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THE HAGUE CONVENTION ON CHOICE-OF-COURT AGREEMENTS: IS THE PUBLIC POLICY EXCEPTION HELPING CLICK-AWAY THE SECURITY OF NON-NEGOTIATED AGREEMENTS?

I. INTRODUCTION

On June 30, 2005, the United States and sixty-three other Member States¹ at the Hague Conference on Private International Law (“HCPIIL”)² signed a Convention on Choice of Court Agreements (“Convention”).³ If ratified by the U.S.,⁴ the Convention will control the

1. In addition to the United States, the current Member States of the Hague Conference are: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malaysia, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela. Hague Conference on Private International Law Frequently Asked Questions 4[d], http://www.hcch.net/index_en.php?act=faq.details&fid=6 (last visited May 16, 2007).

2. The “Hague Conference on Private International Law” is not an event, but is an intergovernmental organization whose goal is “to work for the progressive unification of the rules of private international law,” primarily through negotiation and drafting of multilateral treaties, also called “Hague Conventions.” Hague Conference on Private International Law Frequently Asked Questions 2[b], http://www.hcch.net/index_en.php?act=faq.details&fid=32 (last visited Oct. 2, 2005). The Hague Conventions cover a wide range of topics including: determinations of applicable law, conflicts of jurisdiction, recognition, and administrative and judicial co-operation between authorities. *Id.*

3. Hague Conference on Private International Law, *Convention on Choice of Court Agreements*, June 30, 2005, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=9835 (last visited Oct. 2, 2005) [hereinafter *Convention*]. The Convention is the result of negotiations that began in 1992 at the request of the United States that the HCPIIL negotiate a multilateral convention on the recognition and enforcement of judgments. Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOKLYN J. INT’L L. 7, 8 (1998) (citing letter from Edwin D. Williamson, Legal Advisor, U.S. Department of State, to George Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992)). In 1999, the HCIL produced a Preliminary Draft Convention on Jurisdiction on Foreign Judgments in Civil and Commercial Matters. Hague Conference on Private International Law, *Prelim. Draft Convention on Jurisdiction on Foreign Judgments in Civil and Com. Matters*, Prel. Doc. No. 11, Aug. 2000, <http://www.hcch.net/upload/wop/jdgmpl11.pdf> (last visited Oct. 2, 2005) [hereinafter *Preliminary Draft*]. However, after

recognition and enforcement of exclusive⁵ forum-selection clauses in business-to-business civil and commercial transactions.⁶ It will require that legal judgments on cross-border disputes involving contracts containing an exclusive choice-of-court clause be honored and enforced in other signature States.⁷ For example, under the Convention, if an American and a Belgian company agreed in a contract that all disputes arising under the contract would be brought in the U.S., then the Belgian company could not file suit or seek an alternative judgment in Belgium. If a U.S. court then ruled in favor of the American company, the courts in

further revisions, it became apparent that the scope of the draft convention was too broad and that agreement on the draft convention could not be met. Hague Conference on Private Int'l. L., *Draft Report on the Exclusive Choice of Court Agreements*, Prel. Doc. No. 26, Intro., para. 6, Dec. 24, 2004, http://www.hcch.net/upload/wop/jdgm_pd26e.pdf (last visited Oct. 2, 2005) [hereinafter *Draft Report*]. In 2002, the conference was redirected to focus on narrower bases of jurisdiction. *Id.* By 2003, the focus of the Convention was solely on exclusive choice of court agreements in business-to-business contracts. *See id.*

4. Article 27 of the Convention states that ratification, acceptance, approval, or accession is required for adoption of the Convention and that the instrument used for adoption must be deposited with the Ministry of Foreign Affairs prior to the entry into force of the Convention. *Convention, supra* note 3, art. 27. If the U.S. decides to agree to the Convention then it will have to be ratified by a 2/3 majority of the Senate. U.S. CONST. art. II, § 2, cl. 2. *See also* International News Section, WASH. INTERNET DAILY, Vol. 6, No. 136, (Warren Pub. Inc., D.C.) July 15, 2005.

5. *Convention, supra* note 3, art. 1(1). Under the Convention a choice-of-court clause is "exclusive" where the courts of only one country are designated as the chosen forum for any litigation arising out of the agreement. *See* Ronald A. Brand, *A Global Convention on Choice of Court Agreements*, 10 ILSA J. INT'L & COMP. L. 345, 347 (2004); *See also Convention, supra* note 3, art. 3. This differs from the U.S. common law practice in construing choice-of-court provisions as non-exclusive unless the parties indicate otherwise. Peter D. Trooboff, *Choice-of-Court Clauses*, 27 THE NAT'L L. J. 13 (ALM, New York, N.Y.), Oct. 17, 2005. Under the Convention, choice-of-court clauses are deemed "exclusive unless the parties have expressly provided otherwise." *Convention, supra* note 3, art. 3. Article 22 of the Convention allows States to designate that they will also recognize non-exclusive choice-of-court agreements. *Id.* art. 22.

6. *Convention, supra* note 3, arts. 1–2. The terms "civil" and "commercial" are used in the Convention out of habit; they have been used in Hague Conventions since 1896. *See Preliminary Draft, supra* note 3, at 29–30. The terms have never been defined, but it is agreed that some matters that would be considered civil or commercial in some countries are outside the scope of the convention. *Id.* These include: status and legal capacity of natural persons, family law matters, wills and succession, carriage of passengers or goods by sea, nuclear liability, rights *in rem* in immovable property, certain questions relating to legal persons (corporations), and some issues concerning certain intellectual property rights. *Draft Report, supra* note 3, para. 15.

7. *See Draft Report, supra* note 3. Use of the word "State" in this Note refers to foreign countries rather than a domestic "state."

Belgium would generally be required to recognize and enforce the judgment.⁸

Without the Convention, however, it is unclear whether the Belgian legal system in the example above would recognize and enforce the U.S. judgment. While the U.S. has generally been willing to enforce foreign judgments in international business-to-business contract disputes,⁹ many foreign governments are skeptical of the U.S. legal system because they believe U.S. juries award excessive punitive damages.¹⁰ Thus, foreign courts are frequently reluctant to enforce American court judgments, leaving U.S. companies involved in such disputes with few remedies.¹¹ The adoption of the Convention will greatly benefit U.S. companies by providing clarity and harmonization in international business-to-business transactions by ensuring recognition and enforcement of exclusive choice-of-court agreements and the resulting foreign judgments.

While it may seem that the Convention is a “win-win” situation for the U.S., it is not without controversy among some American companies and organizations.¹² The simplicity of the Convention is made complex because it also covers exclusive choice-of-court agreements in non-negotiated contracts,¹³ such as online “click-wrap”¹⁴ agreements and

8. See *Convention*, *supra* note 3, art. 8. See generally Part II *infra* for discussion of exceptions.

9. The leading precedent on U.S. recognition and enforcement of foreign judgments is *Hilton v. Guyot*, 159 U.S. 113 (1895). There, the United States Supreme Court held that while no state is obligated to give effect to foreign judgments, the U.S. courts should recognize foreign judgments under the notion of comity. See *id.* at 163–64. Comity is the principle “to which the law of one nation, as put in force within its territory ... shall be allowed to operate within the dominion of another nation.” *Id.*

10. See Kristen Hudson Clayton, Comment, The Draft Hague Convention on Jurisdiction and Enforcement of Judgments and the Internet — A New Jurisdictional Framework, 36 J. MARSHALL L. REV. 223, 228 (2002); Andrew C. Schneider, New Treaty Will Help Firms Operate Abroad, KIPLINGER BUS. FORECASTS (Kiplinger Wash. Editors, Inc.), Oct. 10, 2005, available at http://www.kiplingerforecasts.com/home/stories/new_treaty_will_help_firms_operate_abroad.html (last visited Oct. 30, 2005).

11. Schneider, *supra* note 10. A U.S. company has three basic options: (1) accept the breach of contract despite the loss it entails, (2) hire counsel and dispute the matter overseas, or (3) submit the matter to arbitration. *Id.*

12. See *Delegates Sign Convention on Choice of Courts, Await Report*, 19 WORLD INTELL. PROP. REP. (BNA Int’l., D.C.), Aug. 2005, at 17 [hereinafter *Delegates Sign Convention*]; Schneider, *supra* note 10.

13. By not including non-negotiated contracts under the Article 2(2) exclusions, the Convention necessarily includes non-negotiated contracts. See *Convention*, *supra* note 3, art. 2(2). Article 2(2) provides:

This Convention shall not apply to the following matters:

- a) the status and legal capacity of natural persons;

“shrink-wrap”¹⁵ agreements.¹⁶ This is of special concern because of the increased prevalence of non-negotiated contracts for information goods

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- b) maintenance obligations;
 - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition and analogous matters;
 - f) the carriage of passengers and goods;
 - g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
 - h) anti-trust (competition) matters;
 - i) liability for nuclear damage;
 - j) claims for personal injury brought by or on behalf of natural persons;
 - k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
 - l) rights *in rem* in immovable property, and tenancies of immovable property;
 - m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
 - n) the validity of intellectual property rights other than copyright and related rights;
 - o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
 - p) the validity of entries in public registers.

Id. art. 2(2).

14. Click-wrap refers to agreements that appear on a computer screen and require a user to click a “yes” or “I agree” button to assent to the terms and conditions before viewing the website, installing software or purchasing a product from the website. *See* Terry J. Ilardi, *Mass Licensing—Part I: Shrinkwraps, Clickwraps and Browsewraps*, in PAT., & HIGH TECHNOLOGY LICENSING 2005, at 253, 256 (PLI Pat., Copyrights, Trademarks and Literary Prop., Course Handbook Series No. 5939, 2005); *Delegates Sign Convention*, *supra* note 12, at 17. *See also* Part III.B *infra*.

15. Shrink-wrap licenses are license terms that are contained on or inside a software box. Mitchell Waldman, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements*, NTS AM. JUR. 2D COMPUTERS AND THE INTERNET § 16 (2005). Acceptance of the terms is generally indicated by failure to return the software within a designated period of time. Ilardi, *supra* note 14, at 256.

and services.¹⁷ By including non-negotiated contracts, buyers of online software and other services that use non-negotiated terms will be subject to the seller's choice of forum.

The concern by groups such as libraries, nonprofit organizations, Internet Service Providers, and telecommunications companies who oppose the current Convention¹⁸ is that they will be forced to defend themselves in a foreign jurisdiction or be subject to a default judgment.¹⁹ In either case, should judgment result in favor of the seller, the U.S could then be obligated to enforce the judgment, regardless of whether the outcome of the case would have been the same in the U.S.²⁰ Furthermore, these groups believe the inclusion of non-negotiated contracts will enable

16. *Delegates Sign Convention*, *supra* note 12, at 17; Dugie Standeford, *After 13-Year Odyssey, Hague Judgments Treaty Moves Toward Ratification*, WASH. INTERNET DAILY, Vol. 6, No. 133 (Warren Pub. Inc.), July 12, 2005.

17. *See id.*; *see also*, Letter from Robert Oakley, Wash. Aff. Rep., Am. Ass'n of L. Libraries; Miriam Nisbet, Legis. Couns., Am. Library Ass'n.; and Prudence S. Adler, Assoc. Exec. Dir., Ass'n. of Res. Libraries to Jeffrey Kovar, Assistant Legal Advisor for Private Int'l. L. (April 22, 2005) [hereinafter Robert Oakley Letter] (on file with author), available at <http://www.ala.org/ala/washoff/WOissues/copyright/intlcopyright/HagueCmnts0405.pdf> (last visited Oct 4, 2005). Libraries are one of the groups that have voiced concern over the inclusion of non-negotiated contracts because for many libraries most of their transactions involve non-negotiated contracts. *Id.*

18. Sarah Lai Stirland, *Lobbying: Group Urges Rejection of Treaty on Cross-Border Disputes*, NAT'L J. TECH. DAILY (Nat'l J. Group, Inc.) June 15, 2005. Some organizations that have opposed the inclusion of non-negotiated contracts include: the American Association of Law Libraries, American Library Association, AT&T, BellSouth, the Computer Communications Industry Association, MCI, SBC Communications, the U.S. Internet Industry Association, the US Internet Service Provider Assoc. and Verizon Communications. *Id.* The main fear of libraries is that a non-negotiated contract will prohibit copyright privileges which libraries currently enjoy, such as making copies for preservation and inter-library loan. *See* Robert Oakley Letter, *supra* note 17. A foreign court might permit these terms whereas a U.S. court might find them preempted by the Copyright Act. *Id.*

19. Jason Krause, *Concerns Over Clickwrap*, ABA J. E-REPORT (Am. Bar Assoc.), June 3, 2005. Another concern is that consumers might be considered businesses in some circumstances because the definition of consumer under the Convention is very narrow. *See* International News Section, *supra* note 4. The current definition of consumer under the Convention is: "a natural person acting primarily for personal, family or household purposes." Convention, *supra* note 3, art. 2. A prior report of the draft convention stated that the reason that consumers are not covered is because some legal systems have rules that do not allow proceedings over consumers to be brought in a foreign state. *Draft Report*, *supra* note 3, art. 2, para. 17.

20. *See* Robert Oakley Letter, *supra* note 17. The Convention does not permit a court to refuse to recognize or enforce a foreign court judgment on the basis that the court being requested to recognize or enforce the judgment would have decided the case differently. *Convention*, *supra* note 3, art. 8.

companies to essentially forum shop around the world because the drafter of the forum-selection clause can choose the State with the most favorable laws as the exclusive forum and have confidence that it will be enforced.²¹ Moreover, critics are concerned that click-wrap agreements could result in businesses unknowingly²² contracting away rights that they normally would have had under U.S. copyright law, such as lending or fair use rights.²³

Software and publishing companies who support the Convention argued during drafting that it was “unprecedented to exclude a contract because of its form”²⁴ and since no definition of “non-negotiated contract” exists in U.S. law, it would have had to be created from scratch.²⁵ Jeffrey Kovar, the U.S. Department of State Advisor for Private International Law who is also the U.S. negotiator for the Convention, believes that the Convention is “not a workable forum to create new innovations in American law” and that he hoped to maintain the “status quo” in areas that are “not resolved under U.S. law.”²⁶ Besides arguing that excluding non-negotiated contracts was unrealistic, supporters also point to the Convention’s so-called “escape clauses,” which allow non-chosen courts to exercise jurisdiction or refuse to recognize or enforce jurisdiction on the grounds of “manifest injustice” or that the agreement is “manifestly contrary to public policy,”²⁷ as reasons to keep non-negotiated contracts

21. See Krause, *supra* note 19; Businesses Want Clickwrap Contracts Explicitly Excluded from Convention, WORLD INTELL. PROP. REP., Vol. 19, No. 6 (BNA Int’l., D.C.), June 2005, at 16; Delegates Could Finalize Hague Treaty Next Month, WASH. INTERNET DAILY, Vol. 5, No. 43 (Warren Pub. Inc.), Mar. 4, 2004.

22. The term “unknowingly” is used because it is said that few people actually read click-wrap agreements. See Krause, *supra* note 19.

23. See Drew Clark, E-Commerce: Groups Restate Objections To Treaty For Business; Disputes, NATIONAL J. TECH. DAILY (Nat’l J. Group, Inc.), Mar. 5, 2004; Dugie Standeford, E-Commerce Off Front Burner: Intellectual Property Issues Continue to Roil Treaty Talks, WASH. INTERNET DAILY, Vol. 6, No. 49 (Warren Pub. Inc.), March 14, 2005.

24. *Delegates Sign Convention*, *supra* note 12, at 17. Presumably this is because historically treaties have only excluded contracts based on their subject matter rather than form.

25. Krause, *supra* note 19.

26. *Id.* It seems that there is a fear that if the Convention changes U.S. law then the U.S. would not ratify it, thus negotiators are trying to keep the Convention in line with American law in order to increase the chances of ratification. See *id.*

27. See *Convention*, *supra* note 3, arts. 6(c), 9(e). See *infra* Part III for discussion of the public policy exception. The article 6 “escape clauses” state:

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – a) the agreement is *null and void* under the law of the cho-

within the scope of the Convention.²⁸ They feel that the “escape clauses” are enough protection to alleviate the critics concerns.²⁹

With the inclusion of non-negotiated contracts in the final draft, the software and publishing industries have accomplished their objective, but in order for them to succeed completely the Convention will have to be adopted by the U.S. and other States. If adopted, U.S. businesses and organizations will have to look elsewhere in order to get relief from enforcement of non-negotiated contracts containing choice-of-court clauses. Part II of this Note provides a summary of the key clauses within the Convention. Part III.A. of this Note examines U.S. public policy jurisprudence to determine whether this exception is likely to be a realistic safe guard for businesses and organizations at-risk by the inclusion of non-negotiated contracts.³⁰ Part III.B. looks at U.S. jurisprudence in context with domestic click-wrap and shrink-wrap agreements containing forum-selection clauses. Part III.C. concludes that based on prior case law, the public policy exception is unlikely to be a realistic safe guard for libraries, non-profits, and other businesses who are at-risk by the inclusion of non-negotiated contracts in the Convention.³¹ Part IV of this Note

sen court; ... c) giving effect to the agreement would lead to a *manifest injustice* or would be *manifestly contrary to the public policy* of the State of the court seised;

Id. art. 6 (emphasis added).

The article 9 “escape clauses” provide that a non-chosen state may refuse to recognize a foreign court judgment if:

- a) the agreement was *null and void* under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid or ...
- e) recognition or enforcement would be *manifestly incompatible with the public policy* of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

Id. art. 9 (emphasis added).

28. Krause, *supra* note 19.

29. *See id.*

30. *See* Part III.C. *infra* (Art. 21 of the Convention provides that a State which “has a strong interest I not applying this Convention to a specific matter” may “declare that is will not apply the Convention to that matter.”).

31. The reason larger companies are not as at-risk by the inclusion of non-negotiated contracts is because if a big company encounters a click-wrap contract for something and does not like the terms, the company can easily contact the seller of the click-wrap item and negotiate a special contract, which could include bargaining for alternative litigation criteria. *See* Jonathan A. Franklin & Roberta Morris, *Int'l Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals For, and Comments on the Current Proposals*, 77 CHI.-KENT L. REV. 1213, 1285–86 (2002). On the other

suggests other possible solutions for at-risk businesses and organizations, including urging the U.S. to make a declaration³² upon ratification, signing a supplemental convention, and waiting to see the effects should the U.S. ratify the Convention. Part V concludes that if the U.S. decides to ratify the Convention as is, the best option for those at-risk by the inclusion of non-negotiated contracts is to limit non-negotiated transactions until the Convention is modified or the drafter of the non-negotiated contract modifies the forum-selection clause.

II. OVERVIEW OF CONVENTION

The basic rules of the Convention lie within Articles 5,³³ 6,³⁴ and 8.³⁵

hand, like consumers, Universities and libraries are not in the position to negotiate every click-wrap contract, nor are they able to assume the risk of having to go to a foreign forum. *Id.* at 1289.

32. *Convention, supra* note 3, art. 21.

33. Article 5 of the Convention states:

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
3. The preceding paragraphs shall not affect rules: a) on jurisdiction related to subject matter or to the value of the claim; b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Convention, supra note 3, art. 5.

34. Article 6 of the Convention provides:

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless:

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.

First, the Convention provides that the court designated in an exclusive choice-of-court agreement will have exclusive jurisdiction to decide the dispute and will not be allowed to decline jurisdiction “on the ground that the dispute should be decided by a court in another State.”³⁶ Second,

Id. art. 6.

35. Article 8 of the Convention provides:

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Id. art. 8.

36. *Id.* art. 5(1)–(2). Article 5(2) thus forbids a court from using the doctrine of forum non conveniens to transfer the case to a court in a foreign State. *Draft Report, supra* note 3, art. 5. The doctrine of forum non conveniens, which appears mostly in common law systems, allows a court with proper jurisdiction to stay or dismiss a case where there is a more appropriate forum for the proceedings. Ronald A. Brand, *Comparative Forum Non Conveniens on Jurisdiction and Judgments*, 37 *TEX. INT’L L. J.* 467, 468 (2002). For example, assume a claim is brought in New York state court for breach of contract involving products manufactured in Germany. The plaintiff is a German corporation and the manufacturer of the products is a United States corporation with its principle place of business in Delaware. The New York courts are the chosen forum in the contract, and the contract also provides German law as the choice of law. All witnesses, except the CEO of the U.S. corporation, are located in Germany. The New York court would likely conclude that Germany is a better forum to determine the case and would dismiss the case based on the doctrine of forum non conveniens. In contrast, under the Convention, the New York court must hear the case. However, the court could transfer the case to a New York federal court or to a Delaware federal court because these courts are still within the larger

the Convention requires that if an exclusive choice-of-court agreement designating a signature State exists, a court not designated in the agreement must decline to exercise jurisdiction³⁷ over any proceeding inconsistent with the choice-of-court agreement—even if the court otherwise has jurisdiction under its national laws.³⁸ For example, if a party to an agreement attempts to circumvent the exclusive choice-of-court clause and brings a suit in a different forum than designated in the agreement, the court must refuse to take the case.³⁹ However, there are exceptions to this rule which would allow the court to accept jurisdiction despite the choice-of-court agreement if: (1) the agreement is “null and void;”⁴⁰ (2) a party “lacked capacity” to enter into the agreement;⁴¹ (3) the “agreement cannot be performed” by the parties for “exceptional reasons” outside their control;⁴² (4) upholding the agreement would lead to “manifest injustice” or would be “manifestly contrary to the public policy” of the State;⁴³ or (5) the “chosen court has decided not to hear the case.”⁴⁴

chosen “State,”—the United States. *Draft Report, supra* note 3, art. 5, n.92. In paragraphs 3(a) and (b) under article 5, the Convention further states that parties to the proceedings cannot waive subject matter jurisdiction or other internal procedural rules, such as rules precluding certain parties from bringing suit. *Id.* art. 5, para. 3(a)–(b). Thus, if the proceedings concern a matter for which a specialized court exists (such as patent or bankruptcy), and the chosen court is not the proper specialized court, then the chosen court would not be obliged to hear the case. *Id.* art. 5, para. 101. The chosen court could, however, transfer the case to the state court with the proper jurisdiction—even if the proper court is in a state other than the one designated in the choice-of-court agreement. *Id.* art. 5, paras. 101, 107.

37. *Convention, supra* note 3, art. 6. The provisions of this section are most applicable when a party to a choice of court agreement tries to bring suit in a court that is not the chosen court within the agreement.

38. *Draft Report, supra* note 3, art. 6, paras. 107, 119.

39. *See id.*

40. *Convention, supra* note 3, art. 6(a). This provision requires the agreement be “null and void” under the laws of the chosen State, thus application of the law of the chosen court is necessary. *Draft Report, supra* note 3, art. 7, para. 124.

41. *Convention, supra* note 3, art. 6(b). Under the “capacity” provision, the non-chosen court will apply its own choice-of-law rules to determine whether there was lack of capacity by one of the parties. *Draft Report, supra* note 3, art. 7, para. 125.

42. *Convention, supra* note 3, art. 6(d). This is intended to apply to cases when it would not be possible to bring proceedings before the chosen court, such as when there is a war in the State of the chosen court or the chosen court no longer exists. *Draft Report, supra* note 3, art. 7, para. 129.

43. *Convention, supra* note 3, art. 6(c). For a discussion on the public policy exception, see *infra* Part II.

44. *Convention, supra* note 3, art. 6(e). This could be covered under article 6(d), but the drafters thought it was worthy of its own treatment. *Draft Report, supra* note 3, para. 130.

Finally, when requested, a State must recognize and enforce a judgment given by a signature State designated in an exclusive choice-of-court agreement.⁴⁵ The Convention provides exceptions to this requirement as well.⁴⁶ Recognition or enforcement may be refused by a State on the grounds that: (1) the contract is invalid;⁴⁷ (2) a party lacked capacity to enter into the agreement;⁴⁸ (3) improper notice was given to the defendant;⁴⁹ (4) the judgment was obtained by procedural fraud;⁵⁰ (5) the

45. See art. 8 *supra* note 35.

46. *Convention, supra* note 3, art. 9.

47. See *Convention, supra* note 3, art. 9(a). Article 9(a) provides that “recognition or enforcement may be refused if a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid.” *Id.* This clause is analogous to the exception in article 6(a).

48. See *Convention, supra* note 3, art. 9(b). This clause reads: “a party lacked the capacity to conclude the agreement under the law of the requested State.” *Id.* This clause is analogous to the one in article 6(b).

49. See *Convention, supra* note 3, art. 9(c). This clause provides that recognition or enforcement may be refused if:

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents.

Id.

This exception applies if the defendant was not given enough time after notification to prepare his defense. *Id.* However, this exception is waived if the defendant made an appearance in the proceedings without contesting the notification or requesting an adjournment in order to properly prepare. See *id.* This prevents the defendant from raising insufficient notification as a ground for non-enforcement when it could have been raised in the initial proceedings. *Draft Report, supra* note 3, art. 9, para. 140. The exception however, will not be waived if the court giving the judgment does not allow notification to be contested. *Convention, supra* note 3, art. 9(c)(i). Provision 9(c)(ii) provides that recognition and enforcement can be refused if the manner of notification was “incompatible with fundamental principles” relating to service of process in the requested State. *Id.* art. 9(c)(ii). This provision only applies if recognition or enforcement is requested of the State in which service took place. *Draft Report, supra* note 3, art. 9, para. 140.

50. *Convention, supra* note 3, art. 9(d). This clause reads: “the judgment was obtained by fraud in connection with a matter of procedure.” *Id.* Fraud in this provision means “deliberate dishonesty or deliberate wrongdoing.” *Draft Report, supra* note 3, art. 9, para.

judgment violates public policy of the state;⁵¹ (6) the judgment is inconsistent with a prior judgment in the State involving the same parties;⁵² or (7) the judgment is inconsistent with a prior judgment given in another State.⁵³

III. THE PUBLIC POLICY EXCEPTION

Articles 6(c) and 9(e) of the Convention contain the public policy “escape clauses.” As mentioned above, although the court not chosen in the choice-of-court clause is required to suspend or dismiss the action, 6(c) allows the court to take jurisdiction of the case if giving effect to the agreement would be “manifestly contrary to the public policy of the State

142. For example, this provision would apply if the plaintiff forged the defendant’s signature on a false document. *Id.*

51. *Convention, supra* note 3, art. 9(e). This provision reads: “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.” *Id.* The second half of this provision is meant to apply to States where due process of law, natural justice of the right to fair trial is constitutionally mandated. *Draft Report, supra* note 3, art. 9, para. 143. *See also* Part III *infra*.

52. *Convention, supra* note 3, art. 9(f). Article 9(f) reads: “the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties.” *Id.* This exception will typically arise in instances where the judgment that conflicts with the chosen court’s final judgment was given because the requested court thought that one of the article 6 exceptions applied. *Draft Report, supra* note 3, art. 9, para. 148. If the exception did apply, then the requested court can give preference to its own ruling. *Id.* If no exception applies, the requested court would have violated the Convention by hearing the proceeding and should give the chosen court’s judgment preference. *Id.*

53. *Convention, supra* note 3, art. 9(g). This provision states: “the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.” *Id.* This applies when both judgments were given by foreign courts. *Draft Report, supra* note 3, art. 9, para. 149. In this situation, the judgment given by the court designated in the choice-of-court agreement can be refused recognition and enforcement if the following requirements are met: (1) the judgment under the chosen court was given after the conflicting judgment; (2) both judgments involve the same parties; (3) the cause of action of the judgments is the same; and (4) the conflicting judgment must fulfill the requirements necessary for recognition in the requested state. *Id.* Note however, that in the *Draft Report* it was mentioned that provision (g) should be modified because it currently provides an incentive for states not to become parties to the Convention because it is not required that the conflicting judgment not be in contravention of the Convention. *Id.* Since non-Contracting States are not parties to the Convention their judgments will never be in contravention of the Convention. *Id.*

of the court seized.”⁵⁴ Similarly, Article 9(e) allows a court to refuse to recognize or enforce a foreign court judgment if “recognition or enforcement would be manifestly incompatible with the public policy of the requested State.”⁵⁵ Not surprisingly, what constitutes a violation of public policy is not defined in the Convention. However, the use of the public policy exception to deny recognition and enforcement of foreign judgments and forum-selection clauses is not new to the Convention; the exception has been widely recognized in U.S. law⁵⁶ and in other statutes and conventions as well.⁵⁷

In practice however, there are few cases in the U.S. that have denied recognition and enforcement on public policy reasons alone, despite the fact that every state has the right to refuse enforcement of a foreign judgment.⁵⁸ Nevertheless, it is valuable to examine U.S. public policy jurisprudence to understand the application of the exception to foreign judgments and assess the viability of this exception as a means to protect those at-risk by the inclusion of non-negotiated contracts within the Con-

54. *Convention, supra* note 3, art. 6(c). This clause also allows the court seized to accept jurisdiction if “giving effect to the agreement would lead to “manifest injustice.” *Id.*

55. *Id.* art. 9(e). This article continues with “including situations where the specific proceedings leading to judgment were incompatible with fundamental principles of procedural fairness of the State.” *Id.*

56. *See infra*, Part III.A. and B.

57. In the U.S., the United Nations Convention on the Recognition and Enforcement of Arbitral Awards does not require enforcement of an otherwise unenforceable arbitral award when such enforcement would be “contrary to the public policy” of the enforcing country. United Nations Convention on the Recognition and Enforcement of Arbitral Awards, art. 5(2)(b), Dec. 29, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. As the name suggests, the New York Convention sets out rules for recognition and enforcement for foreign arbitral awards. Similarly, a number of states have adopted the Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”) which provides that recognition is not necessary if the action underlying the judgment is “repugnant to the public policy of [the] state.” Uniform Foreign Money-Judgments Recognition Act of 1962, § 4(b)(3), 13 U.L.A. 80 (Supp. 1998). The Brussels Convention, adopted in 1968, regulates the standards of jurisdiction and enforcement between Member States of the European Union. Its public policy exception states that a judgment will not be recognized “if such recognition is contrary to public policy in the State in which recognition is sought. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, tit. III, § 1, art. 27(1) Sept. 27, 1968, *as amended*, 1998 O.J. (C 27) 1, 10 [hereinafter Brussels Convention].

58. Andreas F. Lowenfeld and Linda J. Silberman, *United States of America, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE* 123, 129 (Charles Platto & William G. Horton eds., 2nd ed. 1993). Because there is no U.S. federal law governing the recognition and enforcement of foreign court judgments, state law applies, even in federal courts. *Id.* at 123.

vention. Similarly, despite the fact that there is currently no U.S. case law involving click-wrap agreements containing foreign forum-selection clauses which have resulted in contested foreign judgments, examining U.S. jurisprudence involving click-wrap agreements and forum-selection clauses in a domestic setting is also relevant. This will aid in assessing whether U.S. courts might perceive these types of agreements as violations of public policy.

A. Public Policy Exception Jurisprudence

1. Non-Recognition of the Public Policy Exception

The leading case defining the public policy exception is *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*.⁵⁹ Although this case was decided in the context of enforcement of a foreign arbitral award, the holding still applies to enforcement of foreign judgments in general.⁶⁰ In *Parsons*, the Egyptian corporation Société Générale de l'Industrie du Papier ("RAKTA") contracted with the American corporation Parsons & Whittemore Overseas Co. Inc. ("Overseas") to construct and manage a paperboard mill in Egypt.⁶¹ The agreement contained an arbitration clause and a force majeure clause.⁶² Near the end of the construction phase, Egypt severed ties with the United States and "ordered all Americans expelled from Egypt" except those approved for special visas.⁶³ Overseas subsequently abandoned the project and "notified RAKTA that it regarded this postponement as excused by the force majeure clause."⁶⁴ RAKTA disagreed that

59. *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); Lowenfeld & Silberman, *supra* note 58, at 129.

60. See Lowenfeld & Silberman, *supra* note 58, at 129. Although Lowenfeld and Silberman do not say why enforcement of a foreign arbitral award is relevant to the enforcement of foreign judgments in general, the author of this Note presumes it is because courts tend to use the same public policy analysis regardless of whether it is a foreign arbitration judgment or a foreign court judgment. Article 5(2)(b) of the New York Convention allows the court in which enforcement of the foreign arbitral award is sought to refuse enforcement if "enforcement of the award would be contrary to the public policy of [the forum] country." New York Convention, *supra* note 57, art. 5(2)(b). For further discussion on the New York Convention see note 57 *supra*.

61. *Parsons*, 508 F.2d at 972.

62. *Id.*

63. *Id.*

64. *Id.*

the delay fell under the force majeure clause, and brought an arbitration proceeding for damages for breach of contract.⁶⁵

The arbitration panel awarded damages to RAKTA finding that the force majeure clause only covered part of the delay because Overseas had not made an effort to complete the contract.⁶⁶ One of Overseas' defenses during the U.S. enforcement proceedings was the public policy exception to the New York Convention.⁶⁷ Overseas argued that enforcing the arbitration award on the ground that it could complete the contract, despite the severance of American and Egyptian ties and the U.S. withdrawal of funding for international development, would contravene U.S. public policy.⁶⁸

The United States Court of Appeals for the Second Circuit disagreed with Overseas' argument equating "national" policy with United States "public" policy.⁶⁹ The court concluded that to do so "would mean converting a defense intended to be of narrow scope into a major loophole" to the New York Convention.⁷⁰ The court subsequently upheld the arbitration award and reasoned that the public policy exception only applies "where enforcement would violate the forum state's most basic notions of morality and justice."⁷¹

Even when the substantive laws of the State handing down the judgment are different from those in the U.S., the public policy exception has been an inadequate reason to overturn a foreign judgment.⁷² In *Somportex*, the District Court for the Third Circuit upheld a decision enforcing a British court default judgment against an American corporation.⁷³ There, the plaintiff, a British corporation, had entered into a contract whereby the American defendant corporation would distribute the defendant's gum in Great Britain.⁷⁴ When the transaction failed, the plaintiff filed suit in a British court for breach of contract.⁷⁵ The British court entered a default judgment against the defendant,⁷⁶ and the plaintiff subsequently

65. *Id.*

66. *Id.*

67. *Parsons*, 508 F.2d at 972; *See also* note 39 *supra*.

68. *Id.* at 974.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *Sarl Louis Feraud Int'l v. Viewfinder*, 2005 U.S. Dist. LEXIS 22242, at *16 (2005).

73. *Somportex*, 453 F.2d at 444.

74. *Id.* at 436

75. *Id.*

76. *Id.* at 439.

sought enforcement of the judgment in a U.S. court.⁷⁷ The defendant raised the public policy defense because the British court awarded attorney's fees, which would not have been "recoverable under Pennsylvania law."⁷⁸ The defendant argued that enforcement of the attorney's fees was contrary to Pennsylvania public policy.⁷⁹

Nevertheless, the court dismissed the defendant's argument and agreed with the district court's decision that the "variance with Pennsylvania law is not such that the enforcement 'tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy.'"⁸⁰ The court concluded that the difference between British and Pennsylvania law was not enough to refuse enforcement on the basis of public policy.⁸¹

Similarly, courts have even found that a difference in substantive federal laws is insufficient justification for applying the public policy exception. In *Viewfinder*, the District Court for the Southern District of New York declined to apply the public policy exception despite inconsistencies between French and U.S. intellectual property laws.⁸² The French plaintiff argued in its initial action that the American defendant, *Viewfinder*, violated the plaintiff's intellectual property rights and engaged in unfair competition by posting on its website photographs of models wearing the plaintiff's clothing.⁸³ The defendant raised the public policy defense, arguing that his actions did not "violate American trademark principles;" the website postings constituted fair use; and the plaintiffs "could not copyright their dress designs" under U.S. copyright law.⁸⁴

77. *Id.*

78. *Id.* at 443.

79. *Id.*

80. *Id.* (quoting the District Court quoting *Goodyear v. Brown*, 26 A. 665, 668 (P.A. 1893)).

81. *Id.* at 444.

82. *Sarl Louis Feraud Int'l v. Viewfinder*, 2005 U.S. Dist. LEXIS 22242, at *16. However, the court did apply the public policy exception on other grounds, finding that the defendant's conduct was protected under the First Amendment, and thus, enforcing the agreement would violate U.S. public policy. *Id.* at *19.

83. *Id.* at *1. Even though the French court entered a default judgment against *Viewfinder* and therefore did not directly apply French intellectual property laws, the District Court addressed the defendant's intellectual property law public policy argument anyways. *Id.* at *15-17.

84. *Id.* at *14-15. The fair use doctrine is an affirmative defense to copyright infringement. 17 U.S.C.A. § 107 (2005). The fair use doctrine allows the public to copy parts of a copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship or research. *Id.* Section 107 of the U.S. Copyright Act states:

The court disagreed with the defendant's argument and stated that the differences in French and American intellectual property law "do not come close" to meeting the public policy standard.⁸⁵

Copyright and trademark law are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole. ... If the United States has not seen fit to permit fashion designs to be copyrighted, that does not mean that a foreign judgment based on a contrary policy decision is somehow repugnant to the public policies underlying the Copyright Act and trademark law.⁸⁶

Courts have also found that differences in procedural laws between the U.S. and a foreign State are insufficient reason to withhold enforcement under the public policy exception. In *Tahan v. Hodgson*, the Court of Appeals for the District of Columbia refused to find a violation of public policy solely because of a difference in procedure.⁸⁷ The defendant in this case argued that upholding an Israeli default judgment was against public policy because the notice he received was different than that re-

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

85. *Viewfinder*, 2005 U.S. Dist. LEXIS 22242, at *16.

86. *Id.* (citations omitted).

87. 662 F.2d 862, 866 (D.C. Cir. 1981).

quired under U.S. law.⁸⁸ The court felt that the differences in procedure did not violate public policy because the Israeli notice procedures were not "repugnant to notions of what is decent and just."⁸⁹

2. Recognition of the Public Policy Exception

In most cases in which courts find public policy violations, there is at stake some interest of the forum greater than protecting the litigant,⁹⁰ such as a violation of the U.S. Constitution or the desire to prevent individuals from circumventing federal or state laws.⁹¹ In *Matusevitch v. Telnikoff*,⁹² the District Court for the D.C. Circuit refused to enforce a British court libel judgment on grounds that it violated U.S. and Virginia public policy.⁹³ A British public figure obtained a libel judgment against an American writer.⁹⁴ Subsequently, the writer challenged the action in the district court seeking summary judgment on the grounds that the foreign judgment was unenforceable.⁹⁵ The court distinguished this case from other cases that had rejected the public policy defense because those cases "concern[ed] minor differences in statutory law and in rules of civil procedure or corporate or commercial law."⁹⁶ The court described the United Kingdom libel standards, which place the burden of proving the truth of the statements on the defendant, as contrary to the U.S. libel standards, which require the plaintiff to prove that the statements were false and that the defendant had the necessary intent to commit libel.⁹⁷ Based on the evidence, the court concluded that because the

88. *Id.* The defendant was served in Jerusalem by the plaintiff's attorney, but the defendant refused to acknowledge the service of process because the papers were written in Hebrew. *Id.* Under Rule 52(b)(2) of the Federal Rules of Civil Procedure, a "second" notice must be given at least three days prior to hearing and application for entry of a default judgment in some circumstances. *Id.* at 866.

89. *Id.* The court further pointed out that it "would be unrealistic for the United States to require all foreign judicial systems to adhere to the Federal Rules of Civil Procedure." *Id.*

90. Jonathan A. Pittman, Note, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 991 (1989) (citing von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 63 (1974)).

91. See *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.C. 1995); *Laker Airways v. Sabena, Belgian World Airlines* 731 F.2d 909 (D.C. Cir. 1984), *aff'g* *Laker Airways Ltd. v. Pan American World Airways*, 559 F. Supp. 1124 (D.D.C. 1983)

92. *Matusevitch*, 877 F. Supp. at 1.

93. *Id.* at 4.

94. *Id.* at 3.

95. *Id.* at 2.

96. *Id.*

97. *Id.*

defendant's statements were not made with actual malice, enforcement of the British judgment would be "repugnant" to both state and U.S. public policy.⁹⁸

In *Laker Airways*, the plaintiff, British airline Laker Airways, filed an anti-trust action in the United States against a group of foreign and domestic airlines, claiming that the defendants' price fixing forced them out of business.⁹⁹ Several months later, some of the defendants filed their own suit in the High Court of Justice in the United Kingdom seeking an injunction forbidding the plaintiff from prosecuting them.¹⁰⁰ The British court ultimately issued the injunction, ordering the plaintiff to dismiss its action against the British airlines.¹⁰¹ In the meantime, Laker Airways sought an anti-suit injunction from the United States Court for the District of Columbia to prevent the remaining defendant airlines from requesting an injunction from the British courts as well.¹⁰² The court granted the anti-suit injunction and held that anti-suit injunctions were justified to prevent litigants' evasion of a forum's public policies.¹⁰³

Although the case did not involve enforcement of a foreign judgment, the court in *Laker Airways* analogized the issuance of an anti-suit injunction to prevent a foreign court judgment with that of non-recognition of a foreign judgment.¹⁰⁴ The court concluded that in both instances, states are "not required to give effect to foreign judicial proceedings" based on "policies which do violence to its own fundamental interest."¹⁰⁵ Here, the court found that the anti-trust laws were of "admitted economic importance to the United States," and thus, public policy mandated that the anti-suit injunction be issued to prevent the defendants from "evad[ing] culpability under [the] statutes."¹⁰⁶

In *Ackermann v. Levine*, the plaintiff, a member of a German law firm, sought recognition and enforcement of a German default judgment to recover legal fees against the defendant, an American citizen.¹⁰⁷ The defendant had hired the plaintiff to help him negotiate a New Jersey real estate investment deal with some German banks.¹⁰⁸ The defendant had specifically authorized the attorney to represent him in negotiations, but

98. *Id.* at 6.

99. *Laker Airways*, 731 F.2d at 915, 917.

100. *Id.* at 915.

101. *Id.*

102. *Id.*

103. *Id.* at 931.

104. *Id.*

105. *Id.*

106. *Id.* at 932.

107. 788 F.2d 830, 837 (2d Cir. 1986).

108. *Id.* at 835-36.

no fees were ever discussed.¹⁰⁹ The plaintiff eventually sent the defendant a bill for his services which were computed in accordance with a German legal fee statute.¹¹⁰ Three months later, the plaintiff won a default judgment in a West German court against the defendant.¹¹¹ The District Court for the Southern District of New York found the German judgment to be unenforceable because it was up to the attorney, not the client, to ensure that the client understood the compensation agreement, and because the parties had never discussed the fees, the judgment violated U.S. public policy.¹¹²

The Court of Appeals for the Second Circuit reversed the district court's decision in part, holding that the "narrow public policy exception to enforcement [was] not met" just because the defendant was not informed of the German legal fee statute.¹¹³ Furthermore, the court noted that the exception would not be met even if the attorney's fees were more than American attorneys might have charged.¹¹⁴ However, the court did find a public policy violation on a narrower basis.

The court found that in order to recover attorney's fees, New York public policy requires there be evidence of client authorization for the alleged work performed by the attorney and evidence the attorney actually performed the work for which he charged.¹¹⁵ The court held that the part of the German judgment that included fees for the "study of project files" and "discussion with client and his counsel" were unenforceable because there was no evidence of authorization for the work or proof of actual work product.¹¹⁶ The court felt that recognizing this portion of the judgment could cause "American courts [to] become the means of enforcing unconscionable attorney fee awards" which could lead to the endangerment of "'public confidence' in the administration of the law."¹¹⁷ Furthermore, the court noted, recognizing the foreign judgment would "impose upon American citizens doing business abroad an undue risk in dealing with foreign counsel," which could undermine transnational legal relations.¹¹⁸ Thus, in a sense, both New York and Germany had a substantial interest in not enforcing unconscionable attorney's fees.¹¹⁹

109. *Id.*

110. *Id.* 836–37.

111. *Id.* 837.

112. *Id.* at 841.

113. *Id.* at 842.

114. *Id.*

115. *Id.* at 842–43.

116. *Id.* at 844–45.

117. *Id.* at 844.

118. *Id.* at 844.

119. *See Pittman, supra* note 89, at 991.

In sum, the public policy exception has been construed very narrowly throughout U.S. jurisprudence regardless of whether the differences in the U.S. federal or state laws are substantive or procedural in nature and whether the outcome would have been different in U.S. courts. In the rare instances when courts have refused recognition or enforcement of a foreign judgment because of public policy, it has been to protect a higher federal or state interest, rather than out of fairness to the litigant.

B. Click-wraps, Shrink-wraps, Forum-Selection, and Public Policy

In general, U.S. courts have enforced forum-selection clauses¹²⁰ within click-wrap and shrink-wrap agreements.¹²¹ Although there are no Supreme Court cases enforcing click-wrap agreements, lower courts have often justified upholding these agreements based on precedent set by the Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*¹²² and the

120. The seminal case for U.S. forum-selection clause enforcement is *Bremen v. Zapata*. 407 U.S. 1 (1972). In *Bremen*, an American company contracted with a German corporation to tow a drilling rig from the U.S. to the Adriatic Sea. *Id.* at 1. The contract, drafted by the German company, provided that “any dispute arising must be treated before the London Court of Justice.” *Id.* En route to the Adriatic Sea, the rig was severely damaged during a storm in the Gulf of Mexico. *Id.* The American company sued the German company in a U.S. court for damages. *Id.* The United States Supreme Court announced a strong policy in favor of enforcing forum-selection clauses in “freely negotiated, private international agreements, unaffected by fraud, undue influence or overwhelming bargaining power.” *Id.* at 12. The Court stated:

In such circumstances, it should be incumbent upon the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. at 18.

121. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (enforcing a software shrink-wrap agreement); *Decker v. Circus Circus Hotel* 49 F. Supp. 2d 743 (D.N.J. 1999) (finding a click-wrap forum-selection clause enforceable); *Forrest v. Verizon Communications, Inc.* 805 A.2d 1007 (D.C. 2002) (enforcing a click-wrap agreement which required that all disputes be brought in Virginia); *Hughes v. McMnamon* 204 F. Supp. 2d 178 (D. Mass. 2002) (enforcing a click-wrap forum-selection clause designating Virginia as the exclusive choice-of-court); *But see America Online v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (holding forum-selection clause was not enforceable because it violates California public policy). For an overview of click-wrap agreement jurisprudence see William J. Condon Jr., Comment, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 18 REGENT U. L. REV. 433 (2004).

122. 499 U.S. 585 (1991).

Seventh Circuit Court of Appeals case *ProCD, Inc. v. Zeidenberg*.¹²³ In *Shute*, the Court upheld a non-negotiated contract because it was reasonable that the terms were non-negotiable.¹²⁴ In *ProCD*, the court established that shrink-wrap agreements were enforceable.¹²⁵ Courts have since reasoned that if shrink-wrap contracts are enforceable because an individual gives their consent to the terms by not returning the product, then it follows that an agreement where an individual assents in a more express way by clicking “I Agree” should also be enforceable.¹²⁶ Courts have generally held that as long as the vendor makes the terms available for the individual’s acceptance, and does not try to hide them, the agreement will be enforceable.¹²⁷ Courts have further justified their reasoning on federal and state public policy grounds concluding that enforcement of click-wrap agreements supports the freedom of contract, encourages nationwide commerce,¹²⁸ “protects small businesses, and promotes the Internet as a valuable vehicle for conducting business.”¹²⁹

123. 86 F.3d 1447 (7th Cir. 1996).

124. See Condon, *supra* note 121, at 440. In *Shute* the court enforced a contract of adhesion between Carnival Cruise lines and the plaintiff which required that all litigation relating to the cruise be brought in the state of Florida. 499 U.S. at 587–88, 595. The court reasoned that although the contract was one of adhesion, it was a routine transaction. *Id.* at 593. And because it did not eliminate the plaintiff’s “right to ‘a trial by a court of competent jurisdiction’” it was enforceable. *Id.* at 596 (quoting 46 U.S.C. app. § 183(c) (2001)).

125. See Condon, *supra* note 121, at 440. In *ProCD*, the court enforced the terms of a shrink-wrap agreement, even though the defendant was not aware of the terms of the agreement until after the purchase of the software. 86 F.3d at 1450. The court reasoned that the shrink-wrap agreement was analogous to other “pay now, terms later” transactions, such as insurance, airline tickets and concert tickets, which were enforceable under the UCC. *Id.* at 1451–52. Therefore, because the defendant was given the opportunity to review the terms and return the software if he did not accept them, the shrink-wrap agreement was enforceable. *Id.*

126. See *i.LAN Systems, Inc. v. NetScout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (relying on *ProCD* and finding that click-wrap agreements are enforceable); *Decker*, 49 F. Supp. 2d at 748 (relying on *Shute* and holding that a non-negotiated but accepted contract was enforceable).

127. See *Shute*, 499 U.S. 585; *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532 (N.J. Super. Ct. App. Div. 1999) (comparing terms placed in small print on a passenger ticket with terms placed in a scrollable window of a computer and finding that regardless of the medium, both provide sufficient notice of contract terms). See also Condon, *supra* note 121, at 446.

128. See *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1013 n.13 (D.C. 2002) (citing *Paul Business Systems, Inc. v. Canon U.S.A., Inc.* 397 S.E.2d 804, 807 (Va. 1990)). The *Forrest* court stated that “a contract is no less a contract simply because it is entered into via a computer.” *Id.* at 1101.

129. Condon, *supra* note 121, at 446 (citing *Stomp, Inc. v. NeatO L.L.C.*, 61 F. Supp 2d 1074, 1080–81 (C.D. Cal. 1999)).

Although there are strong policy reasons supporting click-wraps, at least one court has found that a click-wrap agreement can violate public policy. In *America Online, Inc. v. Superior Court*, a California Appeals court found a click-wrap agreement unenforceable because it violated California public policy of protecting consumers from deceptive business practices.¹³⁰ The case involved an AOL click-wrap agreement that included a forum-selection and choice-of-law clause designating Virginia as the exclusive choice of forum and law.¹³¹ The court said that to be valid, a forum-selection clause, among other things, must not “substantially diminish the rights of California consumers in a way that violates California public policy.”¹³² The court concluded that because Virginia limited the remedies available to California consumers by not allowing non-statutory class-action suits, it thereby violated California public policy.¹³³

C. Lessons Learned

In looking at the public policy jurisprudence in context with the click-wrap cases above, it is hard to make a viable argument that the public policy “escape clauses” in the Convention are anything more than a political tool to make States feel comfortable with adopting the Convention.¹³⁴ First, the click-wrap cases and the precedent they rely on demonstrate that there is a strong U.S. policy favoring enforcement of contracts entered into freely, regardless of whether or not they were negotiated.¹³⁵ The U.S. courts’ desire to allow party autonomy in contracts and to encourage online transactions seems to have outweighed the basic contract principle of having an “arms length transaction.”¹³⁶ Thus, a defendant urging a U.S. court to not recognize a foreign judgment on the basis that it was non-negotiated is not likely to be successful unless there is a larger state or federal public policy violation like in *America Online*.¹³⁷

130. 108 Cal. Rptr. 2d 699, 702, 710 (Cal. Ct. App. 2001).

131. *Id.* at 701–02.

132. *Id.* at 707–08. The court stated that the California Consumer Legal Remedies Act was designed “to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.” *Id.* at 710.

133. *Id.* at 702. *But cf. Forrest*, 805 A.2d at 1012 (citing cases which have upheld forum-selection clauses because other remedies other than class action were still available to the individual).

134. See Karen Minehan, Note, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT’L & COMP. L.J. 795, 817–18 (1996), for a discussion of the public policy exception as a necessary political tool for the Convention “because it counters the fears of recalcitrant countries.”

135. See *supra* note 121.

136. See *supra* note 128–29.

137. See *America Online*, 108 Cal. Rptr. 2d 699.

Second, the public policy cases prove that the public policy bar is extremely high. The party resisting enforcement must prove more than a mere difference in law or outcome between the foreign State and the U.S.¹³⁸ The violation must be extreme.¹³⁹ But what exactly is enough, besides a direct constitutional violation, to violate a forum's "most basic notions of morality and justice" is unclear.¹⁴⁰ On one hand, the *Ackermann* case could be read as expanding the public policy exception because finding enforcement of unconscionable attorney's fees as against public policy does not seem to be on the same plane as a constitutional violation.¹⁴¹ On the other hand, the *Viewfinder* case, although only a single federal court case, seems to narrow the public policy exception.¹⁴² If violation of the principles of U.S. copyright law is not a violation of public policy, then it seems that critics of the inclusion of non-negotiated contracts are rightly concerned.¹⁴³ Even though *Viewfinder* did not involve a contract between two parties, it seems that under that case, if a U.S. court is willing to enforce a judgment contrary to U.S. copyright law that was not based on a contract,¹⁴⁴ then it would follow that they would be just as likely to enforce a clause in a click-wrap agreement that contracts away U.S. copyright rights.¹⁴⁵ If this is the case, then the fears expressed by libraries may be realistic.¹⁴⁶

Third, forum shopping for the most favorable laws does not seem to violate public policy under the current line of cases. Although the *America Online* case recognized the public policy exception when there was circumvention of California's public policy,¹⁴⁷ this case is probably limited in its application to the Convention because it involved a consumer and consumer protection laws.¹⁴⁸ The Convention does not cover con-

138. See *Somportex*, 453 F.2d at 443 (finding that a difference in laws governing attorney fee awards does not violate public policy.); See generally Part III.A. *supra*.

139. See *Matusevitch*, 877 F. Supp. at 4 (finding that the difference between U.K. and U.S. libel laws was substantial enough to recognize the public policy exception); See generally *supra* Part III.A.2.

140. *Parsons*, 508 F.2d at 974.

141. See *Ackermann*, 788 F. 2d at 844.

142. See *Viewfinder*, 2005 U.S. Dist. LEXIS 22242, at *16.

143. *Id.*

144. *Id.*

145. This is the same type of reasoning that courts used to determine that if shrink-wrap agreements were enforceable, then a click-wrap agreement to which a party expressly assents in a direct way should also be enforceable. See *supra* note 126.

146. See *supra* notes 17 and 18.

147. See *America Online*, 108 Cal. Rptr. at 702.

148. It is also important to note that it seems that California is the only U.S. state that rejects click-wrap agreements. See *supra* note 121.

sumer contracts.¹⁴⁹ Moreover, while the *Laker Airways* case suggested that a court would be justified in refusing to enforce a foreign judgment if the plaintiff had somehow circumvented the enforcing court's public policy interests,¹⁵⁰ the U.S. tends to enforce both forum-selection clauses and click-wrap agreements.¹⁵¹ Thus, a defendant's argument that the forum shopping was a form of circumvention of the forum's public policies would be less effective because the plaintiff could just counter that the forum was agreed to in the contract.

Finally, the public policy and click-wrap cases show that because most U.S. jurisdictions already have a public policy exception available when considering these types of cases, it is unlikely that formalizing it in the Convention will change their existing practices. Thus, as mentioned before, if the Convention is adopted, those at-risk by the inclusion of non-negotiated contracts will have to look elsewhere for protection.

III. OTHER OPTIONS¹⁵²

A. Declaration

One option for critics of the inclusion of non-negotiated contracts is to urge the U.S. to make a declaration¹⁵³ that it will not apply the Conven-

149. See *Convention*, *supra* note 3, art. 2(1).

150. *Laker Airways*, 731 F.2d at 931–32.

151. See *supra* note 120–21.

152. Direct revisions to the Convention are not suggested as options here since the approved Convention was already signed by the Member States and all previously recommended revisions to the non-negotiated contract aspect of the Convention have been rejected. Besides removing non-negotiated contracts from the scope of the Convention, some of the previously suggested revisions have included the addition of a clause protecting certain institutions: "Agreements conferring jurisdiction and similar clauses in non-negotiated contracts with non-profit, non-commercial organizations, including non-profit libraries, archives, and educational institutions, shall be without effect." See Robert Oakley Letter, *supra* note 17. Adding the following "fairness" clause was another recommendation: "The agreement on choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means." James Love, *What You Should Know About the Hague Conference on Private Int'l Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, CPTEch.org, <http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html>. One reason for not adding a fairness clause was that it would reduce the certainty of the Convention because it would be difficult to determine what various jurisdictions will deem as "fair" or a "weaker business." Hague Conference on Private Int'l L., *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text*, para. 16, Prel. Doc. No. 18, Feb. 2002, http://www.hcch.net/upload/wop/gen_pd18e.pdf.

153. For example, "Canada is on record as saying that it will not apply the Convention to asbestos cases." *Delegates Sign Convention*, *supra* note 12, at 18.

tion to non-negotiated contracts. Article 21 of the Convention allows a signature State to declare that it will not apply the Convention to a specific matter, if it has a strong interest in that matter.¹⁵⁴ The matter to which the declaration pertains must be “clearly and precisely defined” and must be “no broader than necessary.”¹⁵⁵ Furthermore, the Convention will not apply to the subject matter for which the declaration is made within the declaring State, nor will it apply to that subject matter within the other signature States where an exclusive choice-of-court agreement has designated the declaring State as the exclusive forum.¹⁵⁶ Unfortunately, it is unlikely that the U.S. will actually make such a declaration since it took over ten years to reach an agreement on a final Convention and because the U.S. negotiators seem to support the inclusion of non-negotiated contracts.¹⁵⁷ The negotiators hope that the Convention will become the litigation counterpart to the New York Convention¹⁵⁸ and will provide businesses in international transactions a choice between selecting arbitration or litigation as the method to resolve disputes.¹⁵⁹ Furthermore, the purpose of the Convention will be defeated if many States make declarations on many matters.¹⁶⁰

154. *Convention*, *supra* note 3, art. 21. Article 21, declarations with respect to specific matters, states in full:

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply – a) in the Contracting State that made the declaration; b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Id.

155. *Id.* art. 21(1).

156. *Id.* art. 21(2).

157. *See supra* note 26.

158. *See supra* note 57.

159. *See* Ronald A. Brand, *The New Hague Convention on Choice of Court Agreements*, AM. SOC'Y INT'L L. INSIGHTS, July 2005, available at <http://www.asil.org/insights/email/insights0507262.html>.

160. *See Delegates Sign Report*, *supra* note 12, at 18. The objective of the Convention is to create clarity and certainty in transactions, if there are many exceptions then businesses will be left with uncertainty as to the effectiveness of the Convention.

B. Supplemental Convention

Another option is for the U.S. is to try to make a declaration and then enter into a separate bilateral agreement regarding non-negotiated contracts with other Member States that are a party to the Convention. This would allow the U.S. to choose which States' non-negotiated contract judgments to recognize.¹⁶¹ However, it will be time consuming to negotiate an agreement with individual States and would require the U.S. to pass judgment on another country's court system.¹⁶² In the end, this could lead to a negative effect on U.S. relations.

C. Wait and See

Another option for critics is to continue to lobby Congress and then just "wait-and-see" whether other States decide to adopt the Convention. Without a significant number of signature States, the Convention will be of little effect and there may not be any reason for concern.¹⁶³ Furthermore, if the Convention is adopted and the critics' concerns turn out to be correct, they can still petition the U.S. to make a declaration as mentioned above or petition the Secretary General of the HCPIL to amend the Convention.¹⁶⁴

V. CONCLUSION

The Hague Convention on Choice of Courts provides a way to bring certainty and clarity in on-line and off-line international business-to-business transactions. However, this benefit may bring risks to smaller businesses and other organizations such as libraries and non-profits that purchase information goods and services on-line. These groups may be forced to defend a suit in a foreign country which could lead to an adverse foreign judgment which a U.S. court may then be obligated to en-

161. See Trevor C. Hartley, *Accession and Bilateral Agreements*, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS 110 (Andreas F. Lowenfeld & Linda J. Silberman eds., 2001) (defining bilateralization). For an overview of the benefits and downfalls of bilateralization, see Lindsay Loudon Vest, Note, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 813 (2004).

162. See Vest, *supra* note 161, at 814.

163. See Standeford, *supra* note 16 (suggesting that there is no point in having the Convention if countries such as China and Russia do not join the Convention).

164. Article 24(b) states that the Secretary General of the HCPIL shall: "make arrangements for: ...b) consideration of whether any amendments to this Convention are desirable." *Convention, supra* note 3, art. 24(b).

force.¹⁶⁵ The survey of case law above shows that the public policy exception is a very narrow exception and is usually only recognized in instances where there is a violation of a larger state or national public policy, such as a constitutional violation¹⁶⁶ or when the court feels there was a purposeful evasion of U.S. laws.¹⁶⁷ Even in cases where there are differences of procedural or substantive laws, courts have not been willing to recognize the public policy exception.¹⁶⁸ The fact that a contract was not negotiated is not a major concern of courts either since there has historically been an acceptance of agreements that are entered into freely.¹⁶⁹

In sum, the public policy exception, based on precedent, is not likely to provide much protection for at-risk organizations when it comes to non-negotiated contracts. Libraries, small business, and other organizations that frequently transact via non-negotiated contracts can and should continue to lobby Congress and voice their concerns over the inclusion of non-negotiated contracts, even though it is unlikely that the U.S. will make a declaration excluding non-negotiated contracts. If the Convention is ratified by the U.S. and numerous other States, those at-risk can always refuse to make purchases online until the Convention is modified or the drafters of the non-negotiated contracts modify their forum-selection clause. Although this option is not ideal, it is a way for those concerned by the inclusion of non-negotiated contracts within the Convention to protect themselves.

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165. It would feel obligated to enforce because of the requirements under article 8 and 9 of the Convention and out of principles of comity set out in *Hilton v. Guyot*. See *supra* notes 9, 34, 45–52.

166. See *Matusevitch*, 877 F. Supp. at 6.

167. See *Laker Airways*, 731 F.2d at 931; See generally *supra* Part III.A.2.

168. See *supra* Part III.A.1.

169. See *supra* note 119. See generally *supra* Part III.B.

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