

**THE HAGUE CONVENTION ON CHOICE OF COURT
AGREEMENTS: THE IMPACT ON FORUM NON
CONVENIENS, TRANSFER OF VENUE, REMOVAL, AND
RECOGNITION OF JUDGMENTS IN UNITED STATES
COURTS**

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1. INTRODUCTION

The Hague Convention of 30 June 2005 on the Choice of Court Agreements sets forth uniform international rules for the enforcement of “exclusive choice of court agreements concluded in civil or commercial matters,” and for the recognition and enforcement of judgments resulting from proceedings based on such agreements.¹ Mexico ratified the Convention in September 2007; the United States and the European Community became signatories in early 2009.² This treaty contains mandatory standards that, by virtue of the Supremacy Clause of the U.S. Constitution, preempt contrary state or federal law in cases where the Convention applies.³

This Article examines the impact of the Convention on the doctrines of forum non conveniens and transfer of venue in state and federal courts in the United States, on the removal of actions from state courts to federal courts, and on recognition of foreign money judgments. Part II summarizes these doctrines as currently

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¹ Hague Convention on Private International Law, Convention on Choice of Court Agreements art. 1, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

² See *id.* arts. 1(1), 2(1), 8(1), 25 (establishing that a country that has ratified or signed the Convention is referred to as a “Contracting State”). For updated information on the status of the Convention, see Conference on Private International Law Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Apr. 10, 2010).

³ See *infra* notes 141–44 and accompanying text (listing the mandatory standards included in the Convention and how they preempt contrary state and federal law).

followed by our courts in cases where the Hague Convention does not apply. Part III provides an overview of the key provisions of the Hague Convention. The impact of this Convention on the domestic enforcement of forum selection clauses and on the doctrines forum non conveniens, transfer of venue, removal, and recognition of foreign judgments is examined in Part IV. The Article concludes that although the Convention will not require a wholesale revision of these doctrines, it will preempt state and federal laws in some significant areas.

2. DOCTRINES FOLLOWED IN COURTS IN THE UNITED STATES IN CASES WHERE THE HAGUE CONVENTION DOES NOT APPLY

2.1. Forum Selection Clauses (Choice of Court Agreements)

The vast majority of courts in the United States will enforce a choice of court agreement, often referred to as a “forum selection clause,” unless the resisting party shows that enforcement would be unreasonable and unjust.⁴ Enforcement will be denied only when the agreement is invalid based on contract formation principles, such as fraud, duress, or unequal bargaining power; is contrary to the public policy of the forum; or designates a forum that is so gravely inconvenient that it will effectively deprive a party of a meaningful day in court.⁵ However, a few states treat

⁴ See Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 366-72 (1993) (noting that every federal circuit and the vast majority of states enforce a valid and reasonable forum selection clause); 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS §§ 1-7 & 3-1[5][c][iv] (3d ed. 1998 & 2008 Supp.) (providing a collection of cases involving prorogation agreements); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clauses in commercial contracts are prima facie valid and enforceable unless unreasonable); *Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347, 350 n.3 (Ala. 1997) (collecting cases where courts re-evaluated their positions on forum selection clauses); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976) (holding choice of court agreement will be given effect unless it is unfair and unreasonable).

⁵ See, e.g., *Bremen*, 407 U.S. at 12-19 (mentioning a number of situations where forum selection clauses would not be enforced); *Smith*, 551 P.2d at 1208-09 (discussing the public policy cause for not enforcing a forum selection clause); see also Heiser, *supra* note 4, at 370-71 (discussing various standards for enforcement of forum selection clauses); CASAD & RICHMAN, *supra* note 4, § 3-1[5][c][iv] (collecting cases discussing prorogation agreements). Most courts view a forum selection clause as waiving any possible objection to the contractually designated

forum selection clauses less favorably.⁶ Some impose additional prerequisites to enforcement, such as that there be a rational basis for the party's forum choice; others flatly refuse to enforce forum selection clauses in certain cases.⁷

A forum selection clause may be either exclusive (often referred to as "mandatory") or nonexclusive ("permissive"). An exclusive agreement requires that litigation be commenced only in the contractually designated forum. In contrast, a nonexclusive agreement authorizes litigation in a designated forum, but does not prohibit litigation elsewhere. The determination of whether a particular agreement is exclusive or nonexclusive depends on the intent of the parties, which in turn requires an interpretation of the language of the agreement.⁸

There does not appear to be a uniform approach to this important determination.⁹ Some courts are reluctant to find that a forum selection clause is exclusive, requiring an agreement that designates one forum to also contain specific language that clearly excludes jurisdiction elsewhere.¹⁰ For example, one lower court concluded the clause, "Place of jurisdiction shall be Dresden" in an international commercial contract was permissive because it only specified jurisdiction and no other language indicated the parties'

forum's lack of personal jurisdiction. See Heiser, *supra* note 4, at 378-93 (discussing the waivable nature of a defendant's personal jurisdiction right).

⁶ See Heiser, *supra* note 4, at 371-72; CASAD & RICHMAN, *supra* note 4, § 1-7, n.203 (collecting cases where both federal and state courts have enforced prorogation agreements so long as they are just and reasonable).

⁷ E.g., Jetbroadband WV, LLC v. MasTec N. Am., Inc., 13 So. 3d 159, 161-62 (Fla. Dist. Ct. App. 2009) (discussing Florida's restrictions on enforcement of forum selection clauses); Keystone, Inc. v. Triad Sys. Corp., 971 P.2d 1240, 1244 (Mont. 1998) (voiding forum selection clause because Montana statute protects Montana residents from having to litigate outside of Montana); N.C. GEN. STAT. § 22B-3 (2009) (declaring certain forum selection clauses void and unenforceable).

⁸ See cases cited *infra* notes 10-15 (applying various approaches to interpretation of exclusivity of forum selection clauses).

⁹ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, 446-60 (4th ed. Aspen Pub. 2007) (discussing various approaches to the enforceability of international forum selection agreements).

¹⁰ E.g., K & V Scientific Co. v. BMW, 314 F.3d 494, 499 (10th Cir. 2002) (citing cases where courts consider the exclusiveness of forum selection clauses); John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc., 22 F.3d 51, 52 (2d Cir. 1994) (holding that a forum selection clause was not mandatory because it did not contain language making it so); Paper Express, Ltd. v. Pfankuch Maschinen, 972 F.2d 753, 757 (7th Cir. 1992) ("[W]here venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced . . .").

intent to make venue exclusive.¹¹ Moreover, if a clause is ambiguous, *i.e.*, capable of being construed as either permissive or mandatory, the clause will be construed against the drafter.¹²

Other courts apply more neutral principles of contract interpretation. A forum selection clause will be deemed exclusive if the forum is designated with mandatory language.¹³ Under this approach, a clause knowingly incorporated into a contract should not be treated as “meaningless and redundant” by ignoring the likely reason for its existence.¹⁴ Moreover, a clause will be deemed exclusive where the agreement as a whole evinces this intent, despite the absence of typical mandatory terms such as “shall,” “only,” or “must.”¹⁵

2.2. *The Doctrine of Forum Non Conveniens*

The common law doctrine of forum non conveniens permits a trial court to dismiss an action where an alternative forum is available in another country and that forum is substantially more convenient for the parties, the witnesses, or the court.¹⁶ The

¹¹ Hull 753 Corp. v. Elbe Flugzeugwerke GmbH, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999).

¹² See *K & V Scientific*, 314 F.3d at 500-01 (citing cases from various federal circuits that have held this interpretation).

¹³ *E.g.*, *Sterling Forest Assocs., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 251-52 (4th Cir. 1988) (holding that the language “shall be” created a mandatory forum selection clause); *General Electric Co. v. G. Siempelkamp & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (holding that the language “all” and “shall” was mandatory).

¹⁴ *Sterling Forest*, 840 F.2d at 251.

¹⁵ *E.g.*, *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 17-18 & n.5 (1st Cir. 2009) (holding a forum selection clause was mandatory based on context of the contract and not specific words); *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 9 (W.D. Okla. 1984) (holding that a forum selection clause is mandatory based on context and intent of parties, without specific words making it mandatory).

¹⁶ *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981) (granting a forum non conveniens motion); *Stangvik v. Shiley Inc.*, 819 P.2d 14, 17 (Cal. 1991) (concluding that California was an inconvenient forum). Much of this general discussion of forum non conveniens has been stated elsewhere. See Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 611-18 (2008) [hereinafter Heiser, *Forum Non Conveniens and Retaliatory Legislation*] (examining the impact of retaliatory legislation on the use of forum non conveniens); Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1165-68 (2005) [hereinafter Heiser, *Forum Non*

doctrine varies somewhat from state to state, but most jurisdictions have adopted an approach similar to that set forth by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*¹⁷ and *Piper Aircraft Co. v. Reyno*.¹⁸ A defendant filing a forum non conveniens motion seeks dismissal of the action not because the chosen forum lacks jurisdiction—most transnational actions are filed in the state where the defendant resides—but because there is an alternative forum in another country which also has jurisdiction and, in addition, is far more convenient.¹⁹

In assessing whether a forum non conveniens dismissal is appropriate, a court must first determine whether an adequate alternative forum is available.²⁰ Generally, a forum is considered adequate and available if the defendant is subject to personal jurisdiction there and no other procedural bar, such as the statute of limitations, prevents resolution of the merits in the alternative forum.²¹ The possibility of an unfavorable change in substantive or

Conveniens and Choice of Law] (detailing how forum non conveniens operates to protect U.S. companies).

¹⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *Gilbert* dealt with the federal common law doctrine of forum non conveniens in federal courts. Most states, by statute or by case law, have incorporated *Gilbert's* private and public interest factors into their forum non conveniens doctrine. See Heiser, *supra* note 4, at 395 n.198 (citing authorities detailing the incorporation of *Gilbert's* factors); CASAD & RICHMAN, *supra* note 4, § 1-4 (collecting cases regarding forum non conveniens disputes); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315-16 & nn.17-18 (2002) (collecting cases using *Gilbert's* private and public interest factors); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 948-53 & nn.68-88 (1990) (collecting authorities regarding the incorporation of *Gilbert*).

¹⁸ *Piper Aircraft Co.*, 454 U.S. at 235. See authorities cited *supra* note 16 (citing sources that offer a general discussion of forum non conveniens).

¹⁹ *Gilbert*, 330 U.S. at 506-09. See also *Piper Aircraft Co.*, 454 U.S. at 256 (“The central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient.”).

²⁰ *Piper Aircraft Co.*, 454 U.S. at 255 n.22; *Stangvik*, 819 P.2d at 17. The “adequate alternative forum” prerequisite rarely prevents a U.S. court from granting a forum non conveniens motion. See Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 614-18 (“Only where... specifically proven to be corrupt or biased and incapable of acting impartially... will a court find an alternative forum inadequate.”); Megan Waples, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1501 (2004) (reviewing cases and concluding foreign plaintiffs have very little success defeating a forum non conveniens motion on the basis of the adequacy of the alternative forum).

²¹ *Piper Aircraft Co.*, 454 U.S. at 255 n.22; *Stangvik*, 819 P.2d at 18. Defendants routinely stipulate that they will waive any objections to the alternative forum

procedural law is ordinarily not a consideration relevant to the forum non conveniens analysis, unless the remedy provided by the alternative forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.”²²

If a court determines that an adequate alternative forum is available, the court must then balance a variety of private and public interests associated with the litigation. As identified in *Gilbert*, the factors pertaining to the private interests of the litigants include “the relative ease of access to sources of proof; availability of compulsory process for attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”²³

The public interest factors identified in *Gilbert* include the administrative difficulties for courts “when litigation is piled up in congested centers instead of being handled at its origin,” the “local interest in having localized controversies decided at home,” the interest in having the trial in a forum that is at home with the law that must govern the action, the burden of jury duty imposed upon the citizens of a community which has no relation to the litigation, and the avoidance of unnecessary problems in conflicts of law or in the application of unfamiliar foreign law.²⁴ These public and private interest factors are to be applied flexibly by the courts, without giving undue emphasis to any one element.²⁵ The balancing of these various factors, as well as the ultimate

based on personal jurisdiction or statute of limitations, and trial courts typically make such waivers a condition of the forum non conveniens dismissal, rendering these considerations non-factors. See Heiser, *Forum Non Conveniens and Choice of Law*, *supra* note 16, at 1171 (discussing cases involving waivers).

²² *Piper Aircraft Co.*, 454 U.S. at 254; *Stangvik*, 819 P.2d at 19 n.5 (pointing out uncertainty in the language used in *Piper Aircraft Co.*). The “no remedy at all” component of the “adequate alternative forum” inquiry rarely precludes forum non conveniens dismissals in transnational cases. See Heiser, *Forum Non Conveniens and Choice of Law*, *supra* note 16, at 1172-74 (discussing cases proving the “no remedy at all” inquiry rarely precludes dismissal).

²³ *Gilbert*, 330 U.S. at 508.

²⁴ *Gilbert*, 330 U.S. at 508-09; accord *Piper Aircraft Co.*, 454 U.S. at 241 n.6 (quoting *Gilbert*).

²⁵ E.g., *Piper Aircraft Co.*, 454 U.S. at 249-50 (stressing the need for flexibility); *Stangvik*, 819 P.2d at 18-19 (protecting the flexibility of the doctrine).

determination of whether to grant or deny the forum non conveniens motion, is typically left to the trial court's discretion.²⁶

Where the plaintiff is a resident of the forum state, there is ordinarily a strong presumption in favor of a plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.²⁷ However, this presumption disappears when the plaintiff is a resident of a foreign country.²⁸ A nonresident plaintiff's choice of forum is accorded little deference because that choice is viewed as based on choice-of-law considerations, not on convenience.²⁹ Consequently, a foreign plaintiff's choice of a United States forum rarely is a significant factor in favor of retaining jurisdiction.³⁰

2.3. Forum Selection Clauses and Forum Non Conveniens

Courts sometimes confront an issue involving the relationship between forum selection clauses and the doctrine of forum non conveniens. This arises when a plaintiff files an action in the court designated as the exclusive forum in a choice of court agreement, but the defendant nevertheless seeks dismissal based on forum non conveniens. The contractually designated court must decide whether the existence of a choice of court agreement precludes granting the forum non conveniens motion.

In several instances, courts have determined that an exclusive choice of forum agreement does not preclude the court from granting a forum non conveniens motion, even though the effect is dismissal of the case from the contractually mandated forum.³¹

²⁶ *Piper Aircraft Co.*, 454 U.S. at 257. See *Gilbert*, 330 U.S. at 508-09 (discussing the factors to be balanced); *Stangvik*, 819 P.2d at 17 (addressing the court's role in balancing the factors).

²⁷ *Piper Aircraft Co.*, 454 U.S. at 255.

²⁸ *Id.* at 256; *Stangvik*, 819 P.2d at 20.

²⁹ *Piper Aircraft Co.*, 454 U.S. at 251-52. See *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc) (ruling that "the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons... the less deference the plaintiff's choice commands").

³⁰ E.g., *Piper Aircraft*, 454 U.S. at 255-56 (asserting that the presumption of deference for plaintiff's choice of forum is weakened when the plaintiff is foreign); *Stangvik*, 819 P.2d at 20 (asserting that deference to the plaintiff's choice of forum only happens when the forum chosen is the plaintiff's state of residence).

³¹ E.g., *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg., Inc.*, 873 S.W.2d 537, 540 (Ark. 1994) (affirming a forum non conveniens dismissal despite an agreement mandating an Arkansas forum); *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 555 N.E.2d 214, 218-19 (Mass. 1990) (commenting that a

According to these courts, a forum agreement removes only the parties' private convenience interests from consideration, but not the various other private and public interests relevant in the forum non conveniens analysis.³² The parties have no power to contractually waive the various public interest factors or the private ones of third parties, such as the convenience of witnesses, jurors, judges, and the judicial system.³³ Consequently, in cases where the Hague Convention does not apply, the existence of an exclusive choice of court agreement may not preclude a forum non conveniens dismissal.³⁴

2.4. Forum Selection Clauses and Section 1404(a) Motions to Transfer Venue in Federal Courts

Section 1404(a) of Title 28 of the United States Code provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other

forum selection clause cannot bar the use of forum non conveniens because it involves public as well as private interests); *Appalachian Ins. Co. v. Superior Court*, 208 Cal. Rptr. 627, 633 (Cal. Ct. App. 1984) (holding that various public interest factors cannot be automatically outweighed by the existence of a purely private agreement); *Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. App. 1991) (holding as well that various public interest factors cannot be automatically outweighed by the existence of a purely private agreement); *Package Express Cr., Inc. v. Snider Foods, Inc.*, 788 S.W.2d 561, 564-65 (Tenn. Ct. App. 1989) (affirming a forum non conveniens dismissal despite the existence of a mandatory forum selection clause designating a Tennessee court).

³² See cases cited *supra* note 31 (listing courts which have determined that an exclusive choice of forum agreement does not preclude the court from granting a forum non conveniens motion, even though the effect is dismissal of the case from the contractually mandated forum).

³³ *Id.* See also *Heiser*, *supra* note 4, at 394-401 (explaining why the public interest factors and some of the private interest factors are not subject to contractual waiver).

³⁴ See cases cited *supra* note 31 (citing cases in which courts have granted a forum non conveniens motion, even though the effect is dismissal of the case from the contractually mandated forum). Of course, a permissive or non-exclusive choice of court agreement will have little effect on a court's willingness to grant a forum non conveniens dismissal. *E.g.*, *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974, 979-80 (2d Cir. 1993) (rejecting use of the heightened *Bremen* standard used in mandatory forum provision cases because of the permissive forum provision); *Brooke Group Ltd. v. JCH Syndicate* 488, 663 N.E.2d 635, 638 (N.Y. 1996) (stating that the service of suit clause does not mandate the forum, thereby allowing for dismissal on conveniens grounds); *Berg v. MTC Elec. Techs. Co.*, 71 Cal. Rptr. 2d 523, 528-29 (Cal. Ct. App. 1998) (demonstrating the lower standard of review for permissive forum clauses relative to the high standard of "unfair of unreasonable" for mandatory forum clauses).

district or division where it might have been brought.”³⁵ Section 1404(a) is a codification and revision of the common law forum non conveniens doctrine set forth in *Gulf Oil Corp. v. Gilbert*.³⁶ However, unlike forum non conveniens, which applies in federal courts where the alternative forum is in another country, section 1404(a) applies when a party or the court seeks transfer of venue from one federal district court to another.³⁷ A federal court can order transfer under section 1404(a) on a lesser showing of inconvenience than is necessary for dismissal, and can exercise broader discretion than would be permitted under the common law forum non conveniens doctrine.³⁸

In *Stewart Organization v. Ricoh Corp.*,³⁹ the Supreme Court clarified the relationship between a forum selection clause and a section 1404(a) motion to transfer venue. The Court ruled that the existence of an exclusive forum selection clause does not preclude a federal district court in the contractually designated location from transferring the lawsuit to a federal district court in another state.⁴⁰ The Court reasoned that section 1404(a) is intended to give the district court discretion to adjudicate motions for transfer based on an “individualized, case-by-case consideration of convenience and fairness.”⁴¹ As to the weight accorded a forum selection clause, the Court simply noted that flexible and individualized analysis under section 1404(a) encompasses “consideration of the parties’ private expression of their venue preferences.”⁴² A forum selection clause “should receive neither dispositive consideration nor no consideration” the Court ruled, “but rather the consideration for which Congress provided in § 1404(a).”⁴³

³⁵ 28 U.S.C. § 1404(a) (2006).

³⁶ See *supra* notes 23–26 and accompanying text for a discussion of the private and public interest factors relevant under the *Gilbert* court’s forum non conveniens analysis.

³⁷ See *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (noting that the doctrine of forum non conveniens in federal court applies only where the alternative forum is in another country).

³⁸ See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (finding that Congress intended to allow courts to “grant transfers upon a lower showing of inconvenience”).

³⁹ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988).

⁴⁰ See *id.* at 28–31 (“The forum-selection clause. . . should receive neither dispositive consideration. . . nor no consideration”)

⁴¹ *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964).

⁴² *Stewart*, 487 U.S. at 30.

⁴³ *Id.* at 31.

As with *forum non conveniens*, a section 1404(a) transfer motion requires a trial court to consider a variety of public interest factors pursuant to the statutory directive that the transfer be “in the interest of justice.”⁴⁴ These public interest factors cannot be waived by private parties in a contract, and must be taken into account by a court despite the existence of a mandatory forum selection clause.⁴⁵ “Likewise, some private interest factors, particularly the convenience of certain independent witnesses in limited circumstances, may be beyond party control and be considered regardless of a forum selection clause.”⁴⁶ Several lower federal court decisions have adopted this reasoning, granting section 1404(a) transfers of venue despite exclusive choice of court agreements.⁴⁷

2.5. Forum Selection Clauses and Removal Jurisdiction

Pursuant to section 1441 of Title 28 of the United States Code, a defendant may remove a case initiated in state court to the federal district court sitting in the place where such action is pending.⁴⁸

⁴⁴ *Stewart*, 487 U.S. at 30-31. See *Ferens v. John Deere Co.*, 494 U.S. 516, 529-30 (1990) (observing that courts should consider the interests of witnesses and the court as well as the convenience of parties when evaluating § 1404(a) motions); *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 72-73 (1963) (noting that a § 1404(a) transfer motion and a motion to dismiss for *forum non conveniens* involve similar, but not identical, criteria).

⁴⁵ See *Stewart*, 487 U.S. at 30 (Section 1404(a) directs a district court to “take account of factors other than those that bear solely on the parties’ private ordering of their affairs”); Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement after Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 571-74 (1993) (discussing how courts must take into account many public interest factors in order to ensure that the transfer comports with the purpose of § 1404(a)).

⁴⁶ Heiser, *supra* note 45, at 572; see *Stewart*, 487 U.S. at 30-31 (noting that analysis under § 1404(a) includes “consideration of the parties’ private expression of the venue preferences”).

⁴⁷ E.g., *APA Excelsior III v. Premiere Tech., Inc.*, 49 F. Supp. 2d 664, 671-73 (S.D.N.Y. 1999) (approving transfer of venue despite forum selection clause); *McNic Oil & Gas Co. v. Ibex Res. Co.*, 23 F. Supp. 2d 729, 737- (E.D. Mich. 1998) (approving transfer of venue despite Michigan forum selection clauses); *Standard Office Sys. of Fort Smith, Inc. v. Ricoh Corp.*, 742 F. Supp. 534 (W.D. Ark. 1990) (denying transfer to New York of venue despite forum selection clause in sales agreement); see *CASAD & RICHMAN*, *supra* note 4, at 54 n.207 (listing cases where transfers to a chosen forum were denied and those where transfers from a chosen forum were allowed); Heiser, *supra* note 45, at 573-74 n.94 (discussing a survey of forty-four district court decisions applying *Stewart* to forum selection clauses in § 1404(a) transfer motions).

⁴⁸ 28 U.S.C. § 1441(a)-(d) (2006).

Removal is authorized only when the United States District Court has original subject matter jurisdiction over the action, except in actions founded on diversity of citizenship, which are removable only if none of the defendants is a citizen of the state in which the action is brought.⁴⁹ Procedurally, when a defendant files a petition for removal in the federal court, the case is removed automatically from state court.⁵⁰ If the plaintiff wishes to challenge the propriety of removal, he must then file a motion to remand the case back to state court pursuant to 28 U.S.C. § 1447.⁵¹

Some forum selection clauses designate a specific state court as the exclusive forum to adjudicate contract-related disputes. Several U.S. Courts of Appeals have considered whether to enforce such a contractual provision and remand the action back to state court. All have decided to enforce forum selection clauses that specify adjudication in state, rather than federal, court.⁵² These courts view the right to removal as a waivable statutory right—a right the defendant can waive in advance by contract.⁵³ Therefore, generally, a carefully drafted choice of court agreement that

⁴⁹ 28 U.S.C. § 1441(a)–(b) (2006).

⁵⁰ See 28 U.S.C. § 1446 (2006) (governing the procedure for removal from a state court).

⁵¹ 28 U.S.C. § 1447 (2006).

⁵² E.g., *Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 73 (2d Cir. 2009) (affirming district court's remand of personal injury suit to state court based on forum selection clause), *cert. denied*, 130 S. Ct. 401 (2009); *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921 (10th Cir. 2005) (affirming district court's remand of breach of contract suit to state court based on forum selection clause); *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040 (11th Cir. 2001) (holding that defendant in insurance coverage dispute had waived ability to consent to removal by including service of suit clause in policy); *Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248 (7th Cir. 1996) (upholding forum selection clause specifying state court forum in breach of contract suit); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1214 (3d Cir. 1991) (holding that forum selection clause waived reinsurer's right to remove suit originally filed in state court); *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 16 (5th Cir. 1991) (holding that defendant in insurance coverage dispute had waived ability to seek removal by including service of suit clause in policy). *But see* *Morgan v. Nat'l Distillers & Chem. Corp.*, 900 F.2d 890, 894 (6th Cir. 1990) (holding that inclusion of forum selection clause in contract did not constitute waiver of right to seek removal where party seeking removal was agency or instrumentality of foreign state within the meaning of the Foreign Sovereign Immunities Act).

⁵³ See cases cited *supra* note 52 (citing circuit court cases where the court has affirmed the removal of cases specifying state court venue).

designates a state court as the exclusive forum will preclude a lawsuit from being heard in federal court.⁵⁴

2.6. Recognition of Foreign Judgments and Forum Selection Clauses

2.6.1. Enforcement of Foreign Judgments, Generally

As often noted, there is no international Full Faith and Credit Clause.⁵⁵ Consequently, each country is free to adopt whatever standards for recognition and enforcement of foreign judgments it deems appropriate.⁵⁶ Beginning in the late 19th century, jurisdictions in the United States generally recognized foreign judgments on grounds of comity.⁵⁷ Prior to the decision in *Erie Railroad Co. v. Tompkins*,⁵⁸ the standards for recognition by federal courts were based on federal common law.⁵⁹ “After *Erie*, unless a treaty or federal statute applies, the relevant standards are matters

⁵⁴ A possible exception to this general rule is a lawsuit removed to federal court under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1441(d) (2006). See *Morgan*, 900 F.2d at 893 (noting that the Foreign Sovereign Immunities Act provides a foreign state absolute right of removal to federal courts by a foreign state to resolve sovereign immunity issues).

⁵⁵ See, e.g., Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 258–65 (1991) (discussing the recognition of foreign judgments in United States federal courts); Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 243–44 (2004) (stating that the recognition of foreign judgments is not required by the text of the Full Faith and Credit Clause nor does such recognition fit within the clause's original purpose); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 352 (2004) (noting that the United States' Full Faith and Credit Clause does not address foreign judgments).

⁵⁶ Much of this general discussion of recognition of foreign money judgments has been stated elsewhere. See Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 634–38 (discussing the recognition of foreign judgments in the United States and particularly under the Uniform Foreign Money-Judgments Recognition Act).

⁵⁷ See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (providing a discussion on the principle of comity in order to support the court's use of the principle); Brand, *supra* note 55, at 258–62 (discussing the application of the comity principle in American courts).

⁵⁸ 304 U.S. 64 (1938).

⁵⁹ See *Hilton*, 159 U.S. at 163 (relying on the federal common law principle of comity rather than a state law).

for state law.”⁶⁰ Because no comprehensive treaty or federal statute currently exists, recognition and enforcement of foreign judgments is now governed by state law.⁶¹

A majority of states has enacted a highly influential model law, the Uniform Foreign Money-Judgments Recognition Act of 1962 (UFMJRA)⁶² or its 2005 revision, the Uniform Foreign-Country Money Judgments Recognition Act.⁶³ Many of the remaining states have adopted the standards of the UFMJRA or of the substantially similar Restatement (Third) of Foreign Relations Law, as their common law doctrine.⁶⁴ “As a result, even though state law governs, the grounds for recognition and enforcement of foreign judgments are nearly the same in any court in the United States.”⁶⁵ Therefore, for purposes of analysis, this Article will treat the provisions of the UFMJRA as setting forth the relevant standards

⁶⁰ Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 634; *see also* Brand, *supra* note 55, at 262–68 (discussing state rules with regard to foreign judgments and complications that federal courts incur in applying state rules); Miller, *supra* note 55, at 251 (stating that after the Erie decision, federal courts have agreed that state law governs the question of recognition of foreign judgments).

⁶¹ Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 634.

⁶² UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 39 (2002) [hereinafter UFMJRA]. To date, 30 states have enacted the UFMJRA. *Id.*

⁶³ UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (U.L.A.) (Supp. 2008). For the most part, the 2005 Uniform Act is a clarification of the standards set forth in the earlier UFMJRA. To date, 3 states have enacted the 2005 Uniform Act. *Id.* at 5.

⁶⁴ *E.g.*, *Society of Lloyd’s v. Reinhart*, 402 F.3d 982, 999 (10th Cir. 2005) (applying Utah’s common law principles of comity, where Utah has not adopted the UFMJRA); *Alberta Sec. Com’n v. Ryckman*, 30 P.3d 121, 126–27 (Ariz. Ct. App. 2001) (applying the Restatement as Arizona’s common law recognition doctrine); *Petition of Breau*, 565 A.2d 1044, 1049–50 (N.H. 1989) (relying on the Restatement to determine recognition of foreign judgment); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481–82 (1987) (discussing cases that apply §§ 481–82); Brand, *supra* note 55, at 265–83 (comparing the UFMJRA’s and the Restatement’s recognition standards).

⁶⁵ Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 635. Pursuant to the command of *Erie*, a federal court must also apply state law when determining whether to recognize or enforce a foreign judgment. *E.g.*, *McCord v. Jet Spray Int’l Corp.*, 874 F. Supp. 436, 438 (Mass. Dist. Ct. 1994) (noting that a majority of cases hold that “federal courts should use state law in determining the preclusive effect of foreign judgments”); *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993) (stating that in the absence of a federal statute, a court will utilize the procedure of a state court in proceedings to execute a federal judgment).

with respect to whether a court in the United States will enforce a foreign money judgment.⁶⁶

The UFMJRA “applies to any foreign judgment for [money damages] that is final and conclusive and enforceable where rendered”⁶⁷ Under the UFMJRA, such a foreign judgment “is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit,” unless one of the UFMJRA’s grounds for nonrecognition applies.⁶⁸ The references here to “sister state” judgments and “full faith and credit” are significant because they incorporate an important aspect of enforcement of sister state judgments under the Full Faith and Credit Clause of the United States Constitution, *i.e.*, that the enforcing court can not review the merits of an otherwise valid judgment rendered in another state.⁶⁹

2.6.2. *Mandatory Grounds for Nonrecognition of Foreign Judgments*

Two grounds for mandatory nonrecognition of a foreign judgment under the UFMJRA are that the foreign court lacked personal jurisdiction or lacked subject matter jurisdiction.⁷⁰ The UFMJRA contains a non-exclusive list of the proper bases for the assertion of personal jurisdiction over a defendant by the foreign court, generally tracking the Supreme Court’s various holdings under the Due Process Clause.⁷¹ One specified basis is where “the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.”⁷² In other words, recognition and enforcement of a foreign judgment cannot be

⁶⁶ However, the 2005 version of the Uniform Act does contain some additional grounds for nonrecognition of foreign judgments not specified in the 1962 Act. These new grounds will be discussed in this Article where relevant. *See infra* text accompanying notes 92–93 (discussing grounds for nonrecognition introduced in the 2005 version).

⁶⁷ UFMJRA § 2; 13 U.L.A. 46 (2002).

⁶⁸ *Id.* § 3.

⁶⁹ *See* *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (stating that the merits of a judgment given in another state cannot be reviewed by an enforcing court).

⁷⁰ UFMJRA § 4(a)(2)–(3).

⁷¹ *Id.* § 5.

⁷² *Id.* § 5(a)(3).

refused for lack of personal jurisdiction if the litigation proceeded in the foreign court pursuant to a valid forum selection clause.⁷³

The third and final mandatory ground for nonrecognition under the UFMJRA is that “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”⁷⁴ Most courts interpret this reference to “due process” to mean that the foreign procedures must only be “fundamentally fair” and not offend against “basic fairness.”⁷⁵ This mandatory basis for nonrecognition does not mean that a foreign country’s procedures must incorporate all the specific due process requirements reflected in procedures in United States courts.⁷⁶ Foreign

⁷³ *E.g.*, *Genujo Lok Beteiligungs GMBH v. Zorn*, 943 A.2d 573, 580 (Me. 2008) (finding that the forum selection clause provided a foreign court the authority to exercise personal jurisdiction over the parties).

⁷⁴ UFMJRA § 4(a)(1); 13 U.L.A. 59 (2002). With respect to the question of impartiality, the appropriate inquiry is whether the judicial system is an independent branch of the foreign country’s government and is capable of administering, and does in fact administer justice in a fair manner. *See* S.C. *Chimexim S.A. v. Velco Enter., Ltd.*, 36 F. Supp. 2d 206, 213–15 (S.D.N.Y. 1999) (finding Romanian court systems provided impartial tribunals in compliance with the due process requirements). Only where a foreign tribunal is specifically proven to be corrupt or biased and incapable of acting impartially with respect to the defendant, should a United States court find that the foreign legal system lacks impartiality. *See, e.g.*, *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137–38, 142–44 (2d Cir. 2000) (refusing to enforce a Liberian judgment because the court found that Liberia’s judicial system was in disarray); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410–1413 (9th Cir. 1995) (refusing to enforce Iranian judgment against the sister of the Shah of Iran because after the Shah was deposed, the Iranian judicial system did not provide her with fair treatment or basic due process).

⁷⁵ *E.g.*, *Soc’y Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (referring to the American concept of due process as “complex”); *Soc’y of Lloyd’s v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002) (“[F]oreign proceedings need not comply with the traditional rigors of American due process . . .”). Some courts even call this the “international concept of due process” to distinguish it from the complex understanding of due process that has emerged in the United States courts. *E.g.*, *Ashenden*, 233 F.3d at 477 (interpreting that the due process in the Illinois Uniform Foreign Money-Judgment Recognition Act refers to the concept of fair procedure); *Soc’y of Lloyds v. Webb*, 156 F. Supp. 2d 632, 641 (N.D. Tex. 2001) (“International due process is a more flexible approach . . .”); *see* Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1162 (2007) (examining the “extent to which [U.S.] courts should apply American notions of due process in determining whether to recognize and enforce judgments obtained abroad.”).

⁷⁶ According to the drafters of the UFMJRA, “a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved.” UFMJRA § 4 cmt., 13 U.L.A. 59 (2002). *See* *Ingersoll*

judgments have been enforced, for example, even though the foreign procedure did not include the right to cross-examine witnesses,⁷⁷ prohibited the defendant from raising certain defenses and counterclaims,⁷⁸ prohibited discovery as to the amount claimed by the plaintiff,⁷⁹ or lacked a verbatim transcript.⁸⁰ Also, this basis for nonrecognition apparently refers only to the requirements of procedural, not substantive, rights.⁸¹ The only substantive basis that the UFMJRA recognizes for non-enforcement

Milling Mach. Co. v. Granger, 833 F.2d 680, 687 (7th Cir. 1987) (noting that the UFMJRA does not require that the procedures employed by a foreign tribunal be identical to those employed in American courts); Brand, *supra* note 55, at 271 ("Where personal jurisdiction exists, procedures different from those in the United States enforcing court will not generally rise to the level of a violation of due process in the [enforcing] of a foreign judgment."); *see also* sources cited *supra* note 75.

⁷⁷ *E.g.*, Hilton v. Guyot, 159 U.S. 139, 139 (1895) (finding that "[a] foreign judgment cannot be impeached because one of the plaintiffs was permitted to testify without being put under oath, and was not subjected to cross-examination . . ."); Panama Servs. v. Cities Serv. Co., 796 P.2d 276, 285-86 (Okla. 1990) (observing that Panama's argument did not rest on failure to receive "full and fair notice or that it was not given the opportunity to be heard in the Brazilian court" and thus a violation of due process, but rather it focused on the procedural difference); *Ingersoll*, 833 F.2d at 686-88 (dismissing the plaintiff's claim that his waiver of his right to cross-examination equated to less than a "full and fair opportunity to present his claims").

⁷⁸ *See, e.g.*, *Ashenden*, 233 F.3d at 479-80 ("The rationale for the conclusive-evidence clause, and for the denial of full discovery regarding the accuracy of the assessment, is similar to the rationale for the pay now sue later clause."); Soc'y of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 472 (E.D. Pa. 2003) (defendant objected to the foreign court's enforcement of a "pay-now-sue-later" clause, which prohibited defendant from raising certain defenses and counterclaims during the foreign action).

⁷⁹ *See, e.g.*, *Ashenden*, 233 F.3d at 480 ("[P]retrial discovery is not a part of the U.S. concept of due process."); *Panama Servs.*, 796 P.2d at 286 (observing that Panama's argument was based on procedural differences - differences that are not violations of due process.).

⁸⁰ *See* *British Midland Airways, Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (finding that an American corporation which agreed to be bound by foreign law when it entered into contract with a British company was not denied due process by action of foreign courts where it was American corporation's "choice not to pursue the matter on appeal or take advantage of the conditional defense allowance"); *Tonga Air Servs. v. Fowler*, 826 P.2d 204, 212 (Wash. 1992) (en banc) (noting that the absence of a verbatim transcript of the proceedings does not violate due process).

⁸¹ *See* *Ashenden*, 233 F.3d at 480 (observing that "the cases that deal with international due process" speak only of procedural rights).

of a foreign judgment is that the judgment is repugnant to the public policy of the enforcing state.⁸²

2.6.3. *Discretionary Grounds for Nonrecognition of Foreign Judgments*

The UFMJRA also specifies several discretionary grounds for nonrecognition. For example, a foreign judgment need not be recognized where the defendant did not receive proper notice of the foreign court proceeding, the judgment was obtained by fraud or it conflicts with another final judgment, or where the proceeding in the foreign court was contrary to an agreement to litigate the dispute in another court.⁸³

Another discretionary ground for nonrecognition under the UFMJRA is that the “cause of action” on which the judgment is based is “repugnant to the public policy” of the state in which the enforcing court sits.⁸⁴ Although this public policy exception defies easy interpretation, most courts give it a very narrow construction.⁸⁵ This exception operates only in those unusual cases where the foreign judgment is “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”⁸⁶ Because the focus is on the “cause of action,” some

⁸² *Id.* The “public policy” exception to recognition is discussed *infra* in the text accompanying notes 84–91.

⁸³ UFMJRA §§ 4(b)(1)–(2), (4), & (5), 13 U.L.A. 46 (2002).

⁸⁴ UFMJRA § 4(b)(3).

⁸⁵ See, e.g., *Southwest Livestock and Trucking Co. v. Ramón*, 169 F.3d 317, 321 (5th Cir. 1999) (noting the narrowness of the public policy exception and that the level of contravention of forum law must be high); *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) (observing that the standard to satisfy the public policy exception is high and infrequently met); *Soc’y of Lloyd’s v. Mullin*, 255 F. Supp. 2d 468, 475 (E.D. Pa. 2003) (reviewing cases and adopting a “high standard” with respect to the scope of the public policy exception), *aff’d*, 96 Fed. Appx. 100 (3d Cir. 2004). See also *Brand*, *supra* note 55, at 275–76 (noting that the public policy exception seldom has led to denial of enforcement); *Silberman*, *supra* note 55, at 356–59 (noting that outside of the First Amendment area, the public policy exception has not posed a significant barrier to enforcement of foreign judgments).

⁸⁶ *Ackermann*, 788 F.2d at 841 (quoting *Tahan v. Hodgeson*, 662 F.2d 862, 864 (D.C. Cir. 1981)). One classic formulation is that a judgment is contrary to the public policy of the enforcing state where that judgment “tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.” *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971).

courts have concluded that the proper inquiry is whether the substantive law applied in the foreign forum is contrary to public policy.⁸⁷ However, the fact that the judgment offends the enforcement state's public policy does not, in and of itself, permit the court to refuse recognition of that judgment.⁸⁸

Relying on the public policy exception, United States courts have refused to enforce foreign libel judgments where the foreign libel law was repugnant to the free speech values of the First Amendment.⁸⁹ However, when the values involved are less fundamental than the constitutional right of free speech, courts usually enforce foreign judgments, even though the foreign cause of action reflects a policy judgment contrary to that of the corresponding domestic law.⁹⁰ For example, United States courts

⁸⁷ See *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 100 (D.C. Cir. 2006) (recounting that Section 15-383(b)(3) of the Recognition Act permits nonrecognition of foreign judgments only if the cause of action is repugnant to public policy); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 995 (10th Cir. 2005) (reiterating that the Court must focus on the cause of action); *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 332 (5th Cir. 2002) (reiterating that, by the "plain language of the Texas Recognition Act," the cause of action underlying a judgment must be contrary to public policy before nonrecognition of that judgment is allowed); *Ashenden*, 233 F.3d at 480 ("The only substantive basis . . . for not enforcing a foreign judgment is that 'the cause of action on which the judgment is based is repugnant to the public policy' . . .").

⁸⁸ *Ramon*, 169 F.3d at 321. See also cases cited *supra* note 87, which note that where the foreign judgment was not found to offend public policy the court may not refuse recognition of that judgment. But see the recent revision to § 4(c)(3) of the UFMJRA discussed *infra* in text accompanying note 93, which provides for nonrecognition of judgments that offend public policy.

⁸⁹ See, e.g., *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (holding that French court order requiring ISP to block French citizens' access to Nazi material on ISP's United States site was unenforceable in the United States as it threatened the First Amendment), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (en banc). See generally *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.C. Cir. 1995) (showing refusal of U.S. courts to enforce British libel judgment that was contrary to First Amendment values); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997) (confirming the holding from *Matusevitch v. Telnikoff* on same grounds); *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. App. Div. 1992) (showing refusal of U.S. court to enforce a British libel judgment that it found offensive to the First Amendment).

⁹⁰ See, e.g., *Turner*, 303 F.3d at 332-33 (ruling that the public policy exception is not triggered "simply because the body of foreign law upon which the judgment is based is different from the law of the forum or because the foreign law is more favorable to the judgment creditor than the law of the forum" quoting *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980)); *Ackermann*, 788 F.2d at 843 ("It is not enough merely that a foreign judgment fails to fulfill domestic practice or policy."). See also authorities cited *supra* note 85 for the

have enforced foreign judgments even though they were based on causes of action that would be prohibited, or at least not be recognized, in the enforcement forum.⁹¹

The 2005 revision to the Uniform Act adds two new discretionary grounds for non-recognition: “[T]he judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment,” and “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”⁹² The 2005 Act also clarifies two areas that have troubled courts when applying the 1962 Act. First, the 2005 Act broadens the focus of the public policy exception by providing that a foreign judgment need not be recognized if “the . . . judgment or the [cause of action] . . . on which the . . . judgment is based is repugnant to the public policy of this state or of the United States.”⁹³ Second, it specifies that the party resisting recognition has the burden of establishing that offered ground for nonrecognition exists within the Act.⁹⁴

The UFMJRA applies only to foreign judgments granting or denying recovery of a sum of money.⁹⁵ However, a judgment for a “fine or other penalty” is specifically excluded.⁹⁶ This phrase is not

heightened level and narrowness by which courts interpret the public policy exception.

⁹¹ See, e.g., *Ramon*, 169 F.3d at 317 (recognizing Mexican judgment on promissory note even though interest charged was usurious under Texas law); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 691-92 (7th Cir. 1987) (enforcing Belgian judgment awarding prejudgment interest even though inappropriate under Illinois law); *Somportex*, 453 F.2d at 443 (enforcing British judgment that included damages for loss of good will and attorney fees even though Pennsylvania law did not allow recovery for loss of good will or attorney fees); *Soc’y of Lloyd’s v. Webb*, 156 F. Supp. 2d at 632, 643-44 (N.D. Tex. 2001) (recognizing English judgment despite apparent conflict with Texas law that condemns cognovit judgments), *aff’d*, 303 F.3d 325 (5th Cir. 2002). See Brand, *supra* note 55, at 275-76 nn.86-88 (collecting cases); Jay M. Zitter, Annotation, *Construction and Application of Uniform Foreign Money-Judgments Recognition Act*, 88 A.L.R. FED. 5th 545, 615-20 (2001 and Supp. 2009) (reviewing cases).

⁹² UFMJRA, §§ 4(c)(7) & (8), 13 U.L.A. 46 (2002).

⁹³ *Id.* § 4(c)(3) (emphasis added). The same stringent test for finding a public policy violation applied by courts interpreting the 1962 Act applies to the revised Act. *Id.* § 4, cmt. 8. See *supra* notes 84-91 and accompanying text (addressing the public policy exception under the UFMJRA).

⁹⁴ *Id.* § 4(d).

⁹⁵ *Id.* § 1(2).

⁹⁶ *Id.* § 1(2). A judgment for taxes or for support in domestic relations matters is also excluded from coverage. *Id.*

defined in the UFMJRA or its 2005 revision but may mean that a foreign judgment for punitive damages obtained by a private litigant is not covered, although enforcement may still be possible on the basis of comity.⁹⁷ However, the fact that a foreign money judgment includes attorney fees and costs does not necessarily mean that judgment is a penalty or is contrary to the public policy of the enforcement forum.⁹⁸

Likewise, a foreign judgment granting non-monetary relief, such as specific performance or an injunction, is not within the scope of the UFMJRA.⁹⁹ However, several courts have recognized and enforced non-monetary judgments based on comity principles.¹⁰⁰

⁹⁷ See UFMJRA § 7 (providing that the “Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.”); Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 649–53 (discussing enforcement of foreign judgments for punitive damages).

⁹⁸ See, e.g., *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971) (enforcing British judgment including attorney fees even though Pennsylvania law did not allow recovery of attorney fees); *ERBE Elektromedizin GmbH v. Canady*, 545 F. Supp. 2d 491 (W.D.Pa. 2008) (holding foreign judgment for attorney fees was not a penalty and not repugnant to public policy even though attorney fees not recoverable under Pennsylvania or federal law); *Desjardins Ducharme v. Hunnewell*, 585 N.E.2d 321, 323 (Mass. 1992) (enforcing Canadian judgment for costs awarded based on percentage of amount in issue and not on actual costs).

⁹⁹ See UFMJA § 1(2) (restricting foreign judgments to include only judgments of “a foreign state granting or denying recovery of a sum of money”).

¹⁰⁰ See, e.g., *Siko Ventures v. Argyll Equities*, No. SA-05-CA-100-OG, 2005 WL 2233205, at *2 (W.D. Tex. Aug. 5, 2005) (observing that “Texas courts have repeatedly recognized and enforced . . . sister-state judgments under comity principles”); *Nahar v. Nahar*, 656 So. 2d 225, 230 (Fla. Dist. Ct. App. 1995) (recognizing and enforcing decree of Aruban court ordering transfer of decedent’s Florida bank accounts to Aruba to be disposed of according to Dutch law); *Cardenas v. Solis*, 570 So. 2d 996, 999 (Fla. Dist. Ct. App. 1990) (recognizing and enforcing temporary injunction of Guatemalan court freezing funds in defendant’s Florida bank accounts). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. g (1971) (indicating that a foreign nation decree that orders or enjoins an act will be enforced provided enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court, provided the decree is consistent with fundamental principles of justice).

3. THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

3.1. *The Scope of the Hague Convention*

The Hague Convention on Choice of Court Agreements sets forth uniform international rules for enforcing exclusive choice of court commercial transactions agreements between parties, and for the recognition and enforcement of judgments resulting from proceedings based on such agreements.¹⁰¹ The scope of this Convention is limited in several important ways. First, the Convention applies only in “international cases.”¹⁰² For purposes of jurisdiction, a case is an “international case” unless the parties are residents of the same Contracting State and the dispute is connected only with that State.¹⁰³

Second, the Convention applies only to “exclusive choice of court agreements.”¹⁰⁴ An “exclusive choice of court agreement” is one that designates one or more courts of one Contracting State to the exclusion of the jurisdiction of any other courts.¹⁰⁵ Significantly, an agreement that designates one or more courts of one Contracting State is deemed exclusive unless the parties have expressly provided otherwise.¹⁰⁶

Third, the Convention applies only to “agreements concluded in civil or commercial matters.”¹⁰⁷ It expressly does not apply to choice of court agreements in consumer or employment contracts.¹⁰⁸ Moreover, several additional matters are specifically

¹⁰¹ See Hague Convention, *supra* note 1, preamble (creating rules that would “promote international trade and investment through enhanced judicial co-operation”).

¹⁰² *Id.* arts. 1(2), (3).

¹⁰³ *Id.* art. 1(2).

¹⁰⁴ *Id.* arts. 1, 3 & 22. However, Article 22 permits Contracting States through reciprocal declarations to extend the recognition and enforcement provisions of the Convention to non-exclusive choice of court agreements. See also TREVOR C. HARTLEY & MASOTO DOGAUCHI, EXPLANATORY REPORT: CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS ¶¶240-255 (2007) [hereinafter EXPLANATORY REPORT] (discussing the provisions of Article 22. This authoritative EXPLANATORY REPORT, contains article-by-article commentary reflecting the views of the Diplomatic Session which adopted the Convention), http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=98.

¹⁰⁵ Hague Convention, *supra* note 1, art. (3)(a).

¹⁰⁶ *Id.* art. 3(b).

¹⁰⁷ *Id.* art. 1(1).

¹⁰⁸ *Id.* art. 2(1).

excluded from coverage, including various family law matters, anti-trust claims, and most intellectual property (except copyright) matters.¹⁰⁹ There is one particularly significant exclusion: the Convention does not apply to personal injury claims “brought by or on behalf of natural persons.”¹¹⁰

3.2. *Jurisdiction of the Chosen Court and the Obligations of the Court Not Chosen*

Article 3 of the Convention defines an “exclusive choice of court agreement” to mean a written agreement that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, “the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.”¹¹¹ Articles 5 and 6 then set forth the Convention’s basic rules with respect to the jurisdiction of the court chosen in an exclusive choice of court agreement, as well as the obligations of a court not chosen.

Article 5(1) provides that the court of a Contracting State designated in an exclusive agreement “shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.”¹¹² Most significantly, under Article 5(2), the chosen court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.”¹¹³ The intent of this language is clear: the chosen court must hear the case unless the agreement is “null and void,” and has no discretion to dismiss or stay the proceedings under the common law doctrine of *forum non conveniens*.¹¹⁴

“The ‘null and void’ provision is the only generally applicable exception to the rule that the chosen court must hear the case.”¹¹⁵

¹⁰⁹ *Id.* art. 2(2). *See also id.* art. 2(5) (stating that proceedings in which a country or a government agency is a party are not necessarily excluded from the scope of the Convention). *But see id.* art. 2(6) (discussing how the Convention does not affect the sovereign immunity of States or international organizations).

¹¹⁰ *Id.* art. 2(2)(j).

¹¹¹ *Id.* art. 3(a).

¹¹² *Id.* art. 5(1).

¹¹³ *Id.* art. 5(2).

¹¹⁴ *See* EXPLANATORY REPORT, *supra* note 104, ¶¶132-34, at 44 (discussing Article 5(2)’s intent to preclude the chosen court from resorting to *forum non conveniens* or *lis pendens*).

¹¹⁵ *Id.* ¶125, at 43.

The phrase “null and void” is not defined by the Convention, but apparently refers to generally recognized grounds for invalidating an agreement such as fraud, mistake, misrepresentation, duress, and lack of capacity.¹¹⁶ However, the Convention does not authorize the chosen court to refuse to enforce a choice of court agreement where enforcement would be contrary to the public policy of the State of the chosen court.¹¹⁷

Article 5 of the Convention also contains two specific exceptions to the general rule that the designated court shall not decline jurisdiction. Article 5(3)(a) states that the general rule of Article 5(1) and 5(2) does “not affect rules on jurisdiction related to subject matter or to the value of the claim;” and Article 5(3)(b) provides that the general rule shall not affect rules “on the internal allocation of jurisdiction among the courts of a Contracting State.”¹¹⁸ However, Article 5(3)(b) states, “where the chosen court has discretion as to whether transfer a case” from one court to another within the Contracting State, “due consideration should be given to the choice of the parties.”¹¹⁹ As will be explained below, these two exceptions complicate analysis of the Convention’s impact on the doctrines of forum non conveniens, transfer of venue from one federal district court to another, and removal from state to federal court.¹²⁰

Article 6 of the Convention specifies the obligations of a court of a Contracting State other than the court chosen by an exclusive choice of court agreement. That court must suspend or dismiss the proceedings to which the agreement applies unless one of five narrow exceptions applies. These include: that “the agreement is null and void under the law of the State of the chosen court,” that giving effect to the agreement would be “manifestly contrary to the public policy of the State of the court seised,” or that “the chosen

¹¹⁶ See *id.* ¶126 (discussing the meaning of Article 3(c)).

¹¹⁷ In contrast, the Convention does provide a public policy exception to the general obligation of a court not chosen to decline to hear the case, and to the general rule of recognition and enforcement of judgments rendered by the chosen court. Hague Convention, *supra* note 1, arts. 6(c), 9(e). See *infra* notes 122, 131–32 and accompanying text (discussing this exception).

¹¹⁸ Hague Convention, *supra* note 1, art. 5(3)(a)–(b).

¹¹⁹ *Id.* art. 5(3)(b).

¹²⁰ See *infra* notes 163–75 and accompanying text (examining how these two exceptions are involved in the analysis of the Convention’s impact on the doctrines of forum non conveniens, transfer of venue, and removal to federal court).

court has decided not to hear the case” on some basis consistent with the Convention.¹²¹ This last exception applies, for example, when a choice of court agreement refers to a specific court in a Contracting State but that court transfers the action to another court in the same state based on the internal allocation of jurisdiction among the courts of that state.¹²² In such circumstances, Article 6 does not preclude the transferee court, or any other court, from hearing the case.¹²³

3.3. Recognition and Enforcement of Judgments

The Hague Convention also contains provisions regarding recognition and enforcement of certain judgments.¹²⁴ The general rule, stated in Article 8, is that a judgment given by a court in a Contracting State designated in an exclusive choice of court agreement must be recognized and enforced in other Contracting States.¹²⁵ “Recognition or enforcement may be refused only on the grounds specified in [the] Convention.”¹²⁶ The enforcing court is prohibited from reviewing the merits of the judgment, except as necessary to determine whether a ground for nonrecognition applies, and is bound by the findings of fact on which the court of origin based its jurisdiction under the Convention.¹²⁷ However, a

¹²¹ Hague Convention, *supra* note 1, art. 6(a), (c), (e). See also EXPLANATORY REPORT, *supra* note 104, ¶¶141-59, at 46-49 (providing an excellent discussion of this general obligation and the five specific exceptions).

¹²² See EXPLANATORY REPORT, *supra* note 104, ¶¶155-59, at 48-49 (discussing this exception and providing examples).

¹²³ See *id.* (discussing this exception and providing examples). This exception recognizes that in order to avoid a denial of justice, some court must be available to hear the case. *Id.* ¶155, at 48.

¹²⁴ Hague Convention, *supra* note 1, arts. 8-12, 22. “Recognition” means the court so requested “gives effect to the determination of the legal rights and obligations made by the court of origin.” EXPLANATORY REPORT, *supra* note 104, ¶170, at 51. “Enforcement” means the application of the legal procedures of the court so requested to ensure that the defendant obeys the court of origin’s judgment. *Id.*

¹²⁵ Hague Convention, *supra* note 1, art. 8(1). In addition, Article 22 permits Contracting States, through reciprocal declarations, to extend the recognition and enforcement provisions of the Convention to non-exclusive choice of court agreements. See EXPLANATORY REPORT, *supra* note 104, ¶¶240-55, at 66-69 (discussing the provisions of Article 22).

¹²⁶ Hague Convention, *supra* note 1, art. 8(1).

¹²⁷ *Id.* art. 8(2) (binding the reviewing court to the court of origin’s findings on jurisdiction “unless the judgment was given by default”).

judgment will be recognized and enforced only if it is in effect and enforceable in the "State of origin."¹²⁸

All of the exceptions to recognition and enforcement specified in the Convention are discretionary.¹²⁹ Consequently, even where one or more exceptions apply, the Convention does not preclude recognition and enforcement.¹³⁰ The specific exceptions to recognition and enforcement stated in Article 9 include: the agreement was "null and void" under the law of the chosen State, unless the chosen court has determined that the agreement is valid; the defendant did not receive proper notice; the judgment was obtained through fraud or is inconsistent with another judgment; or where recognition and enforcement would be "manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."¹³¹ This last exception is intended to be very narrow, referring only to the most basic norms and principles of the enforcement state.¹³²

The Convention's recognition and enforcement provisions also apply to a judgment given by a court in a Contracting State after a transfer of the case from the chosen court as permitted by Article 5(3).¹³³ However, where the chosen court had discretion as to whether to transfer the case to another court, recognition and enforcement may be refused against a party who objected to the transfer in a timely manner in the state of origin.¹³⁴ For example, where the case was commenced by the plaintiff in the chosen federal district court but was transferred over plaintiff's objection to another federal district court pursuant to 28 U.S.C. § 1404(a), a

¹²⁸ *Id.* art. 8(3). Recognition and enforcement may be postponed or refused if the judgment is subject to review in the country of origin. *Id.* art. 8(4).

¹²⁹ *See id.* arts. 8(1), 8(5), 9-11 (providing various grounds under which recognition and enforcement "may" be refused).

¹³⁰ *See* EXPLANATORY REPORT, *supra* note 104, ¶182, at 53 (noting that when an exception applies, the Convention does not require recognition and enforcement of the judgment, but "does not preclude [the enforcing court] from doing so").

¹³¹ Hague Convention, *supra* note 1, art. 9(a), (c)-(e).

¹³² *See* EXPLANATORY REPORT, *supra* note 104, ¶¶151-53, 189-90 (noting that the exception is intended to apply to those judgments that would "axiomatic[ally]" be contrary to public policy).

¹³³ Hague Convention, *supra* note 1, art. 8(5). For discussion of the transfer provisions of Article 5(3), *see supra* notes 118-19 and accompanying text.

¹³⁴ Hague Convention, *supra* note 1, art. 8(5).

court in another Contracting State need not recognize a judgment against the plaintiff.¹³⁵

The Convention's enforcement provisions clearly apply to foreign judgments denying or awarding money damages.¹³⁶ However, Article 11 provides that recognition or enforcement of a money judgment may be refused if, and to the extent that, the damages do not compensate a party for actual loss or harm suffered, "including exemplary or punitive damages."¹³⁷ However, the enforcing court must take into account whether and to what extent the damages awarded serve to cover costs and expenses related to the proceedings.¹³⁸

Interestingly, the Convention's enforcement provisions are not expressly limited to foreign judgments for money damages. This means that these provisions may also apply to a non-monetary judgment, such as one for specific performance or injunctive relief.¹³⁹ However, a Contracting State is be obliged to enforce a non-monetary remedy that is not available under its own law.¹⁴⁰

4. THE IMPACT OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS ON COURTS IN THE UNITED STATES

4.1. *The Hague Convention Preempts Contrary Domestic Law*

By its terms, the Hague Convention "shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters."¹⁴¹ The Convention also contains similar mandatory language in most of its key provisions.

¹³⁵ See EXPLANATORY REPORT, *supra* note 104, ¶¶175–81 (providing examples and discussing various applications of Article 8(5)).

¹³⁶ See *id.* ¶¶ 203–05 (providing a discussion of the structure and purpose of Article 11 concerning damages).

¹³⁷ Hague Convention, *supra* note 1, art. 11(1). See EXPLANATORY REPORT, *supra* note 104, ¶¶ 203–05 (identifying the concerns and drafting history that underlie the Article's provisions).

¹³⁸ Hague Convention, *supra* note 1, art. 11(2).

¹³⁹ See EXPLANATORY REPORT, *supra* note 104, ¶¶89, 164, n.201 (demonstrating together that a Contracting State must recognize an applicable non-monetary judgment of another Contracting State to the best of its ability).

¹⁴⁰ See *id.* ¶89 (explaining that enforcing courts, which are not required to grant remedies that are unavailable under their own laws, should apply the internal enforcement measures available to them that give the foreign judgment the truest effect).

¹⁴¹ Hague Convention, *supra* note 1, art. 1(1).

For example, when delineating the obligations of the contractually chosen court and of courts not chosen, the Convention states that the court designated in an exclusive agreement “shall have jurisdiction to decide a dispute to which the agreement applies,” and a court not chosen “shall suspend or dismiss proceedings to which an exclusive agreement applies.”¹⁴² Likewise, when addressing recognition of foreign judgments, the Convention states that such judgments “shall be recognized and enforced” unless a specified exception applies.¹⁴³

The mandatory nature of this treaty means that, by virtue of the Supremacy Clause of the U.S. Constitution, its standards preempt inconsistent state and federal law in cases where the Convention applies.¹⁴⁴ Consequently, in such cases, the Convention’s directives regarding enforcement of choice of court agreements and recognition of judgments will prevail over contrary rules followed by U.S. courts in cases outside the scope of the Convention.

4.2. *The Hague Convention and Enforcement of Forum Selection Clauses in U.S. Courts*

As discussed previously, the vast majority of courts in the United States will enforce a choice of court agreement, unless the resisting party shows that enforcement would be unreasonable and unjust.¹⁴⁵ Enforcement will be denied only when the agreement is invalid based on contract formation principles, is contrary to the public policy of the forum, or designates a forum that is so gravely inconvenient that it will effectively deprive a party of a meaningful day in court.¹⁴⁶ This standard is essentially the same as the one set

¹⁴² *Id.* arts. 5(1), 6.

¹⁴³ *Id.* art. 8(1).

¹⁴⁴ *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (indicating that, by virtue of the Supremacy Clause, the Hague Service Convention preempts inconsistent methods of service of process prescribed by state law).

¹⁴⁵ *See supra* notes 4–7 and accompanying text (discussing the willingness of courts in the United States to enforce choice of courts agreements).

¹⁴⁶ *See supra* note 5 and accompanying text (discussing reasons why United States courts might decide against enforcing choice of court agreements).

forth in Article 6 of the Hague Convention.¹⁴⁷ However, there are some minor differences.

The Convention does not explicitly provide any exception to enforcement based on inconvenience, "grave" or otherwise.¹⁴⁸ However, Article 6 authorizes the court not chosen to exercise jurisdiction where giving effect to the choice of court agreement would lead to a "manifest injustice."¹⁴⁹ This broad reference would seem to encompass those exceptional circumstances where the inconveniences associated with the chosen forum are so profound that they will effectively deprive a party of a meaningful day in court.¹⁵⁰ In addition, the Convention does not authorize an exception to enforcement of a choice of court agreement where doing so would be contrary to the public policy of the state of the chosen court.¹⁵¹ Some jurisdictions within the United States do recognize these grounds for non-enforcement, although they are infrequently invoked.¹⁵²

Although nearly every jurisdiction in the United States has adopted standards similar to those in the Convention, a few states treat forum selection clauses less favorably.¹⁵³ When these state laws conflict with the Hague Convention, the Convention's provisions will prevail.¹⁵⁴ The most significant difference between the Convention and domestic law does not involve enforcement

¹⁴⁷ Hague Convention, *supra* note 1, art. 6. See *supra* notes 112–17, 121 and accompanying text (discussing circumstances under which the Hague Convention does not require that a choice of court decision be enforced).

¹⁴⁸ See Hague Convention, *supra* note 1, art. 6 (lacking an explicit inconvenience exception).

¹⁴⁹ *Id.* art. 6(c).

¹⁵⁰ See EXPLANATORY REPORT, *supra* note 104, ¶¶151–53, at 48 (discussing the "two limbs" of Article 6(c)).

¹⁵¹ See *supra* note 117 and accompanying text (noting that although the Convention does not allow a chosen court to refuse to enforce a choice of court agreement which would be contrary to its public policy, the Convention does provide public policy exceptions to the general obligation of the court not chosen to decline to hear a case, and to the general rule of recognition and enforcement of judgments rendered by the chosen court).

¹⁵² See, e.g., *Cerami-Kote, Inc. v. Energywave Corp.*, 733 P.2d 1143 (Idaho 1989) (determining the forum selection clause in the contract violated the public policy of the State of Florida).

¹⁵³ See *supra* notes 6–7 and accompanying text (discussing state laws disfavoring forum selection clauses).

¹⁵⁴ See *supra* note 144 and accompanying text (addressing the preemptive effect of the Convention).

standards but rather the interpretation of an otherwise enforceable agreement.

The Convention states that a choice of court agreement which designates the courts of one Contracting State, or one or more specific courts of one contracting state, “shall be deemed to be exclusive unless the parties have expressly provided otherwise.”¹⁵⁵ This presumption of exclusivity conflicts with the interpretative approach taken by many U.S. courts, which presume *against* exclusivity.¹⁵⁶ The Convention preempts this domestic approach in cases within the treaty’s scope.

4.3. *The Hague Convention and Forum Non Conveniens*

The Hague Convention has a clear impact on the doctrine of forum non conveniens applied in U.S. courts. As explained above, an important general rule of the Hague Convention is that the court designated as the exclusive forum in a valid choice of court agreement is precluded from dismissing or staying an action based on forum non conveniens.¹⁵⁷ But this general rule is subject to so many exceptions that its impact on the use of forum non conveniens by courts in the United States is considerably less than first appears.

The most frequent, and the most controversial, use of forum non conveniens is in transnational tort cases—often product liability actions—brought by foreign persons in a U.S. court seeking recovery of personal injury damages from defendants who reside in the United States.¹⁵⁸ Such personal injury actions are expressly excluded from the scope of the Convention.¹⁵⁹ Likewise, the Convention specifically excludes other types of cases where forum non conveniens motions are likely, including tort actions for damage to tangible property that do not arise from contractual

¹⁵⁵ Hague Convention, *supra* note 1, art. 3(b). See also EXPLANATORY REPORT, *supra* note 104, ¶¶ 102–109 (discussing the manner in which the exclusivity of a choice of court agreement is interpreted under the Convention and providing examples).

¹⁵⁶ See *supra* notes 9–12 and accompanying text (discussing the reluctance of some courts in the United States to read choice of court agreements as exclusive).

¹⁵⁷ See *supra* notes 113–14 and accompanying text (detailing the Hague Convention’s limits on forum non conveniens).

¹⁵⁸ See Heiser, *Forum Non Conveniens and Retaliatory Legislation*, *supra* note 16, at 609–11, 618–21 (collecting authorities and discussing the frequent use of forum non conveniens in transnational tort litigation).

¹⁵⁹ Hague Convention, *supra* note 1, art. 2(2)(j).

relationships, anti-trust claims, marine pollution claims, and many actions involving intellectual property rights (other than copyright and related rights).¹⁶⁰

However, with respect to those commercial and civil matters that do come within the scope of the Convention, an action commenced in a U.S. court pursuant to an exclusive choice of court agreement cannot be dismissed or stayed based on forum non conveniens if the alternative forum is in another *country*.¹⁶¹ This is certainly a significant change in the availability of the common law doctrine. Whether a forum non conveniens dismissal is permitted when the alternative forum is in another *state* within the United States depends on the description of the forum designated in an exclusive choice of court agreement.¹⁶² The same analysis applies to motions to transfer venue from one federal district court to another pursuant to 28 U.S.C. §1404(a), which is discussed below.

4.4. *The Hague Convention and Federal Court Transfer of Venue*

The Hague Convention recognizes that some signatory countries may not have unified legal systems.¹⁶³ For example, the United States is comprised of a number of states with different systems of law and, in addition, a separate federal court system with limited subject matter jurisdiction. The Convention addresses non-unified legal systems by directing that “any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit.”¹⁶⁴ Consequently, if an exclusive choice of court agreement designates “the courts of the State of California,” the word “State” in Article 5(2) would refer to California and not to the United States, and the California state court would be precluded under

¹⁶⁰ *Id.* art 2(2). See generally CASAD & RICHMAN, JURISDICTION, *supra* note 4, § 1-4 (discussing the various types of cases in which forum non conveniens motions are granted).

¹⁶¹ Hague Convention, *supra* note 1, art. 5(2). See EXPLANATORY REPORT, *supra* note 104, ¶¶15, 107, 127-140 (discussing “non-unified” legal systems and the limitations Article 5 places on a court’s ability to decline jurisdiction).

¹⁶² See *infra* notes 163-168 and accompanying text (discussing interaction between Hague Convention and U.S. state and federal court systems).

¹⁶³ See Hague Convention, *supra* note 1, art. 25 (describing application of Convention to Contracting States with non-unified legal systems).

¹⁶⁴ *Id.* art. 25(1)(c).

Article 5(2) from declining jurisdiction in favor of a court in another U.S. state.¹⁶⁵

However, as discussed previously, pursuant to the exception stated in Article 5(3)(b), the general rule of Article 5(2) does “not affect rules—on the internal allocation of jurisdiction among the courts of a Contracting State.”¹⁶⁶ Therefore, if an exclusive agreement designates “the Superior Court of San Diego, State of California,” that state court would not be precluded from transferring the case to another state court within California based on notions of convenience or proper venue.¹⁶⁷ If the exclusive agreement generally designates “a court located within the United States” and an action is commenced in a California state court, that court would not be precluded from dismissing the action based on *forum non conveniens* where the alternative forum is in another state within the United States, such as Illinois or Florida.¹⁶⁸

Likewise, if an exclusive agreement designates “the United States District Court for the Southern District of California,” that federal court would not be precluded from transferring the case to another federal district court located in another state pursuant to 28 U.S.C. § 1404(a).¹⁶⁹ In this context, the word “State” in Article 5(2) is properly construed to refer to the United States, and Article 5(3)(b) would therefore permit a discretionary transfer of venue to another federal district court within the United States, for example, to the Southern District of New York or the Western District of Texas.

The only limitation imposed by Article 5(3)(b) on this internal allocation of jurisdiction is, where the chosen state has discretion as to whether to transfer a case, that “due consideration should be given to the choice of the parties.”¹⁷⁰ This “due consideration” of the parties’ choice of forum is essentially the same vague standard

¹⁶⁵ See EXPLANATORY REPORT, *supra* note 104, ¶¶128–34 (discussing the meaning of the term “state” in the Convention, especially as it relates to countries containing several territorial units).

¹⁶⁶ Hague Convention, *supra* note 1, art. 5(3)(b). See *supra* text accompanying notes 118–19 (parsing Hague Convention Article 5 language on allocation of jurisdiction between State’s domestic court systems).

¹⁶⁷ See EXPLANATORY REPORT, *supra* note 104, ¶¶139–40 (noting, with examples, that the Convention allows for internal allocation rules).

¹⁶⁸ See *id.* ¶¶ 130–31 (discussing similar examples).

¹⁶⁹ See *id.* ¶¶ 131, 139–40 (discussing a similar example as well as the Convention’s treatment of internal allocation rules).

¹⁷⁰ Hague Convention, *supra* note 1, art. 5(3)(b).

endorsed in *Stewart Organization v. Ricoh Corp.*, where the Supreme Court ruled that an exclusive choice of court agreement did not preclude a federal court transfer of venue based on convenience pursuant to section 1404(a).¹⁷¹ Therefore, the Hague Convention does not alter the ability of a federal district court to transfer venue to a district court in another state pursuant to section 1404(a).¹⁷²

4.5. *The Hague Convention and Removal Jurisdiction*

The Hague Convention does not appear to preclude a defendant from removing a case from state court to federal court pursuant to 28 U.S.C. § 1441. Although the text of the Convention is not clear on this issue, the “internal allocation of jurisdiction” and the “transfer” language in Article 5(3)(b) may also refer to removal of jurisdiction.¹⁷³ Moreover, Article 5(3)(a) states that the general rule of Article 5(2) does not affect the Contracting State’s internal laws “on jurisdiction related to subject matter.”¹⁷⁴ Therefore, if an exclusive choice of court agreement designates “the state courts of California,” the Convention would not preclude removal of an action from a California Superior Court to the appropriate U.S. District Court in California.¹⁷⁵ However, as discussed previously, although the Convention does not preclude

¹⁷¹ See *supra* text accompanying notes 39–43 (discussing *Stewart Org. v. Ricoh*, 487 U.S. 22, 28–31 (1988)).

¹⁷² Although not precluded by the Convention, in some circumstances a section 1404(a) transfer may affect the obligations under Article 6 of a court not chosen in an exclusive choice of court agreement, and the recognition and enforcement of a judgment given by the transferee court under Article 8. See Hague Convention, *supra* note 1, art. 6(e) (providing that a court in a Contracting State other than the chosen court is not precluded from hearing a case where “the chosen court has decided not to hear the case”); *id.* art. 8(5) (providing that recognition or enforcement may be refused against a party who objected to a discretionary transfer in a timely manner); EXPLANATORY REPORT, *supra* note 104, ¶¶156–58, 175–81 (discussing the meaning of Articles 6(e) and 8(5)); See also *supra* notes 121–23, 133–35 and accompanying text (discussing those Articles as they relate to cases transferred under internal allocation rules).

¹⁷³ See EXPLANATORY REPORT, *supra* note 104, ¶¶ 135–40, n.176 (discussing the meaning of Articles 5(3)(a) and (b)).

¹⁷⁴ Hague Convention, *supra* note 1, art. 5(3)(a).

¹⁷⁵ For the same reason, an exclusive choice of court agreement that designates a court with limited jurisdiction, such as a United States district court, will not preclude dismissal if the chosen court lacks subject matter jurisdiction under the relevant internal laws. See EXPLANATORY REPORT, *supra* note 104, at 45, ¶¶136–39 (discussing the meaning of subject matter jurisdiction in federated States such as the United States and application of the Convention to those states).

removal, the federal court would enforce the exclusive agreement and remand the action back to state court.¹⁷⁶

4.6. *The Hague Convention and Recognition of Judgments*

The rules for recognition and enforcement of foreign judgments contained in the Hague Convention are remarkably similar to those set forth in the Uniform Foreign Money-Judgments Recognition Act of 1962 (UFMJRA) and its 2005 revision, the Uniform Foreign-Country Money Judgments Recognition Act. Like the UFMJRA, the Convention embodies the general rule that judgments within its scope must be recognized and enforced.¹⁷⁷ For the most part, the authorized grounds for nonrecognition are the same in both sources. However, as discussed below, there are a few differences.

Unlike the UFMJRA, which contains both mandatory and non-mandatory exceptions to recognition and enforcement, all the exceptions authorized by the Convention are discretionary. The UFMJRA mandates nonrecognition if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with fundamental due process, or if the foreign court lacked subject matter or personal jurisdiction.¹⁷⁸ The Convention permits nonrecognition on similar grounds, but does not require it.¹⁷⁹ Although this difference in the two laws appears important, its impact will likely be quite limited. A court in the United States is unlikely to exercise its discretion in favor of recognition or enforcement of a judgment rendered by a foreign legal system whose courts are not impartial or whose procedures violate fundamental notions of due process.

¹⁷⁶ See *supra* text accompanying notes 48–54 (discussing U.S. Courts of Appeals' decisions to enforce such forum selection clauses).

¹⁷⁷ Of course, the provisions in the Hague Convention apply only where recognition and enforcement of judgments rendered by one Contracting State is sought in another Contracting State, whereas the provisions of the UFMJRA apply to a money judgment rendered by any foreign country. See *supra* text accompanying notes 62–69, 124 (discussing the UFMJRA).

¹⁷⁸ See *supra* text accompanying notes 70–74 (discussing UFMJRA requirements in greater detail).

¹⁷⁹ See *supra* text accompanying notes 129–30 (noting that nonrecognition under the Convention is discretionary).

4.6.1. *The Public Policy Exception*

There are some differences between the language of the “public policy” exception in the Convention and the same exception in the UFMJRA. Under Article 9(e) of the Convention, recognition or enforcement may be refused if the foreign judgment would be “manifestly incompatible” with the public policy of the enforcement state, whereas section 4(b) of the UFMJRA more narrowly permits nonrecognition if the “cause of action” on which the judgment is based is repugnant to public policy.¹⁸⁰

This difference in the public policy exceptions means that in some instances a court in the United States may refuse to enforce a foreign judgment under the Convention where it would not have had the discretion to do so if the UFMJRA applied.¹⁸¹ In those states that narrowly focus on the “cause of action,” the Convention will preempt state law and require the enforcing court to focus more broadly on whether the judgment itself is repugnant to public policy. However, because the public policy exception in both laws is discretionary and very narrow, preemption by the Convention may have little impact. Moreover, this difference does not even exist in those states that have adopted the 2005 version of the uniform Act, whose public policy exception applies to the judgment itself as well as to the cause of action on which that judgment is based.¹⁸²

The Hague Convention also permits nonrecognition of a foreign judgment given by a court other than the chosen court after a discretionary transfer within the Contracting State, where recognition or enforcement is sought against a party who objected to the transfer.¹⁸³ This exception is not available under the UFMJRA. However, even in those few cases where the terms of the Convention’s exception are satisfied, a court in the United States is unlikely to exercise its discretion to deny recognition unless the transferee court in the foreign country was so seriously inconvenient, in comparison to the chosen court, that the transfer

¹⁸⁰ See *supra* notes 84–88 (discussing the UFMJRA’s position on the public policy exception); *supra* text accompanying notes 131–32 (discussing the Convention’s public policy exception) and accompanying text.

¹⁸¹ See *id.* (discussing generally the UFMJRA’s and Convention’s public policy exception).

¹⁸² See *supra* text accompanying note 93 (discussing the 2005 Act).

¹⁸³ See *supra* text accompanying notes 133–35 (discussing this permitted nonrecognition in greater detail).

denied the losing (and objecting) party a meaningful day in court. When such serious inconvenience exists, a court might then exercise its discretion and deny recognition, perhaps because the specific proceedings leading to the judgment were also fundamentally unfair within the meaning of the Convention.¹⁸⁴

4.6.2. *Enforcement of Judgments for Non-Monetary Relief*

An interesting area of apparent conflict involves recognition and enforcement of foreign judgments for non-monetary relief, such as specific performance or an injunction. Such judgments appear to be subject to the Convention's general rule that foreign judgments *shall* be recognized and enforced unless some specified exception applies.¹⁸⁵ In contrast, the general approach followed by courts in the United States is that non-monetary judgments *may* be enforced as a matter of international comity.¹⁸⁶ Under this approach, a court may be quite willing to *recognize* a non-monetary judgment for purposes of res judicata and collateral estoppel, but the same court may be unwilling to *enforce* the judgment as its own without further consideration of the appropriateness of such relief.¹⁸⁷

Whether this potential conflict between treatment of non-monetary judgments under the treaty and domestic law proves significant depends on how courts interpret the Convention. A reasonable interpretation is that the "public policy" exception to mandatory enforcement applies because this issue is of

¹⁸⁴ See Hague Convention, *supra* note 1, art. 9(e) (providing that recognition could be refused in such a situation).

¹⁸⁵ See *supra* text accompanying notes 139-40 (discussing that because the Convention is not expressly limited to monetary judgments, it seems to apply to non-monetary judgments as well).

¹⁸⁶ See *supra* note 100 (listing cases where non-monetary judgments were enforced in the United States).

¹⁸⁷ See, e.g., *Pilkington Bros. v. AFG Industries Inc.*, 581 F. Supp. 1039, 1040 (D. Del. 1984) (refusing to issue a preliminary injunction based solely on a foreign interim injunction); *Yoder v. Yoder*, 330 A.2d 825, 828 (Conn. Super. Ct. 1974) (holding that although a Mexican divorce decree was enforceable under comity, it was not necessary for the court to adopt the decree as its own). Cf. *Baker v. General Motors Corp.*, 522 U.S. 222, 234-36 (1998) (distinguishing between recognition of sister-state judgment for injunctive relief for purposes of claim and issue preclusion, and direct enforcement of an injunction entered by another state).

fundamental importance to the enforcement state.¹⁸⁸ Another is that the Convention's enforcement provisions are not intended to require a Contracting State to enforce a non-monetary remedy if this is not possible under its legal system.¹⁸⁹ Courts in the United States will likely adopt one of these interpretations influenced, perhaps, by the uncertainty in domestic law as to whether the Full Faith and Credit Clause requires enforcement of a sister-state judgment for non-monetary relief.¹⁹⁰

4.6.3. *Reciprocity*

Some jurisdictions have added a reciprocity requirement to their version of the UFMJRA.¹⁹¹ A court in one of these states will not recognize a judgment rendered by a court in a foreign country unless that country would recognize a similar judgment of the state.¹⁹² The Hague Convention establishes reciprocal recognition of foreign judgments rendered pursuant to an exclusive choice of court agreement, and therefore, may make the reciprocity requirement irrelevant in cases where the Convention applies.¹⁹³ To the extent that a state still refuses to recognize a foreign judgment covered by the Convention because the rendering country that gave the judgment will not recognize other judgments that are outside the scope of the Convention, the reciprocity requirement must yield to the Convention.

¹⁸⁸ See Hague Convention, *supra* note 1, art. 9(e) (providing for the public policy exception); *supra* text accompanying notes 131-32 (discussing the public policy exception).

¹⁸⁹ See EXPLANATORY REPORT, *supra* note 104, at 37, ¶ 89 n.201, (discussing history and intent of provisions regarding enforcement of judgments for non-monetary relief).

¹⁹⁰ See *Baker*, 522 U.S. at 234-36 (1998) (discussing the enforcement of sister-state judgments for injunctive relief under the Full Faith and Credit Clause); see generally Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747 (1998) (examining enforcement of sister-state judgments for equitable relief under the Full Faith and Credit Clause).

¹⁹¹ E.g., FLA. STAT. § 55.605(2)(g) (2009) (providing that a "foreign judgment need not be recognized if: The foreign jurisdiction . . . would not give recognition to a similar judgment rendered in this state."); MASS. GEN. LAWS ANN. ch. 235, § 23A, ¶3(7) (West 2009) ("A foreign judgment shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state."); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (Vernon 2009) (providing similarly).

¹⁹² See *supra* text accompanying note 190 (discussing the enforcement of sister-state judgments for injunctive relief under the Full Faith and Credit Clause).

¹⁹³ See *supra* text accompanying notes 124-27 (discussing the Convention's requirements of recognition).

There is one final observation regarding the impact of the Hague Convention on domestic recognition and enforcement laws. This Article has treated the UFMJRA or its 2005 revision as setting forth the relevant standards with respect to whether a court in the United States will enforce a foreign judgment. However, some states have not enacted statutes implementing the UFMJRA and its 2005 revision, and may not have adopted similar common law standards.¹⁹⁴ To the extent that a state has recognition and enforcement rules that are inconsistent with those contained in the Convention, the treaty's standards will prevail in cases where it applies.

5. CONCLUSION

Where the Hague Convention on Choice of Court Agreements applies, its standards will preempt contrary federal and state law. Despite this, in most cases, the Convention should have little impact on the enforcement of forum selection clauses and on the doctrines of forum non conveniens, transfer of venue, removal and remand, and recognition of foreign judgments in courts in the United States. However, in some areas, the Convention will require significant changes in domestic law.

One such area involves the important question of whether an otherwise enforceable choice of court agreement is exclusive, and therefore, covered by the Convention, or nonexclusive, and thus, outside the scope of the Convention. The Convention deems many agreements to be exclusive that would be interpreted as nonexclusive by many courts when applying domestic law. Courts in the United States must replace such domestic law with the Convention's presumption that an agreement is exclusive unless the parties have expressly stated otherwise. And, of course, to the extent that the Convention's standards conflict with the laws of those few states that restrict the enforcement of choice of court agreements, the standards of the Convention will prevail.

Another area involves forum non conveniens. In some circumstances, the Hague Convention on Choice of Court Agreements precludes a court in the United States from declining jurisdiction based on the common law doctrine of forum non conveniens. This is a noteworthy achievement. However, these

¹⁹⁴ See *supra* text accompanying notes 62-65 (providing the number of states that have enacted the UFMJRA or its 2005 version).

circumstances are limited to exclusive choice of court agreements in "international cases" that designate a court in the United States in "civil and commercial matters," within the meaning of the Convention. The Convention excludes from its coverage several types of actions in which *forum non conveniens* is typically, and successfully, invoked by defendants. Consequently, that common law doctrine will continue to play an important role in transnational litigation in courts in the United States.

Likewise, the Hague Convention will have little or no impact on how the federal courts in the United States treat exclusive choice of court agreements in the context of motions to transfer venue pursuant to 28 U.S.C. § 1404(a), or of motions to remand after removal from state court to federal court under 28 U.S.C. § 1441 and § 1447. The Convention does not interfere with such internal allocations of jurisdiction within a country with a non-unified legal system, such as the United States.

Finally, with respect to recognition and enforcement of money judgments rendered by courts in other Contracting States, the standards set forth in the Convention are remarkably similar to those already in effect in a majority of states. There are some differences, but most are not very significant. Therefore, the Convention's impact in this area, as in the others discussed above, should require few changes in the domestic law.