judgment of the chosen court. Also, contrary to Article 9(g), there is no requirement that the cause of action resulting in the judgment of the court of the requested state was the same as the judgment of the chosen court.

⁵⁷ *Id.* art. 9(g).

(h) the judgment awards damages that do not compensate a party for actual loss or harm suffered—i.e., punitive damages—but only to the extent of such damages.⁵⁸

If the goal of the Convention is to reduce business uncertainty through the enforcement of forum selection clauses in international contracts, the Convention and its drafters have created a framework that appears well reasoned on its face but leaves much to be desired in practice. The broad exceptions cast doubt about the Convention's efficacy, especially since a non-chosen court may avail itself of exceptions that appear more robust and numerous than those available to the chosen court. The exceptions in the Convention arguably attenuate whatever clarity or predictability it aims to provide.

III. IMPLEMENTATION OF THE HAGUE CONVENTION IN CONTRACTING PARTIES' JUDICIAL DECISIONS

Although the Convention marks a pivotal moment for the harmonization of private international law, it appears that its actual application in transnational litigation has been uninspiring. There seems to be a shortage of judicial decisions explaining when courts will find that any of the exceptions to the three main Convention mandates apply.

The first case ever decided under the Convention,⁵⁹ *Ermgassen & Co Limited v. Sixcap Financials Pte Limited*,⁶⁰ was delivered by the High Court of the Republic of Singapore in June of 2018. In *Ermgassen*, a U.K. company filed an enforcement application in the High Court of Singapore seeking the recognition and enforcement of a U.K. order granting summary judgment against a Singaporean company.⁶¹ Summary judgment was issued by the U.K. court based on an exclusive choice of court clause inserted in the contract executed by the parties at the basis of the action.⁶² In relevant part, the choice of court clause recited:

The Engagement Letter and these Terms of Engagement shall be governed by and construed in accordance with English law. *ERMGASSEN & CO and the Client irrevocably submit to the exclusive jurisdiction of the English courts to settle any disputes in connection with any matter arising out of the Engagement Letter and/or these Terms of Engagement.*⁶³

⁵⁸ *Id.* art. 11(1). We can interpret this provision to mean that the overall judgment should still be enforced, but with the exclusion of damages other than compensatory damages.

⁵⁹ *First case under the Choice of Court Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://perma.cc/58X4-RHBU> (last visited December 23, 2022).

⁶⁰ *Ermgassen & Co Limited v. Sixcap Financials Pte Limited* [2018] SGHCR 8 (Singapore) [hereinafter *Ermgassen*].

⁶¹ *Id.* ¶ 4.

⁶² *Id.* ¶ 17(c).

⁶³ *Id.* (emphasis added).

After finding that the order granting summary judgment fell within the scope of the Convention,⁶⁴ and that there were no apparent grounds for refusal, the High Court of Singapore granted the U.K. company's enforcement application.⁶⁵ Overall, possibly because the defendant did not contest the enforcement application, the judgment in *Ermgassen* is straightforward and lacks any meaningful analysis as to the applicability of any exceptions.

The sole case discussing the Convention's exceptions in greater detail appears to be the recent case *Motacus Constructions Ltd v Paolo Castelli SpA*,⁶⁶ decided by the Manchester Technology and Construction Court in the U.K. In *Motacus*, the Court was called to enforce a decision issued by a U.K. adjudicator in contravention with the underlying construction contract's choice of court clause, which conferred exclusive jurisdiction to the courts of Paris, France.⁶⁷ The facts of this case were peculiar because a domestic U.K. law, the "Scheme for Construction Contracts," actually mandated the involvement of a U.K. adjudicator in the resolution of disputes arising from construction contracts performed in the U.K.⁶⁸

The party seeking enforcement of the U.K. adjudicator's decision argued that the choice of court clause was unenforceable under the Convention because (a) for the court to give effect to the jurisdiction of the clause would lead to "manifest injustice" or be "manifestly contrary to public policy"⁶⁹ because it conflicted with internal law; and (b) the adjudicator's decision was an "interim measure" for which the Convention provided an exception.⁷⁰ On one hand, the court rejected the argument that enforcing the clause would have amounted to manifest injustice or be manifestly contrary to public policy simply because it conflicted with a basic internal law.⁷¹ On the other hand, however, the court held that it did not have to deny the enforcement of the adjudicator's decision under the Convention—even if such denial was contrary to a valid choice of court provision—because it considered the decision to be an "interim measure" and therefore excluded by the mandates of the Convention.⁷² Any explanation as to

⁶⁴ *Id.* ¶ 19. More specifically, the High Court of the Republic of Singapore found that the summary judgment order fell within the scope of the Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) and new Order 111 of the Rules of Court (Cap 322, R5, 2014 Rev Ed), which were brought into effect in Singapore to give domestic effect to the Convention. *Id.* ¶ 2.

⁶⁵ *Id.* ¶¶ 25, 26.

⁶⁶ *Motacus Constructions Ltd v. Paolo Castelli SpA* [2021] EWHC 356 (TCC).

⁶⁷ *Id.* ¶ 1.

⁶⁸ *Id.*

⁶⁹ *Id.* ¶ 25.

⁷⁰ *Id.* ¶ 28. See Convention, *supra* note 9, art. 7.

⁷¹ *Motacus Constructions Ltd*, *supra* note 66, ¶¶ 54, 55.

⁷² *Id.* ¶¶ 56–60.

why the adjudicator's decision could be considered to be an "interim" measure despite a party seeking enforcement of it, was meager. The court's decision in *Motacus* is unfortunate because it undermines the Convention's applicability. If any measure loosely categorized as "interim" can arguably be excluded from the Convention's mandates, then such mandates may rarely apply. In addition, if a state could ratify the Convention and then avoid its application for certain cases by merely adopting an internal law establishing an "interim" measure, there would be no purpose in ratifying the Convention at all.

The shortage of judicial decisions applying the Convention could also be explained by its "give-way" provisions contained in Article 26. Recall that Article 26 relates to cases in which *both* the Convention and another international instrument are technically applicable to the case at hand, and establishes the circumstances under which the Convention must "give way" to such other international instrument.⁷³ One may reasonably infer that the Convention has received limited implementation within the EU-member states because of Article 26(6), which affords precedence to the rules of a Regional Economic Integration Organization adopted before or even *after* the Convention.⁷⁴ Indeed, although the EU is arguably where international transactions are most lively among the Convention's few contracting parties,⁷⁵ the Convention is not applicable in most cases because Article 26(6) allows Brussel I Recast to prevail over the Convention.⁷⁶

Relevant judicial decisions, and more precisely the scarceness thereof, suggest that perhaps: (a) the Convention's importance has been overvalued—i.e., it did not meaningfully modify the current contracting states' already existing law—and/or, (b) the lack of more widespread ratification has prevented it from reaching its full potential.

A. The Convention's Framework vs. Internal Existing Law

Due to the scant availability of court decisions on the Convention's exceptions, it is difficult to determine the degree to which the Convention modified contracting states' existing law. To better evaluate whether the

⁷³ Convention, *supra* note 9, art 26.

⁷⁴ *Id.* art. 26(6).

⁷⁵ The EU-member states here are counted as one single "contracting party."

⁷⁶ Convention, *supra* note 9, art. 26(6). It is important to note, however, that since the U.K. exited the EU in December 31, 2020 ("Brexit"), and because the U.K. has acceded to the Convention in its own right (*see Status Table, supra* note 10), the Convention has now become more widely applicable, and U.K. cases where Brussels I Recast would have prevailed before Brexit are now decided under the Convention. *See Motacus Constructions Ltd, supra* note 66 (deciding whether to deny an application for summary judgment in England was proper in a construction contract that conferred exclusive jurisdiction on the courts of France).

Convention improved the enforceability of choice of court clauses in its contracting states, it is helpful to conduct a brief analysis of the judicial decisions from two sample jurisdictions, France and the U.K., in which only local rules and no international convention were applied.

1. France

French case law shows that choice of court clauses are generally upheld in international commercial cases based on internal private French law, with similar results that one would expect under the Convention's framework.⁷⁷ Specifically, enforcement of choice of court clauses is established by Article 48 of the French *Code de procédure civile*⁷⁸ and was confirmed by a 2020 decision by the highest French court, the *Cour de cassation*.⁷⁹ In that decision, the *Cour* was called to decide whether French courts had jurisdiction over a dispute for breach of contract between a French company and a Dutch company headquartered in California.⁸⁰ The contract in question contained a choice of court provision identifying California as the appropriate forum to resolve disputes arising from it.⁸¹ Specifically, the choice of court clause, titled "*loi applicable*,"⁸² was worded as follows:

This License Agreement shall be governed in all respects by the laws of the State of California without regard to its conflicts of law provisions. The parties agree that all disputes relating to the License or Software shall be determined by the state and federal courts of California.⁸³

The French company, who unsurprisingly preferred to initiate a dispute in France, argued that the clause was *noyée*⁸⁴ in the middle of the contract's subtitles,

⁷⁷ Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., May 13, 2020, 18-25.103, <https://perma.cc/ZH57-VTLK> [hereinafter Cass. 18-25.103].

⁷⁸ See CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 48 <https://perma.cc/4VDB-WNR2> ("Toute clause qui, directement ou indirectement, déroge aux règles de compétence territoriale est réputée non écrite à moins qu'elle n'ait été convenue entre des personnes ayant toutes contracté en qualité de commerçant et qu'elle n'ait été spécifiée de façon très apparente dans l'engagement de la partie à qui elle est opposée.") ("Any clause that departs, directly or indirectly, from the rules of territorial jurisdiction will be deemed non-existent unless it has been agreed between parties to a contract entered into as merchants and the same has been provided for in an explicit manner in the undertakings of the party against whom it will be enforced.") (author's own translation) [hereinafter C.P.C. art. 48].

⁷⁹ Cass. 18-25.103, *supra* note 77.

⁸⁰ *Id.* ¶ 1.

⁸¹ *Id.*

⁸² "Applicable law."

⁸³ Cass. 18-25.103, *supra* note 77 ("Le présent contrat de licence sera régi à tous égards par les lois de l'Etat de Californie sans égard aux dispositions relatives aux conflits de lois. Les parties consentent à ce que tous les litiges relatifs à l'accord de licence ou au logiciel soient tranchés par les juridictions étatiques et fédérale de Californie") (author's own translation).

⁸⁴ "Drowned."

and therefore was invalid. The *Cour*, however, applying Article 48 of the *Code de procédure civile*,⁸⁵ found that the clause was perfectly legible and therefore the French company had explicitly agreed to the clause conferring exclusive jurisdiction to California. Thus, they upheld the judgment by the lower court⁸⁶ holding that French courts did not have jurisdiction over the dispute.⁸⁷ After all, it appears that French internal law does not diverge substantially from the framework established by the Convention. This is true at least when it comes to the decision not to exercise jurisdiction when there is a valid choice of court clause applicable in the case at hand.

2. United Kingdom

Contrary to France, U.K. judges tend to have broad discretion⁸⁸ when deciding whether to enforce a choice of court clause under internal law without the rules of an international instrument. For example, in *Donohue v. Armco Inc and Others*,⁸⁹ the House of Lords⁹⁰ was called to decide whether to issue an injunction to restrain proceedings pending in the State of New York for a dispute arising under three contracts which provided for the exclusive jurisdiction of the English court.⁹¹ One of the clauses⁹² reads: “the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement.”⁹³ In declining to issue the injunction, the House of Lords explained that a written exclusive choice of court clause is generally upheld absent “strong reasons for departing from it,” and that “[w]hether a party can show strong reasons . . . will depend on all the facts and circumstances of the particular case.”⁹⁴ Here, the House of Lords agreed with the lower court’s conclusion that England was not the natural forum for these

⁸⁵ C.P.C. art. 48, *supra* note 78.

⁸⁶ Cour d’appel [CA] [regional court of appeal] Orléans, Sept. 27, 2018, 298-18.

⁸⁷ Cass. 18-25.103, *supra* note 77.

⁸⁸ Discretion that would be generally restricted if the Convention applied insofar as there are a number of limited exceptions to the three main Convention mandates, as discussed in Section II of this Article.

⁸⁹ *Donohue v. Armco Inc and Others* [2001] UKHL 64.

⁹⁰ Together with the function of upper chamber of Parliament, also the court of last resort in the U.K. until 2009, when it was substituted for its judicial functions by the Supreme Court of the U.K.

⁹¹ *Donohue v. Armco Inc and Others*, *supra* note 89, ¶ 7.

⁹² Each of the clauses in the three agreements was differently worded, but the House of Lords indicated that there was no substantial difference between them. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* ¶ 24 (emphasis added).

proceedings because the connections with England were slim,⁹⁵ and because New York proceedings were not vexatious nor oppressive.⁹⁶ Had the Convention been applicable to *Donobue v. Armco Inc and Others*, the House of Lords likely would have had to give effect to the exclusive choice of court contained in the three contracts and would have had to hear the case. In addition, had the United States also been a party to the Convention at the time of *Donobue*, the New York court would have had to decline the case, which in this circumstance it clearly did not do so.

The U.K. courts' broad discretion in enforcing choice of court clauses was also confirmed in the most recent case of *Jong v. HSBC Private Bank (Monaco) SA*.⁹⁷ In *Jong*, the plaintiff filed an action in the courts of England against two HSBC companies, despite the fact that the contract between the plaintiff and HSBC designated Monaco as the sole forum to resolve disputes.⁹⁸ Although the court ultimately found that Monaco was indeed the proper forum to resolve this particular dispute, the presence of an exclusive choice of court clause was only one of the various factors which the court considered.⁹⁹ The existence of a valid choice of court clause would have not, by itself, been enough to hold that Monaco was the proper forum.¹⁰⁰

Unlike France, U.K. internal laws substantially diverge from the Convention's framework. U.K. courts are likely not going to defer to the parties' *ex-ante* decisions regarding where to resolve their disputes if no other element points to that jurisdiction.

B. Lack of Widespread Ratification

Until and unless major economies like the United States, China, and Japan, step in and ratify the Convention, the Convention will not fulfill its potential. Because the Convention was conceived to provide certainty to, and therefore facilitate, international transactions, its goal would be best served if the economies most involved in international business were to ratify it.

Widespread ratification would also allow judicial decisions under the Convention to develop. Indeed, a lack of precedent leaves parties in the dark with regard to the circumstances in which one of the Convention's exceptions will

⁹⁵ In particular, the House of Lords agreed with the lower court's conclusion that the action "involving US plaintiffs, mostly US or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of *forum non conveniens*." *Id.* ¶ 20.

⁹⁶ *Id.*, *passim*.

⁹⁷ *Jong v. HSBC Private Bank (Monaco) SA* [2015] EWCA Civ 1057, <https://perma.cc/8MAX-5JRN>.

⁹⁸ *Id.* ¶ 1.

⁹⁹ *Id.* ¶ 27–28.

¹⁰⁰ *Id.*

apply. The development of a full body of judicial decisions would allow parties and practitioners to ascertain additional parameters that would ensure that their chosen forum, and any forum which potentially has an interest in the dispute, will respect their choice.

IV. ENFORCEMENT OF CHOICE OF COURT CLAUSES IN TRANSNATIONAL AGREEMENTS OUTSIDE OF THE HAGUE CONVENTION'S FRAMEWORK: U.S. APPROACHES (NEW YORK, FLORIDA, AND CALIFORNIA)

Historically, U.S. courts have not favored choice of court clauses.¹⁰¹ In recent years, however, courts are starting to hold that such clauses are *prima facie* valid.¹⁰² Yet, such momentum appears not to have been enough to propel the United States towards ratifying the Convention. There is still ongoing debate about how the Convention would be implemented, (i.e., whether by federal legislation, state law, or a combination of both).¹⁰³

Typically, disputes arising from international transactions—including the enforcement of choice of court clauses in international agreements—are initiated in federal court, or in state court but then later removed to federal court based on diversity jurisdiction.¹⁰⁴ Although each state has its own internal sets of laws regarding jurisdiction and enforcement of choice of court clauses, because laws and rules regarding the enforceability of choice of court clauses are procedural

¹⁰¹ See, e.g., *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (72 Mass.) 174 (1856); *Benson v. E. Bldg. & Loan Ass'n*, 174 N.Y. 83, 66 N.E. 627 (1903); *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N.E. 678 (1916); accord *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

¹⁰² See *M/S Bremen*, 407 U.S. at 9.

¹⁰³ Lipe, *supra* note 11, at 11.

¹⁰⁴ Article III, § 2 of the U.S. Constitution allows federal courts to adjudicate cases and controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” On that basis, Congress established original federal jurisdiction over disputes involving foreign persons over civil actions where the amount in controversy exceeds \$75,000 and the dispute involves “(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States.” 28 U.S.C. § 1332(a). It is to be noted that disputes involving foreign persons may only give rise to diversity jurisdiction if they involve citizens of a State, as disputes arising solely among foreigners will not give rise to diversity jurisdiction. *Karazanos v. Madison Two Assocs.*, 147 F.3d 624, 626 (7th Cir. 1998) (citing *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809)). See also *Saadeh v. Farouki*, 107 F.3d 52, 55 (D.C. Cir. 1997) (collecting pre-1988 cases).

rather than substantive in nature, federal law, as opposed to state law, will govern.¹⁰⁵

In U.S. courts, the enforcement of choice of court clauses involves two main analyses: (a) whether the court can properly exercise jurisdiction over the dispute and over the parties to the dispute; and (b) whether the chosen forum is the most appropriate under the doctrine of *forum non conveniens*.

A. Jurisdiction

To hear a dispute, a U.S. court must have both subject matter jurisdiction over the object of the dispute and personal jurisdiction over each of the parties to the dispute. While subject matter jurisdiction relates to the court's inherent power to hear and decide a case,¹⁰⁶ personal jurisdiction refers to a court's power over a person (or entity) who is a party to the controversy before the court, including its power to render judgments affecting that person's rights.¹⁰⁷

Federal district courts must follow state law on personal jurisdiction.¹⁰⁸ Indeed, federal courts have personal jurisdiction over a party when such a party is subject to the jurisdiction of the state in which the district court sits.¹⁰⁹ When it comes to personal jurisdiction and enforcement of forum selection clauses, different U.S. states follow different approaches. The courts of the State of New York, for example, broadly assert jurisdiction over parties who have consented to it. New York courts have held that the parties' consent to a valid forum selection clause is sufficient for the chosen court to establish personal jurisdiction.¹¹⁰ Under

¹⁰⁵ *Collins on behalf of herself v. Mary Kay, Inc.*, 874 F.3d 176, 181 (3d Cir. 2017) (“Applying federal law to questions of enforceability of forum selection clauses comports with settled law in this Circuit” (internal citation omitted)); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (noting that because “[q]uestions of . . . the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature,” federal law applies in diversity cases); *accord Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32, 108 S. Ct. 2239, 2245, 101 L. Ed. 2d 22 (1988) (“We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court’s decision whether to give effect to the parties’ forum-selection clause.”).

¹⁰⁶ *See generally Independence Mortgage Trust v. White*, 446 F. Supp. 120, 122 (D. Or. 1978) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962), *Lockerty v. Phillips*, 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943)).

¹⁰⁷ *Personal Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁰⁸ Fed. R. Civ. P. 4.

¹⁰⁹ *Id.*; *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 382–83 (3d Cir. 2022).

¹¹⁰ *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 n. 6 (1st Cir.1995). *See also Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 127 (S.D.N.Y. 1997) (“An enforceable forum selection clause amounts to consent to personal jurisdiction.”); *Ultracashmere House, Ltd. v. Madison's of Columbus, Inc.*, 534 F. Supp. 542, 545 (S.D.N.Y.1982) (“In fact, the forum selection clause alone would constitute consent to personal jurisdiction.”).

the laws of New York, in the absence of a showing of any violation of public policy, fraud, or mistake, a forum selection clause will be enforced.¹¹¹

Similarly, courts in California have held that contracting parties may expressly consent to litigate issues regarding the contract in a particular forum, and that this choice will normally be binding unless it is unfair or unreasonable.¹¹² Unfair or unreasonable has been interpreted in a restrictive way: for example, mere “hardship” in traveling to California does not make a choice of court clause unfair or unreasonable.¹¹³

On the contrary, the courts of Florida place little weight on the consent of the parties.¹¹⁴ As a matter of public policy, a contractual choice of forum clause designating Florida as the forum may not serve as the sole basis for asserting *in personam* jurisdiction over an objecting, non-resident defendant as a matter of public policy.¹¹⁵

In summary, assuming the U.S. court has subject matter jurisdiction over the dispute, whether a court can exercise personal jurisdiction over a foreign party who has entered into a choice of court agreement will primarily depend on the specific law of each U.S. state where the court is sitting. If, for example, the court is in New York or California, the existence of the choice of court agreement will most likely indicate to the court that the foreign party has consented to personal jurisdiction and that the court can therefore hear the case. If, on the other hand, the court is in Florida, the analysis of personal jurisdiction will consider more variables, including public policy considerations.

B. Forum Non Conveniens

Even after both personal and subject matter jurisdiction are established, federal courts may dismiss a case under the federal doctrine of *forum non conveniens*.¹¹⁶ Specifically, when examining the proper mechanism for enforcing a forum selection clause in federal court, the U.S. Supreme Court and lower Circuit Courts of Appeals have held that a motion to dismiss for *forum non conveniens* is

¹¹¹ Nat'l Union Fire Ins. Co. v. Weir, 131 A.D.2d 380, 381 (1st Dep't 1987).

¹¹² Zenger-Miller, Inc. v. Training Team, GmbH, 757 F. Supp. 1062, 1069 (N.D. Cal. 1991) (citing Ruggieri v. General Well Service, Inc., 535 F. Supp. 525, 528–29 (D. Colo. 1982).

¹¹³ Zenger-Miller, Inc., 757 F. Supp. at 1069.

¹¹⁴ Trepko, Inc. v. Golden W. Trading, Inc., No. 8:20-CV-464-CEH-JSS, 2021 WL 424347, at *2 (M.D. Fla. Feb. 8, 2021) (holding that the Florida courts did not have personal jurisdiction although the contract stated, “This Contract is governed by the laws of the state of Florida, and dispute resolution must be carried out in Florida.”).

¹¹⁵ McRae v. J.D./M.D., Inc., 511 So.2d 540, 544 (Fla. 1987).

¹¹⁶ Am. Dredging Co. v. Miller, 510 U.S. 443, 447–48 (1994) (citations omitted).

most appropriate.¹¹⁷ The common law doctrine of *forum non conveniens* refers to a court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case.¹¹⁸

For cases in which the transferee forum is within the federal court system, Congress codified the doctrine of *forum non conveniens* under 28 U.S.C. § 1404(a),¹¹⁹ and through that promulgation, replaced the traditional remedy of outright dismissal.¹²⁰ For cases where, instead, the alternative forum is foreign, the common-law doctrine of *forum non conveniens* continues to apply in federal courts.¹²¹ In particular, where the transferee forum is a foreign court, the Supreme Court asks district courts to weigh the same factors ordinarily found under section 1404(a) because “both § 1404(a) and *forum non conveniens* ‘entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.’”¹²²

Generally, a district court has broad discretion when deciding a motion under Section 1404(a)¹²³ by “weigh[ing] the relevant factors and decid[ing] whether, on balance, a transfer would serve ‘the convenience of parties and witnesses’ and otherwise promote ‘the interest of justice.’”¹²⁴ The standard *forum non conveniens* analysis is, however, modified when the parties’ contract contains a

¹¹⁷ See *Atl. Marine Constr. Co. v. U.S. Dist. Court for Western Dist. of Tex.*, 571 U.S. 49, 60 (2013); *accord* *Niemi v. Lasshofer*, 770 F.3d 1331, 1351 (10th Cir. 2014).

¹¹⁸ See *Atl. Marine*, 571 U.S. at 60.

¹¹⁹ When determining whether to transfer a matter to another federal court under section 1404(a), the reviewing court is invited to weigh many case-specific factors rooted in justice and convenience. Some examples of these case-specific factors include, but are not limited to: the plaintiff's choice of forum, the existence of a valid forum-selection clause, the state that is most familiar with the governing law, the cost of litigation, the location of witnesses and documents, and the availability of a compulsory process to compel the attendance of unwilling non-party witnesses. *Id.* at 63.

¹²⁰ *Id.* at 60 (internal citations omitted).

¹²¹ *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

¹²² See *Atl. Marine*, 571 U.S. at 61 (internal citation omitted). Therefore, any citation to § 1404(a) is made for the limited purpose of referring the reader to those case-specific factors that a federal court might weigh from dismissing and later transferring an action to a nonfederal forum.

¹²³ *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006).

¹²⁴ *Reed v. Luxury Vacation Home LLC*, No. 20 CIV. 4243 (PGG), 2022 WL 4624839, at *9 (S.D.N.Y. Sept. 30, 2022) (citing *Atl. Marine*, 571 U.S. at 62–63 (2013)). See also *D.H. Blair & Co.*, 462 F.3d at 106–07 (discussing relevant factors, including “(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties”).

valid forum-selection clause.”¹²⁵ The Court’s first step in evaluating a motion to dismiss for *forum non conveniens* due to a forum-selection clause is to determine whether the clause is valid.¹²⁶ Once it is determined that the clause is valid, then the court enforces the forum-selection clause by applying a modified *forum non conveniens* analysis, under which the court should not consider arguments about the parties’ private interest, but may consider public-interest factors only.¹²⁷ Where there is a valid forum selection clause, “[i]n all but the most unusual cases . . . the ‘interest of justice’ is served by holding parties to their bargain and upholding the forum-selection clause.”¹²⁸ Indeed, courts believe that the enforcement of a valid forum-selection clause, bargained for by the parties, “protects their legitimate expectations and furthers vital interests of the justice system.”¹²⁹ For these reasons, “a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.”¹³⁰

For example, in *M/S Bremen v. Zapata Off-Shore Co.*, the Supreme Court held in 1972 that the federal district courts in the United States will enforce a mandatory choice of court clause *unless* the party challenging it “clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”¹³¹ In establishing this firm rule, the Court further held that the burden of proof is on the party seeking to escape the contract to show that a trial in the contractual forum will be so difficult and inconvenient that he will, for all practical purposes, be “deprived of his day in court.”¹³² Absent such a showing, courts will generally hold that party to his bargain.¹³³

U.S. federal case law now strongly favors choice of court clauses and litigants’ bargained-for expectations while providing discretion to district courts to weigh and examine—on a case-by-case basis—policy, reasonableness, and

¹²⁵ *Atl. Marine*, 571 U.S. at 62–63. (Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, transfer would serve ‘the convenience of parties and witnesses’ and otherwise promote ‘the interests of justice.’” (quoting 28 U.S.C. § 1404(a)).

¹²⁶ *Id.* at 581 n.5.

¹²⁷ *Id.* at 580–82.

¹²⁸ *Encompass Aviation, LLC v. Surf Air Inc.*, No. 18 CIV. 5530 (CM), 2018 WL 6713138, at *6 (S.D.N.Y. Nov. 30, 2018).

¹²⁹ *Stewart Organization*, 487 U.S. at 33.

¹³⁰ *Id.*

¹³¹ 407 U.S. 1, 15 (1972). Although *M/S Bremen* specifically mentioned “admiralty” cases.

¹³² *Id.*

¹³³ *Id.*

other factors in determining whether to transfer a case.¹³⁴ For example, in *Santos v. Costa Cruise Lines, Inc.*, American citizens sued an Italian cruise company in the New York State Supreme Court for injuries to her husband allegedly resulting from the cruise company's negligence.¹³⁵ After the case was removed to federal court, the Italian cruise company moved to dismiss for *forum non conveniens* due to a choice of court clause contained in the plaintiffs' passage ticket contract, which stated:

All claims, controversies, disputes, suits and matters of any kind whatsoever arising out of, concerned with or incident to any voyage that does not depart from, return to, or visit a U.S. port . . . shall be instituted in the courts of Genoa, Italy to the exclusion of the courts of any other country, state or nation.¹³⁶

The court found that the clause was enforceable because, among other things “[p]laintiffs traveled on an Italian-flagged ship, that departed from and returned to an Italian port,” so it was “clearly foreseeable that . . . Italy would be the chosen forum in the forum-selection clause.”¹³⁷ In addition, the Court found that the plaintiffs had failed to adequately assert any public interest factors that would provide a basis for not enforcing the forum-selection clause.¹³⁸ On the contrary, the court found that neither New York nor the U.S. had any interest in deciding the controversy.¹³⁹ Indeed, if the only connection with a U.S. state is a plaintiff's state of residence, it is not enough to find an interest in keeping the case in the U.S. forum.¹⁴⁰

In brief, in the United States the enforcement of choice of court clauses depends on whether the called upon court is part of the federal or state court system, and on where such court is located where the action is brought. Indeed, even assuming that most international contract disputes are brought or removed to federal court, federal courts will still have to apply state law when deciding whether to exercise personal jurisdiction over the parties to the action. As shown, the extent to which each state is willing to exercise personal jurisdiction greatly varies from state to state. In addition, even if a court has personal jurisdiction over

¹³⁴ *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). *See also* *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)).

¹³⁵ *Santos v. Costa Cruise Lines, Inc.*, 91 F. Supp. 3d 372 (E.D.N.Y. 2015).

¹³⁶ *Id.* at 376.

¹³⁷ *Id.* at 379.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See also* *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1335 (11th Cir.2011) (holding that, in an action brought in Florida by a Florida plaintiff against a Brazilian carrier, Brazil had greater interest).

the parties, a motion to dismiss for *forum non conveniens* may give the court discretion to determine, on a case-by-case basis, that there is a “better” forum that should resolve the dispute.

V. CONCLUSION

When assessing transnational contract strategies, parties and their attorneys should be mindful that courts of both the chosen and the non-chosen forum may not enforce a bargained-for choice of court clause, nor a judgment resulting from it.

To increase certainty, the Convention has created a framework that greatly increases the odds that the parties’ self-determination on choice of court in transnational agreements will be respected. As discussed in this Article, the Convention is valuable in theory, but its implementation so far has been limited, presumably due to its lack of widespread ratification and its broad “give-way” provisions. With the U.K.’s withdrawal from the EU, however, we should expect more judgments applying and interpreting the Convention. It is reasonable to assume that, before Brexit, many disputes concerning the enforcement of a choice of court agreement involving a U.K. party were decided under Brussel I Recast.¹⁴¹ Now such disputes will instead need to be decided under the Convention, potentially producing more case law on the Convention’s applicability, but only time will tell.

The foregoing analysis of France and the U.K. shows that in some jurisdictions, the Convention has modified the pre-existing regime. In France, domestic law on the enforcement of choice of court provisions substantially mirrors the Convention. In the U.K., by contrast, domestic law generally does not defer to the parties’ choice and extends substantial discretion to judges. In cases where the Convention applies, such discretion is significantly restricted so that the scale tips in favor of the parties’ choice.

Because the United States has not ratified the Convention, an array of different tests subject to each state’s internal law continue to apply to the enforcement of choice of court decisions. As a byproduct of federalism, the tests applied by U.S. courts greatly vary based on whether the called upon court is part of the federal or state court system as well as on the location of the federal court. In two of the jurisdictions analyzed, New York and California, courts tend to defer to the parties’ decision when it comes to dispute resolution and will enforce choice of court clauses absent injustice and unreasonableness or invalidity due to fraud or overreaching. On the other hand, courts in Florida generally will not hear a case merely because the parties have chosen Florida as the forum for their disputes. Parties to a transnational agreement choosing one of the jurisdictions of the

¹⁴¹ See II(a).

United States must not assume that their choice will be respected. To the contrary, they should first conduct extensive research to assess the likelihood that their chosen forum will respect the bargained-for choice of court clause in their agreement.

This would change, towards more certainty, if the United States ratified the Convention.¹⁴² It is unfortunate that, despite many U.S.-based companies conducting business internationally, parties involved in transnational business transactions with a link to the United States potentially run the risk of not seeing their forum choice respected.

It appears that it is time that the United States seriously considers ratifying the Convention. Indeed, ratification would provide much needed uniformity within U.S. subnational law although, like in the U.K., even after ratification judges could still exercise some level of discretion by utilizing the Convention's exceptions on a case-by-case basis.

¹⁴² For some general background on the discussion about United States ratification of the Convention, see Ted Folkman, *COCA Update*, LETTERS BLOGATORY (Feb. 11, 2016), <https://perma.cc/YY82-PF8E>. See also Peter Bert, *US Ratification of Hague Choice of Court Convention: Bad News from Across the Pond*, DISPUTE RESOLUTION GERMANY (Jan. 12, 2017), <https://perma.cc/3GNB-RN4F>.