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Ronald A. Brand and Paul Herrup

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PART ONE

A BASIC INTRODUCTION TO THE 2005
HAGUE CHOICE OF COURT CONVENTION

CHAPTER I

The Context and History of the Hague Negotiations

I. INTRODUCTION

The Hague Convention on Choice of Court Agreements [“the Convention”] requires that courts give effect both to agreements of the parties regarding the proper forum for settlement of disputes, and to the resulting judgments. The Convention is contained in the Final Act of the Twentieth Session of the Hague Conference on Private International Law, signed on June 30, 2005,¹ and will affect both the planning of international commercial transactions and the process of dispute settlement in the resulting relationships. The Convention, in many ways, may serve as the litigation counterpart to the very successful United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²

This initial chapter provides context for consideration of the Convention. We first deal with the political-legal context, and then provide a history of both the legal issues and the process that led to the Convention.

II. THE CONTEXT OF THE HAGUE NEGOTIATIONS

Global trade, with its increase in the movement of people, goods, capital, services, and ideas across borders brings with it an increase in transnational disputes. In the absence of uniform legal rules of substance and practice, uncertainties abound in the resolution of these disputes. These uncertainties are reflected in party forum shopping and parallel proceedings, as well as in difficulties and expense in the recognition and enforcement of foreign judgments.

Problems of recognition and enforcement of home country judgments in foreign countries are of particular concern, especially for U.S. judgment creditors. These problems require that a litigant consider at the outset the law of both the country

¹ The text of the Final Act of the Twentieth Session [hereinafter Final Act], and a documentary history of the Choice of Court Convention project, are available on the Hague Conference website at: <http://www.hcch.net/index.en.php?act=conventions.text&cid=98>. The Final Act also contained amendments to the Hague Conference Statute that will allow the European Community, and similar Regional Economic Integration Organizations, to become members of the Hague Conference and parties to its conventions.

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

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in which it is seeking a judgment and of the country in which that judgment may require enforcement. If a judgment is available in one country, but not enforceable in the country where the judgment debtor has assets, that judgment has little value. It is necessary prior to litigation to consider whether the national law of the second country will permit recognition and enforcement of a judgment, how seriously recognition or enforcement might be resisted, and the amount that might actually be collected. Although transaction costs tend to be greater with some types of claims than with others – pure contract judgments tend to be more readily enforceable – the problem is nonetheless a general one.

As of 2008, the United States is not a signatory to any general international convention for the recognition and enforcement of judgments. Nonetheless, foreign judgments generally are readily recognized and enforced in U.S. courts, either on the basis of comity or under state statutes.³ A judgment from a U.S. court will be recognized and enforced in foreign courts only if, and to the extent that, the law of the foreign country permits such recognition and enforcement. Foreign law generally tends to be less hospitable to recognition and enforcement of judgments than is the law of the United States.⁴

To rectify this perceived gap in transnational litigation, the United States proposed in 1992 that the Member States of the Hague Conference on Private International Law negotiate a multilateral convention with rules applicable to both the exercise of jurisdiction and the recognition and enforcement of the resulting judgments in the courts of the Contracting States.

As those negotiations proceeded, it became apparent that the initial approach was too ambitious. There was too much variation in national practice – and in the values and policies underlying that practice – to reach agreement on a text that was both workable and generally acceptable. It also became apparent, however, that consensus might be attainable in certain areas, most notably in the fundamental area of judicial forum selection clauses (“choice of court agreements”).

Litigation practice in the United States in connection with forum selection clauses is characterized by a relatively high degree of certainty and efficiency. A choice of court agreement will be enforced, subject to claims of fundamental unfairness.⁵ Moreover, a foreign judgment based on a choice of court agreement, as with most commercial judgments from foreign courts, is generally eligible for easy recognition and enforcement in the courts of the United States. The practice of other countries often has been less friendly to choice of court agreements, and less certain – especially

³ See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 481–82 (1986); National Conference of Commissioners on Uniform State Laws, UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13-II U.L.A. 49 (2002); RONALD A. BRAND, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 2 (1992).

⁴ See, e.g., Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 222 (1993–94).

⁵ See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (“forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness”); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.”).

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with respect to recognition and enforcement of the resulting judgments.⁶ Thus, a balanced and workable convention that can make transnational litigation more predictable and consistent in this area of law can be a welcome part of a global approach to private international law.

III. THE HISTORY OF THE HAGUE NEGOTIATIONS

A. THE PRE-EXISTING INTERNATIONAL LEGAL FRAMEWORK FOR A NEW CONVENTION

In 1969, the Hague Conference on Private International Law⁷ concluded both a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,⁸ and a Convention on the Recognition of Divorces and Legal Separations.⁹ The first of these conventions came into force on February 1, 1971, but only Cyprus, The Netherlands, and Portugal became parties,¹⁰ and no state ever deposited the bilateral agreements necessary to make the treaty operational. The divorce recognition convention came into force on June 1, 1970, with only fourteen countries (mostly European) having ever ratified it or acceded to it.¹¹ The United States never ratified either convention, and currently is not a party to any treaty specifically focused on the recognition of judgments.¹²

In 1968, the European Community ["EC"] created its own framework for both jurisdiction and the recognition and enforcement of judgments. The Brussels Convention was designed to provide uniformity in both jurisdiction and judgment practice.¹³ Article 63 of the Convention required that any state becoming a member

⁶ See, e.g., RONALD A. BRAND, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 23–24 (1992).

⁷ The original Statute of the Hague Conference is found at 15 U.S.T. 2228, T.I.A.S. No. 5710. Amendments to the Statute were approved on June 30, 2005. Final Act, *supra* note 1. Information on the Hague Conference and its conventions may be found on its website at <http://www.hcch.net/>. U.S. participation in the Hague Conference on Private International Law was authorized by Congress in 1963. H.R.J. Res. 778 (Dec. 30, 1963), 77 Stat. 775 (codified as amended at 22 U.S.C. § 269g (1988)).

⁸ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol, *done* Feb. 1, 1971, *reprinted in* 15 AM. J. COMP. L. 362 (1967) and *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁹ Opened for signature fall 1969, *printed in* 8 I. L. M. 31 (1969) and *available at* http://hcch.net/index_en.php?act=conventions.text&cid=80.

¹⁰ See http://hcch.net/index_en.php?act=conventions.status&cid=79.

¹¹ See http://hcch.net/index_en.php?act=conventions.status&cid=80.

¹² Some treaties to which the United States is a party have tangential provisions on recognition and enforcement of judgments. See, e.g., the Australia–United States Free Trade Agreement, art. 14.7, May 18, 2004 (entered into force Jan. 1, 2005), 118 Stat. 919, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html (providing that the fact that a governmental agency is a judgment creditor should not disqualify the judgment for recognition and enforcement in the other Contracting State).

¹³ European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *done* at Brussels, Sept. 27, 1968, 41 O.J. Eur. Comm. (C 27/1) (Jan. 26, 1998) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the

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of the EC also accept the Brussels Convention.¹⁴ The Brussels Convention, however, was not a suitable foundation for a global system of judgments recognition. Some countries outside the EC hold serious reservations about substantive provisions of the Brussels Convention. Moreover, the Brussels Convention did not authorize accession by a non-EC state. With the replacement of the Brussels Convention by the Brussels I Regulation,¹⁵ which became effective in March 2002, such a possibility became a moot point. As internal legislation of the European Community, the Brussels I Regulation obviously could not be the vehicle for global harmonization.

The Lugano Convention,¹⁶ which mirrors the Brussels Convention but includes the Member States of the European Free Trade Association (EFTA – Iceland, Liechtenstein, Norway, and Switzerland) as Contracting States, is “open to accession by . . . other States which have been invited to accede upon a request made by one of the Contracting States to the depositary state.”¹⁷ However, such a third state may be invited to accede to the Lugano Convention only if the existing Contracting States unanimously agree to that state’s participation.¹⁸

B. THE NEGOTIATIONS

In May 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State, sent a letter to the Secretary General of the Hague Conference on Private International Law proposing that the Conference take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.¹⁹ The matter was considered by a Working Group at The Hague in October of 1992, which “unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments.”²⁰ Rather than putting the matter on the negotiating agenda for the quadrennial session beginning in 1992, the Seventeenth Session of the Hague

1996 accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden) [hereinafter Brussels Convention]. On May 1, 1999, the Amsterdam Treaty became effective for the European Union Member States, and competence for coordination of rules on jurisdiction and recognition of judgments now lies with the Community institutions, which have used that authority to replace the Brussels Convention with a Community Regulation. Council Reg. (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. Euro. Comm. 2000 L 12/1 (Jan. 16, 2000) [hereinafter Brussels I Regulation].

¹⁴ Brussels Convention, *supra* note 13, art. 63.

¹⁵ Brussels I Regulation, *supra* note 13.

¹⁶ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters [hereinafter Lugano Convention], O.J. Euro. Comm. 1988 L 319/9, reproduced in 28 I.L.M. 620 (1989).

¹⁷ *Id.* art. 62(1)(b).

¹⁸ *Id.* The accession by most of the former EFTA states to the EC has brought them within the Brussels Convention, and now the Brussels I Regulation, thus limiting the significance of the Lugano Convention in this regard.

¹⁹ Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)).

²⁰ *Conclusions of the Working Group Meeting on Enforcement of Judgments*, ¶3, Hague Conference on Private International Law, Prel. Doc. No. 19 of November 1992 for the attention of the Seventeenth Session.

Conference, in May of 1993, decided to study the matter further through a Special Commission.²¹

The June 1994 Special Commission established by the Hague Conference determined that it would be “advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters” and recommended that “this question . . . be included in the Agenda for the future work of the Conference at its Eighteenth Session.”²² The Special Commission on General Affairs and Policy of the Conference, in June of 1995, recommended to the Eighteenth Session of the Hague Conference that the proposal for a judgments convention be adopted as one of the works of that session.²³ As part of the Final Act of its Eighteenth Session, held in October of 1996, the Hague Conference decided to include the question of such a convention on the Agenda of its Nineteenth Session.²⁴

Early in the process (prior to the meeting of the Special Commission of June 1994), the United States submitted a report prepared by Professor Arthur von Mehren, proposing the negotiation of a “mixed” convention.²⁵ Such a convention would have departed from past conventions by creating a hybrid structure. Conventions like the earlier Hague Conventions²⁶ are described as single (sometimes referred to as “simple”) conventions, because they have rules applicable only in the court asked to recognize a foreign judgment. Thus, they deal with the question of jurisdiction only indirectly through review in the recognizing court of the originating court’s jurisdiction.

Conventions like Brussels and Lugano are “double conventions.” They provide both rules of direct jurisdiction applicable in the court in which the case is first brought (“the court of origin”), as well as rules applicable in the court of another state asked to recognize and enforce the resulting judgment (“the court addressed”). Such a convention generally removes the need for indirect consideration of the jurisdiction of the court of origin, since the check on jurisdiction comes in that court, under rules of jurisdiction agreed to by all Contracting States.

A mixed convention, as proposed by Professor von Mehren, would contain some features of a double convention by providing rules for both jurisdiction and the recognition and enforcement of judgments. There would exist both a list of required bases of jurisdiction (which all Contracting States must apply) and a list of prohibited

²¹ *Final Act of the Seventeenth Session* 17, Hague Conference on Private International Law (1993). The Hague Conference generally holds a Plenary Session every four years. The work of the Conference, however, is accomplished primarily through Special Commissions of governmental experts who meet between Plenary Sessions to prepare preliminary drafts of the conventions to be presented, discussed, and adopted at the Plenary Session in Diplomatic Conference.

²² *Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel. Doc. No. 1 (June 1994).

²³ *Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference*, Hague Conference on Private International Law, Prel. Doc. No. 9, at 31 (Dec. 1995).

²⁴ *Final Act of the Eighteenth Session* 21, Hague Conference on Private International Law (Oct. 19, 1996).

²⁵ Arthur T. von Mehren, Recognition Convention Study: Final Report (copy on file with authors).

²⁶ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *supra* note 8; Convention on the Recognition of Divorces and Legal Separations, *supra* note 9.

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bases of jurisdiction (which no Contracting State could apply). Judgments founded on required bases of jurisdiction would be entitled to recognition and enforcement. Since courts should not take jurisdiction on bases appearing on the prohibited list, only limited exceptions to recognition and enforcement would apply. Unlike the double convention approach, however, the jurisdictional lists would not be exclusive and any jurisdictional basis not included on one of the two lists would be permitted to exist outside the convention structure. A judgment in a case in which jurisdiction is founded on such jurisdictional basis would, however, not be entitled to recognition and enforcement under the convention. Instead, such a judgment would be subject to review in the court addressed in the manner applicable absent a treaty, under its national law (including its choice of law rules).²⁷

Formal negotiations on a new Hague Convention began in June of 1997 with a two-week meeting of the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters.²⁸ The next session of the Special Commission was held in March of 1998,²⁹ but it was not until a meeting in November 1998 that the first document containing draft language for convention provisions was issued by the Drafting Committee.³⁰ That document included the first draft of provisions dealing with issues of convention scope, required bases of jurisdiction, provisional and protective matters, prohibited grounds of jurisdiction, *lis pendens*, declining jurisdiction (*forum non conveniens*), rules of recognition, legal aid, and damages. It was considered further during two weeks in June and one week in October of 1999, at which time a Preliminary Draft Convention text was produced.³¹

A Diplomatic Conference originally was contemplated for fall 2000. After a letter from Jeffrey Kovar, Assistant Legal Adviser for Private International Law at the U.S. Department of State, indicated substantial problems with the Preliminary Draft Convention text, however, it was decided to delay the Diplomatic Conference, and to adjust the procedural rules under which the draft text would be considered. A decision was made to split the Diplomatic Conference into two parts, with at least the first part operating under a consensus (rather than the previous majoritarian) process. That first part of the Conference was held in June 2001, resulting in a new text. This Interim Text looked much like the 1999 text, but with many more bracketed provisions, footnotes, and explanations of various positions.³²

²⁷ For a discussion of U.S. law on recognition of foreign judgments, see Chapter 11, below.

²⁸ *Preliminary Results of the Work of the Special Commission Concerning the Proposed Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Information Document (Sept. 1997).

²⁹ See Catherine Kessedjian, *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel. Doc. No. 9 (July 1998).

³⁰ *Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Working Document No. 144 (20 Nov. 1998) [hereinafter Committee Draft].

³¹ The text of the Preliminary Draft Convention is available at http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=3494&dtid=35.

³² Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text [hereinafter

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The Preliminary Draft Convention text, and the process which produced it, were controversial. Even though the original 1992 Working Group had recommended the negotiation of a mixed convention,³³ it was not until June of 1999 that the Special Commission voted specifically to adopt the mixed convention model.³⁴ Even then, however, draft language often reflected that of earlier double conventions, particularly the Brussels Convention. Thus, despite the formal decision to negotiate a mixed convention, in both the 1999 Preliminary Draft Convention text and the June 2001 Interim Text, the words and concepts often were those of a double convention.

The negotiations prior to June 2001 were conducted by majority vote, as required by the Hague Conference Statute. With the individual delegations from the fifteen (and later twenty-five) Member States of the European Union (EU) voting on specific articles during this process (and with a number of other states involved eager to become Member States of the EU), the Preliminary Draft Convention and Interim Text language looked much like that of the Brussels and Lugano Conventions then in force in the EU states. This led to great difficulty in developing a convention that might work on a global basis. In particular, it created many problems for the United States, with its jurisdictional system based on constitutional limitations that produce a different focus than do the rules of the civil law-oriented Brussels system.³⁵

Even with adjustment to a consensus process, the problems of achieving a comprehensive convention along the lines of either the 1999 or the 2001 text were substantial. Thus, on April 24, 2002, Commission I of the Nineteenth Session of the Hague Conference set up an informal working group to consider drafting a convention based on the jurisdictional provisions on which substantial consensus existed, beginning with jurisdiction based on agreement of the parties. That group met three times, and in March 2003 produced a draft text of a choice of court convention.³⁶ At a meeting of the Special Commission on General Affairs and Policy of the Conference, held in April 2003, it was decided to circulate this text among the Member States. This process led to a further Special Commission meeting in April of 2004, and then to the Diplomatic Conference held as Commission II of the Twentieth Session of the Hague Conference on Private International Law in June of 2005, at which the Convention on Choice of Court Agreements was completed.

Interim Text]. Available at http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35. Bracketed text, in Hague Conference practice, indicates matters on which final agreement has not been reached.

³³ *Conclusions of the Working Group Meeting on Enforcement of Judgments*, Hague Conference on Private International Law, Prel. Doc. No. 19 of November 1992 for the attention of the Seventeenth Session.

³⁴ *Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters*, Adopted provisionally by the Special Commission, Hague Conference on Private International Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document No. 241 (June 18, 1999).

³⁵ See, e.g., Ronald A. Brand, *Due Process as a Limitation on Jurisdiction in U.S. Courts and a Limitation on the United States at the Hague Conference on Private International Law*, 60 U. PITT. L. REV. 661 (1999).

³⁶ *Preliminary Result of the Work of the Informal Working Group on the Judgments Project*, Hague Conference on Private International Law, Prel. Doc. No. 8 of March 2003 (corrected) for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference, available at http://www.hcch.net/index_en.php?act=publications.details&pid=3506&dtid=35.

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With the signing of the Final Act, including the Hague Convention on Choice of Court Agreements, on June 30, 2005, the Convention became open for signature and ratification. The official Report on the Convention was issued in early May 2007.³⁷ No state had signed the Convention prior to the issuance of the Report. Mexico deposited its instrument of ratification on September 26, 2007.

³⁷ Trevor Hartley & Masato Dogauchi, *Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report*, available at <http://www.hcch.net/upload/exp137e.pdf>.

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CHAPTER 2

The Convention Structure and Content

I. INTRODUCTION

This chapter provides a brief introduction to the Convention. It is not meant to be a substitute for the more detailed analysis that follows, but rather an effort to provide in one place a basic overview of the Convention's purpose, scope of application, and basic rules, and to facilitate a general understanding of the Convention.

II. THE THREE BASIC RULES¹

The Hague Convention on Choice of Court Agreements provides rules giving effect to choice of court agreements and for recognizing and enforcing the resulting judgments.² These objectives are accomplished in the Convention primarily through three basic rules found in Articles 5, 6, and 8.

A. ARTICLE 5: THE CHOSEN COURT SHALL HAVE JURISDICTION

Article 5(1) of the Convention provides the basic rule that “[t]he 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.” In this rather simply stated provision, the Convention provides both the basic rule of jurisdiction applicable in the chosen court and the major general qualification to that rule. The rule itself is a reflection of respect for party autonomy and the desire to provide predictability in commercial and other relationships of a private nature. As a general proposition, if the parties in an exclusive choice of court agreement select a specific court located in a Contracting State for purposes of adjudicating their disputes, that court shall have jurisdiction.

¹ Portions of this chapter are adapted from Ronald A. Brand, *Introductory Note to the 2005 Hague Convention on Choice of Court Agreements*, 44 I.L.M.1291–93 (2005), and Ronald A. Brand, *ASIL Insight: The New Hague Convention on Choice of Court Agreements* (July 26, 2005), available at <http://www.asil.org/insights/2005/07/insights050726.html>.

² The convention can be understood, in part, as performing for litigation some of the functions performed for arbitration by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention], available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. Both conventions create rules for honoring party choice of forum and recognizing the resulting tribunal decision. Although general analogy to the New York Convention is useful, important differences between the two conventions do exist. To the extent possible, those differences are discussed in the more detailed material contained in the chapters that follow.